Erasmus Law Review

ELR

Volume 16 | Issue 1 | 2023

eleven | Online at elevenjournals.com

Contents

Mission Statement
The *Erasmus Law Review* seeks to foster independent critical scholarship as relevant to the discipline of law. The Board of Editors encourages the submission of legally relevant manuscripts by legal scholars and practitioners as well as those versed in other disciplines relevant to law, such as criminology, sociology, political science and economics. This Open Access journal usually commissions articles around specific themes, although 'calls for papers' on specific topics might be issued occasionally and will be published on the Review's website. All prospective articles are submitted to double-blind peer review (two reviews per article), and final publication is dependent on the outcome of these reviews.

ISSN: 2210-2671

mvw
media voor vak
& wetenschap

Experimental Insight Into the Fair Process Effect and Its Boundary Conditions

External Attributions May Moderate Reactions to Procedural Justice in Legal Contexts

Lisa Ansems, Kees van den Bos & Elaine Mak*

Abstract

The perception of being treated fairly during decision-making processes is an important topic in the research literature on law and society. Many studies have indeed found that perceived procedural justice affects people's reactions, for instance, by increasing their trust in legal authorities and lowering their intentions to protest against these authorities' decisions. Here, we reveal support for this fair process effect and point to some of its potential boundary conditions. In our experimental study, 239 participants imagined being the defendant during a single-judge criminal court hearing that used either a fair or an unfair procedure. Following the experience of a fair as opposed to an unfair procedure, participants showed more trust in judges and were less inclined to protest against the judicial ruling. Interestingly, the effect of the procedure manipulation on trust in judges was moderated by the extent to which participants attributed their case outcomes to external causes. We found a fair process effect among participants with relatively low external attribution ratings, while this effect attenuated and was not statistically significant among participants whose external attribution ratings were relatively high. These findings point to the possibility that attributional processes can moderate people's responses to procedural justice in legally relevant contexts.

Keywords: procedural justice, fair process effect, boundary conditions, external attributions, experiment.

1 Introduction

Criminal justice is frequently a subject of debate both in Dutch society and beyond. Part of such debates is the focus and concerns on the issue of sentencing and the question whether criminal sentences are sufficiently severe. Studies on perceived procedural justice suggest that, in addition to sentences, criminal procedures and how people perceive these are important as well.[1] That is, people's perceptions that they are treated fairly by legal authorities during decision-making procedures tend to be associated with various legally relevant variables, including trust in authorities and intentions to protest against case outcomes.[2] Such effects of perceived procedural justice on people's reactions are referred to as the fair process effect.[3]

Because the fair process effect may have important implications for the legal domain (for instance, in terms of trust in judges and filing appeals),[4] it is important to gain a better understanding of this effect. To that end, many researchers have focused on the question in which circumstances the fair process effect is likely to be more pronounced. For instance, Brockner and Wiesenfeld aggregated findings of forty-five previous studies and found that people tend to react more strongly to perceived procedural justice when they consider their outcomes unfavourable, such as when they lose an arbitration procedure or a court case.[5] Other studies suggest that perceived procedural justice has stronger effects when people find themselves in situations of uncertainty (e.g. when they are not sure whether they can trust decision-making authorities)[6] or when they feel inhibit-

* Lisa F.M. Ansems, PhD, is researcher at Leiden University, Leiden, the Netherlands. Kees van den Bos is Professor of Empirical Legal Science and Professor of Social Psychology at Utrecht University, Utrecht, the Netherlands. Elaine Mak is Professor of Jurisprudence at ,Utrecht University, Utrecht, the Netherlands. Ethics Approval: Our study procedures were approved by the ethical board of the Faculty of Law, Economics, and Governance at Utrecht University.

1 E.A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (1988); T.R. Tyler and E.A. Lind, 'A Relational Model of Authority in Groups', in M.P. Zanna (ed.), *Advances in Experimental Social Psychology* (1992) 115.

2 For example, H.A.M. Grootelaar and K. van den Bos, 'How Litigants in Dutch Courtrooms Come to Trust Judges: The Role of Perceived Procedural Justice, Outcome Favorability, and Other Socio-legal Moderators', 52 *Law and Society Review* 234 (2018); T.R. Tyler and Y.J. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (2002); L.F.M. Ansems, K. van den Bos & E. Mak, 'The Importance of Perceived Procedural Justice Among Defendants With a Non-Western Background Involved in Dutch Criminal Cases', 12 *Frontiers in Psychology* 29 (2021).

3 R. Folger, D. Rosenfield, J. Grove & L. Corkran, 'Effects of "Voice" and Peer Opinions on Responses to Inequity', 37 *Journal of Personality and Social Psychology* 2253 (1979); K. van den Bos, 'Humans Making Sense of Alarming Conditions: Psychological Insight into the Fair Process Effect', in R.S. Cropanzano and M.L. Ambrose (eds.), *Oxford Handbook of Justice in Work Organizations* (2015) 403.

4 I.M. Boekema, *De Stap naar Hoger Beroep: Onderzoek naar Appelgedrag van Burgers in Bestuursrechtelijke Zaken* (2015); H.A.M. Grootelaar, *Interacting with Procedural Justice in Courts* (2018).

5 J. Brockner and B.M. Wiesenfeld, 'An Integrative Framework for Explaining Reactions to Decisions: Interactive Effects of Outcomes and Procedures', 120 *Psychological Bulletin* 189 (1996).

6 K. van den Bos, 'Uncertainty Management: The Influence of Uncertainty Salience on Reactions to Perceived Procedural Fairness', 80 *Journal of Personality and Social Psychology* 931 (2001).

doi: 10.5553/ELR.000231

ed (e.g. when they are not sure how to behave because other people may be evaluating them).[7]

The present study takes a different approach; that is, rather than focusing on situations in which the effects of perceived procedural justice are likely to be stronger, we examine when these effects may be attenuated or even reversed. In other words, we assess whether people's favourable reactions to perceived procedural justice may be weakened, possibly to the extent that the fair process effect is no longer statistically significant, or reversed, such that people respond more favourably to procedures they perceive as unfair over procedures they perceive as fair.

Previous studies in organisational, performance-oriented or laboratory settings have sometimes found evidence for such a moderation of the fair process effect.[8] We take these earlier findings as our point of departure and examine whether they can be observed in a different context. Indeed, one may wonder whether these findings extend to legal settings, given the different types of authorities involved (i.e. judges rather than work supervisors) and given the suggestion that legal authorities are often seen as important representatives of how people are being evaluated by society.[9] As we will explain later, feeling evaluated may play an important role in attenuating or reversing the fair process effect.

To assess whether the fair process effect may be attenuated or reversed in legal contexts, and building on our previous survey study on this topic,[10] we conducted an experimental study in the Netherlands among 239 participants who were asked to imagine that they were the defendant during a criminal court hearing that used either a fair or an unfair procedure. We also involved potentially moderating variables that may make the fair process effect less likely to emerge.[11] By examining these possible boundary conditions, our study enhances current insights into the fair process effect, which improves our understanding of procedural justice in legally relevant settings.

1.1 Procedural Unfairness as an External Attribution Opportunity

One explanation for the potential attenuation or reversal of the fair process effect relates to people's need to feel good about themselves and to protect their self-esteem.[12] When people receive negative outcomes that they attribute to internal causes, this may threaten their self-esteem.[13] To preserve their self-esteem, people may look for opportunities to attribute negative outcomes to external causes rather than their own behaviours or capabilities.[14]

Importantly, unfair procedures offer such external attribution opportunities, while fair procedures are likely to trigger internal attributions.[15] After all, procedural unfairness allows people to put the blame for their negative outcomes on something other than themselves (i.e. on the perceived unfairness of the procedure), whereas procedural fairness may force people to attribute their negative outcomes to something about themselves.[16] Hence, people may sometimes prefer unfair procedures because these allow them to maintain their self-esteem by making external attributions for negative outcomes.[17] As a result, the fair process effect may sometimes be attenuated or even reversed.[18]

This line of reasoning is supported by a few empirical studies. For instance, Gilliland studied the interaction between procedures and outcomes in a laboratory experiment concerning employee selection. Participants who were selected showed a fair process effect, such that procedural justice led people to feel more capable to perform the job and thus report higher levels of self-efficacy. For rejected participants, however, procedural justice led to lower ratings of self-efficacy.[19] Similarly, Schroth and Shah examined the interaction between procedures and outcomes in an experimental design that varied whether or not participants would have been hired based on their performance on a managerial assessment task. These authors also conducted a field study that assessed students' perceptions of procedural justice and outcome justice in the context of their mid-

7 L. Hulst, K. van den Bos, A.J. Akkermans & E.A. Lind, 'On the Psychology of Perceived Procedural Justice: Experimental Evidence that Behavioral Inhibition Strengthens Reactions to Voice and No-voice Procedures', 6 *Frontiers in Psychological and Behavioral Science* 1 (2017).

8 For overviews, see D.R. Bobocel and L. Gosse, 'Procedural Justice: A Historical Review and Critical Analysis', in R.S. Cropanzano and M.L. Ambrose (eds.), *The Oxford Handbook of Justice in the Workplace* (2015) 51; J. Brockner, B.M. Wiesenfeld & D.A. Diekmann, 'Towards a "Fairer" Conception of Process Fairness: Why, When and How More May Not Always Be Better Than Less', 3 *Academy of Management Annals* 183 (2009); S.D. Desai, H. Sondak & K.A. Diekmann, 'When Fairness Neither Satisfies Nor Motivates: The Role of Risk Aversion and Uncertainty Reduction in Attenuating and Reversing the Fair Process Effect', 116 *Organizational Behavior and Human Decision Processes* 32 (2011).

9 Tyler and Lind, above n. 1.

10 Ansems et al. (2021), above n. 2.

11 Brockner et al. (2009), above n. 8; K. van den Bos, J. Bruins, H.A.M. Wilke & E. Dronkert, 'Sometimes Unfair Procedures Have Nice Aspects: On the Psychology of the Fair Process Effect', 77 *Journal of Personality and Social Psychology* 324 (1999).

12 M.R. Leary and M.L. Terry, 'Self-evaluation and Self-esteem', in D. Carlston (ed.), *Oxford Handbook of Social Cognition* (2013) 534; C. Sedikides, L. Gaertner & Y. Toguchi, 'Pancultural Self-enhancement', 84 *Journal of Personality and Social Psychology* 60 (2003).

13 B. Weiner, 'An Attributional Theory of Achievement Motivation and Emotion', 92 *Psychological Review* 548 (1985).

14 R.L. Cohen, 'Perceiving Justice: An Attributional Perspective', in J. Greenberg and R.L. Cohen (eds.), *Equity and Justice in Social Behavior* (1982) 119.

15 J. Brockner, L. Heuer, N. Magner, R. Folger, E. Umphress, K. van den Bos, R. Vermunt, M. Magner & P. Siegel, 'High Procedural Fairness Heightens the Effect of Outcome Favorability on Self-evaluations: An Attributional Analysis', 91 *Organizational Behavior and Human Decision Processes* 51 (2003); K. Leung, S.K. Su & M.W. Morris, 'When Is Criticism *Not* Constructive? The Roles of Fairness Perceptions and Dispositional Attributions in Employee Acceptance of Critical Supervisory Feedback', 54 *Human Relations* 1155 (2001).

16 R. Cropanzano, Z.S. Byrne, D.R. Bobocel & D.E. Rupp, 'Moral Virtues, Fairness Heuristics, Social Entities, and Other Denizens of Organizational Justice', 58 *Journal of Vocational Behavior* 164 (2001).

17 Van den Bos et al. (1999), above n. 11.

18 Brockner et al. (2009), above n. 8.

19 S.W. Gilliland, 'Effects of Procedural and Distributive Justice on Reactions to a Selection System', 79 *Journal of Applied Psychology* 691 (1994).

doi: 10.5553/ELR.000231

term examinations. The findings of both studies suggested a positive impact of procedural justice on self-esteem when outcomes were positive and a negative impact of procedural justice on self-esteem when outcomes were negative.[20]

Brockner et al., too, found an interaction between procedures and outcomes in laboratory settings as well as real-life work contexts. In addition, their research offered empirical evidence for the assumed role of attributional processes by showing that the interaction between outcome favourability and procedural justice was explained (mediated) by the interaction between outcome favourability and internal attributions (operationalised in this study as the extent to which participants attributed their performance on a managerial assessment exam to themselves).[21]

Some studies have examined when these interactions between procedures and outcomes are particularly likely to occur. For example, research by Brockner et al. suggests that procedural justice is more likely to be inversely related to people's self-evaluations after receiving negative outcomes when people are more prevention focused (meaning that they are focused on avoiding losses rather than achieving gains).[22] In addition, Holmvall and Bobocel found that people responded more negatively to unfavourable outcomes following fair procedures when they were higher in independent (rather than interdependent) self-construal, meaning that they identified themselves in terms of their achievements rather than in terms of their relationships with others.[23] Importantly, Holmvall and Bobocel found this reversed fair process effect not only on self-esteem but also on measures of perceived outcome fairness and outcome satisfaction.[24] Three experiments by Van den Bos et al. also showed a reversed fair process effect on measures other than participants' self-esteem. Participants in these experiments were told that there were five hierarchical positions within a simulated organisation and that, based on their task performance, they would be appointed to one of these positions (resulting in favourable or unfavourable outcomes). Van den Bos et al. found that participants reported lower outcome judgments (Experiments 1 and 2) and stronger intentions to protest against their outcomes (Experiment 3) following accurate rather than inaccurate procedures when they felt strongly evaluated. The authors explain these effects by referring to attribution-seeking processes: when people feel that they are strongly evaluated, they may search for opportunities to attribute negative outcomes to external causes in order to preserve their self-esteem. Because unfair procedures offer such external attribution opportunities, people may respond more positively to procedural unfairness.[25] Taken together, these and other studies show that, under certain conditions, the fair process effect may be moderated by people's external attributions.[26]

1.2 The Current Research

The present study builds on these earlier findings and aims to extend them to a legally relevant context. Thus, we conducted an experimental study in the Netherlands among 239 participants with a non-Western ethnic-cultural background,[27] who read a scenario in which they were the defendant during a criminal court hearing before a single judge. We conducted our study among people with a non-Western ethnic-cultural background because some of them may feel negatively evaluated by Dutch society. After all, some members of society have a quite negative image of people with a non-Western background, which is also experienced as such by them.[28] Indeed, a 2020 study showed that people with Moroccan and Turkish backgrounds in particular feel discriminated relatively often, more so than people who otherwise do not belong to the dominant majority in the Netherlands.[29] As explained earlier, feeling negatively evaluated can play an important role in the attributional processes studied here.[30] Therefore, our study focused on participants with a non-Western background.[31]

In our experiment, we manipulated procedural justice by means of random allocation to conditions, such that one-half of the participants read about a procedure that was fair and the other half of the participants read about a procedure that was unfair. All participants received the same negative case outcome (i.e. a fine of €400).[32] Among other things, we then assessed participants' perceptions of procedural justice, outcome judgments (i.e.

20 H.A. Schroth and P.P. Shah, 'Procedures: Do We Really Want to Know Them? An Examination of the Effects of Procedural Justice on Self-esteem', 85 *Journal of Applied Psychology* 462 (2000).

21 Brockner et al. (2003), above n. 15; see also J.D. Lilly and K. Wipawayangkool, 'When Fair Procedures Don't Work: A Self-Threat Model of Procedural Justice', 37 *Current Psychology* 680 (2018).

22 J. Brockner, D. de Cremer, A.Y. Fishman & S. Spiegel, 'When Does High Process Fairness Reduce Self-evaluations Following Unfavorable Outcomes? The Moderating Effect of Prevention Focus', 44 *Journal of Experimental Social Psychology* 187 (2008).

23 C.M. Holmvall and D.R. Bobocel, 'What Fair Procedures Say about Me: Self-construal and Reactions to Procedural Fairness', 105 *Organizational Behavior and Human Decision Processes* 147 (2008).

24 *Ibid.*

25 Van den Bos et al. (1999), above n. 11.

26 Brockner et al. (2009), above n. 8.

27 The term 'non-Western ethnic-cultural background' in this work refers to being born in a non-Western country, which according to Statistics Netherlands refers to countries in Africa, Latin-America and Asia (excluding Indonesia and Japan) or Turkey. We also use the term to refer to persons whose parents or other ancestors were born in a non-Western country. See www.cbs.nl/nl-nl/publicatie/2018/47/jaarrapport-integratie-2018 (last visited 20 July 2022).

28 W. Huijnk and I. Andriessen, *Integratie in zicht? De integratie van migranten in Nederland op acht terreinen nader bekeken* (2016).

29 I. Andriessen, J. Hoegen Dijkhof, A. van der Torre, E. van den Berg, I. Pulles, J. Iedema & M. de Voogd-Hamelink, *Ervaren discriminatie in Nederland II* (2020).

30 Van den Bos et al. (1999), above n. 11.

31 When analysing our data, we found that participants' average external attribution ratings were at the middle of the 7-point external attributions scale ($M = 4.01$, $SD = 1.19$).

32 This fine is larger than the amount of €150 that is indicated by the relevant legal guidelines. We opted for a higher fine because this is more likely to be perceived as a negative case outcome by research participants, which makes the scenario more likely to trigger the external attribution processes that we are interested in. See www.rechtspraak.nl/voor-advocaten-en-juristen/reglementen-procedures-en-formulieren/strafrecht/paginas/orientatiepunten-voor-straftoemeting.aspx (last visited 20 July 2022).

how fair participants consider their case outcomes and how satisfied they are with these outcomes), external attribution ratings (i.e. the extent to which participants attribute their outcomes to external causes), intentions to protest against the judicial ruling, trust in judges, and the grades that they assigned to indicate their level of trust in judges.

Our study differs from previous research that found attenuated or reversed fair process effects in several ways. First, we use a different sample than the samples used in the laboratory experiments that make up a large part of the relevant procedural justice literature, which focus on WEIRD[33] (Western, Educated, Industrialised, Rich and Democratic) participants.[34] That is, participants in our study had a non-Western background and were generally less educated than college student samples. Second, our study explicitly involves external attribution ratings as a potentially moderating variable. Other studies examining the potential attenuation or reversal of the fair process effect often assume that attributional processes play a role but do not include attributions as a variable in their analyses.[35] Third, we examine the potential moderation (attenuation or reversal) of the fair process effect in a novel context, focusing on legal procedures rather than treatment in organisational or performance-oriented settings.[36]

To test our ideas, we formulated three hypotheses. First, we assess whether we can observe the fair process effect that has been found in previous procedural justice studies.[37] Thus, Hypothesis 1 predicts that procedural justice, as manipulated in the scenario, has an effect on participants' trust in judges, the grade that participants assigned to indicate their level of trust in judges, and participants' protest intentions. More specifically, we expect that participants in the fair procedure condition have more trust in judges, assign a higher grade to indicate their level trust in judges and report lower protest intentions than participants in the unfair procedure condition.

Second, we assess the potential interaction between the procedure manipulation and external attribution ratings. Specifically, Hypothesis 2 predicts a fair process effect when people's external attribution ratings are relatively low, such that participants in the fair procedure condition have more trust in judges, assign a higher grade to indicate their level of trust in judges and report lower protest intentions. Based on previous work,[38] Hypothesis 2 predicts that these effects of the procedure manipulation may be attenuated or even reversed when external attribution ratings are relatively high.

Third, we examine whether there is an interaction between the procedure manipulation and participants' outcome judgments. One of the reasons why we include outcome judgments in our study is that, as explained earlier, receiving negative outcomes may make people look for external attribution opportunities to protect their self-esteem.[39] Because unfair procedures offer such external attribution opportunities, people may prefer unfair procedures over fair procedures, such that the fair process effect may be attenuated or even reversed.[40] In addition, the fair process effect may be strengthened when outcomes are perceived as unfavourable, because unfavourable outcomes may prompt people to examine what caused these outcomes and, hence, pay more attention to procedural fairness. Brockner and Wiesenfeld propose that both types of reactions may be explained by the sense-making processes that unfavourable outcomes tend to trigger.[41] Aggregating these insights, Hypothesis 3 examines whether the fair process effect is moderated by outcome judgments, such that participants' reactions to the procedure manipulation are strengthened, attenuated or reversed when they judge their outcomes negatively.

Taken together, we examine the following hypotheses:

Hypothesis 1: Procedural justice affects participants' trust in judges, the grade that participants assigned to their trust in judges, and participants' protest intentions, such that participants in the fair procedure condition have more trust in judges, assigned a higher grade for their trust in judges and report lower protest intentions than participants in the unfair procedure condition (fair process effect).

Hypothesis 2: There is an interaction between procedural justice and external attribution ratings, such that there is a fair process effect when participants' external attribution ratings are relatively low and an attenuated or reversed fair process effect when external attribution ratings are relatively high.

Hypothesis 3: There is an interaction between procedural justice and outcome judgments, such that the fair process effect is strengthened, attenuated or reversed when participants judge their outcomes negatively.

1.3 Research Context

The scenarios we used in this study focused on a criminal court hearing before a single judge. In the Dutch legal context, single judges (instead of a three-judge panel) handle criminal cases in which the public prosecutor demands a maximum of one-year imprisonment. Single

33 J. Henrich, S.J. Heine & A. Norenzayan, 'The Weirdest People in the World?', 33 *Behavioral and Brain Sciences* 61 (2010).

34 For example, Gilliland, above n. 19; Holmvall and Bobocel, above n. 23; Van den Bos et al. (1999), above n. 11. We note that, because we used a different kind of sample, we were able to examine whether fair process effects found in other studies could also be observed among research participants with different backgrounds. Since demonstrating possible differences in reactions to perceived procedural justice among research participants with WEIRD and non-WEIRD backgrounds was not the focus of our research, we did not include both groups in our study.

35 For example, Brockner et al. (2008), above n. 22; Holmvall and Bobocel, above n. 23; Schroth and Shah, above n. 20. For an exception, see Brockner et al. (2003), above n. 15.

36 For example, Brockner et al. (2003), above n. 15; Schroth and Shah, above n. 20; Van den Bos et al. (1999), above n. 11.

37 For example, J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (1975); Lind and Tyler, above n. 1; Van den Bos (2015), above n. 3.

38 For example, Brockner et al. (2009), above n. 8; Van den Bos et al. (1999), above n. 11.

39 Cohen, above n. 14.

40 Brockner et al. (2009), above n. 8; Van den Bos et al. (1999), above n. 11.

41 Brockner and Wiesenfeld, above n. 5.

doi: 10.5553/ELR.000231

judges can impose fines, community service or prison sentences, among other things, and these sentences can be conditional or unconditional. Cases typically handled by single judges include assault, theft, insult, threat, destruction, drug offenses and driving under the influence. Defendants can choose to be assisted by a criminal defence lawyer during the proceedings. Rather than viewing the court hearing as a clash of parties before a passive judge, as is the case in more adversarial systems, the Dutch legal system treats defendants as subject of the investigation and involves an active role for judges. In addition, Dutch court hearings involve only professional judges and, thus, do not have bifurcated proceedings in which juries determine defendants' guilt and judges decide on sentences. Court hearings before a single judge usually last around 30 minutes, and judgments are mostly delivered directly afterwards.[42]

Our research participants were people with a non-Western ethnic-cultural background. The Netherlands is a multicultural society, the four largest groups with a non-Western ethnic-cultural background being people with a Turkish, Moroccan, Surinam or Antillean background.[43] Dutch citizens with a non-Western ethnic-cultural background tend to trust the judiciary as an institution to a similar extent as does the average Dutch citizen,[44] and trust in judges among the general population is relatively high compared to other Dutch institutions.[45] As explained earlier, some people with a non-Western background may feel negatively evaluated by Dutch society. This may trigger the attributional processes that we study in this work and that may attenuate or reverse reactions to procedural justice.

2 Method

2.1 Participants and Design

Our sample consisted of 239 persons with a non-Western ethnic-cultural background who were approached between 9 September 2019 and 10 October 2019 at two shopping centres in the city of Utrecht, the Netherlands to participate in our study. Of these participants, 130 (54.4% of the sample) were men and 109 (45.6% of the sample) were women. Participants were between 18 and 68 years, with a mean age of 31.46 years (SD = 11.78). Their highest completed levels of education ranged from no education at all (N = 3, 1.3%) via primary school (N = 7, 2.9%), secondary school (N = 65, 27.3%), secondary vocational education (N = 84, 35.3%) and higher professional education (N = 55, 23.1%) to university (N = 22, 9.2%). Two participants (0.8%) indicated that they had a different kind of highest completed level of education.

Participants also indicated whether they had a Moroccan (N = 98, 41.0%), Surinam (N = 52, 21.8%), Turkish (N = 40, 16.7%), Antillean (N = 12, 5.0%) background, or other ethnic-cultural background (N = 43, 18.0%). These other ethnic-cultural backgrounds included Afghanistan (N = 7, 2.9%), Somalia (N = 4, 1.7%), Iraq (N = 3, 1.3%) and Iran (N = 3 participants, 1.3%).

As many as 89 participants (37.4%) had experienced an actual hearing at a criminal court. Because we did not want to make participants potentially feel stigmatised, we did not ask them whether they were defendants during these court hearings. Therefore, this number may include participants who experienced court hearings as defendants, as victims, as part of the audience or in their professional capacities.

In the experiment, participants read a scenario in which they were the defendant during a criminal court hearing that progressed in either a fair or an unfair way. Participants were randomly assigned to one of these two conditions. The text of the scenarios was based on findings of our previous qualitative interview study in which we interviewed 100 defendants in criminal cases to examine what makes them feel treated fairly during their court hearings.[46] After reading the scenario, participants were asked to indicate their perceptions of procedural justice during the court hearing, their judgments of the outcome they received in the scenario (which was held constant across conditions), the extent to which they made external attributions with regard to what happened in the scenario, the extent to which they wanted to protest against their outcomes, their levels of trust in Dutch judges, and the grade that they assigned to indicate the extent of their trust in Dutch judges.

Our research assistant approached 873 persons to participate in the study, 253 of whom agreed to do so. This resulted in a response rate of 29.0%. Filtering out questionnaires of persons who turned out to have a Western ethnic-cultural background, did not indicate their ethnic-cultural background, turned out to be younger than 18 years or skipped answering a large number of questions eventually left us with 239 questionnaires to be used for our analyses. With this number of participants, we were able to test our hypotheses with sufficient statistical power. After all, an a priori G*Power analysis indicated that, to achieve statistical power of 0.80 to detect the two-way interaction between external attribution ratings and the procedure manipulation, with α = 0.05 and a relatively small effect size (f^2 = 0.04), we needed at least 191 participants.[47]

42 L.F.M. Ansems, K. van den Bos & E. Mak, 'Speaking of Justice: A Qualitative Interview Study on Perceived Procedural Justice Among Defendants in Dutch Criminal Cases', 54 *Law and Society Review* 643 (2020).

43 Andriessen et al., above n. 29.

44 J. Van der Schaaf, *Nieuwe Nederlanders en Vertrouwen in de Rechter* (2018).

45 J. den Ridder, E. Miltenburg, S. Kunst, L. van 't Hul & A. van den Broek, *Burgerperspectieven bericht 1 2022* (2022).

46 Ansems et al. (2020), above n. 42.

47 J. Cohen, P. Cohen, S.G. West & L.S. Aiken, *Applied Multiple Regression/Correlational Analysis for the Behavioral Sciences* (2013); F. Faul, E. Erdfelder, A.-G. Lang & A. Buchner, 'G*Power 3: A Flexible Statistical Power Analysis Program for the Social, Behavioral, and Biomedical Sciences', 39 *Behavior Research Methods* 175 (2007). In our analyses, we also tested whether there was a significant three-way interaction between outcome judgments, external attribution ratings and the procedure manipulation. These analyses were conducted for exploratory purposes only, however, and are not reported in the present article. After all, a G*power analysis showed that, to achieve sufficient statistical power of 0.80 to detect the three-way interaction, with α = 0.05 and a relatively small effect size (f^2 = 0.02),

doi: 10.5553/ELR.000231

2.2 Experimental Procedure

Our study procedures were approved by the ethical board of the Faculty of Law, Economics, and Governance at Utrecht University. A research assistant approached potential participants at two shopping centres in the city of Utrecht, the Netherlands. Participants were approached both inside the shopping centres and directly outside. The two selection criteria that were used were whether people appeared to have a non-Western ethnic-cultural background and were aged 18 years or older (both criteria subsequently confirmed for each participant after they filled out the questionnaire).

When approaching potential participants, our research assistant explained that she was assisting with a study on what makes people feel treated fairly and justly and asked whether they would be willing to fill out a short questionnaire. When people agreed, she provided additional information about the study, indicating that participation consisted of reading a short story about a hypothetical court hearing and answering questions about that court hearing as well as some other topics. She also explained that only people with a non-Western ethnic-cultural background were eligible for participation in the study, indicating that we were very interested in their perceptions and experiences. In addition, participants were notified that their participation was on a voluntary basis and that their answers would be treated confidentially and anonymously. Throughout the entire study we ensured that we treated people with respect.

After agreeing to participate, participants were asked to carefully read the following scenario and imagine that they were part of it:

> For some time now, you have been having a conflict with your neighbours. They make so much noise that it makes you lose sleep at night. Talking about this has not worked. A couple of months ago, you were unable to control yourself during an argument in which you severely offended your neighbours. Your neighbours filed a charge of insult against you at the police station.
>
> Today, you have to appear before the criminal law division of the court in Utrecht. You enter the courtroom and take a seat. You are sitting opposite to a judge. Next to the judge are the public prosecutor and a court official who takes notes during the court hearing.
>
> The judge checks your personal information. He informs you that you have the right to remain silent. The public prosecutor then tells you that you are charged with insult. The judge asks you to tell what happened.

Then the experimental manipulation was introduced. That is, for participants in the fair condition (N = 118, 49.4% of the sample), the scenario continued as follows:

> You notice that the judge gives you *a lot of time* to tell your side of the story. The judge does not interrupt you. He *listens* attentively to what you are saying. As a result, your impression is that the judge had not already made up his mind about your case beforehand. The judge seems to be really trying to get a *good idea* of what happened exactly. For example, he asks a lot of questions. The conflict with your neighbours about the noise, and how this has lasted for several years, is discussed as well. The judge comes across as *friendly*.

Participants in the unfair condition (N = 121, 50.6% of the sample) read the following:

> You notice that the judge gives you only *very little time* to tell your side of the story. The judge interrupts you a couple of times. He does *not* seem to listen attentively to what you are saying. As a result, your impression is that the judge had already made up his mind about your case beforehand. The judge does *not* seem to be really trying to get a good idea of what happened exactly. For example, he asks very few questions. The conflict with your neighbours about the noise, and how this has lasted for several years, is not discussed either. The judge comes across as *unfriendly*.

After reading this part, for both groups the scenario continued as follows:

> Then, the public prosecutor is allowed to speak. She presents the evidence against you and demands that you pay a fine of €450. You are allowed to respond to this. You reply by saying that you think this is a way too harsh penalty for a charge of insult. In addition, it is hard for you to come up with this amount of money. The public prosecutor is then allowed to speak once more. She sticks to the fine she demanded. After you have received a final opportunity to say something, the judge puts forward his verdict.

Participants in the fair condition then read:

> The judge explains that he is taking into account your side of the story. He understands that you were angry at your neighbours because of the noise that they were making. Nevertheless, he deems a sentence warranted.

Participants in the unfair condition read the following:

> The judge shortly explains that he deems a sentence warranted.

For all participants, the scenario ended in the same way:

> The judge therefore sentences you to pay a *fine of €400*. You are disappointed about this verdict. You still think this sentence is too harsh. You had expected a less severe sentence. The judge explains that you can appeal this verdict. This ends your trial. You leave the courtroom.

at least 387 research participants were needed. Complete details and results are available with the first author on request.

doi: 10.5553/ELR.000231

After reading the scenario, participants answered questions regarding our main and background variables. Upon completing the questionnaire, they were thanked for their participation with a small token of appreciation and offered a summary of the research results that we would later send to them if they were interested. During data collection, our research assistant kept a logbook detailing relevant information, including participants' oral comments on the questionnaire.

2.3 Measures

In the following, we describe the measures we used for our independent variable (perceived procedural justice), moderating variables (outcome judgments and external attributions), dependent variables (protest intentions, trust in judges and grades assigned for trust in judges) and background variables. All measures were assessed on 7-point scales (1 = *completely disagree* to 7 = *completely agree*) unless indicated otherwise.

2.3.1 Independent Variable

The items we used to examine perceived procedural justice were partly based on work by Hulst et al. and Van den Bos et al.[48] We asked the participants to indicate to what extent they agreed with the following three statements: 'I think the procedure that has been followed during the court hearing is fair', 'I think the procedure that has been followed during the court hearing is just', and 'I think the procedure that has been followed during the court hearing is justified'. Together, these items formed a reliable perceived procedural justice scale (α = 0.92), with higher scores reflecting higher levels of perceived procedural justice.

2.3.2 Moderating Variables

Building on research by Grootelaar and Van den Bos and research by Van den Bos et al.,[49] we measured participants' outcome judgments by asking them to indicate to what extent they agreed with the following three statements about the judge's ruling: 'I think this ruling is fair', 'I think this ruling is just', and 'I am satisfied with this ruling'. Answers to these questions were averaged to form a reliable outcome judgments scale (α = 0.92), with higher scores indicating that participants judged their outcomes more positively.

We also assessed the extent to which participants made external attributions with items that were inspired by the research by Van den Bos et al.[50] We asked participants to indicate to what extent they agreed with the following six statements: 'I got this ruling because of myself' (reverse-coded), 'I got this ruling because of my own behaviour' (reverse-coded), 'I got this ruling because of something outside of myself', 'I got this ruling because of something other than my own behaviour', 'I got this ruling because of how the court hearing progressed', and 'I got this ruling because of how I was treated during the court hearing'. Averaging participants' answers to these questions yielded a scale with sufficient reliability for our theory-testing purposes (α = 0.60).[51] Higher scores on this scale indicate higher external attribution ratings.[52]

2.3.3 Dependent Variables

Following Stahl et al. and Van den Bos et al.,[53] we measured participants' protest intentions by asking them the following two questions: 'To what extent would you want to criticise the ruling?' and 'To what extent would you want to protest against the ruling?' (1 = *not at all* to 7 = *very much*). These items formed a reliable protest intentions scale (α = 0.87), with higher scores reflecting stronger intentions to protest against the judge's ruling.

Building on Grootelaar and Van den Bos,[54] who aimed to assess levels of trust as directly as possible, we solicited participants' trust in Dutch judges by asking them to indicate to what extent they agreed with the following three statements: 'I have faith in Dutch judges', 'I think Dutch judges are trustworthy', and 'I feel that Dutch judges cannot be trusted' (reverse-coded). Together, participants' answers to these questions formed a reliable trust in judges scale (α = 0.85). Higher scores on this scale reflect higher levels of trust in Dutch judges. In addition, we asked participants to express their trust in Dutch judges with a report grade from 1 (*lowest*) to 10 (*highest*), in conformity with the grading system used at Dutch schools.

2.3.4 Background Variables

Finally, we examined several background variables to be able to provide a sample description, asking participants whether they had ever experienced an actual hearing at a criminal court, and asking them to indicate their highest completed level of education, gender, ethnic-cultural background or origins, and age. At the end of the questionnaire, there was room for participants to write down remarks or issues they considered important and that had not been assessed by means of our questions.[55]

48 Hulst et al., above n. 7; Van den Bos et al. (1999), above n. 11.

49 Grootelaar and Van den Bos, above n. 2; Van den Bos et al. (1999), above n. 11.

50 Van den Bos et al. (1999), above n. 11.

51 F.M. Cramwinckel, E. van Dijk, D. Scheepers & K. van den Bos, 'The Threat of Moral Refusers for One's Self-concept and the Protective Function of Moral Cleansing', 49 *Journal of Experimental Social Psychology* 1049 (2013); J.C. Nunnally and I.H. Bernstein, *Psychometric Theory* (1994).

52 We report all measures in our study and thus note that we also included perceived everyday discrimination in our questionnaire to serve as a possible proxy for external attribution ratings. We did this because in one of our previous studies (Ansems et al. (2021), above n. 2) our measure of external attributions turned out to be insufficiently reliable. In the present study, however, the external attributions scale did reach sufficient reliability for this study's purposes, and perceived everyday discrimination and external attribution ratings were only marginally significantly correlated ($r = 0.12$, $p = 0.08$). Therefore, we included perceived everyday discrimination in our analyses for exploratory purposes only and do not report the results here. Complete details and results are available from the first author on request.

53 T. Stahl, R. Vermunt & N. Ellemers, 'Reactions to Outgroup Authorities' Decisions: The Role of Expected Bias, Procedural Fairness, and Outcome Favorability', 11 *Group Processes and Intergroup Relations* 281 (2008); Van den Bos et al. (1999), above n. 11.

54 Grootelaar and Van den Bos, above n. 2.

55 There were missing values for external attribution ratings (one missing value), protest intentions (1 missing value), trust in judges (3 missing values), grade for trust in judges (20 missing values), having experienced an

doi: 10.5553/ELR.000231

3 Results

This section first reports the results of our manipulation check and the main effects of the procedure manipulation on participants' trust in judges, the grade that they assigned to indicate the level of their trust in judges, and their protest intentions (Hypothesis 1). We then describe the results of the analyses testing whether there was an interaction between participants' external attribution ratings and the procedure manipulation (Hypothesis 2). Finally, we assess the interaction between the procedure manipulation and outcome judgments (Hypothesis 3).[56]

3.1 Manipulation Check

To check if the manipulation that varied whether participants read the fair scenario or the unfair scenario affected perceived procedural justice among our participants, we performed a General Linear Model (GLM) analysis with the procedure manipulation as a dichotomous independent variable and perceived procedural justice as a dependent variable. Indeed, we found a statistically significant main effect of the procedure manipulation, $F(1, 231) = 60.88$, $p < 0.001$, $\eta p^2 = 0.21$, with participants in the fair condition reporting higher levels of perceived procedural justice ($M = 4.28$, $SD = 2.03$) than participants in the unfair condition ($M = 2.45$, $SD = 1.52$).[57]

3.2 Testing the Main Effects of the Procedure Manipulation

To assess whether our dependent variables were affected by the procedure manipulation, we performed three separate GLM analyses with the procedure manipulation as a dichotomous independent variable and trust in judges, the grade that participants assigned to indicate the level of their trust in judges, and protest intentions as dependent variables. These analyses revealed a significant effect of the procedure manipulation on trust in judges, $F(1, 228) = 6.22$, $p < 0.05$, $\eta p^2 = 0.03$, with participants in the fair condition reporting higher levels of trust in judges ($M = 4.91$, $SD = 1.40$) than participants in the unfair condition ($M = 4.42$, $SD = 1.60$). Participants in the fair condition also gave their trust in judges a higher grade ($M = 6.75$, $SD = 1.61$) than participants in the unfair condition ($M = 6.10$, $SD = 1.90$), $F(1, 211) = 7.10$, $p < 0.01$, $\eta p^2 = 0.03$. Furthermore, participants in the fair condition showed significantly lower protest intentions ($M = 4.69$, $SD = 1.81$) than participants in the unfair condition ($M = 5.43$, $SD = 1.74$), $F(1, 230) = 10.23$, $p < 0.01$, $\eta p^2 = 0.04$. These results support our first hypothesis, which predicted that participants in the fair condition would have more trust in judges, assign a higher grade to indicate the level of their trust in judges and report lower protest intentions than participants in the unfair condition.[58]

3.3 Testing the Moderating Effect of External Attributions

We examined Hypothesis 2 by conducting GLM analyses with the procedure manipulation as a dichotomous independent variable and external attribution ratings as a continuous (quasi-interval) moderating variable. The external attributions variable was standardised before being entered into our analyses.

3.3.1 Trust in Judges

We performed a GLM analysis with the procedure manipulation and external attribution ratings as independent and moderating variables and trust in judges as a dependent variable. This analysis yielded a significant main effect of the procedure manipulation, $F(1, 225) = 5.91$, $p < 0.05$, $\eta p^2 = 0.03$; no statistically significant main effect of external attribution ratings, $F(1, 225) = 0.16$, $p = .69$, $\eta p^2 = 0.00$; and a significant interaction between external attribution ratings and the procedure manipulation, $F(1, 225) = 5.12$, $p < 0.05$, $\eta p^2 = 0.02$. The main effect of the procedure manipulation indicated that participants in the fair condition reported more trust in judges ($M = 4.91$, $SD = 1.40$) than participants in the unfair condition ($M = 4.43$, $SD = 1.60$). The nonsignificant main effect of external attribution ratings indicated that external attribution ratings were not significantly associated with trust in judges.

We interpreted the interaction effect by assessing the simple effect of the procedure manipulation at different levels of participants' external attribution ratings. The effect of the procedure manipulation was statistically significant when external attribution ratings were relatively low (i.e. estimated at 1 *SD* below the mean), such that participants in the fair condition reported more trust in judges ($M = 5.05$, $SE = 0.17$) than participants in the unfair condition ($M = 4.08$, $SE = 0.24$), $F(1, 225) = 10.95$, $p < 0.01$, $\eta p^2 = 0.05$. In contrast, when external attribution ratings were relatively high (i.e. estimated at 1 *SD* above the mean), the effect of the procedure ma-

actual court hearing (1 missing value), highest completed level of education (1 missing value), and age (3 missing values).

56 To detect outliers in our main analysis – that is, the main effect of the procedure manipulation on participants' trust in judges – we examined Cook's distance; see Cohen et al., above n. 47; D. Cook, 'Detection of Influential Observation in Linear Regression', 19 *Technometrics* 15 (1977). This revealed that six participants had Cook's distance scores more than 3 *SD*s above the mean. These participants were excluded from all analyses reported in the Results and Discussion sections of this article; see also Cramwinckel et al., above n. 51; K. van den Bos, J. Brockner, M. van den Oudenalder, S.V. Kamble & A. Nasabi, 'Delineating a Method to Study Cross-cultural Differences with Experimental Control: The Voice Effect and Countercultural Contexts Regarding Power Distance', 49 *Journal of Experimental Social Psychology* 624 (2013). When analyses including these six participants yielded different results, this is noted in footnotes.

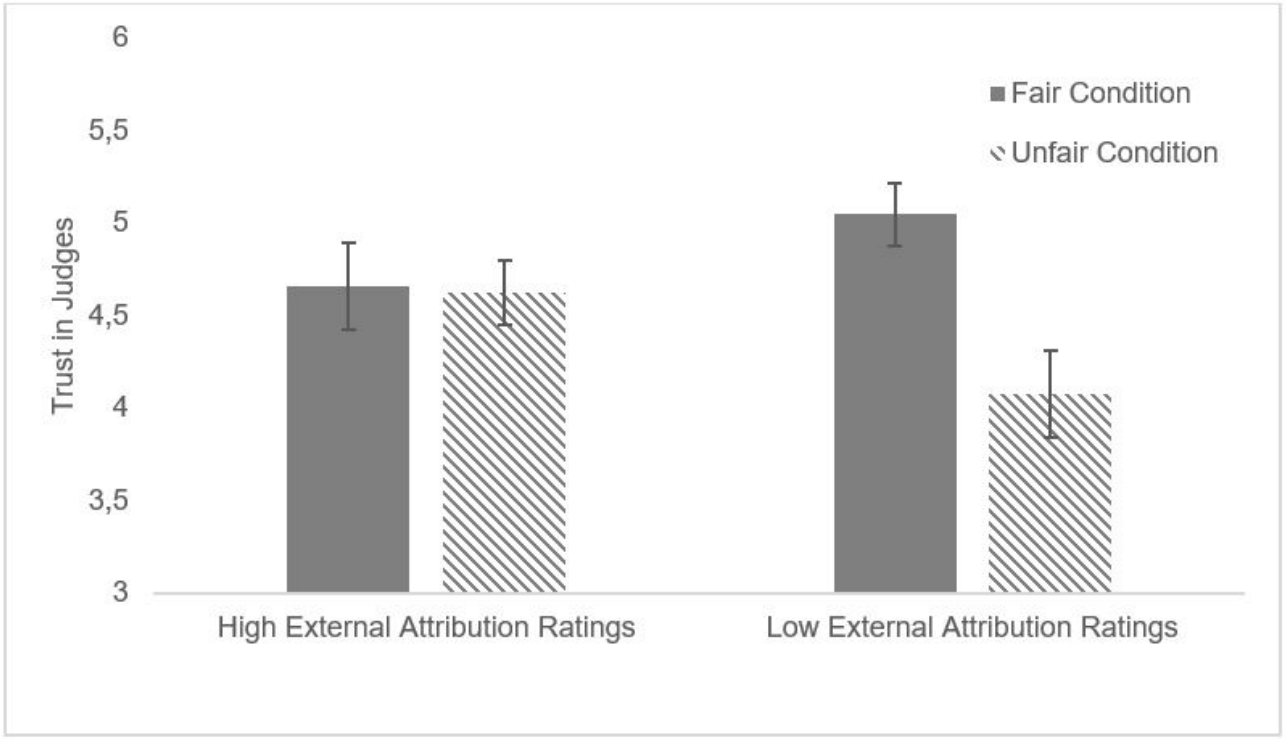
57 Please note that, strictly speaking, these conditions should be referred to as the 'more fair' and 'less fair' conditions. After all, the average score of participants in the fair condition ($M = 4.28$, $SD = 2.03$) is not far from the middle of the 7-point perceived procedural justice scale (i.e. score 4). Indeed, a one-sample *t* test showed that the average score of participants in the fair condition did not significantly deviate from 4, $t(111) = 1.44$, $p = .15$, $d = 0.14$. For reasons of simplicity, however, we refer to the experimental conditions as the 'fair' and 'unfair' conditions.

58 When we performed these analyses while including the six outliers, we did not find a significant effect of the procedure manipulation on trust in judges, $F(1, 234) = 1.99$, $p = 0.16$, $\eta p^2 = 0.01$, or on the grade participants gave their trust in judges, $F(1, 217) = 2.23$, $p = 0.14$, $\eta p^2 = 0.01$.

doi: 10.5553/ELR.000231

nipulation was no longer statistically significant, $F(1, 225) = 0.01$, $p = 0.91$, $\eta p^2 = 0.00$, with participants in the fair condition reporting a similar level of trust in judges ($M = 4.66$, $SE = 0.23$) as participants in the unfair condition ($M = 4.63$, $SE = 0.17$). Figure 1 illustrates the interaction effect.

Figure 1 *Trust in Judges, the Procedure Manipulation and External Attribution Ratings*



These results indicate that we observed a fair process effect when external attribution ratings were relatively low: when participants reported relatively low external attribution ratings, they showed more trust in judges in the fair condition than in the unfair condition. This effect was not statistically significant when external attribution ratings were relatively high. That is, when participants reported relatively high external attribution ratings, they showed similar levels of trust in judges in the fair condition as they did in the unfair condition.

3.3.2 Grade for Trust in Judges

We also conducted a GLM analysis with the procedure manipulation and external attribution ratings as independent and moderating variables and the grade that participants assigned to indicate their level of trust in judges as a dependent variable. This yielded a marginally significant main effect of the procedure manipulation, $F(1, 208) = 3.44$, $p = 0.07$, $\eta p^2 = 0.02$; a marginally significant main effect of external attribution ratings, $F(1, 208) = 2.77$, $p < 0.10$, $\eta p^2 = 0.01$; and a nonsignificant interaction between external attribution ratings and the procedure manipulation, $F(1, 208) = 1.22$, $p = 0.27$, $\eta p^2 = 0.01$. The marginally significant main effect of the procedure manipulation suggested that participants gave their trust in judges a somewhat higher grade when they were in the fair condition ($M = 6.75$, $SD = 1.61$) than when they were in the unfair condition ($M = 6.15$, $SD = 1.85$). The marginally significant main effect of external attribution ratings suggested that participants who reported higher external attribution ratings gave their trust in judges a somewhat lower grade. The nonsignificant interaction effect indicated that the effect of the procedure manipulation on the grade participants assigned to indicate their level of trust in judges was not moderated by their external attribution ratings.

3.3.3 Protest Intentions

Furthermore, we performed a GLM analysis with the procedure manipulation and external attribution ratings as independent and moderating variables and protest intentions as a dependent variable. Again, we found a significant main effect of the procedure manipulation, $F(1, 228) = 4.78$, $p < 0.05$, $\eta p^2 = 0.02$; a significant main effect of external attribution ratings, $F(1, 228) = 10.83$, $p < 0.01$, $\eta p^2 = 0.05$; and no significant interaction between external attribution ratings and the procedure manipulation, $F(1, 228) = 0.18$, $p = 0.67$, $\eta p^2 = 0.00$. The main effect of the procedure manipulation indicated that participants showed lower protest intentions in the fair condition ($M = 4.69$, $SD = 1.81$) than in the unfair condition ($M = 5.43$, $SD = 1.74$). The main effect of external attribution ratings indicated that participants showed more protest intentions when they reported higher external attribution ratings. The nonsignificant interaction effect showed that the effect of the procedure manipulation on participants' protest intentions was not moderated by their external attribution ratings.

3.3.4 Interim Conclusion

Together, these analyses show that we obtained partial support for our second hypothesis, which predicted that

doi: 10.5553/ELR.000231

the effect of the procedure manipulation on trust in judges, the grade participants assigned to indicate the level of their trust in judges, and protest intentions would be attenuated or even reversed when external attribution ratings were relatively high. That is, our analyses did not yield an interaction effect of external attribution ratings and the procedure manipulation on the grade participants assigned to indicate the level of their trust in judges and their protest intentions. We did find an interaction effect of external attribution ratings and the procedure manipulation on participants' trust in judges. Specifically, our analyses revealed that participants in the fair condition reported a significantly higher level of trust in judges than participants in the unfair condition in case of relatively low external attribution ratings, while this effect ceased to be significant when external attribution ratings were relatively high.[59]

3.4 Testing the Moderating Effect of Outcome Judgments

We tested Hypothesis 3 by conducting GLM analyses with the procedure manipulation as a dichotomous independent variable and outcome judgments as a continuous (quasi-interval) moderating variable. Like the variable measuring external attributions, the outcome judgments variable was standardised before being entered into our analyses.

3.4.1 Trust in Judges

We performed a GLM analysis with the procedure manipulation and outcome judgments as independent and moderating variables and trust in judges as a dependent variable. We found a significant main effect of outcome judgments, $F(1, 226) = 7.08$, $p < 0.01$, $\eta p^2 = 0.03$; a marginally significant main effect of the procedure manipulation, $F(1, 226) = 3.56$, $p = 0.06$, $\eta p^2 = 0.02$; and no statistically significant interaction between outcome judgments and the procedure manipulation, $F(1, 226) = 0.27$, $p = 0.60$, $\eta p^2 = 0.00$. The main effect of outcome judgments showed that participants who judged their outcomes more positively reported more trust in judges. The marginally significant effect of the procedure manipulation on trust in judges suggested that participants in the fair condition reported somewhat higher levels of trust in judges ($M = 4.91$, $SD = 1.40$) than participants in the unfair condition ($M = 4.42$, $SD = 1.60$). The nonsignificant interaction effect indicated that the effect of the procedure manipulation on trust in judges was not moderated by participants' outcome judgments.

3.4.2 Grade for Trust in Judges

We also conducted a GLM analysis with the procedure manipulation and outcome judgments as independent and moderating variables and the grade participants assigned to indicate their level of trust in judges as a dependent variable. This analysis yielded a significant main effect of outcome judgments, $F(1, 209) = 9.50$, $p < 0.01$, $\eta p^2 = 0.04$; a significant main effect of the procedure manipulation, $F(1, 209) = 3.93$, $p < 0.05$, $\eta p^2 = 0.02$; and no significant interaction effect, $F(1, 209) = 0.37$, $p = 0.54$, $\eta p^2 = 0.00$. The main effect of outcome judgments showed that participants who judged their outcomes more positively gave their trust in judges a higher grade. Furthermore, the main effect of the procedure manipulation showed that in the fair condition participants assigned a higher grade for their trust in judges ($M = 6.75$, $SD = 1.61$) than they did in the unfair condition ($M = 6.10$, $SD = 1.90$). The nonsignificant interaction between the procedure manipulation and outcome judgments indicated that the effect of the procedure manipulation on the grade participants assigned to indicate the level of their trust in judges was not moderated by their outcome judgments.

3.4.3 Protest Intentions

Finally, we conducted a GLM analysis with the procedure manipulation and outcome judgments as independent and moderating variables and protest intentions as a dependent variable. This analysis revealed a significant main effect of outcome judgments, $F(1, 228) = 41.49$, $p < 0.001$, $\eta p^2 = 0.15$; a significant main effect of the procedure manipulation, $F(1, 228) = 4.17$, $p < 0.05$, $\eta p^2 = 0.02$; and no significant interaction between outcome judgments and the procedure manipulation, $F(1, 228) = 0.81$, $p = 0.37$, $\eta p^2 = 0.00$. The main effect of outcome judgments indicated that participants who judged their outcomes more positively reported lower protest intentions. In addition, the main effect of the procedure manipulation showed that participants in the fair condition expressed lower protest intentions ($M = 4.69$, $SD = 1.81$) than participants in the unfair condition ($M = 5.43$, $SD = 1.74$). Again, the nonsignificant interaction effect showed that the effect of the procedure manipulation on participants' protest intentions was not moderated by their outcome judgments.

3.4.4 Interim Conclusion

These analyses show that we did not find the two-way interaction between the procedure manipulation and outcome judgments that we explored with our third hypothesis on any of our dependent variables. In other words, the effect of procedural justice on trust in judges, grade for trust in judges, and protest intentions was not moderated by participants' outcome judgments in our study. We come back to these results in the Discussion section to follow.[60]

59 When we performed these analyses while including the six outliers, this yielded partly different results. That is, we did not find a significant main effect of the procedure manipulation on trust in judges, $F(1, 231) = 1.69$, $p = 0.20$, $\eta p^2 = 0.01$. The effect of external attribution ratings on trust in judges was marginally significant in both the fair condition ($b = -0.27$, $\beta = -0.17$, $t[115] = -1.83$, $p = 0.07$) and the unfair condition ($b = 0.27$, $\beta = 0.16$, $t[116] = 1.73$, $p = 0.09$). In addition, the main effect of the procedure manipulation on the grade participants assigned to indicate their level of trust in judges ceased to be marginally significant, $F(1, 214) = 0.52$, $p = 0.47$, $\eta p^2 = 0.00$. We found a marginally significant effect of the procedure manipulation on protest intentions, $F(1, 234) = 3.74$, $p = 0.05$, $\eta p^2 = 0.01$.

60 When we performed these analyses while including the six outliers, we did not find a significant main effect of the procedure manipulation on trust in judges, $F(1, 232) = 0.69$, $p = 0.41$, $\eta p^2 = 0.00$, or on the grade that participants assigned to indicate their level of trust in judges, $F(1, 215) =$

doi: 10.5553/ELR.000231

4 Discussion

In this study, we assessed participants' reactions to procedural justice. We focused not only on replicating the fair process effect but also on its potential attenuation, or even reversal, by involving moderating variables. Our results showed that we successfully manipulated procedural justice by asking participants to read a scenario in which they were the defendant in a criminal court hearing that progressed in either a fair or an unfair way. This procedure manipulation had statistically significant effects on participants' trust in judges, the grade they assigned to indicate the level of their trust in judges, and their protest intentions. That is, participants reported more trust in judges, assigned a higher grade to indicate their level of trust in judges and were less inclined to protest against the judicial ruling in the fair condition than in the unfair condition. The effect of the procedure manipulation on trust in judges was significantly moderated by participants' external attributions, such that we found a fair process effect among participants with relatively low external attribution ratings, while this effect was attenuated, in fact was not statistically significant, among participants whose external attribution ratings were relatively high. In what follows, we discuss the implications and limitations of our study and suggest directions for future research that may further enhance our insight into the fair process effect and its boundary conditions in legal contexts.

4.1 Implications

4.1.1 The Fair Process Effect

The main effects of the procedure manipulation found in this study are important because they suggest that people, when faced with the same negative outcome, report more trust in judges, assign a higher grade to indicate their level of trust in judges and are less inclined to protest against judicial rulings in case of fair procedures. Experimental designs such as the one used in our study, which vary procedural justice but keep the outcome constant (in this case, a fine of €400), can be a powerful way of uncovering such fair process effects. In addition, we found these effects among research participants who differ from the WEIRD participants that are the focus of many procedural justice studies, as we focused on citizens in the Netherlands with a non-Western ethnic-cultural background. In these ways, our findings support results obtained by previous studies in legal contexts that found associations between procedural justice and other important variables, sometimes among marginalised groups.[61]

These fair process effects are particularly relevant in the context of criminal court hearings, we think, as many defendants have a non-WEIRD background and receive a negative case outcome in the form of a conviction. Our findings can therefore be of interest to legal practice, including the judiciary. After all, people's protest intentions as examined in the present study are likely to be at least to some extent related to appeals against their case outcomes, which has implications for judges' workload.[62] Trust in judges, too, is an issue that has the Dutch judiciary's ongoing attention[63] and has become even more relevant since the childcare benefits scandal.

The effects of procedural justice on important variables like protest intentions and trust in judges, of course, do not imply that judges and other authorities can or should use procedural justice in an instrumental or even manipulative way. For one, people may often detect insincere efforts by authorities to seem fair (also termed 'hollow justice'),[64] such that these efforts are likely to backfire.[65] Moreover, having people feel treated fairly during legal procedures has value in itself, apart from its impact on attitudes like protest intentions and trust.[66] We do think, however, that the fair process effects obtained in our study point to the societal relevance of our findings, beyond their scientific contributions.

4.1.2 Boundary Conditions

As mentioned earlier, we aimed to examine not only the replication of the fair process effect but also its potential boundary conditions. Hence, a second important finding of our study is that participants' external attribution ratings moderated the effect of the procedure manipulation on trust in judges in the way predicted by our second hypothesis. That is, we found an effect of the procedure manipulation on trust in judges among participants with relatively low external attribution ratings, while this effect ceased to be statistically significant when external attribution ratings were relatively high. In other words, our study suggests a boundary to the fair process effect in that the effect was attenuated and indeed not statistically significant among participants with relatively high external attribution ratings.

These findings fit with the line of reasoning presented at the beginning of this work. That is, people may sometimes want to attribute negative outcomes to external

0.79, $p = 0.38$, $\eta p^2 = 0.00$. The main effect of the procedure manipulation on protest intentions was marginally significant, $F(1, 234) = 3.54$, $p = 0.06$, $\eta p^2 = 0.02$.

61 For example, J.D. Casper, T.R. Tyler & B. Fisher, 'Procedural Justice in Felony Cases', 22 *Law & Society Review* 483 (1988); J.M. Landis and L. Goodstein, 'When Is Justice Fair? An Integrated Approach to the Outcome versus Procedure Debate', 11 *American Bar Foundation Research Journal* 675 (1986); Tyler and Huo, above n. 2.

62 In line with this, Boekema's study of administrative law cases showed a statistically significant relationship between perceived procedural justice and filing an appeal, although this relationship was not as strong as the relationship between appeals and people's perceptions of their outcomes (Boekema, above n. 4).

63 See, for instance, the inaugural address by the President of the Dutch Supreme Court, available at www.hogeraad.nl/over-ons/raad/toespraken-president/rede-dineke-groot-installatie-president-hoge-raad/ (last visited 20 July 2022).

64 For example, Lind and Tyler, above n. 1; Tyler and Lind, above n. 1; R.J. MacCoun, 'Voice, Control, and Belonging: The Double-edged Sword of Procedural Fairness', 1 *Annual Review of Law and Social Science* 171 (2005).

65 Lind and Tyler, above n. 1.

66 For a further discussion of these issues, see L.F.M. Ansems, *A Critical Test of Perceived Procedural Justice From the Perspective of Criminal Defendants* (2021) (Chapter 6).

causes in order to preserve their self-esteem.[67] Since unfair procedures offer such external attribution opportunities, people may respond more positively to procedural unfairness, yielding an attenuation, or even reversal, of the fair process effect.[68] Thus, our finding that the fair process effect was not statistically significant among participants with relatively high external attribution ratings may indicate that participants who wanted to attribute their outcomes to external causes responded less positively to the fair procedure condition, because the fair procedure did not offer them the external attribution opportunities they desired. In this way, people's desire to protect their self-esteem when faced with negative outcomes may account for the interaction between external attribution ratings and the procedure manipulation observed in the present study.

Our findings regarding the interaction between external attribution ratings and the procedure manipulation add to previous studies that examined potential boundary conditions of the fair process effect in at least two ways. First, previous studies often assumed that attributional processes may underlie the attenuation or reversal of the fair process effect rather than explicitly including attributions as a variable in their analyses.[69] Because our analyses involved participants' external attribution ratings as a potentially moderating variable, our study provides direct empirical support for this suggestion.

Second, our study extends previous findings regarding participants' attenuated preference for fair procedures to an important new context. That is, rather than examining the potential attenuation or reversal of the fair process effect in organisational, performance-oriented or laboratory contexts,[70] we assessed these issues in a legally relevant setting. After all, participants imagined being the defendant in a criminal court hearing during which they were treated fairly or unfairly. Our findings thus suggest that in legal settings, too, attributional processes may moderate people's reactions to fair procedures. In our study, this moderation entailed an attenuation (rather than a reversal) of the fair process effect to the extent that the effect was no longer statistically significant. Future studies using different methods and different research participants could examine whether, in legal contexts, the fair process effect may be reversed when external attribution ratings are high. Such studies could also reflect on the normative implications of a reversed fair process effect.[71]

One of the reasons the interaction effect we found in the present study is interesting, we think, is that intergroup dynamics may play a role in the context of court hearings in general and criminal court hearings in particular. That is, some defendants may be sensitive to the fact that, in various respects, for them the judge represents an outgroup.[72] The present study may thus advance our thinking about people's attenuated preference for fair procedures in contexts that involve intergroup dynamics, which can shape people's reactions to procedural justice to an important extent.[73]

Finally, we note that we did not find an interaction between the procedure manipulation and outcome judgments, as explored by our third hypothesis. This might be explained by the scenarios used in our study, which focused on criminal court hearings. After all, Grootelaar and Van den Bos found an interaction between outcome favourability and perceived procedural justice in Dutch motoring fine cases but not in single-judge criminal cases.[74] They write that whether this interaction can be observed may depend on the type of legal case examined. The nonsignificant interaction between outcome judgments and procedural justice supports their suggestion.

4.2 Limitations

The present study has some limitations that one should keep in mind when interpreting the results and designing future research that may follow from the study presented here. First, we note explicitly that the correlational aspects of some of our findings clearly limit what we learn from these findings and the confidence with which we can interpret our results. Most notably, in our experiment both participants' external attributions and their outcome judgments were affected by the procedural fairness manipulation.[75] These effects of our procedure manipulation on external attributions and outcome judgments are not unexpected, as they clearly fit with the large literature on the fair process effect.[76] Furthermore, in our interpretation of the results, we relied

67 Cohen, above n. 14.

68 For example, Brockner et al. (2009), above n. 8; Van den Bos et al. (1999), above n. 11.

69 For an exception, see Brockner et al. (2003), above n. 15.

70 For example, Brockner et al. (2003), above n. 15; Schroth and Shah, above n. 20; Van den Bos et al. (1999), above n. 11.

71 For example, if people sometimes respond more favourably to procedures that they perceive as unfair, it does not automatically follow that authorities should not aim to enhance perceptions of procedural fairness. Furthermore, as pointed out by one of the anonymous reviewers of this article, internal attributions prompted by fair procedures might lead to desirable change within a defendant. For further discussion of translating empirical findings from procedural justice research to the normative domain of law, see Ansems (2021), above n. 66 (Chapter 6).

72 M.J. Hornsey and S. Esposo, 'Resistance to Group Criticism and Recommendations for Change: Lessons from the Intergroup Sensitivity Effect', 3 *Social and Personality Psychology Compass* 275 (2009); M. Hornsey and A. Imani, 'Criticizing Groups from the Inside and the Outside: An Identity Perspective on the Intergroup Sensitivity Effect', 30 *Personality and Social Psychology Bulletin* 365 (2004).

73 H.J. Smith, T.R. Tyler, Y.J. Huo, D.J. Ortiz & E.A. Lind, 'The Self-relevant Implications of the Group-value Model: Group Membership, Self-worth, and Treatment Quality', 34 *Journal of Experimental Social Psychology* 470 (1998).

74 Grootelaar and Van den Bos, above n. 2.

75 More specifically, a GLM analysis with the procedure manipulation as an independent variable and external attribution ratings as a dependent variable showed that participants in the fair condition reported lower external attribution ratings ($M = 3.65$, $SD = 1.20$) than participants in the unfair condition ($M = 4.33$, $SD = 1.10$), $F(1, 230) = 20.20$, $p < 0.001$, $\eta p^2 = 0.08$. Furthermore, a GLM analysis with the procedure manipulation as an independent variable and outcome judgments as a dependent variable showed that participants in the fair condition judged their outcomes more positively ($M = 2.89$, $SD = 1.81$) than participants in the unfair condition ($M = 2.17$, $SD = 1.53$), $F(1, 231) = 10.80$, $p < 0.01$, $\eta p^2 = 0.05$.

76 Van den Bos (2015), above n. 3; K. van den Bos, 'What Is Responsible for the Fair Process Effect?', in J. Greenberg and J. Colquitt (eds.), *Handbook of Organizational Justice* (2005) 273; K. van den Bos, *The Fair Process Effect: Overcoming Distrust, Polarization, and Conspiracy Thinking* (in press).

doi: 10.5553/ELR.000231

on earlier research that used experimental manipulations of attributions[77] and outcome favourability.[78] This noted, we would applaud future research that manipulates procedure, external attributions and outcome judgments independently from each other, with full experimental control and with random assignment to conditions.[79] The current mix of experimentally manipulating procedure and measuring participants' attributions and their outcome judgments did not include experimental manipulations of attributions and outcome judgments, thus limiting the confidence with which we can interpret the findings as presented in our research study.

A second limitation of the present study is its use of scenarios, which provides less external validity than studies that ask people about their experiences and perceptions during actual court hearings with real stakes.[80] Indeed, the lack of real interaction with a judge may be why the relationships between procedural justice and trust in judges in our study are not as strong as those found in studies involving real-life court hearings.[81] In line with this, Lind and Tyler point out that the fair process effect tends to be less powerful in study contexts that are less real.[82] One could also argue, however, that real-life situations are more likely to trigger the attributional processes that may attenuate or reverse the fair process effect. This is in line with findings Brockner et al. obtained in organisational settings,[83] which suggest that reversed fair process effects can occur in real-life situations during which people are being evaluated. Future studies are needed to assess whether attributional processes may sometimes attenuate or reverse the fair process effect in actual court hearings.

Third, we manipulated procedural justice by varying whether participants read the fair scenario or the unfair scenario. These scenarios were based on findings of our previous qualitative study that examined what makes defendants in criminal cases feel treated fairly during their court hearings.[84] Future research may examine whether manipulations focusing on other aspects of procedures or focusing on a single procedural aspect yield attenuated or reversed fair process effects too.

Fourth, although the scale we used to measure participants' external attribution ratings showed sufficient reliability for theory-testing purposes,[85] one should take care when applying these insights to important legal contexts. Follow-up research could examine how external attribution ratings can be assessed in a more reliable manner in the context of criminal court hearings. For example, one might consider measuring only external attribution ratings rather than also including reverse-coded items measuring internal attributions as in the present study, because both types of attributions do not necessarily rule out one another.[86]

Fifth, we note that the interaction between the procedure manipulation and external attribution ratings was statistically significant only on participants' trust in judges. Hence, our findings regarding the attenuation of the fair process effect should be interpreted with caution. Follow-up research is needed to assess whether our results can be replicated and whether there is an interaction effect of procedural justice and external attributions on other variables as well.

4.3 Coda

The present study shows that procedural justice, as manipulated in a scenario involving a criminal court hearing, had significant effects on trust in judges and intentions to protest against judicial rulings. These effects were not attenuated or reversed depending on participants' outcome judgments. We did find an attenuation of the effect of procedural justice on trust in judges among participants with relatively high external attribution ratings to such extent that the effect was no longer statistically significant. This is an interesting finding, because it reveals a potential boundary condition of the fair process effect. Overall, however, our results support the importance of procedural justice. Thus, our study suggests that procedural fairness matters when people are responding to legally relevant stimulus materials. We hope that our experimental insight into the fair process effect and some of its potential boundary conditions will help to better understand people's reactions to criminal procedures.

77 Van den Bos et al. (1999), above n. 11.

78 Brockner and Wiesenfeld, above n. 5.

79 R.E. Kirk, *Experimental Design: Procedures for the Behavioral Sciences* (2013); K. van den Bos, *Empirical Legal Research: A Primer* (2020).

80 For example, Casper et al., above n. 61; L. Hulst, K. van den Bos, A.J. Akkermans & E.A. Lind, 'On Why Procedural Justice Matters in Court Hearings: Experimental Evidence that Disinhibition Weakens the Association between Procedural Justice and Evaluations of Judges', 13 *Utrecht Law Review* 114 (2017).

81 For example, Grootelaar and Van den Bos, above n. 2.

82 Lind and Tyler, above n. 1.

83 J. Brockner, 'Making Sense of Procedural Fairness: How High Procedural Fairness Can Reduce or Heighten the Influence of Outcome Favorability', 27 *The Academy of Management Review* 58 (2002); Brockner et al. (2003), above n. 15.

84 Ansems et al. (2020), above n. 42.

85 Nunnally and Bernstein, above n. 51.

86 For example, Brockner et al. (2003), above n. 15; B. Major, W.J. Quinton & S.K. McCoy, 'Antecedents and Consequences of Attributions to Discrimination: Theoretical and Empirical Advances', in M.P. Zanna (ed.), *Advances in Experimental Social Psychology* (2002) 251.

doi: 10.5553/ELR.000231

Plant Blindness and the Law on International Trade in Wildlife

Tanya Wyatt & Alison Hutchinson*

Abstract

While habitat destruction threatens other-than-human life across the planet, overexploitation and illegal trade are the second leading source of threats to wildlife. 'Wildlife' though predominantly is taken to mean other-than-human animals, and plants are largely overlooked or ignored even though they are critical to human societies and the health of the planet. Adopting a green criminological analysis, this article provides evidence that legislation governing wildlife use and protection is speciesist and 'plant blind'. Through a content analysis of 185 countries' wildlife trade legislation, we find that not all legislation includes plants and that in some legislation different species of plants are regarded differently. This means that there are gaps in the framework of legal protection for some plants, which can have real-world consequences. For instance, lack of protection can lead to reduced conservation for exploited plants, which in turn can increase the loss of biodiversity and further threaten ecosystem health and planetary well-being. Legislative and societal plant blindness needs to be challenged and overturned to help stop the biodiversity crisis.

Keywords: green criminology, plant blindness, speciesism, Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), environmental crime.

1 Introduction

Overexploitation and illegal trade are threatening one million species of wildlife.[1] While the illegal trade in wildlife has become a global area of concern, for the most part 'wildlife' is taken to mean other-than-human animals. Even in critical criminological and social science scholarship highlighting the speciesist nature of efforts to combat wildlife trafficking, plants are usually not the focus of attention.[2] In this article, we adopt a green criminological gaze to argue that this 'plant blindness'[3] extends to national legislation transposing international commitments supposedly designed to protect wildlife from overexploitation from trade. First, we outline the green criminological gaze by discussing what speciesism and plant blindness are; this sets the scene for why such biases are important. Then, we detail the current conservation status of plants, including the nature and scope of the threats to plants from overexploitation and illegal trade. This is followed by an overview of the global legal framework for trading plants and a discussion on the importance of plant visibility and inclusion in conservation and wildlife legislation. We then describe our methodology, which involves a content analysis of legislation implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), specifically analysing the legal definitions of wildlife. This approach establishes how definitions for wildlife (including plants) are recognised within national regulations transposing CITES, with the potential for plants to be recognised as protected wildlife on the one hand, and alternately recognised as an exploitable resource on the other. Finally, we detail our findings as to whether plants are legally defined as wildlife. We conclude with a discussion of how plant blindness can be combatted and what this would mean for criminology and wildlife law.

1.1 Green Criminology, Speciesism and Plant Blindness

Green criminology challenges many of the stances of the orthodox views of criminology and many criminal justice and legal systems, but relevant to this article is green criminology's advocacy that humans are not the only victims of environmental harm and crime.[4] Society as a whole, particularly regarding humans' use of other beings, needs to reconsider its speciesist nature that only focuses on humans and sees other-than-human animals as resources.[5] As White[6] and others note, this is

* Tanya Wyatt was a Professor of Criminology at the Northumbria University in Newcastle, United Kingdom. Alison Hutchinson is a Postdoctorate Researcher at the University of Sheffield, United Kingdom.

1 IPBES (Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services), *IPBES Global Assessment Summary for Policymakers*, www.ipbes.net/sites/default/files/downloads/summary_for_policymakers_ipbes_global_assessment.pdf (last visited 7 May 2019).

2 J. Marguiles, L. Bullough, A. Hinsley, D. Ingram, C. Cowell, B. Goettsch, B. Klitgard, A. Lavorgna, P. Sinovas & J. Phelps, 'Illegal Wildlife Trade and the Persistence of "Plant Blindness"', 1 *Plants, People, Planet* 173, at 182 (2019); Hutchinson, A., Stephens-Griffin, N. and Wyatt, T. (2022) "Speciesism and the Wildlife Trade: Who gets Listed, Downlisted and Uplisted in CITES?", *International Journal for Crime, Justice and Social Democracy*, 11(2), pp. 191-209. doi: 10.5204/ijcjsd.1945; T. Wyatt, *Wildlife Trafficking: A Deconstruction of the Crime, Victims and Offenders. Second Edition* (2021).

3 J.H. Wandersee and E.E. Schussler, 'Preventing Plant Blindness', 61(2) *The American Biology Teacher* 82 (1999).

4 *See* R. White, *Transnational Environmental Crime: Toward an Eco-global Criminology* (2011) and A. Nurse and T. Wyatt, *Wildlife Criminology* (2020) among others.

5 *See* R. Sollund, *The Crimes of Wildlife Trafficking. Issues of Justice, Legality and Morality* (2019) among others.

6 White, above n. 4.

doi: 10.5553/ELR.000236

critical for the sake of the planet and ecosystem health as well as to decrease the suffering of other beings. Yet, as we detail next, the green criminological efforts to expand victimisation have not gone far enough and the challenges to speciesism itself appear to be plant blind. Thus, our green criminological approach draws from both speciesism and plant blindness scholarship to analyse legislation designed to protect all species from overexploitation.

The word speciesism was introduced by Ryder,[7] who argued that if it is morally wrong to hurt innocent humans, then logically it is also morally wrong to hurt innocent individuals of other species. Singer[8] defines speciesism as: 'a prejudice or attitude of bias in favour of the interests of members of one's own species and against those of members of other species'. Species in both conceptualisations could be taken to mean other-than-human animals or plants. However, the scholarship about speciesism and many scholars employing a lens of speciesism to their research have confined it to other-than-human animals.

For instance, Waldau[9] states: 'Speciesism is the inclusion of all human animals within, and the exclusion of all other animals from, the moral circle.' Horta,[10] in his article 'What is Speciesism?' begins the article by only mentioning other-than-human animals. He proposes that speciesism might be constructed in different ways and proceeds to categorise the existing scholarship on speciesism. First, he suggests 'Speciesism 1 is the unjustified disadvantageous consideration or treatment of those who are not classified as belonging to one or more particular species.'[11] This is within the understanding that the concept of a species is somewhat problematic, and species are a construction of human scientists. 'Speciesism 2 is the unjustified disadvantageous consideration or treatment of those who are not classified as belonging to one or more particular species for reasons that do not have to do with the individual capacities they have.'[12] According to Horta, treating an individual disadvantageously because they lack certain capacities not because of their species is not speciesism. Finally, 'Speciesism 3 is the unjustified disadvantageous consideration or treatment of those that are not classified as belonging to one or more particular species on the basis of species membership alone.'[13] Here, Horta appears to be trying to be more specific as to the motivation for the poor treatment; in this case, that motivation is solely membership in a particular species. Horta's breakdown of the possible conceptualisations of speciesism raises the issue of capacities as being central to this discussion.

As Horta[14] goes on to discuss, among scholars (and humans in general) there are those who believe that only certain species can be harmed or should be helped. For some people, if the subject in question is not human, they 'lack the capacity to have any experience at all. Hence, there is no reason to take them into account'.[15] And still '[O]ther theorists accept that nonhuman animals can suffer harms, yet reject that we must regard them as morally considerable.'[16] Thus, the ability or capacity to feel pain and suffering are key concepts within speciesism, here strictly confined to other-than-human animals. More recent formulations of speciesism theorise about the hierarchical nature of regard for other-than-human species.[17] More consideration is given to species whom humans judge to be more intelligent. Linked to this is the advocacy for less or no use and consumption of those species deemed to have intelligence (i.e. great apes and whales).

As Lavorgna and Sajeva[18] note, this perspective is explicitly chosen by scholars like Sollund,[19] who focus on other-than-human animals for moral reasons and challenge societal notions that other-than-human animals are only resources for humans. Others may well focus on other-than-human animals because of an unconscious bias.[20] Heywood[21] argues that Anglo-European epistemological traditions place other-than-human animals as evolutionarily more advanced than plants. Other (green) criminological work has also excluded plants. Beirne[22] in his groundbreaking 'Towards a Non-speciesist Criminology' pushes the boundaries of the criminological and victimological gaze to other-than-human animals, but stops short of plants. Flynn and Hall,[23] too, expand the victimological circle, but only to other-than-human animal harm.

Thus, not recognising value beyond other-than-human animals (often grounded in ideas that there are no other forms of intelligence, cognition and ways of being) is in

7 R. Ryder, 'Experiments on Animals', in S. Godlovitch, R. Godlovitch & J. Harris (eds.), *Animals, Men and Morals* (1971) 41.

8 P. Singer, *Animal Liberation: The Definitive Classic of the Animal Movement [Fortieth Anniversary Edition]* (2015/1975), at 35.

9 P. Waldau, *The Specter of Speciesism: Buddhist and Christian Views of Animals* (2001), at 38.

10 O. Horta, 'What is Speciesism?', 23(3) *The Journal of Agricultural and Environmental Ethics* 243 (2010).

11 *Ibid.*, at 245.

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*, at 257.

16 *Ibid.*

17 J. Dunayer, 'The Rights of Sentient Beings Moving Beyond Old and New Speciesism', in R. Corbey & A. Lanjouw (eds.), *The Politics of Species: Reshaping Our Relationships with Other Animals* 27 (2013).

18 A. Lavorgna and M. Sajeva, 'Studying Illegal Online Trade in Plants: Market Characteristics, Organisational and Behavioural Aspects, and Policing Challenges', 27 *European Journal on Criminal Policy and Research* 451 (2020).

19 Sollund, above n. 5; R. Sollund, 'Expressions of Speciesism: The Effects of Keeping Companion Animals on Animal Abuse, Animal Trafficking and Species Decline', 55(5) *Crime, Law and Social Change* 437 (2011); R. Sollund, 'Speciesism as Doxic Practice, or Valuing Plurality and Difference', in R. Ellefsen, R. Sollund & G. Larsen (eds.), *Eco-global Crimes. Contemporary Problems and Future Challenges* R. 91 (2012).

20 V.H. Heywood, 'Plant Conservation in the Anthropocene – Challenges and Future Prospects', 39(6) *Plant Diversity* 314 (2017).

21 *Ibid.*

22 P. Beirne, 'Towards a Non-Speciesist Criminology', 37(1) *Criminology* 117 (1999).

23 M. Flynn and M. Hall, 'The Case for a Victimology of Nonhuman Animal Harms', 20(3) *Contemporary Justice Review* 299 (2017).

itself a form of speciesism. As Nurse and Wyatt[24] note, there is a significant amount of scientific information supporting the idea that plants are not the inanimate objects humans have viewed them as. For instance, Grant[25] has found that trees are communal and that they form interspecies alliances. Wohlleben[26] describes the vast fungal networks that make this communication and sharing of water possible between trees. 'Mother' trees distribute resources underground to saplings when the saplings are struggling to survive, and trees being eaten by deer send out chemicals through the air to warn neighbouring trees of the danger.[27] The neighbouring trees then start producing a toxin that prevents the deer from eating them. Scientists have also recently discovered the emission and detection of sounds occurring between trees.[28] Noteworthy is the focus on trees, which as highlighted below, seem to be held in higher regard than other plant life. Overall though, the point is there is much more to learn about all life on Earth and assuming human capacities are the standard for judging consideration and value has contributed to the ongoing biodiversity crisis. This is because human lack of recognition of the value of other forms of life has led to concrete ways in which other species' protection is disregarded.

Lavorgna and Sajeva[29] state that official definitions of 'wildlife' include both other-than-human animals and plants. Yet, they point out that in reality more limited conceptualisations of wildlife are often employed. Wyatt et al.[30] similarly found that while the text of CITES specifies both fauna and flora are to be protected, in practice parties to CITES have varying definitions of wildlife in their transposed national legislation. Their study found that in the case of fish more than 10 per cent of parties' legislation specifically exclude fish from wildlife legislation. Furthermore, nearly one-third of party legislation provides no definition of wildlife leaving a potential loophole.[31]

In the context of plants, others have found a similar pattern for plants being excluded, which has been specifically labelled as plant blindness. For example, Marguiles et al[32] point out that in the United States (US) the much-touted Lacey Act that protects endangered species only added timber species decades after the act came into force. Even if plants are included in legal definitions, they receive much less research and conservation funding. For instance, the United Kingdom's (UK) Illegal Wildlife Trade Challenge Fund only accepted projects designed to protect plants since 2021, even though the fund started in 2013. Another example is that Havens et al[33] found that 57 per cent of wildlife on the US Endangered Species Act are plants, but they only have received 4 per cent of the federal funding for protection. It is not as if plants that are threatened are somehow less endangered than other-than-human animals. Three of the top five most threatened taxonomic groups that have been most thoroughly assessed by the International Union for the Conservation of Nature (IUCN) for the Red List are plants – cycads, cacti, and conifers,[34] but these species are not at the forefront of conservation initiatives or public awareness campaigns about biodiversity. Further plant blindness is seen when non-compliance with plant protections is uncovered. In cases involving plants, they are not handled in the same way as for terrestrial other-than-human animals.[35] However, Phelps and Webb[36] note that timber is treated similarly to terrestrial other-than-human animals. As mentioned, timber seems to be given more consideration.

Thus, our green criminological approach to an analysis of wildlife legislation adopts a non-speciesist stance and expands that to include a challenge to plant blindness. Such an approach using plant blindness and speciesism as critical lenses can shine a light on the exploitation and victimisation of both some favoured plant species (e.g. commercially exploitable timber species) and those plant species judged to be less desirable, aesthetically pleasing or useful (to humans) (e.g. weeds). This fits, as mentioned above, Dunayer's[37] concept of 'new-speciesism' which recognises that advocacy for other-than-human animals is often hierarchical (e.g. in recognising complex and 'intelligent' species over others). It also illustrates Wyatt's[38] hierarchy of victimhood where commercially or aesthetically pleasing other-than-human animals (e.g. cute pandas rather than tarantulas) are prioritised over other species. She proposes the same is true for plants, where beauty and utility (e.g. orchids and trees) are prioritised over other aspects, including being a key species in ecosystems (e.g. peatmoss).

As highlighted above, plants have rarely qualified in discussions on speciesism which has focussed on expanding the rights of, or moral circle towards, other-than-human animals (whether in totality or based on a hierarchy of concern based on intelligence or other capabilities). Challenging the plant blindness of speciesism and expanding the concept of speciesism to include plants more specifically moves towards a fuller appreciation for the ecological connectedness of species and

24 Nurse and Wyatt, above n. 4.
25 R. Grant, 'Do Trees Talk to Each Other?' *Smithsonian Magazine* (March 2018).
26 P. Wohlleben, *The Hidden Life of Trees: What They Feel, How They Communicate – Discoveries from a Secret World* (2016).
27 *Ibid*.; Heywood, above n. 21.
28 Heywood, above n. 21.
29 Lavorgna and Sajeva, above n. 18.
30 T. Wyatt, K. Friedman & A. Hutchinson, 'Are Fish Wild?' 42 *Liverpool Law Review* 485 (2021).
31 *Ibid*.
32 Marguiles et al., above n. 2.
33 K. Havens, A.T. Kramer & E.O. Guerrant Jr., 'Getting Plant Conservation Right (or Not): The Case of the United States', 175(1) *International Journal of Plant Sciences* 3 (2013).
34 B. Goettsch, C. Hilton-Taylor, G. Cruz-Piñón, J.P. Duffy, A. Frances, H.M. Hernández, … K.J. Gaston, 'High Proportion of Cactus Species Threatened with Extinction', 1(10) *Nature Plants* 15142 (2015); Grant, above n. 25.
35 J. Phelps and E.L. Webb, '"Invisible" Wildlife Trades: Southeast Asia's Undocumented Illegal Trade in Wild Ornamental Plants', 186 *Biological Conservation* 296 (2015).
36 *Ibid*.
37 Dunayer, above n. 17.
38 Wyatt (2021), above n. 2.

doi: 10.5553/ELR.000236

the need to recognise the poor treatment and victimisation of all other-than-human species. As with the animal rights discourse, we recognise that expanding consideration to plants will be complex in the light of the multitude of ways in which plants are used and their centrality to meeting many human needs (discussed in the following section). A detailed discussion on provisions for the rights or welfare of plants or how to contend with the conflict between rights of species are beyond the scope of this article; however, highlighting the plant blindness evident in constructs of speciesism is a first step in expanding moral consideration towards them. This has implications for individual plants, whole species, ecosystems and the planet. We now discuss the commercial and aesthetic uses of plants.

1.2 The Use and Conservation of Plants

Perhaps more than humans are aware, plants are integral and common in our daily lives. Our article focuses on plant trade, but it is important to give a brief overview of plant protection in general. To protect and govern their continued use, there are several international legal frameworks. Most far reaching perhaps is the Convention on Biological Diversity (CBD) which oversees the 'Global Strategy for Plant Conservation' and focusses on jointly achieving conservation and sustainable use of wild plants, crops and genetic resources, but does not focus specifically on trade regulations. Focussing more fully on crop plants, the Food and Agriculture Organization's (FAO) 'International Treaty on Plant Genetic Resources for Food and Agriculture' aids the implementation of the CBD's Nagoya protocol (on access and benefit sharing of genetic resources) by enabling the treaty's 149 ratifying parties to access sixty-four species of crops for research, breeding and agricultural training purposes. Furthermore, and with a focus firmly on international wildlife trade, CITES regulates trade in listed plant species. Together these conventions and treaties provide a legal framework for the exploitation and protection of plants. While the CBD and FAO have had a concerted focus on plant diversity and their sustainable and equitable use, CITES listings for plants have lent towards species traded by botany collectors and horticulturalists.[39] This highlights how conservation initiatives for plants have a tendency to focus on security for human food provisioning, whereas trade initiatives for plants have focussed on select groups of favoured plants. As our focus in this article is on trade and trafficking and the speciesism and plant blindness in that regard, we do not integrate the CBD or other governance structures into our discussion about the use and conservation of plants here. It is worth noting there are also other relevant schemes or organisations, such as the Forest Stewardship Council (a voluntary monitoring programme of actors in the market to provide certification that timber is coming from ecologically and socially sustainable sources) and the International Tropical Timber Organisation (ITTO) (a capacity-building initiative that supports sustainable management practices, particularly in implementation of CITES, but it does not regulate trade). And while these may contribute to improved sustainable forest management by some companies who are monitored or by countries which are party to the ITTO, as they are not focussed specifically on trade regulation, we do not integrate them into our discussion. CITES, as *the* international legislative framework for protecting plants in trade, and because of its structure and remit, is our primary focus for exploring plant blindness and speciesism.

According to the FAO,[40] fossil records indicate that humans have been using plants for more than 60,000 years. Plants may have played a central role in some patterns of colonialisation, such as the Dutch and English trade routes from Indonesia for the nutmeg trade in the 15th century;[41] this may be the case for other spices, ingredients and dyes as well (i.e. vanilla and sugar cane). Plants obviously are used extensively in agriculture that produces food, but they also are the bulk of the ingredients for spices and drinks. The horticulture industry (i.e. landscaping and decorative plants) is ubiquitous. Plants are also the foundation for many homewares and textiles. Furthermore, plants are essential to the medicinal and pharmaceutical industries as well as the cosmetic industry and the growing wellness industry (i.e. aromatics and homeopathy). Perhaps most visible is the use of timber, and this visibility likely stems from its status as a multi-billion-dollar transnational industry.[42] Timber is used in building and furniture construction, as well as contributing to the above trades in medicine, fuel and food among other things. It is estimated that 880 million people spend part of their time looking for wood or making charcoal.[43] In addition, many millions of people rely on timber as their source of heat and fuel for cooking. It is important to distinguish that the timber industry consists of extraction of native and natural forests, as well as land conversions for fast-growing managed timber plantations. We focus on the former – the extraction of 'wild' trees. We do recognise that the use of 'wild' simplifies a complicated legal regime and conceptual debate about native versus non-native species, artificial propagation and managed cultivation. This focus on wild has been done as a way to explore the trade and trafficking of timber that is not growing in plantations.

We suggest though that both aspects of the industry (wild-sourcing and cultivation) are rarely if ever characterised as 'wildlife' industries or 'wildlife' economies, even though, as mentioned, plants taken from the wild will often be supplying them. Most likely and presumably due to the economic value already mentioned, most

39 For a more complete discussion of the speciesist nature of CITES listings, *see* A. Hutchinson, N. Stephens-Griffin and T. Wyatt, 'Speciesism and CITES: What Uplistings and Downlistings Say about Views of Wildlife', 11(2) *International Journal of Crime, Law and Social Democracy* 191-209 (2022). https://doi.org/10.5204/ijcjsd.1945.

40 FAO (Food and Agriculture Organization), 'State of Forests', www.fao.org/state-of-forests/en/ (last visited 29 March 2022) (2020).

41 *Ibid.*

42 Hutchinson et al., 2022; Lavorgna and Sajeva, above n. 18.

43 FAO, above n. 40.

is known about the timber trade – the largest of the plant trades valued at over USD 200 billion annually.[44] Despite their significance in trade, gaps and uncertainties remain surrounding the conservation status of plants (and trees) and the impact of exploitation on both plant species and wider ecosystems. There are approximately 60,000 tree species. Of these, nearly 30 per cent are threatened (critically endangered, endangered or vulnerable) on the IUCN Red List.[45] If data-deficient categories are included and assumed to be threatened, then 51.3 per cent of trees are threatened.[46] Although the number of IUCN Red List assessments for tree species have increased dramatically over recent years (thanks to the combined efforts of the Botanic Gardens Conservation International (BGCI), and the IUCN Global Tree Specialist Group, among others), only around half of the world's tree species have Red List assessments and many commercially exploited timber species have outdated or no conservation assessments.[47] Less is known about other plants, with Red List assessments only covering around 4 per cent of recognised plant species, with an estimated two in every five plant species believed to be threatened with extinction.[48]

Beyond timber, the wild plant trade 'largely goes unmentioned, unrecognised and under-researched'.[49] For instance, Jenkins et al[50] note that of the approximately 30,000 medicinal and aromatic species documented, 60 to 90 per cent of these are collected in the wild. A particular concern raised by Jenkins and colleagues is that for medicinal and aromatic plants 93 per cent have not had their conservation status assessed. Leaman and Schipmann[51] note of the 7 per cent of these plants that have been assessed, 20 per cent are threatened with extinction in the wild. According to Royal Botanic Gardens at Kew,[52] some 723 medicinal plant species and 234 edible plant species are known to be threatened with extinction. This demonstrates not only the oversight towards medicinal and aromatic plants in conservation assessments, but also the prevalence of threats towards those who have been assessed. Similarly, for cacti, Goettsch and colleagues[53] found that upwards of 31 per cent of all cactus species are threatened with extinction, and 47 per cent of these species are impacted by collection for horticultural and ornamental trade purposes, much of which is illegal, which we discuss in more depth below. Not all of these species will be directly threatened by trade and exploitation (one of the leading threats to plants is agriculture and aquaculture),[54] so the threat levels in IUCN lists and the correlation to plants listed in the appendices of CITES are worth further exploration.[55] However, in their latest report on the state of the world's plants, the Royal Botanic Gardens at Kew[56] highlight the looming threat of an existing 'extinction debt' – wherein the rate of plant extinctions (from known habitat loss) is generationally delayed or postponed as ecosystems can no longer support the variety of species they once did. The unknown impact and challenges in predicting delayed extinctions will undoubtedly destabilise plant trade dynamics which, as noted above, are already resting on uncertain or absent conservation assessments.

1.3 Legal Plant Trade and CITES

The bulk of CITES listings are for plant species. According to the CITES[57] website, for flora, there are 395 species plus 4 subspecies in Appendix I; 32,364 species, including 109 populations in Appendix II; and 9 species plus 1 variety in Appendix III. While their numbers far outweigh animal groups, there is no further detail given on this summary webpage for flora, whereas for fauna there is a breakdown by species class. This perhaps appears speciesist since animals are listed in this order: mammals, birds, reptiles, amphibians, fish and invertebrates. This does not reflect the number of species listed in each order and is not in alphabetical order. Interestingly, the numbers given for flora do not match the actual species listed in the appendices.

44 FAO (Food and Agriculture Organization), 'Global Production and Trade of Forest Products in 2016', www.fao.org/forestry/statistics/80938/en/ on (last visited 5 June 2018).

45 BGCI (Botanic Gardens Conservation International), 'State of the World's Trees'. BGCI, Richmond, UK, www.bgci.org/wp/wp-content/uploads/2021/08/FINAL-GTAReportMedRes-1.pdf (last visited 5 July 2022) (2021).

46 *Ibid*.

47 *Ibid*.; J. Mark, A.C. Newton, S. Oldfield & M. Rivers, 'The International Timber Trade: A Working List of Commercial Tree Species', https://globaltrees.org/wp-content/uploads/2014/11/TimberWorkingList-v2DImage.pdf (last visited 5 July 2022) (2014).

48 Royal Botanic Gardens, 'State of the World's Plants and Fungi', www.kew.org/sites/default/files/2020-10/State%20of%20the%20Worlds%20Plants%20and%20Fungi%202020.pdf (last visited 5 July 2022) (2020); S. Sharrock, 'A Guide to the GSPC. Richmond, UK: Botanic Gardens Conservation International', www.bgci.org/wp/wp-content/uploads/2019/04/Guide_to_GSPC_english.pdf (last visited 5 July 2022) (2012).

49 M. Jenkins, A. Timoshyna & M. Cornthwaite, *Wild at Home: Exploring the Global Harvest, Trade and Use of Wild Plant Ingredients*, www.traffic.org/site/assets/files/7339/wild-at-home.pdf (last visited 14 October 2021), at iv (2018).

50 *Ibid*.

51 D.J. Leaman and U. Schippmann, 'Personal Communication with the IUCN SSC Medicinal Plant Specialist Group IUCN 2006'. *Conserving Medicinal Species. Securing a Healthy Future* U. (2018).

52 Royal Botanic Gardens at Kew, above n. 48.

53 Goettsch et al., above n. 34.

54 Mark et al., above n. 47.

55 CITES has three appendices where wildlife are listed depending on the threat to survival from international trade. Appendix I species are the most endangered and protected; both import and export permits are required for trade in these species, and trade may only take place if it is 1. not detrimental to the species' survival (determined by the Scientific Authority of the state of export), 2. in contravention of any national laws, or 3. causing injury or damage to living 'specimens'. Appendix II species are those that could become endangered if trade is unsustainable; the above measures also apply; however, only export permits are required. Species listed on this appendix may also be subject to further regulations or trade limits to prevent the species qualifying for an Appendix I listing. Finally, Appendix III is a national level listing, where a party to CITES is concerned about their population of a species, so requires export permits and a certificate of origin to be issued confirming the legality of trade as well as overseeing that any trade in live specimens (animals/plants) does not involve their injury or cruel treatment. Lack of any of the required permits is a violation of CITES and the convention requires that parties penalise such violations. How the party penalises is left up to the party.

56 Royal Botanic Gardens at Kew, above n. 48, at 17.

57 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 'The CITES Species', https://cites.org/eng/disc/species.php (last visited 4 April 2022) (no date).

doi: 10.5553/ELR.000236

Table 1 CITES flora species listed alphabetically by order and broken down by appendix

Order	App I	App II	App III	Order	App I	App II	App III
Apiales	0	2	0	*Magnoliales*	0	0	1
Arecales	1	8	1	*Malvales*	0	1	0
Asparagales	0	11	0	*Myrtales*	0	73	0
Asterales	1	0	0	*Nepenthales*	5	136	0
Bromeliales	0	3	0	*Orchidales*	176	27,746	0
Caryophyllales	74	1,471	0	*Papaverales*	0	0	1
Cyatheales	0	653	0	*Pinales*	5	7	3
Cycadales	97	243	0	*Primulales*	0	27	0
Dicksoniales	0	5	0	*Ranunculales*	0	3	0
Dipsacales	0	1	0	*Rhamnales*	0	3	0
Ebenales	0	85	0	*Rosales*	0	1	0
Euphoriales	17	698	0	*Rubiales*	1	0	0
Fabales	1	300	1	*Santanales*	0	1	0
Fagales	0	0	1	*Sapindales*	0	29	0
Gentianales	4	32	0	*Scrophulariales*	0	4	0
Juglandales	0	1	0	*Theales*	0	1	0
Lamiales	0	0	1	*Trochodendrales*	0	0	1
Laurales	0	1	0	*Violales*	2	6	0
Liliales	27	495	0	*Zingiberales*	0	2	0
				Total	**411**	**32,049**	**10**

Through the Species+ website[58] run by the United Nations Environment Programme-Wildlife Conservation Monitoring Centre (UNEP-WCMC), anyone can freely download a comma-separated file of all listed species. Having done this on 1 April 2022, we have compiled Table 1 of CITES-listed flora species.

The plants who are most frequently listed are orchids by more than twenty times compared to the next order of plants – *Caryophyllales* – cacti. Both orders are predominantly in demand by collectors,[59] but also for food and psychotropic drugs.[60] Other orders with notable numbers are *Euphorbiales*, a plant made into wax for food and lubricants,[61] *Fabales* (legumes, peas and beans) and *Cycadales* (cycads).

1.4 Overexploitation and the Illegal Trade in Plants

CITES provides a mechanism to monitor international trade and requires confiscation of any 'specimen' violating CITES provisions for listed species (no permit/documentation, quota has been exceeded, there is a prohibition of trade). A violation of CITES does not have to be made a criminal act, so, as mentioned, there is variation in how violations are dealt with.[62] Timoshyna et al.[63] argue that since plant confiscations and seizures contain many CITES Appendix II-listed species, this indicates poor compliance with CITES regulations (missing documentation, reporting, etc.) rather than intentional violations (smuggling or purposefully violating the convention). We suggest that there is not enough information to assume this would be the case; it could well be incidents of corporate crime, where businesses engage

58 www.speciesplus.net/.

59 A. Hinsley, H.J. de Boer, M.F. Fay, S.W. Gale, L.M. Gardiner, R.S. Gunasekara, P. Kumar, S. Masters, D. Metusala, D. Roberts, S. Veldman, S. Wong & J. Phelps, 'A Review of the Trade in Orchids and Its Implications for Conservation', 186(4) *Botanical Journal of the Linnean Society* 435, at 455 (2017); Marguiles et al., above n. 2.

60 A. Lavorgna and G. Rekha, 'From Horticulture to Psychonautics: An Analysis of Online Communities Discussing and Trading Plants with Psychotropic Properties', 25 *Trends in Organised Crime* 192, at 204 (2020).

61 I. Arroyo-Quiroz and T. Wyatt, 'Wildlife Trafficking between the European Union and Mexico', 8(3) *International Journal for Crime, Justice and Social Democracy* 23, at 37 (2019); Royal Botanic Gardens at Kew, above n. 48.

62 T. Wyatt, *Is CITES Protecting Wildlife? Assessing Implementation and Compliance* (2021).

63 A. Timoshyna, Z. Ke, Y. Yang, X. Ling & D. Leaman, *The Invisible Trade: Wild Plants and You in the Times of COVID-19 and the Essential Journey Towards Sustainability*, www.traffic.org/site/assets/files/12955/covid-wild-at-home-final.pdf (last visited 14 October 2021).

in illegal behaviour as a cost-saving measure and to increase their profits.[64] Such concerns have been noted surrounding the transparency of labelling plants within ingredients lists (e.g. accuracy and provenance), with misleading labelling potentially being used to skirt customs regulations.[65] The fact that much of the plant trade is legal provides additional cover for illegal activity[66] and another reason why there is a gap in knowledge as to the nature and scale of the illegal trade. Furthermore, as Marguiles et al[67] propose, scholarship shows that while there is some understanding of the legal trade in CITES-listed species, it is not enough and does not include all the non-CITES-listed species. Even less is understood about the nature, scope and mechanisms of plant trafficking, so this, too, requires further research.[68]

As indicated, the nature and scale of the illegal plant trade is not fully known. Perhaps more than other illegal markets, wildlife trafficking is thought to have a large dark figure of crime, meaning the amount of illegal activity that is taking place is unknown.[69] This dark figure of crime in part stems from wildlife trafficking happening in remote places, being viewed as a victimless crime, and not being a police priority.[70] Lavorgna and Rekha[71] suggest that there are varying levels of illegality in the illegal plant trade and that these have different levels of seriousness. At one end of the spectrum, there are administrative violations where a permit is missing or contains errors (the poor compliance issue raised by Timoshyna et al).[72] At the other end, there is the targeted collection from the wild of highly endangered species, as well as concerted efforts to obtain newly described species, whose novelty and rarity make them desirable for personal or commercial collections.[73] Both ends of the spectrum can have negative ecological impacts and negative implications for the survival of species. Presumably, even less is known about overexploitation and overharvest as these are taking place within legal frameworks and are not subject to regulation or seizures.

One useful source of information on illegal wildlife trade comes from the United Nations Office on Drugs and Crime (UNODC) *World Wildlife Crime Report*.[74] Their most recent report found that of the global wildlife seizures between 1999 and 2018, 14.3 per cent were of plants (see Figure 1).

Again, as with the CITES summary of plant species listed, the level of detail for plants is not to the same taxonomic level as for other-than-human animals. The UNODC[75] report also contains a case study of the illegal rosewood timber trade, highlighting that when plants are the focus of further scrutiny, this also tends to be of a timber species. This supports Lavorgna and Rekha's[76] assertion towards the varying seriousness for plant-related crimes, as timber trade is valued highest (economically) of all plant trades. In actuality though, CITES seizure data from 2018 (relating to European Union data) shows that 23 per cent of wildlife confiscations were of medicinal products (not timber species), making them the largest category of all seizures.[77] Medicinal and aromatic plants made up 260,562 items, 6,685 kilograms and 23 litres of these seized products.[78] In addition to the illegal timber and medicinal trades, there is further evidence to support that cacti[79] and orchids[80] for the horticultural and ornamental trades are subject to illegal trade and some of these studies have provided statistics regarding illegal trade based on CITES trade records, indicating a small fraction of the overall trade is illegal. Most recently, media reports have documented the illegal trade in *Dudleya farinosa*,[81] a succulent plant known as 'bluff lettuce'. Like cacti and orchids, Marguiles[82] found the illegal trade in bluff lettuce is not originating from mainstream plant consumers, but is driven by more specialist collectors. In addition, Arroyo and Wyatt[83] and the Royal Botanic Gardens at Kew[84] have documented some amount of illegal trade in *Euphorbiales*.

64 A. Lavorgna, 'Wildlife Trafficking in the Internet Age', 3(5) *Crime Science* 1, at 12 (2014); T. Wyatt, D. Van Uhm and A. Nurse. 'Differentiating criminal networks in the illegal wildlife trade: organized, corporate and disorganized crime' 23 Trends in Organised Crime, 350 – 366 (2020). https://doi.org/10.1007/s12117-020-09385-9. .

65 A. Lavorgna, S.E. Middleton, D. Whitehead, C. Cowell & M. Payne, 'FloraGuard: Tackling the Illegal Trade in Endangered Plants', www.kew.org/sites/default/files/2020-10/FloraGuard%20Tackling%20the%20illegal%20trade%20in%20endangered%20plants.pdf (last visited 5 July 2022) (2020).

66 Lavorgna, above n. 64; Lavorgna et al. above n. 65..

67 Marguiles et al., above n. 2.

68 *Ibid*.

69 Wyatt (2021), above n. 2.

70 Lavorgna and Sajeva, above n. 18; Wyatt (2021), above n. 2.

71 Lavorgna and Rekha, above n. 60.

72 Timoshyna et al., above n. 63.

73 Lavorgna and Rekha, above n. 60; Lavorgna and Sajeva, above n. 18; Marguiles et al., above n. 2.

74 UNODC (United Nations Office on Drugs and Crime), *World Wildlife Crime Report* (2020).

75 *Ibid*., at 10.

76 Lavorgna and Rekha, above n. 60.

77 TRAFFIC, 'Overview of Seizures of CITES-Listed Wildlife in the European Union – January to December 2018', www.traffic.org/publications/reports/an-overview-of-seizures-of-cites-listed-wildlife-in-the-european-union/ (last visited 5 April 2022) (2020).

78 *Ibid*.

79 Goettsch et al., above n. 34; Arroyo-Quiroz and Wyatt, above n. 61.

80 Hinsley et al., above n. 59.

81 J. Marguiles, 'Korean 'Housewives' and 'Hipsters' Are Not Driving a New Illicit Plant Trade: Complicating Consumer Motivations Behind an Emergent Wildlife Trade in *Dudleya farinosa*', 8 *Frontiers in Ecology and Evolution* 1, at 2 (2020).

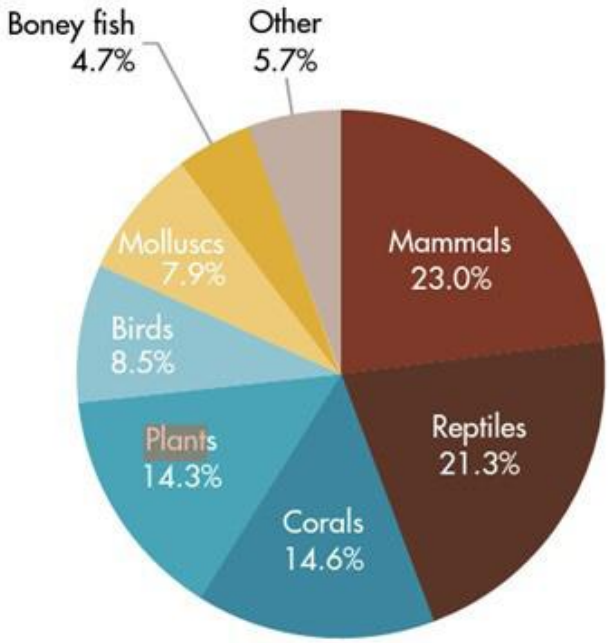
82 *Ibid*.

83 Arroyo-Quiroz and Wyatt, above n. 61.

84 Royal Botanic Gardens at Kew, above n. 48.

doi: 10.5553/ELR.000236

Figure 1 *Share of seizure incidents in World WISE by taxonomic category (1999-2018)*



Source: UNODC World WISE Database.

Other factors that contribute to the lack of knowledge about overexploitation and illegal plant trade stem from the large amount of informal collection of wild plants. There is a large amount of undocumented use of wild plants, and it is not always clear or recorded when a plant is wild or when it is cultivated.[85] As alluded to above, the very definitions of 'wild', 'natural', 'cultivated', etc. can prove problematic when trying to determine the origin of traded plants. The fact that some plants are extracted from the wild and are also cultivated adds additional challenges for regulating international trade as it adds a layer of complexity to prove origin and provides a means of laundering wild-sourced plants as having been cultivated. Further complexities arise in that many companies specifically market plant products as 'wild' and 'natural' as a desirable feature that many consumers may prefer to purchase. However, companies often have not verified that the plants have been harvested in ecologically sustainable ways.[86] Although a vast majority – 99 per cent – of trade in cacti, orchids and snowdrops are believed to be from cultivated plants, Jenkins et al[87] note that 'Where plants are wild-collected, adherence to CITES regulations is in itself a reliable indicator of sustainability.' This sentiment, however, overlooks the evidence that the non-detriment findings required to ensure trade in CITES species is sustainable are frequently not based on scientific evidence and can be subject to political and/or industry pressure.[88] Thus, CITES permits should indicate sustainability and legality, but there are exceptions to this.

Another aspect contributing to the lack of knowledge about the illegal plant trade is the central role played by the Internet for selling plants. Internet-facilitated plant (and other-than-human animal) trafficking has resulted in layers of organisation being removed and relationships between suppliers, intermediaries and buyers changing.[89] These fluid criminal networks of professional offenders, who are connected as gardeners or other occupations to the legal plant trade, organise their lives around this criminal activity.[90] Lavorgna and Sajeva[91] found that these networks could be categorised into two groups – the live specimen trade and derivative products. The low-risk high profit of the illegal plant trade and the status and passion that goes along with collecting were the main motivations behind the online illegal trade.[92] The low-risk element stems from the sheer scale of trying to police advertisements of plants online when technology companies and the police have nearly no knowledge of what species are illegal and from trying to prove criminal intent from receiving a postal package. Illegal plant traders can additionally operate openly on easily accessible parts of the Internet.[93] The complex taxonomy of identifying plants and the further complication of verifying whether the plant is wild-collected or cultivated means that investigations into illegal activity are challenging.[94]

Whereas the trafficking of other-than-human animals has recently gained more attention because of the likely link to the corona virus pandemic with a bat and perhaps a secondary other-than-human animal passing the

85 Jenkins et al., above n. 49.
86 *Ibid.*
87 *Ibid.*, at 29.
88 Wyatt (2021), above n. 62.
89 Lavorgna, above n. 64.
90 *Ibid.*
91 Lavorgna and Sajeva, above n. 18.
92 *Ibid.*
93 Royal Botanic Gardens at Kew, above n. 48.
94 *Ibid.*

doi: 10.5553/ELR.000236

virus on to a human,[95] less attention is given to the fact that plants too can pose public and environmental health risks when they fail to be screened through the proper phytosanitary channels.[96] Thus, the illegal plant trade poses public and environmental health risks. Ash disease in the UK, for instance, was brought to the island through a legal nursery shipment, highlighting that even with scrutiny disease transmission is possible and could potentially be worse if the plants are smuggled and not undergoing checks.[97] Despite the anatomical differences between plants and animals, plant pathogens have been known to infect animal hosts.[98] Consuming contaminated foods, ingesting herbal medicines and smoking all potentially expose humans to plant viruses.[99] However, considering the ubiquitous nature of plant trade, further research is needed to understand the extent and propensity for cross-kingdom infections, as much of the literature surrounding the crossover of plant-animal diseases has focussed on individual cases (e.g. infections arising post-operatively and agricultural crossovers).[100] Apart from the risk of spreading disease, the illegal plant trade threatens numerous species as well as destroying natural resources for many people.[101] For local populations of plants, overharvest, which may be legal, is the biggest threat as it may lead to depletions or extirpations.[102] Plant extinctions can have far-reaching implications for the health of environments and ecosystems as well as other-than-human animals and humans reliant on plants for food and shelter.

Thus, much more information needs to be gathered to improve understanding of the nature and scope of legal and illegal plant trade as well as overexploitation. The reason that we do not know more is likely connected to humans' ongoing speciesism, including plant blindness, which impacts upon research and conservation agendas, and, as we will focus on shortly, which wildlife are granted protection under trade legislation in the first place.

95 E. Sallard, J. Halloy, D. Casane, et al., 'Tracing the Origins of SARS-COV-2 in Coronavirus Phylogenies: A Review', 19 *Environmental Chemistry Letters* 769 (2021).

96 Phelps and Webb, above n. 35.

97 Wyatt (2021), above n. 2.

98 J.S. Kim, S.J. Yoon, Y.J. Park, S.Y. Kim & C.M. Ryu, 'Crossing the Kingdom Border: Human Diseases Caused by Plant Pathogens', 22(7) *Environmental Microbiology* 2485, at 2495 (2020).

99 F. Balique, H. Lecoq, D. Raoult & P. Colson, 'Can Plant Viruses Cross the Kingdom Border and be Pathogenic to Humans?', 7 *Viruses* 2074, at 2098 (2015).

100 *Ibid.*; H. Habsah, M. Zeehaida, H. Van Rostenberghe, R. Noraida, W.I. Wan Pauzi, I. Fatimah, et al., 'An Outbreak of Pantoea spp. in a Neonatal Intensive Care Unit Secondary to Contaminated Parenteral Nutrition', 61 *Journal of Hospital Infection* 213, at 218 (2005); B.M. Hause, E. Nelson & J. Christopher-Hennings, 'Identification of a Novel Statovirus in a Faecal Sample from a Calf with Enteric Disease', 102(9) *Journal of General Virology* 001655 (2021);

101 Phelps and Webb, above n. 35.

102 Jenkins et al., above n. 49.

2 Methodology

As part of a UK Arts and Humanities Research Council (AHRC) Leadership Fellowship 'Lessons Learned from the Implementation of and Compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)', a content analysis of 183 CITES parties' wildlife trade-related legislation and two non-parties was conducted (Haiti and South Sudan). Part of this analysis entailed examining whether and how countries define 'wildlife'. As we note in our findings, some parties do not specifically use or define the word 'wildlife' but utilise 'fauna' and 'flora' and/or 'specimen'. We took these to refer to wildlife and included these usages in the appropriate categories described below. Our analysis included examining how 'anima/faunal' and 'plant/flora' are defined.

It is important to note that these data do have limitations. These stem from language and legislative complexity. For 112 parties, we located online English versions of the legislation that transposes CITES. Primarily, the legislation was found in the ECOLEX and FAOLEX databases. Google translate was relied on for legislation in languages other than Spanish and Russian. Clearly, this may have implications for exact definitions. However, CITES is ultimately a trade-related treaty whose sole focus is the regulation of international trade in listed species,[103] so it may not be surprising that such trade legislation does not address broader debates around wildlife definitions. Yet, we maintain that this can have negative consequences for plant conservation and thus biodiversity. Negative consequences stem from the fact that specific exclusion from or a lack of clarity around inclusion in CITES legislation may create loopholes through which species in need of protection from exploitative trade are not afforded this because of wildlife definitions in the legislation. Furthermore, which plants are specifically protected in cases where they are included in the legislation requires more research. When reading in more depth the lists of species in some legislation, it became apparent that while not explicitly stated as being excluded, often no timber species were listed.

Having copied each wildlife definition or taken notes from the parties' CITES legislation into a Microsoft Excel spreadsheet, we then conducted a content analysis. We looked for whether the words 'plant' or 'flora' specifically appeared. We then examined whether specific plant and/or flora appeared (e.g. trees). CITES does distinguish artificially propagated plants from wild-sourced plants by providing a separate code for artificial propagation for categorising plants when traded. This distinction, however, does not seem to affect the inclusion or use of the words animal/fauna and plant/flora in the Convention text. That is not to say a plant's origin was not mentioned in some parties' legislation as we discuss shortly. In some cases, the definition of wildlife meant plants were included in the legislation transpos-

103 Sollund, above n. 5; Wyatt (2021), above n. 62.

doi: 10.5553/ELR.000236

ing CITES; in other cases, this meant plants were excluded from the legislation transposing CITES. There were also instances where only some plants – native or naturally growing (as opposed to artificially propagated) – were included, which we categorised as 'partially included' as not all CITES-listed species would be covered by limiting to native/naturally growing ones. In some pieces of legislation, it was not explicitly clear whether plants were wildlife; we erred on the side of inclusion, so we coded this as 'implied included'. Legislation which also specifically mentioned other legislation that dealt with plants (such as forestry legislation) was coded as 'separate'. Many pieces of legislation did not define wildlife at all. Thus, we employed six codes during our content analysis – included, excluded, partially included, implied included, separate and no definition (a breakdown of each of these is given in Table 2).

Table 2 Codes for the inclusion of plants within CITES legislation

Codes	Number of pieces of legislation
Included	71
Partially included	3
Implied included	2
Separate	18
Excluded	10
No definition/unspecified	81
Total	**185**

3 Findings

Here we provide an overview of the legislation within each of our six categories as well as provide some more detailed illustrative examples from each of the categories. Our analysis of CITES-specific legislation found that plants are included in wildlife definitions in seventy-one pieces of legislation (a full breakdown of these definitions is given in Table 2). It is worth noting that inclusion in the legislation may or may not lead to operationalised protection in the country. Enforcement of these legislation by the appropriate agency or regulator is beyond the scope of our analysis, but is a key piece of further research to fully understand whether and how plants are protected. In terms of the intention of the legislation, India's Wild Life (Protection) Act 1972,[104] for instance, has an entire chapter – IIIA Protection of Specified Plants – which details proper picking, uprooting, cultivating, dealing, possessing, and purchasing of listed plants and the licenses required to do so. However, upon looking at the specified plants, no trees are included; trees are covered under separate forestry legislation. So, whereas plants are included as wildlife, trees appear to not always be treated under the law the same as other plants. In contrast, the Environmental Protection Law of Mongolia (1995)[105] extends protection to land and soil, underground resources and mineral wealth, water, plants, animals and air. Plants are specifically defined as: 'natural and planted forests, trees, and all types of higher and lower plants that grow within the territory of Mongolia' (Environmental Protection Law 1995).[106] The law seeks to protect resources from adverse effects to prevent ecological imbalance. Canada's legislation – the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (WAPPRIITA) – begins with the definition of terms used in the legislation.[107] A plant 'means any specimen, whether living or dead, of any species of plant that is listed as "flora" in an appendix to the Convention, and includes any seed, spore, pollen or tissue culture of any such plant'.[108] As is evident from the title of the law, Canada regulates international trade and also trade domestically between its provinces.

Plants are specifically excluded in ten cases. In Russia, the Federal Law of the Russian Federation on Wildlife (No. 52-FZ of 1995)[109] only includes 'wild animals' and genetic resources of 'animal origin'. Interestingly, in the case of Sierra Leone, their 1972 The Wild Life Conservation Act[110] explicitly only covers activities involving animals. However, their 2010 Conservation and Wildlife Policy[111] includes plants: 'Wildlife refers to all species of

104 *Wild Life (Protection) Act 1972*, https://legislative.gov.in › sites › default › files (last visited 10 April 2022) (1972).

105 *Environmental Protection Law of Mongolia*, https://resourcegovernance.org/sites/default/files/Environmental%20Protection%20Law.pdf (last visited 10 April 2022) (1995).

106 *Ibid.*

107 *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (WAPPRIITA)*, https://laws-lois.justice.gc.ca/eng/acts/W-8.5/FullText.html (last visited 15 November 2022) (1992).

108 *Ibid.*

109 *Federal Law of the Russian Federation on Wildlife* (No. 52-FZ of 1995), www.ecolex.org/details/legislation/federal-law-of-the-russian-federation-on-wildlife-no-52-fz-of-1995-lex-faoc022375/ (last visited 10 April 2022) (1995).

110 *The Wild Life Conservation Act 1972*, http://extwprlegs1.fao.org/docs/pdf/sie41659.pdf (last visited 10 April 2022) (1972).

111 *Conservation and Wildlife Policy*, http://extwprlegs1.fao.org/docs/pdf/sie149515.pdf (last visited 10 April 2022) (2010).

doi: 10.5553/ELR.000236

indigenous terrestrial and aquatic flora and fauna (including micro-organisms) and their natural habitats.' It is acknowledged within this policy that the 1972 Act, which is still in effect, is out of date. Interestingly though, the policy only protects indigenous species, which brings us to our next category.

There are three examples of plants partly being included in definitions of wildlife. For instance, the Decree of the President of the Republic of Belarus dated 15 July 2019 No. 269 'On the State Inspectorate for the Protection of Fauna and Flora under the President of the Republic of Belarus' refers to wild land and vegetation.[112] This appears to only include plants in the 'wild'. Digging further into Belarussian legislation, there is a separate law 'Law of the Republic of Belarus "On Flora"'[113] that outlines activities that are allowed for not only wild plants, but also cultivated plants. Again, forestry regulations are given in a separate piece of legislation.

Legislation from Bulgaria and Cabo Verde was categorised as 'implied included' as definitions referred to biodiversity rather than plants specifically. For eighteen pieces of legislation, there was obvious reference to separate (probably forestry) legislation. In Burkina Faso, for instance, there is a clear distinction between the fishery, forestry and wildlife legislation. For eighty-one countries, legislation transposing CITES contained no definition for wildlife.

From this legislative analysis, one piece of legislation that stood out is that of Bhutan. The Forest and Nature Conservation Act of Bhutan 1995 explicitly defines timber. '"Timber" means trees, whether standing or fallen, whether converted or not, and includes logs, branches, stumps, roots, firewood, lops and tops.'[114] Furthermore, this legislation defines plants as part of 'forest produce'.

> g. 'Forest Produce' includes the following, whether or not found in the Forests:
> i. trees and parts or product of trees including timber, firewood, charcoal, bark, wood-oil, resin, latex or natural varnish, katha/kutch, etc.;
> ii. wild plants and parts or products of wild plants including flowers, seeds, bulbs, roots, fruits, leaves, grasses, creepers, reeds, orchids, bamboo, cane, fungi, moss, medicinal plants, herbs, leaf mould or other vegetative growth, whether alive or dead;
> iii. wild animals including fish, and parts or products of wild animals including skin, hides, feathers, fur, horn/antlers, tusks, bones, bile, musk, honey, wax, lac; and
> iv. boulders, stone, sand, gravel, rocks, peat, surface soil.[115]

While the above examples illustrate how plants are incorporated into legislation, the reasons for this inclusion seem to tend to revolve around trade and instrumental use rather than aesthetic or other reasons. Thus, not surprisingly specific protected plants are frequently those used extensively in trade. For example, in a related piece of legislation to the transposing of CITES, Peru's 'Resolution No. 021 of 2018'[116] establishes guidelines for implementing forest and wildlife legislation. In addition to detailing logging offences, the legislation also prohibits unlawful extraction of cacti, succulents, orchids and bromeliads (likely linked to the recognition of those species within CITES). Another example is Guatemala's 'Decree No. 99/96'[117] which establishes laws surrounding the marketing and use of chewing gum derived from the sapodilla tree. Fruits from this tree are also key ingredients in jams and drinks, as well as being used in traditional medicines.[118] Yet, Guatemala also provides perhaps the only example of protections for plant species that go beyond mere trade interests. Its 'Decree No. 13'[119] recognises the long-entwined relationship between the spirituality and customs of Mayan people and corn (*Zea mays* L) and declares that the many varieties of corn are a 'natural and cultural product' with 'intangible cultural heritage' that must be protected. However, clearly the species is still consumed, with the same decree also highlighting how corn contributes to the food security of Guatemala. The two decrees demonstrate humans' complex relationship with nature and with plants and provide a glimpse into how legislation might reflect more than plants' instrumental value to people.

As a further exploration of speciesism in legislation, as a side note beyond plants, we identified legislation in ten[120] countries that extended protection provisions against the unlawful collection of mushrooms (or fungi

112 Decree of the President of the Republic of Belarus dated July 15, 2019 No. 269, 'On the State Inspectorate for the Protection of Fauna and Flora under the President of the Republic of Belarus', http://gosinspekciya.gov.by/en/legal-provisions/regulations/ (last visited 10 April 2022) (2019).

113 *Law of the Republic of Belarus*, 'On Flora', http://gosinspekciya.gov.by/actual/lesopolzovanie-i-zashchita-lesa/353/ (last visited 10 April 2022) (2003).

114 *Forest and Nature Conservation Act of Bhutan 1995*, http://extwprlegs1.fao.org/docs/pdf/bhu7101.pdf (last visited 10 April 2022) (1995).

115 *Ibid.*, at 1-2.

116 *Resolution No. 021 – OSINFOR – Methodology for calculating the amount of fines to be imposed by the Forest Resources and Wildlife Supervision Agency (OSINFOR) for infractions of Forest and Wildlife Legislation (2018)*, www.ecolex.org/details/legislation/resolucion-no-021-2018-osinfor-metodologia-de-calculo-del-monto-de-las-multas-a-imponer-por-el-organismo-de-supervision-de-los-recursos-forestales-y-de-fauna-silvestre-osinfor-por-infraccion-a-la-legislacion-forestal-y-de-fauna-silvestre-lex-faoc177708/?q=Peru+021&type=legislation&xsubjects=Forestry&xcountry=Peru&xdate_min=2018&xdate_max=2018 (last visited 31 July 2022).

117 Decree No. 99/96 – Law for the use and marketing of chewing gum (1996). www.ecolex.org/details/legislation/decreto-no-9996-ley-para-el-aprovechamiento-y-comercializacion-del-chicle-lex-faoc060559/?q=Guatemala+99&type=legislation&xsubjects=Wild+species+%26+ecosystems&xcountry=Guatemala&xdate_min=&xdate_max= (last visited 31 July 2022).

118 S.P. Bangar, N. Sharma, H. Kaur, K.S. Sandhu, S. Maqsood & F. Ozogul, 'A Review of Sapodilla (Manilkara Zapota) in Human Nutrition, Health, and Industrial Applications'. Pre-proof *Trends in Food Science & Technology* (2022).

119 *Decree No. 13*: Law that declares corn (*Zea mays* L.) as intangible cultural heritage of the Nation, www.ecolex.org/details/legislation/decreto-no-13-2014-ley-que-declara-al-maiz-zea-mays-l-como-patrimonio-cultural-intangible-de-la-nacion-lex-faoc140262/?q=Guatemala+13&type=legislation&xdate_min=&xdate_max= (last visited 31 July 2022).

120 Fungi included: Kuwait, Latvia, Lithuania, Norway, Portugal, Republic of North Macedonia, Saudi Arabia, Serbia, Slovenia, Tajikistan.

doi: 10.5553/ELR.000236

generally). Only two cases (Croatia and Latvia) were found to have additional provisions for the protection of lichens ('Ordinance on the collection of native wild species', 2017,[121] and 'Species and habitat protection law', 2000[122] – respectively). We now turn to a discussion of these findings that links back to our green criminological approach combining speciesism and plant blindness.

4 Discussion and Conclusion

Legislation defining and protecting wildlife is complex and our content analysis, while robust, undoubtedly oversimplifies and misses certain aspects. This is perhaps particularly the case for plants, where their use and protection sit across trade, conservation, forestry and likely other legislative frameworks. In the case of trade legislation, CITES is the international framework for overseeing sustainable plant trade for those species who are listed. But for more than half of the parties to CITES, plants are not explicitly named as being protected within the legislation. This seems to indicate an inherent plant blindness. Furthermore, the heavy weighting of orchids and cacti within CITES, in contrast to the other many hundreds if not thousands of exploited and threatened plant species not listed within CITES (medicinal, food, timber), perhaps speaks to the underpinning trade interests within CITES. This, we suggest, speaks to the speciesism of legislation as when plants are included only those deemed valuable by human standards are those protected. This is evident in that the plants who are protected in CITES are those traded by horticulturalists and collectors, whereas plants who tend not to be protected under CITES are key resources for industry and manufacturing groups. The fact that there is often an entire separate forestry legislation reveals trees may be the focus of greater management, but again for commercial exploitation.

Further research and content analysis would likely yield a more detailed picture as to definitions of plants and wildlife. That said, it is clear that in ten cases plants are not included in CITES-specific legislation (Table 2). Within 'plants', there is more variation, and it is more likely that trees are not defined as wildlife. Others have noted trees are treated differently to other plants because of their economic value and our findings somewhat support this in that the management of trees and forests is very often completely separate to other wildlife.[123] Perhaps this division between wildlife and forestry legislation has created a vacuum in which plant blindness can exist; where the recognition of plants (generally) is overlooked as neither form of legislation consistently includes plants in their definitions.

Overall, then in terms of wildlife, plants are not given the same attention – be research funding or consideration when drafting legislation. This highlights how speciesism itself can be plant blind. This has real-world consequences for conservation, biodiversity loss and crime. As mentioned, plants are critical to ecosystem health and if their conservation is lacking, then this could threaten species and ecosystem survival as well as human and other-than-human food systems. Such biodiversity loss is an environmental crisis. The legislative analysis related to plants reveals that efforts to conserve plants and curb biodiversity loss take on a variety of forms, including, but not often, making exploitation of plants a crime. For instance, timber, the largest wildlife trade, rests on the legal exploitation of the planet's forest. Yet, as we have demonstrated, measures for their protection overwhelmingly lie in forestry legislation established to manage forestry exploitation, separate from wider conservation provisions for plants and the environment. This is despite forests providing crucial habitats for plants and animals alike, as well as contributing to carbon storage, critical in the face of climate change. Furthermore, as noted previously, plants (other than timber species) are often under-researched and under-prioritised, with 96 per cent of recognised plant species yet to be assessed by the IUCN, despite their numerous benefits to both humans and within the wider web of biodiversity – a clear example of speciesism and plant blindness. Recognising this plant blindness within legislative systems, non-timber plants species, too, fall between the various legislative arms of wildlife and forestry – with protections largely established for specifically listed protected species (CITES, national Red Lists), irrespective of the interconnected relationships between species. And overexploitation of plants from trade and trafficking is just one of the mounting human threats to biodiversity. Plant and other species' biodiversity loss are also stemming from climate change, genetic modification and monoculture crops, often maintained by powerful structural corporate interests.[124] Not legally recognising (some) plants as wildlife is plant blind and speciesist and just one element of the overall speciesism in many societies that is contributing to the destruction to ecosystems and the planet.

Marguiles et al.[125] point out that plant blindness is a global phenomenon. Our content analysis supports this as the examples of where plants are excluded are from around the world. Yet, the disregard for plant life is not generalisable to all human societies,[126] and broader legislation focussing on the stability of ecosystems and the environment gives scope to include all plant species, irrespective of their use and importance to humans (for trade). Plant blindness seems to be an Anglo-Western approach to nature, which is not the case in many indigenous and other communities that have a closer, even

121 *Ordinance on the collection of native wild species* (2017), www.fao.org/faolex/results/details/en/c/LEX-FAOC184696 (last visited 30 July 2022).

122 *Species and habitat protection law* (2000), www.varam.gov.lv/en/protection-species-and-habitats?utm_source=https%3A%2F%2Fwww.google.com%2F, (last visited 30 July 2022).

123 Hutchinson et al., 2022; Lavorgna and Sajeva, above n. 18.

124 R. Walters, *Eco-crime and Genetically Modified Food* (2011); White, above n. 4.

125 Marguiles et al., above n. 2.

126 *Ibid.*

doi: 10.5553/ELR.000236

empathetic, relationship with plants.[127] Lessons for improving legislation to make it more inclusive of all wildlife can be found in legislation underpinned by the Rights of Nature approach and/or Earth Jurisprudence that recognise the value of all life and disrupt the anthropocentric, unquestioned commodification and consumption of wildlife and nature.[128] The lessons are not just applicable to legislation; adopting an Earth-centric approach can also further green criminological scholarship by expanding its enquiry to more fully include plants and all other-than-human species. Such scholarship has the potential to contribute to positive change by highlighting biases. To reverse the biodiversity crisis and slow the sixth mass extinction, it is essential to challenge plant blindness and speciesism in all aspects of society, including in the legislative frameworks that underpin the protection of life on the planet.

127 M. Balding and K.J. Williams, 'Plant Blindness and the Implications for Plant Conservation', 30(6) *Conservation Biology* 1192, at 1199 (2016).

128 C. Cullinan, 'A History of Wild Law', in P. Burdon (ed.), Exploring Wild Law: The Philosophy of Earth Jurisprudence (2011) 12 - 23; J. Koons, 'What is Earth Jurisprudence? Key Principles to Transform Law for the Health of the Planet', 18(1) *Penn State Environmental Law Review* 47 (2009).

doi: 10.5553/ELR.000236

Corporate Governance Beyond the Shareholder and Stakeholder Model

Dirk Schoenmaker, Willem Schramade & Jaap Winter*

Abstract

There is a heated debate on shareholder versus stakeholder governance. The debate has expanded from traditional stakeholders who are directly involved with the company, such as employees and customers, to stakeholders who are indirectly affected by the company's conduct, for example through ecological damage and climate change, including future stakeholders. But the lack of an integrated measure makes it difficult to hold the board accountable against multiple goals. This article develops an integrated model of corporate governance including current and future stakeholders, building on an integrated measure for corporate value. The board can use this integrated value measure to balance the interests of the various stakeholders in a structured way. The integrated value measure can also be used by stakeholders (including shareholders) to hold the board accountable for its decisions. Finally, the article examines mechanisms, such as stakeholder councils and sustainability-related performance pay, to include the interests of the various stakeholders on the board.

Keywords: shareholder model, stakeholder model, sustainability, corporate governance.

1 Introduction

The debate on the shareholder versus the stakeholder view on the company goes back to the 1930s. Berle, one of Roosevelt's New Deal architects, wanted to include the interests of labour in the control of companies. His mechanism for labour to influence the company was diversified ownership of stocks through savings or pension funds.[1] Berle stressed the disciplining role of shareholders to control company management.[2] By contrast, Dodd argued that business has obligations to the community,[3] including customers, creditors and employees. At the time, he predicted that 'public opinion will demand a much greater degree of protection to the worker'.[4] In his view, the company should be run in the interests of its stakeholders.

Almost a century later, the debate has expanded to the environment. Following the Paris Climate Agreement of 2015 and the EU's Green Deal of 2020, the question arises as to how the interests of the environment (which we label further on as future stakeholders) should be incorporated by a company's board. History repeats itself. Answers range from the view that business should just follow the legal requirements and not make its own ecological policies (a prime example is Bebchuk and Tallarita)[5] to the recognition of the firm's responsibility to serve its stakeholders.[6] Again, the main arguments of the shareholder proponents are that the government should take care of externalities via regulation[7] and that the board is accountable to none in the case of multiple goals or masters.[8]

The Friedman doctrine still has wide support.[9] But Zingales shows that two conditions are needed for the Friedman doctrine to hold.[10] The first is that companies do not have market or political power. The second is that companies do not pose externalities or, alternatively, that the government could address these externalities perfectly through regulation. Both conditions are violated in practice. Large corporations are too big to regulate.[11] Moreover, governments cannot effectively regu-

* Dirk Schoenmaker, PhD, is Professor of Finance at the School of Management of the Erasmus University Rotterdam, the Netherlands. Willem Schramade is Fellow at the School of Management of the Erasmus University Rotterdam, the Netherlands. Jaap Winter is Professor of Corporate Law at the Vrije Universiteit Amsterdam, the Netherlands. We would like to thank two anonymous referees and participants in the "Corporation in Society" workshop of Utrecht University, 23-25 May 2022 for their very useful comments.

1 A. Berle and G. Means, *Private Property and the Modern Corporation* (1932).

2 A. Berle, 'Corporate Powers as Powers in Trust', 44(7) *Harvard Law Review* 1049 (1931).

3 E.M. Dodd, 'For Whom are Corporate Managers Trustees?', 45(7) *Harvard Law Review* 1145 (1932).

4 *Ibid.*, at 1151.

5 L. Bebchuk and R. Tallarita, 'The Illusory Promise of Stakeholder Governance', 106(1) *Cornell Law Review* 91 (2021); see also B. Cornell and A. Shapiro, 'Corporate Stakeholders, Corporate Valuation and ESG', 27(2) *European Financial Management* 196 (2021).

6 C. Mayer, L. Strine & J. Winter, 'The Purpose of Business is to Solve Problems of Society, Not to Cause Them', in L. Zingales, J. Kasperkevic & A. Schechter (eds.), *Milton Friedman 50 Years Later* (2020) 65; and J. Winter, 'Towards a Duty of Societal Responsibility of the Board', 17(5) *European Company Law Journal* 192 (2020).

7 M. Friedman, 'The Social Responsibility of Business is to Increase Its Profits', *The New York Times Magazine* 13 September (1970).

8 Bebchuk and Tallarita, above n. 5.

9 S. Kaplan, 'The Enduring Wisdom of Milton Friedman', in L. Zingales, J. Kasperkevic & A. Schechter (eds.), *Milton Friedman 50 Years Later* (2020) 4.

10 L. Zingales, 'Friedman's Legacy: From Doctrine to Theorem', in L. Zingales, J. Kasperkevic & A. Schechter (eds.), *Milton Friedman 50 Years Later* (2020) 128.

11 *Ibid.*

late all companies' externalities owing to asymmetric information between governments and companies.[12]
Analysing the control structure of companies, Tirole shows that the implementation of the stakeholder model leads to deadlocks in decision-making and a lack of a clear mission for management.[13] The reason for the failure of the stakeholder model is the absence of a measure of the aggregate welfare of the stakeholders (including investors). Tirole argues that it is harder to measure the firm's contribution to the welfare of employees, of suppliers or of customers than to measure its profitability.[14] There is no accounting measure of this value, although in some examples one can find imperfect proxies (e.g. the number of layoffs). Moreover, there is no market value of the impact of past and current managerial decisions on the future welfare of stakeholders (i.e. the counterpart of the stock market measurement of the firm's assets).
Recent advances in impact valuation enable companies to measure social and ecological quantities and express these in monetised form using cost-based or welfare-based prices.[15] The monetisation of the different value components enables aggregation. Building on these impact valuation methods, Schramade, Schoenmaker and De Adelhart Toorop develop a measure of integrated value, which combines financial, social and ecological value.[16] This integrated value measure allows managers to balance several types of value (financial, social and ecological) at the same time, which often involves trade-offs. Schramade et al. derive decision rules that help managers *ex ante* to make investment decisions accordingly.[17] The integrated value measure can also be used to hold managers *ex post* accountable for their decisions.
The contribution of this article is twofold. First, we develop an integrated model for corporate governance that allows for a systematic inclusion of future stakeholders. Conventional stakeholder models include the interests of direct stakeholders, such as employees and customers, alongside the financial stakeholders. More recent models argue for the inclusion of ecological concerns (climate change, biodiversity and water scarcity) and wider societal concerns (human rights, precarious work), but that is not always done in a systematic way.[18] Moreover, the incorporation of ecological value implies the inclusion of future stakeholders, representing future generations that bear the consequences of ecological degradation.
Second, we elaborate on the governance implications of the integrated value measure for decision-making and accountability. This integrated value measure addresses the problem of multiple goals and masters posed by Tirole[19] and, more recently, by Bebchuk and Tallarita.[20] The measure provides guidance for decision-making that balances the interests of current and future stakeholders. The measure also allows for the prioritisation of specific types of value,[21] in line with a company's purpose.[22] The integrated value measure also serves to hold management accountable.
The article is organised as follows. Section 2 reviews the main corporate governance models and introduces the integrated model. Section 3 discusses how management can balance the interests of a company's various stakeholders. The integrated value measure provides guidance for balanced decision-making. Section 4 examines the mechanisms to include the interests of the various stakeholders on the board. Section 5 concludes.

2 Corporate Governance Models

This section reviews the strengths and weaknesses of the current corporate governance models. These are the shareholder model (as adopted in the United States), the stakeholder model (as adopted in Germany and the Netherlands) and the enlightened shareholder model (as applied in the United Kingdom).[23] The integrated model is presented as an alternative corporate governance model to address the drawbacks of the current models. Table 1 summarises the key characteristics of the main models.

12 R. Shapira and L. Zingales, 'Is Pollution Value-Maximizing? The Dupont Case', *CEPR Discussion Paper No. 12323*, (2017), www.nber.org/papers/w23866.
13 J. Tirole, 'Corporate Governance', 69(1) *Econometrica* 1 (2001).
14 *Ibid*.
15 G. Serafeim, R. Zochowski & J. Downing, 'Impact-Weighted Financial Accounts: The Missing Piece for an Impact Economy', *White Paper, Harvard Business School* (2019), www.hbs.edu/faculty/Pages/item.aspx?num=59129; and R. De Adelhart Toorop, J. Kuiper, V. Hartanto & A. de Groot Ruiz, *Framework for Impact Statements, Beta Version* (2019).
16 W. Schramade, D. Schoenmaker & R. de Adelhart Toorop, 'Decision Rules for Integrated Value', *Working Paper, Erasmus Platform for Sustainable Value Creation* (2022), https://ssrn.com/abstract=3779118.
17 *Ibid*.
18 C. Mayer, 'Shareholderism Versus Stakeholderism–A Misconceived Contradiction', 106(7) *Cornell Law Review* 1859 (2022).
19 Tirole, above n. 13.
20 Bebchuk and Tallarita, above n. 5.
21 Schramade et al., above n. 16.
22 C. Mayer, *Prosperity: Better Business Makes the Greater Good* (2018).
23 J. Wieland, 'Corporate Governance, Values Management, and Standards: A European Perspective', 44(1) *Business & Society* 74 (2005).

doi: 10.5553/ELR.000237

Table 1 Comparing Corporate Governance Models

Dimension	Shareholder model	Stakeholder model	Integrated model
Goal	Shareholder value	Stakeholder value	Integrated value
Optimisation	*FV*	*STV = FV + SV*	*IV = FV + SV = EV*
Stakeholders	Shareholders	Current stakeholders	Current and future stakeholders
Assumptions	– Shareholder, as residual claimant, 'owns' the company and deserves control – Serving the interests of other stakeholders is instrumental to shareholder value	– Managers act in the interest of the company on behalf of financial and direct stakeholders	– Managers act in the interest of the company on behalf of financial, social and ecological stakeholders
Implications	– Shareholder value provides clear guidance for decision-making and accountability – Social and ecological value considerations come second, if considered at all	– Multiple goals suggest unclear guidance and require balancing rules for decision-making and accountability – Financial and social value considerations incorporated – Ecological value considerations come second, if considered at all	– Multiple goals suggest unclear guidance and require balancing rules for decision-making and accountability – Financial, social and ecological value considerations incorporated

Note: FV = financial value; SV = social value; EV = ecological value; STV = stakeholder value; IV = integrated value.

2.1 The Shareholder Model

In the shareholder model, the goal of the company is to maximise the value of the company. This is the value of the securities provided by the financiers, i.e. shareholders and creditors. Shareholders are in control of the company, because they are residual, non-contractual claimants.[24] They get paid after all contractual claims to other stakeholders, such as creditors, employees, customers, and government, are paid. Shareholders thus maximise financial value *FV*, after the other stakeholders are satisfied.

The shareholder model is consistent with Friedman's argument that 'the business of business is business'.[25] In this view, it is the task of the government to take care of social and ecological concerns. Mehrotra and Morck discuss several challenges for proponents of the shareholder view: contractual and business ethics.[26] First, it is difficult to incorporate all possible future circumstances in contracts with stakeholders. Unforeseen circumstances, including externalities, can happen, which give rise to the notion of incomplete contracts.[27] In these cases that the contract does not provide for, the shareholder interest would override the interests of the other stakeholders in the shareholder model.

Second, business ethics concerns are a final line of defence for stakeholders.[28] Obeying the letter of the law regarding the rights of stakeholders can pit shareholder value maximisation against social welfare. Where externalities are important, a narrow focus on shareholder value can create scope for managers making morally dubious decisions. For example, maximising shareholder value ex ante might justify cutting costs and entertaining acceptably small risks of ecological disasters. Even if such a disaster triggers legal actions that bankrupt the committing company, its shareholders are protected by limited liability and so lose only the value of their shares.

Such disasters might be discouraged by exposing directors to personal liability should they occur. But there are several hurdles to holding directors to account. A first step is to determine board accountability, and then the biggest hurdle is the 'business judgment rule' that provides a high threshold for board (personal) liability. Finally, directors have usually liability insurance, which limits their personal exposure. Shapira and Zingales show how a respected company, like DuPont, willingly caused ecological damage by disposing of a toxic chem-

24 M. Jensen and W. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure', 3(4) *Journal of Financial Economics* 305 (1976).

25 Friedman, above n. 7.

26 V. Mehrotra and R. Morck, 'Governance and Stakeholders', in B. Hermalin and M. Weisbach (eds.), *The Handbook of the Economics of Corporate Governance* (2017) 637.

27 S. Grossman and O. Hart, 'The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration', 94(4) *Journal of Political Economy* 691 (1986); and O. Hart and J. Moore, 'Property Rights and the Nature of the Firm', 98(6) *Journal of Political Economy* 1119 (1990).

28 Mehrotra and Morck, above n. 26.

ical used in the making of Teflon in its West Virginia plant.[29] This case was turned into a legal thriller film called Dark Waters. The harmful pollution was a rational decision: under reasonable probabilities of detection, polluting was ex ante optimal from the company's perspective, albeit a very harmful decision from a societal perspective. The DuPont case is an example of how, as Winter points out,[30] the modern corporation under this shareholder model has become amoral: the consequences of its conduct towards third parties are irrelevant for decision-making. Shapira and Zingales examine why different mechanisms of control, like legal liability, regulation and reputation, can all fail to deter socially harmful behaviour.[31] One common reason for the failures of deterrence mechanisms is that the company controls most of the information and its release.

The key question remains, how to rank shareholder and other stakeholder interests? Should all interests be put on an equal footing (the stakeholder model), or should shareholder interests come first (the enlightened shareholder model).

2.2 The Stakeholder Model

The stakeholder model states that managers should balance the interests of all stakeholders, which include financial agents (shareholders and debtholders) as well as direct agents (consumers, workers, suppliers).[32] Adopting the stakeholder view, Magill, Quinzii and Rochet develop a model where a large firm typically faces endogenous risks that may have a significant impact on the workers it employs and the consumers it serves.[33] These risks generate externalities on these stakeholders, which are not internalised by shareholders. As a result, in the competitive equilibrium, there is under-investment in the prevention of these risks.

Magill, Quinzii and Rochet suggest that this under-investment problem can be alleviated if companies are instructed to maximise the total welfare of their stakeholders rather than shareholder value alone (stakeholder equilibrium).[34] The stakeholder equilibrium can be implemented by introducing new property rights (employee rights and consumer rights) and instructing managers to maximise the stakeholder value *STV* of the company (the value of these rights plus the shareholder value).

In a setting with three stakeholder groups (consumers, employees and shareholders), Magill, Quinzii and Rochet show how companies can maximise the total value for the stakeholders – the value to consumers measured by the consumer surplus, the value to employees measured by workers surplus and the value to shareholders measured by profit.[35] The company balances these three values, depending on the weight given to each stakeholder.

Tirole formulates three problems with serving various stakeholders in the stakeholder model.[36] First, the stakeholder model may reduce pledgeable income (income available for financiers), as cash flows are distributed to various stakeholders. Second, it may lead to a less clear mission and fewer incentives for managers, as they have to serve multiple masters. Third, divided control among multiple stakeholders may lead to deadlock in decision-making. But Tirole recognises that the shareholder model also has its shortcomings, such as biased decision-making leaving scope for important externalities.[37]

The debate on the stakeholder model has traditionally focused on stakeholders with a direct relation to the company, i.e. employees, creditors, customers, suppliers. The ecological and social challenges the world faces, however, make clear that a much wider circle of stakeholders is affected by the conduct of companies. In the seminal Shell decision of the District Court of The Hague of 26 May 2021, for example, it was held that Shell would commit a tort towards people in the Netherlands, in general, and inhabitants of the *Waddengebied* (the coastal and island area of the north of the Netherlands), in particular, by not committing to more specific CO_2 reductions.[38] Future stakeholders, by definition, are also not included in the classical stakeholder model thinking. The ecological and societal challenges we face cannot be effectively addressed if we stick to this classical stakeholder model.

2.3 The Enlightened Shareholder Model

Although the shareholder model cannot fully satisfy the interests of stakeholders, there are also problems with the stakeholder model.[39] The manager has to serve all interests and in the end will serve none.[40] Managers may in that case choose an objective function that is most closely relevant to their own interests.[41] Stakeholder theory may thus leave managers unaccountable, as optimising several objectives simultaneously is difficult to measure and control.

Jensen argues that shareholder value maximisation is best achieved in practice by catering to all stakeholders – an approach he calls Enlightened Value Maximisation.[42] This view defends stakeholder interests as a means to the end goal of shareholder value maximisation. But Mehrotra and Morck show that this argument is flawed.[43] It fails to resolve the many situations of clear conflict between the interests of shareholders and different stakeholders. It also fails to value externalities

29 Shapira and Zingales, above n. 12.
30 Winter, above n. 6.
31 Shapira and Zingales, above n. 12.
32 R. Freeman, *Strategic Management. A Stakeholder Approach* (1984).
33 M. Magill, M. Quinzii & J.C. Rochet, 'A Theory of the Stakeholder Corporation', 83(5) *Econometrica* 1685 (2015).
34 *Ibid.*
35 *Ibid.*
36 Tirole, above n. 13.
37 *Ibid.*
38 www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Royal-Dutch-Shell-must-reduce-CO2-emissions.aspx.
39 Tirole, above n. 13.
40 Bebchuk and Tallarita, above n. 5.
41 M. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function', 12(2) *Business Ethics Quarterly* 235 (2002).
42 *Ibid.*
43 Mehrotra and Morck, above n. 26.

doi: 10.5553/ELR.000237

that the corporate may inflict on more distant stakeholders, such as the environment.

Nonetheless, Mehrotra and Morck argue that enlightened value maximisation, or refined shareholder value, may well be the least bad alternative on offer.[44] In contrast to stakeholder theory, the approach has a single roughly measurable objective, refined shareholder value, while explicitly recognising that good relations with stakeholders can boost firm value by easing contracting costs and facilitating surplus creation. Companies put systems in place for energy and emissions management, sustainable purchasing, IT, building and infrastructure to enhance ecological standards, and all kinds of diversity in employment. The underlying objective of these activities remains economic. Although introducing sustainability into business might generate positive side effects for some sustainability aspects, the main purpose is to reduce costs and business risks, to improve reputation and attractiveness for new or existing human talent, to respond to new customer demands and segments and thereby to increase profits, market positions, competitiveness and shareholder value. Business success is still evaluated from a purely economic point of view and remains focused on serving the business itself and its economic goals.[45]

In the enlightened shareholder model, shareholder value or profit maximisation is still the guiding principle for the organisation, though with some refinements. Jensen proposes that the company should avoid excessive negative social and ecological impact.[46] Examples of excessive negative impacts are using child labour, unsafe work conditions and/or heavy pollution in the production process. The problem with this enlightened shareholder model is that the interests of other stakeholders are considered relevant only to the extent they are seen as conducive to creating financial value to shareholders. They are not valued as interests to be taken into account for their own sake that should lead management to not maximise shareholder value. The amoral character of the company continues under the enlightened shareholder value model. This will continue to keep business from taking sufficient responsibility for addressing the ecological and societal problems we face.

2.4 The Integrated Model

While the traditional stakeholder model incorporates only direct social value alongside financial value into the company's objective, it does not deal with ecological and broader social value. Hart and Zingales make a distinction between shareholder value, which aims for maximisation of financial value only, and shareholder welfare, which incorporates social and ecological externalities.[47] An important assumption in their model is that these externalities are not perfectly separable from production decisions. So companies face a choice in the degree of sustainability in their business model. The mechanism in the Hart- Zingales model to guide that choice is voting by prosocial shareholders on corporate policy.

Moving to corporate law, Mayer, Strine and Winter argue that companies should focus on sustainable wealth creation and that the balance between shareholders and stakeholders needs to be restored.[48] They recommend for the US context that large companies (with over $1 bn of revenues) should become Public Benefit Corporations that should state a public purpose beyond profit maximisation and should fulfil that purpose as part of the responsibilities of their directors and be accountable for it. Winter et al. argue for an explicit duty of societal responsibility for directors.[49] The European Commission's recent proposal for a Directive on Corporate Sustainability Due Diligence (2022/0051 COD) takes a similar direction by stating that the member states must ensure that directors, when fulfilling their duty of care to further the interests of the company, take into account the consequences of their decision for sustainability matters, including, where applicable, human rights, climate change and ecological consequences, in the short, medium and long term (Art. 25 of the proposal).[50]

These developments raise the question of how to balance the interests of the various stakeholders. Schoenmaker and Schramade introduce integrated value *IV*, which combines financial, social and ecological value in an integrated way.[51] The company should optimise this integrated value in the interest of current and future stakeholders. The optimisation requires a careful balancing of the three dimensions whereby interconnections and trade-offs are analysed but none should deteriorate in favour of the others.[52] Next, the systematic inclusion of future stakeholders, who will face the consequences of (lack of) ecological actions today ensures that ecological externalities are incorporated. While the Hart-Zingales model argues that (prosocial) shareholders vote on corporate policy, the Schoenmaker-Schramade integrated model states that the managing board decides on corporate policy and is accountable to all stakeholders. The key difference is that the board is accountable to shareholders in the former and to stakeholders in the latter. There are two major drawbacks for

44 *Ibid.*

45 T. Dyllick and K. Muff, 'Clarifying the Meaning of Sustainable Business: Introducing a Typology from Business-as-Usual to True Business Sustainability', 29(2) *Organization & Environment* 156 (2016).

46 Jensen, above n. 41.

47 O. Hart and L. Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value', 2(2) *Journal of Law, Finance, and Accounting* 247 (2017).

48 Mayer et al., above n. 6.

49 J.W. Winter, J.M. de Jongh, J.B.S. Hijink, et al., 'Naar een zorgplicht voor bestuurders en commissarissen tot verantwoorde deelname aan het maatschappelijk verkeer', 86 *Ondernemingsrecht* 471 (2020); see for critical reactions H.J. de Kluiver, 'Over de verantwoordelijke onderneming. Naar een Paradise by the dashboard light?', Ondernemingsrecht 2020/126; and W.A. Westenbroek, 'Een maatschappelijke verantwoordelijkheid voor ondernemingen en (bange?) bestuurders of co ro nawetenschap in crisistijd?, Ondernemingsrecht 2021/3.

50 EC proposal for Directive 2022/0051 COD, https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0051(COD)&l=en.

51 D. Schoenmaker and W. Schramade, *Principles of Sustainable Finance* (2019).

52 Schramade et al., above n. 16.

leaving the balancing of stakeholder interests to prosocial shareholders. First, shareholders are not representative for the preferences of other stakeholders (and wider society). Second, shareholders are subject to the free-rider problem in that they face the full cost of prosocial decisions but only part of the benefits. This leads to an underprovision of social and ecological value. Hart and Zingales acknowledge the potential for underprovision in their model.[53]

A new business language is emerging around 'the integrated value' of the company. Traditional financial reports record assets, liabilities and profits on the basis of only financial and manufactured capitals (financial value). Integrated financial reports broaden this range to six capitals, by adding human, social, intellectual and natural capitals, reflecting social and ecological value.[54],[55] These capitals incorporate the social and ecological externalities and are expressed in money. This single language of integrated reporting enables managers to analyse the trade-offs for decision-making.

The review of the corporate governance models in this section indicates that the integrated model is best able to serve the interests of all stakeholders. Section 3 deals with decision-making in a multiple stakeholder setting.

3 Balancing Interests

The balancing of shareholder and other stakeholder interests is a key question in the reviewed corporate governance models. A company's board has to make a judgment on this balancing of interests in setting corporate strategy, policies and investments. The forming of this judgment is relevant for ex ante decision-making and ex post accountability.

The power of the shareholder model is the clear and single objective of shareholder value maximisation, which improves decision-making and accountability. But it comes at the cost of important externalities, as noted by Tirole.[56] Mayer and Edmans show how companies can create long-term value by combining economic (shareholder) and societal (stakeholders) value.[57] Companies operate in a disruptive world where their performance on climate change, consumer trust and employee satisfaction is becoming as important for society as their financial performance.[58] The balancing of interests for long-term value creation can be done qualitatively and quantitatively.

3.1 Qualitative-Based Judgment

Mayer argues that directors should act according to the reasons why the company was created and exists and what it is there to do, namely its purposes.[59] These should be the guiding star of the board, not rigid rules of shareholder rights or primacy that trump other interests. It is against those purposes and their associated values that the board's actions and performance should be judged. Directors have the right to act with judgment – business judgment – and they should exercise that judgment in a form that they believe is appropriate to the circumstances. By making corporate values explicit, corporate purpose makes management accountable for its delivery. Mayer claims that 'corporate purpose and values make accountability laser sharp'.[60] He encourages a multiplicity of purposes across companies and competition in models to deliver them in order to stimulate innovation.

A different approach is taken by Edmans.[61] He develops principles of multiplication, comparative advantage and materiality, which also do not rely on calculations. Edmans stresses that 'value is only created when an enterprise uses resources to deliver more value than they could do elsewhere – the social benefits exceed the social opportunity costs'.[62] The three interrelated principles should guide a manager's judgment to deliver value in complex situations with multiple stakeholders. The principle of multiplication ensures that the social benefits exceed the private costs, which is an easy hurdle to pass. The principle of comparative advantage requires the company to deliver more value than other companies with an activity. Finally, the principle of materiality asks whether the stakeholders that the activity benefits are material to the company. The combined application of these principles makes it likely that the activity creates profits by creating value for society.

The common element of these qualitative approaches is that a company should – in accordance with its purpose – deliver value to its main stakeholders. Both Mayer and Edmans argue that it is difficult or impossible not only to forecast the monetary effect on each stakeholder, but also to weight the different stakeholders.[63] So you cannot measure overall societal value. That still leaves the problem of holding management accountable to its multiple stakeholders.[64]

It is important to distinguish two aspects of being held accountable. The first is the circumstances under which a court may hold that the directors have breached their duties and impose liability for damages. In some jurisdictions liability will only occur when there is a certain level of bad faith or intent to do wrong on the part of the

53 Hart and Zingales, above n. 47.

54 R. Eccles, M. Krzus & S. Ribot, 'Meaning and Momentum in the Integrated Reporting Movement', 27(2) *Journal of Applied Corporate Finance* 8 (2015).

55 Integrated value is related to the capitals approach of the International Integrated Reporting Council, which uses six capitals: financial and manufactured capital (financial value), social and human capital (social value), natural capital (ecological value) and intellectual capital (all three values); see International Integrated Reporting Council, 'The international IR framework' (2013).

56 Tirole, above n. 13.

57 Mayer, above n. 22; A. Edmans, *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (2020).

58 L. Kurznack, D. Schoenmaker & W. Schramade, 'A Model of Long-Term Value Creation', *Journal of Sustainable Finance & Investment* 1 (2021), https://doi.org/10.1080/20430795.2021.1920231.

59 Mayer, above n. 22.

60 *Ibid.*

61 Edmans, above n. 57.

62 *Ibid.*

63 Mayer, above n. 22; Edmans, above n. 57.

64 Tirole, above n. 13; Bebchuk and Tallarita, above n. 5.

doi: 10.5553/ELR.000237

director. In other jurisdictions a somewhat more objective standard is applied, which comes down to acting like no director acting reasonably in the circumstances would act. Both approaches allow for a margin of discretion for directors to make judgments. Only if the margin is transgressed and the director acts in bad faith or with bad intent or in a way that no reasonable director would have acted are courts likely to impose liability on directors. Courts have developed various concepts, such as reasonability, proportionality and procedural fairness that guide them on the question of whether and to what extent they should hold directors liable for the company's conduct.[65] This prevents directors from being held liable merely because some stakeholder would have favoured another decision.

The second aspect of accountability is the judgment of whether directors have performed well, have taken the best possible decision and have not succumbed to comfortable managerial slack as there is no clear measure to indicate what an optimal decision would be. The basic question is whether directors have delivered value to various stakeholders, as promised. If not, directors should be able to explain why there was a shortfall in value compared with expectations/promises. A quantitative approach that captures overall society value can be helpful in the accountability of the management board to stakeholders (including shareholders). The next subsection proposes to use an integrated value measure to quantify and balance the various forms of value – financial, social and ecological – within the integrated value concept.

3.2 Quantitative Judgment

To quantify the company objective, Schramade, Schoenmaker and De Adelhart Toorop have developed an integrated value measure that combines financial, social and ecological value.[66] Recent developments in impact valuation enable companies to not only measure or forecast social and ecological quantities but also to express these in monetised form.[67] At the moment, these cost-based or welfare-based assessments of social and ecological value are typically less robust than those of financial value. But innovations in technology (measurement, information technology, data management) and science (life cycle analyses, social life cycle analyses, ecological extended input-output analysis, ecological economics) make the quantification and monetisation of social and ecological impacts increasingly possible.

The next question is how to steer on this integrated value measure. Schramade et al. design decision rules for corporate investment and valuation.[68] The balancing of positive and negative values across the financial, social and ecological domains is a key element of these decision rules. Just summing of positives and negatives allows for the netting of financial, social and ecological values. Imbalances in the social and/or ecological dimension can then continue to build up, as is currently happening. The other extreme, no netting, is very restrictive. Any negative value should then be avoided, which may lead to a standstill of corporate investments. Schramade et al. suggest taking the middle ground, whereby negative values get a higher weight than positive values.[69] Companies thus have an incentive to reduce negative (social and ecological) values. A credible transition pathway back to positive on the problematic value dimension(s) is then a main focus of management.

A second element of the decision rules is the weighting across the value dimensions. While shareholder-driven companies only value the financial dimension, companies that pursue long-term value creation also give a positive weight to the social and ecological dimensions. The model allows companies to choose their degree of sustainability: from moderate (weight of half) and equal weights (weight of one) to purposeful (higher weights for the social and ecological dimensions than for the financial dimension). While the majority of companies may apply moderate or equal weights, purposeful companies act as front runners in the return to operating within social and planetary boundaries. Companies can then prioritise specific types of value, in line with their purpose.[70]

Following Schramade et al., these decision rules can be formalised in an integrated value measure *IV* as follows:[71]

$$IV = \{ FV^{+} + \beta \cdot SV^{+} + \gamma \cdot EV^{+} \} + \delta * \{ FV^{-} + \beta \cdot SV^{-} + \gamma \cdot EV^{-} \}$$
with $\delta > 1$,

whereby *FV, SV and EV* represent the financial, social and ecological value. The superscript +/- stands for a positive/negative value, respectively. β *and* γ are the weightings for the social and ecological value dimensions, and δ reflects the higher weighting of negative values.

These decision rules acknowledge the interrelations between the different types of values and allow a structured balancing of stakeholder interests. An important corporate governance question is with whom to vest responsibility for setting the parameters (β, γ *and* δ) of the decision rules for calculating integrated value. In our view, the executive directors should set the parameters as part of company strategy, which is subsequently challenged in a strategy dialogue with the non-executive directors (in a one-tier board) or the supervisory board (in a two-tier board). In addition, stakeholder-driven companies often have a stakeholder council (see Section 4) where the company's priorities are discussed. Stakeholders can thus indirectly influence the setting of the parameters.

By setting the parameters (β, γ *and* δ) of the decision rules in advance, executive management can be held ac-

65 Winter, above n. 6.
66 Schramade et al., above n. 16.
67 Serafeim et al., above n. 15; De Adelhart Toorop et al., above n. 15.
68 Schramade et al., above n. 16.
69 *Ibid.*
70 Mayer, above n. 22.
71 Schramade et al., above n. 16.

doi: 10.5553/ELR.000237

countable by non-executive directors or the supervisory board on delivery of integrated value (*IV*) against these rules. The annual general meeting of shareholders and, if applicable, the stakeholder council can also use the reporting on realised integrated value to hold the board accountable.

It should be acknowledged that the integrated value measure is not absolute. Not every aspect of various stakeholder interests, including interests of future generations, can be measured and monetised. But applying an integrated value measure may provide useful and necessary guidance for boards in their decision-making by counterbalancing the bias to prioritise the clearly measurable financial value. This helps the board to widen the scope of their concerns and thus to explicitly balance the various interests for which they are responsible.

4 Mechanisms

While Section 2 has set out how the integrated model can broaden corporate governance to various stakeholders, Section 3 has shown how the board can apply an integrated value measure to quantify and balance the underlying financial, social and ecological value creation for these stakeholders. The next question is, what mechanisms can be designed to make the integrated model operational: how to include the interests of the various stakeholders in board decision-making? The following types of mechanisms are reviewed: formal governance models, formal board mandates, board composition, stakeholder councils (including future stakeholders) and incentive mechanisms.

Formal stakeholder models, such as co-determination (under which employees and possibly other groups elect directors along with shareholders), typically focus on the particular interests of the involved stakeholder groups rather than the general interest of the company. Moreover, the scope and number of stakeholders evolve over time, while formal mechanisms are static.

A more flexible mechanism is formulating formal board mandates for sustainability at the company level. These formal board mandates can be incorporated in the company's charter or bylaws.[72] The European Commission's proposal to include sustainability in the directors' duty of care has the same effect (see proposal for a Directive on Corporate Sustainability Due Diligence (2022/0051 COD)).[73] Such mandates make sustainability an explicit board priority and facilitate board sustainability oversight. To make it work, boards have to disclose whether boards and management discuss sustainability during board meetings. Boards can then work with management to identify specific social and ecological priorities for the company, include them in the company's strategy and assess their impact on the company's long-term value. In terms of our model, boards have to set the parameters (β, γ *and* δ) for the integrated value. Under the EU Corporate Sustainability Reporting Directive (2022/2464), boards will have to disclose the outcomes and specific results in a wide range of sustainability matters.[74]

Another mechanism is the composition of a board and the expertise of its members. Coffee argues for broadly representative and diverse boards that are sensitive to the company's impact on society.[75] Such broad and diverse boards are diverse not only on gender, ethnic and age characteristics but also on expertise. Without directors with the proper expertise, boards do not possess the collective skill set and background to examine the impacts of complex social and ecological issues on corporate strategy. However, international evidence shows that less than 5% of executive and non-executive role specifications require sustainability experience or a sustainability mindset.[76] This seems a missed opportunity for companies in their pursuit of broader stakeholder interests. Winter proposes that boards work with an X-team model.[77] An X-board consists of a core group of members that comprise the formal board and additional members that can advise on specific (sustainability) matters. Additional members could be advisory members of the board who would not share in the collective responsibility of the full board. This could speed up the increase in knowledge that is available in boards without overcrowding boards with members for each specific topic.

To foster accountability, a company can establish a stakeholder council with the relevant stakeholders. The board would discuss, at least once a year, the sustainability performance of the company. The board can also consult the stakeholder council on important decisions, with societal impact. To promote transparency, the stakeholder council reports annually about its activities and advice in the company's integrated annual report. Winter et al. have proposed to include the setting up of a stakeholder council as a best practice in the Dutch Corporate Governance Code.[78] A challenge is to include not only current stakeholders but also future stakeholders. An interesting mechanism, developed in Japanese local politics, is Future Design.[79] Future design aims to

72 V. Ramani and B. Ward, 'How Board Oversight Can Drive Climate and Sustainability Performance', 31(2) *Journal of Applied Corporate Finance* 80 (2019).

73 EC, above n. 50.

74 EU Directive 2022/2464, *Official Journal of the European Union*, L322/15, 16.12.2022.

75 J. Coffee, 'Diversifying Corporate Boards — The Best Way Toward a Balanced Shareholder/Stakeholder System of Corporate Governance', in L. Zingales, J. Kasperkevic & A. Schechter (eds.), *Milton Friedman 50 Years Later* (2020) 36.

76 H. Reus, 'Call to Action: Accelerating Sustainable Business Leadership', *Paper, Russell Reynolds Associates* (2018), www.russellreynolds.com/en/insights/reports-surveys/call-to-action-accelerating-sustainable-business-leadership; I. Sørensen and T. Handcock, 'Leadership for the Decade of Action', *White Paper, United Nations Global Compact & Russell Reynolds Associates* (2020), www.russellreynolds.com/en/insights/reports-surveys/leadership-for-the-decade-of-action.

77 Winter, above n. 6.

78 Winter et al., above n. 49.

79 T. Saijo, *Future Design: Incorporating Preferences of Future Generations for Sustainability* (2020).

doi: 10.5553/ELR.000237

solve the dilemma between current stakeholders, who bear the cost of long-term investment, and future stakeholders, who reap the benefits.

The idea of future design is simple. If there is no one to protect the interests of future generations, then designate people to take on the role of future generations and have them stand in for future generations. This is the same reasoning as role-playing scenarios used frequently in, for example, war games. Saijo calls these people who are to take on the role of future generations the 'imaginary future generation' or 'imaginary future persons'.[80] People, when they become an 'imaginary future generation', really change their lines of thought and points of view, becoming clearly aware of the interests of future generations. As a result, they actually think and act in the interest of future generations. One or more persons with such a designated role can be added to the stakeholder council.

Finally, incentive mechanisms also play a role. While variable executive pay is related mainly to financial performance, companies are starting to include sustainability targets in executive remuneration. Using an international sample of ISS Executive Compensation Analytics, Ormazabal et al. show that the adoption of sustainability metrics in executive compensation contracts is rising fast: from 1% in 2011 to 38% in 2021.[81] They also find that adoption of sustainability variables in managerial performance is accompanied by improvements in sustainability performance and meaningful changes in the compensation of executives. Linking executive compensation to sustainability goals helps boards to make management accountable for sustainability performance.[82] The EU proposal for a Directive on Corporate Sustainability Due Diligence (2022/0051 COD) mandates the obligation to adopt a plan to ensure that the strategy and business model of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C when setting variable remuneration (Art. 15 of the proposed Directive).[83] Another incentive mechanism is deferral of variable compensation, for example by up to 3, 5 or 7 years. Such deferral helps to align executives' interests with the long-term interests of their company. The deferral of bonuses means they can be forfeited if evidence emerges of unexpectedly poor financial, social or ecological performance by the executive, their team or the company overall.

5 Conclusions

This article moves the corporate governance debate beyond the shareholder and stakeholder model. To address the societal and ecological challenges, the debate has to be shifted beyond the inner circle of shareholders and other direct stakeholders (employees, customers, creditors). Broader society and future stakeholders are also affected by the company's conduct through ecological damage (e.g. climate change) and social damage (e.g. human rights violations or underpayment in the value chain).

Such a broad remit for corporate governance requires measures to balance the interests of all these stakeholders. This article presents an integrated measure for corporate value that includes financial, social and ecological value. The board can use this integrated value measure to balance the interests of the various stakeholders in a structured way. The integrated value measure can also be used by stakeholders (including shareholders) to hold the board accountable for its decisions.

To make our proposed integrated model operational, several mechanisms are reviewed. The formal board mandate could include sustainability. A diversely composed board helps to broaden discussions on the board. Companies are starting to work with stakeholder councils to incorporate the views of external stakeholders. A promising idea is to include future generations in such stakeholder councils. Next, incentive mechanisms could reflect the company's objective function. The relative weights of financial, social and ecological value in the company objective could be applied to the weighting of financial, social and ecological targets in performance pay (which still tends to be financially driven). Linking executive compensation to sustainability goals helps supervisory/non-executive boards to make executive management accountable for sustainability performance.

Our proposed integrated model of corporate governance broadens the remit to all relevant stakeholders, both current and future stakeholders. By taking its moral responsibility in society, the company's board can ensure that the company retains its social licence to operate.

80 *Ibid.*

81 G. Ormazabal, S. Cohen, I. Kadach & S. Reichelstein, 'Executive Compensation Tied to ESG Performance: International Evidence', *CEPR Discussion Paper DP17267* (2020), https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=3841435; see also K. Maas, 'Do Corporate Social Performance Targets in Executive Compensation Contribute to Corporate Social Performance?' 148(3) *Journal of Business Ethics* 573 (2018).

82 Ramani and Ward, above n. 72.

83 EC, above n. 50.

‘Le vent nous portera’: Rescue and Confinement at Sea under Human Rights Law

Mariagiulia Giuffré*

Abstract

As a response to the pandemic, sea-rescue operations in the Mediterranean have either come to a halt or have been perilously delayed. Since then, policies of port closure and semi-closure have been undertaken under different forms. Nevertheless, States have an obligation to assist ships’ masters in delivering any shipwreck to a place of safety, even in times of COVID-19 or any other public emergency. This article explores whether State responsibility under international human rights law might be engaged whenever rescuing boats are compelled to lengthy standoffs with no coastal State allowing disembarkation. Therefore, in discussing the interim measures issued by the European Court of Human Rights (ECtHR) in cases of prolonged confinement at sea – following port closures and refusals of a place of safety – it suggests that the ECtHR should have ordered disembarkation of all shipwrecked onboard. Indeed, the actual conditions of migrants and asylum-seekers compelled to exhausting and unlawful standoffs at sea, in addition to their precarious physical and mental health, may amount to inhuman and degrading treatment and to a de facto deprivation of personal liberty under Articles 3 and 5 of the European Convention on Human Rights (ECHR). While contesting the increasing use of a language of ‘crisis’ and the recent ‘practical and effective’ approach of the Court of Strasbourg, aimed at preventing ‘foreigners [including asylum seekers] circumventing restrictions on immigration’, this article concludes highlighting the risks of such an approach, thereby exhorting the Court to challenge what may become a perpetual (rather than exceptional) emphasis on a migration crisis.

Keywords: search and rescue, European Court of Human Rights, inhuman and degrading treatment, interim measures, closed ports.

1 Introduction

On 12 April 2020, 150 migrants were rescued in the Mediterranean Sea by the Alan Kurdi (a vessel operated by the German NGO SeaEye), and after 12 days at sea – due to Italy and Malta’s refusal to allow disembarkation – were eventually transferred onboard an Italian ship for another 14 days of quarantine.[1] Following the spread of COVID-19, Malta declared that it would no longer offer a safe place to irregular migrants, and denied disembarkation to the passengers of the Danish oil tanker Maersk Etienne.[2] In September 2020, the Court of Strasbourg turned down the request for interim measures of a group of persons who were rescued by the Etienne,[3] and only after 40 days at sea, they were allowed to land in Italy.

With the COVID-19 crisis, healthcare national systems have been overwhelmed, causing an increasing number of governments to declare a state of emergency and/or adopt measures constraining free movement of persons across land and maritime borders. Migrants, in particular, stand to be wronged by State authorities in several ways. As a response to the pandemic, sea-rescue operations in the Mediterranean have either come to a halt or have been perilously delayed.[4]

In April 2020, the Italian government established that:

> for the entire duration of the national health emergency caused by the spread of Covid-19, Italian ports do not fulfil the conditions to be classified and defined as places of safety, in accordance with the Search and Rescue (SAR) Convention, in all those cases of rescue operations conducted outside the SAR area by vessels flying the flag of foreign States.[5]

* Mariagiulia Giuffré is a Reader (Associate Professor) in Law at Edge Hill University, United Kingdom. This article is part of a project on ‘Externalizing Border Management and Refugee Rights’ funded through the Independent Social Research Foundation (ISRF). I wish to thank Dr Lilian Tsourdi for her comments to an earlier version of this article. I would also like to thank Ms Tonika Stephenson for her assistance in the editing of the paper. All remaining errors are my own.

1 BBC, ‘Coronavirus: Italy Orders Rescued Migrants onto Quarantine Ship’ (12 April 2020), www.bbc.co.uk/news/world-europe-52263969.

2 Press release by the Ministry for Foreign and European Affairs and the Ministry for Home Affairs, ‘National Security and Law Enforcement: Malta Should Not Carry the Burden of Migrant Trafficking’ (10 April 2020), www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/10/pr200650en.aspx.

3 Malta Today, ‘Three Migrants Aboard Oil Tanker Maersk Etienne Jump Overboard in Desperation’ (6 September 2020), www.maltatoday.com.mt/news/national/104574/three_migrants_aboard_oil_tanker_maersk_etienne_jump_overboard_in_desperation_#.X8KxWOVxfid.

4 Info Migrants, ‘Don’t Stop Rescue Ships Due to Coronavirus’, *MSF to Italy* (2 March 2020), www.infomigrants.net/en/post/23106/don-t-stop-rescue-ships-due-to-coronavirus-msf-to-italy.

5 Executive Decree n. 150, issued by the Italian government on 7 April 2020, www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf. This Decree should be read together, but not without a certain degree of confusion, with Decree n. 1287 (12 April 2020) of the Head of Office of Civilian Defence (*Protezione Civile*) establishing instead that those people rescued at sea, for whom it was not possible to identify a place of safety, can be quarantined onboard designated ships, while those who have been able to autonomously reach the Italian territory are accommodated in suitable reception centres for the duration of the quarantine. *See Decreto del Capo Dipartimento* n. 1287 (12 April 2020).

 doi: 10.5553/ELR.000232

This decree denies access to a safe port in Italy only to certain people on the basis of random criteria, such as the place of rescue and the flag of the vessel rescuing the shipwrecked.[6] Given that it has provisionally been used as a blueprint by other countries, such as Malta, Libya and Tunisia, to enforce policies of port closure,[7] it provides the additional risk that more States will follow suit and deny their ports as places of safety, relying on COVID-19 (or any other potential future threat to public security and safety) as a justification to extend restrictive policies against aliens well beyond an emergency situation.

While 2 years after the outbreak of the COVID-19 pandemic there has been a gradual reopening of national borders and a notable increase in the number of migrants and asylum-seekers reaching Europe,[8] especially through the Central Mediterranean route,[9] the year 2021 was also the deadliest year since 2018.[10] Nevertheless, the indication of a place of safety to NGO vessels rescuing people in distress continues to be delayed in many cases, thereby forcing people to spend several days at sea in critical humanitarian conditions.[11]

In late October 2022, Italy's new right-wing-led government declared that NGO rescuing vessels operate in breach of international and domestic norms on security and border control, thus formalizing the closure of Italian ports to people rescued at sea.[12] As a consequence of the new decrees, more than 1,000 rescued migrants were stranded aboard four ships for several days amid deteriorating conditions onboard.[13] According to the government only people in urgent need of medical care could be allowed to disembark while all others should have left Italian territorial waters.[14] One of the underlying aims of the new Law-Decree 1/2023, enacted by the Italian government on 2 January 2023, is to further limit the work of rescuing NGOs. For instance, imposing them to reach without delay a port of disembarkation (which, in practice, is indicated very far from the area of distress)[15] de facto entails NGOs' disengagement from further rescue operations in the Mediterranean.[16]

Overall, the posture adopted by the new Italian government marks, to a certain extent, a return to the approach adopted by the former Ministry of the Interior, Mr Salvini, between 2018 and 2019, and the strategy implemented with the spread of the COVID pandemic aimed at closing ports to migrants rescued at sea. All these cases show how the issue of port closure and/or semi-closure with the consequent confinement of people at sea for several days is increasingly topical, assumes slightly different forms and might take place whenever an emergency is perceived as threatening the security of a State, thereby requiring urgent attention by both scholars and practitioners.

Being informed about a distress situation, the Maritime Rescue Coordination Centre of the coastal State receiving a distress call (e.g., Italy in all the cases hereinafter examined) has a duty to intervene and to cooperate with other coastal States in rescuing and disembarking the shipwrecked in the *next place of safety* – a duty which exists even if the boat calls from the outside of their territorial waters or SAR areas.[17] Although the issue of migrants' rescue at sea and their rapid disembarkation in a safe port raises a plethora of questions under asylum law, the law of the sea and the search and rescue legal framework,[18] this article will be limited to explore whether State responsibility under international human rights law is engaged every time rescuing boats are compelled to such standoffs with no coastal State allowing prompt disembarkation.[19]

6 *See* A. Algostino, 'Lo stato di emergenza sanitaria e la chiusura dei porti: sommersi e salvati', 2 *Questione Giustizia* (2020), https://www.questionegiustizia.it/articolo/lo-stato-di-emergenza-sanitaria-e-la-chiusura-dei-porti-sommersi-e-salvati_21-04-2020.php; V. Keller, F. Schöler, & M. Goldoni, 'Not a Safe Place? Italy's Decision to Declare Its Ports Unsafe under International Maritime Law' (14 April 2020), https://verfassungsblog.de/not-a-safe-place/.

7 U. De Giovannangeli, 'Porti chiusi ai migranti. Il Decreto della vergogna fa scuola a Malta e in Libia' (10 April 2020), Porti chiusi ai migranti. Il Decreto della vergogna fa scuola a Malta e in Libia | Globalist.

8 European Union Agency for Asylum, 'Asylum Applications in EU Approaching Highest Level since 2016' (28 January 2022), https://euaa.europa.eu/news-events/asylum-applications-eu-approaching-highest-level-2016.

9 Frontex, 'EU External Borders in 2021: Arrivals Above Pre-pandemic Levels' (11 January 2022), https://frontex.europa.eu/media-centre/news/news-release/eu-external-borders-in-2021-arrivalsabove-pre-pandemic-levels-CxVMNN.

10 IOM, Missing Migrants Project, https://missingmigrants.iom.int/region/mediterranean?region_incident=All&route=3861&year%5B%5D=2500&month=All&incident_date%5Bmin%5D=&incident_date%5Bmax%5D=.

11 *See, e.g.*, Fanpage.it, 'Migranti, 800 persone sulle navi di Open Arms e Humanity aspettano un porto da settimane', www.fanpage.it/attualita/migranti-800-persone-sulle-navi-di-open-arms-e-humanity-a; spettano-un-porto-da-settimane/; La Repubblica, 'Migranti, il Viminale concede il porto. I 450 migranti di Mare Jonio e Sea Watch sbarcheranno a Pozzallo', www.repubblica.it/cronaca/2022/06/08/news/migranti_braccio_di_ferro_tra_le_ong_e_il_viminale_o_ci_danno_un_porto_entro_10_ore_o_entriamo_lo_stesso-352996493/.

12 *See, e.g.*, Directive of the Ministry of the Interiors, no. 14100/141(8), 23 October 2022.

13 Euronews, 'Hundreds of Migrants in Limbo as Italy Closes Ports to NGOs', www.euronews.com/2022/11/05/hundreds-of-migrants-in-limbo-as-italy-closes-ports-to-ngos.

14 *See, e.g.*, Decree of the Ministries of the Interiors, Defence, and Infrastructures, 4 November 2022.

15 *See* ANSA, 'Migranti, la Ocean Viking giunta in porto a Ravenna', www.ansa.it/sito/notizie/cronaca/2022/12/31/migranti-la-ocean-viking-giunta-in-porto-a-ravenna_87fea78c-c385-4ecc-8b7f-b9d7076361a4.html.

16 For a thorough analysis of Law-Decree 1/2023, *see* ASGI, 'Contro la Costituzione, le ONG e i diritti umani: l'insostenibile fragilità del decreto legge n.1/2023' (5 January 2023), www.asgi.it/primo-piano/contro-la-costituzione-le-ong-e-i-diritti-umani-linsostenibile-fragilita-del-decreto-legge-n-1-2023/.

17 On cooperation duties, *see* Arts. 2.1. and 12.3 of the Annex to the Search and Rescue (SAR) Convention; and Regulation IV of Chapter 5 of the International Convention for the Safety of Life at Sea (SOLAS).

18 On the semi-closed ports policy and the responsibility of the flag State, *see* C. Favilli, 'La stagione dei porti semichiusi: ammissione selettiva, respingimenti collettivi e responsabilità dello Stato di bandiera', *Questione Giustizia* (November 2022). On asylum and allocation of competences, *see* M. Di Filippo, 'The Allocation of Competence in Asylum Procedures Under EU Law: The Need to Take the Dublin Bull by the Horns', *Revista de Derecho Comunitario Europeo* 41 (2018). On the law of the sea and protection of life, *see* I. Papanicolopulu, *International Law and the Protection of People at Sea* (2018); F. De Vittor and M. Starita, 'Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters', in *The Italian Yearbook of International Law Online* (2019).

19 For reasons of space, and considering the human rights focus of this article, law of the sea obligations with regard to people rescued at sea will be addressed in another article.

Section 2 of this article provides an overview of the interim measures issued by the Court of Strasbourg in cases of lengthy confinement at sea, following port closures and refusals of a place of safety. Section 3 examines whether the containment onboard rescuing vessels for several days might amount to a de facto deprivation of liberty in breach of Article 5 of the European Convention on Human Rights (ECHR). Section 4 discusses to what extent the conditions onboard, combined with the precarious physical and mental health of rescued migrants, reach the threshold of inhuman and degrading treatment under Article 3 of the ECHR. Lastly, prior to the closing remarks, Section 5 briefly contests the recent 'practical and effective' approach of the Court in cases involving migrants and asylum-seekers, especially in a situation of 'crisis' and 'mass influx'.

2 No Place of Safety: An Overview of the European Court of Human Rights' Interim Measures on Rescuing Vessels' Standoffs

This section intends to examine the interim measures issued by the Court of Strasbourg in cases of lengthy standoffs at sea. Under Rule 39 of the Rules of the ECtHR,

> The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to para. 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.[20]

Interim measures are thus indicated either to the applicant or to the respondent State, at any stage of the proceeding, with the purpose of ensuring effectiveness of human rights and their preservation, while waiting for the resolution of the case before the Court.[21] Interim measures can require States either to take positive measures, such as providing protection to the victim, or more frequently negative measures, such as requiring a State to refrain from taking action that might, for example, endanger the life of the victim or facilitate her *refoulement*.[22] Overall, these measures have been defined as 'a unique tool that can help the Court impact an ongoing situation as this unravels, rather than provide *ex post facto* redress'.[23]

In *Mamatkulov and Askarov* v. *Turkey*,[24] the ECtHR has cemented the legally binding nature of interim measures by virtue of Article 34 of the Convention whereby States must refrain from any act or omission that might undermine the effective exercise of the right of individual petition.[25] The requirements that the Court has elaborated in its case law to grant interim measures concern the existence of a threat of irreparable harm of a serious nature; the imminence of the harm; and the presence of an arguable case that removal/extradition would violate, prima facie, the ECHR.[26] Therefore, used to prevent harmful violations that could not be repaired by a decision on the merits,[27] 'the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable'.[28] Persons fleeing war, persecution, and poverty, enduring any sort of abuses and violence in Libyan detention camps, surviving long journeys onboard unseaworthy boats, experiencing situations of distress at sea, and assisting, as powerless spectators, the death of their fellows and family members are most likely in a vulnerable condition.[29] The question is whether their continued stay at sea onboard unequipped assisting vessels for several weeks might entail a further compression of their fundamental rights and a serious deterioration of their mental integrity, with a potential risk for their own life and the life of those with whom they share such draining journeys.

Comparing the first cases addressed by the Court of Strasbourg regarding port closure and migrants' standoffs in 2019, with those occurring during the pandemic

20 European Court of Human Rights, 'Rules of the Court'. *Registry of the Court* (October 2022), http://echr.coe.int/Documents/Rules_Court_ENG.pdf.

21 V. Stefanovska, 'The Significance of Interim Measures of the European Court of Human Rights in Extradition Proceedings', *Conference Proceedings of the Scientific International Conference "Towards a Better Future: The Rule of Law, Democracy and Polycentric Development"*, at 338 (2018).

22 H. Legeay, C. Ferstman, & D. Rodriguez-Pinzon, 'Panel I: The Use of Interim Measures by the Committee against Torture: Towards a Comprehensive Instrument for the Protection of Victims and Witnesses in Torture Cases', 20(4) *Human Rights Brief* 9, at 9 (2013), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1888&context=hrbrief.

23 K. Dzehtsiarou and V.P. Tzevelekos, 'Interim Measures: Are Some Opportunities Worth Missing?', 2 *European Convention on Human Rights Law Review* 1, at 2 (2021).

24 *Mamatkulov and Askarov* v. *Turkey*, ECtHR, App nos. 46827/99 and 46951/99 (2005).

25 O. de Schutter, 'The Binding Character of the Provisional Measures Adopted by the European Court of Human Rights', 7 *International Law FORUM du droit international* 16, at 18 (2005); F. de Weck, 'Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture', at 68 (Brill 2017).

26 European Legal Network on Asylum (ELENA) and European Council on Refugees and Exiles (ECRE). 'Research on ECHR Rule 39 Interim Measures' (April 2012), at 14, www.ecre.org/wp-content/uploads/2016/05/RULE-39-RESEARCH_FINAL.pdf.

27 H. Keller and M. Cedric, 'Interim Measures Compared: Use of Interim Measures by the UN Human Rights Committee and the European Court of Human Rights', 73 *ZaöRV* 325, at 326-7 (2013), www.zaoerv.de/73_2013/73_2013_3_a_325_372.pdf.

28 ELENA/ECRE 2012, above n. 26, at 7.

29 In *M.S.S.* v. *Belgium and Greece*, the ECtHR describes asylum-seekers *as* 'a particularly underprivileged and vulnerable population group in need of special protection', para. 263. *See also Tarakhel* v. *Switzerland (GC)* App. n. 29217/12 (2014), para. 9; *A.S.* v. *Switzerland*, App no. 39350/13 (30 June 2015) para. 29. Costello and Hancox speak of a vulnerability of asylum-seekers *to* the State. *See* C. Costello and E. Hancox, 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee', in V. Chetail, P. de Bruycker & F. Maiani (eds.), *Reforming the Common European Asylum System. The New European Refugee Law* (2016), at 442-3.

doi: 10.5553/ELR.000232

in 2020, it is possible to note how the Court seems to concede an even ampler margin of appreciation to governments in managing their external borders. For example, in *B.G. and Others* v. *Italy* (January 2019), in its reply to a request for interim measures by the passengers of the NGO vessel Sea-Watch 3, the Court does not indicate disembarkation, but nonetheless requests the Government of Italy, under Rule 39, to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary until further notice. As far as the 15 unaccompanied minors are concerned, the government is requested to provide adequate legal assistance.[30]
In *Rackete and Others* v. *Italy* (June 2019), the Court decides not to indicate to the Italian government the interim measures requested by the applicants, which would have required that they be allowed to disembark in Italy from the ship Sea-Watch 3 after 10 days at sea off the coasts of Lampedusa.[31] The Court also indicates to the Italian government that it could rely on Italian authorities to continue to provide all necessary assistance to those persons onboard Sea-Watch 3 who are in a vulnerable situation on account of their age or state of health. Considering that interim measures are only granted in a very limited number of cases concerning an imminent risk of irreparable harm, the decision of the Court in *Rackete and Others* v. *Italy* should not be read as full endorsement of the 'closed ports' policy of the Italian government. Indeed, despite refusing to request the disembarkation of all traumatised passengers, there is, nevertheless, an acknowledgement by the Court of the critical conditions onboard while conceding leeway to governments in deciding how to offer adequate care to those in a vulnerable position.
Again, in the more recent cases of denial of a place of safety in the context of the COVID-19 pandemic, the Court does not consider the condition of migrants huddled up onboard of a rescuing ship for several days sufficiently serious to require immediate disembarkation. But it goes further, as the *Etienne* case shows. Etienne Maersk is a Danish commercial vessel which, in August 2020, rescued, in Maltese SAR waters,[32] 27 migrants including minors and a pregnant woman. Following their standoff at sea for a month with no State offering a port of safety, the ECtHR replies to the request of the applicants without indicating to the Government of Malta, under Rule 39, any interim measure (*O.O. and O.A.* v. *Malta*). It concludes that 'bearing in mind that the Maltese authorities do not intend to take any active action for the applicants' return to Libya, the current situation on the vessel is one where there is no risk of imminent and irreparable harm, or danger to life or health of the applicants'.[33]

Therefore, the abstract nature of interim measures and the seemingly hands-off approach of the Court in those cases of rescue and standoff at sea is grounded in the lack of imminent risk of removal to Libya, as if *refoulement* were the only cause of concern in these types of cases.[34] Accordingly, it finds no immediate danger for the migrants' life and health as to request disembarkation. It is hence to be asked what the acceptable threshold of suffering is to warrant the intervention of both State authorities and potentially the Court. Therefore, shifting focus from *non-refoulement* (and the foreseeable risk in case of pushback), the next section examines the actual conditions of migrants compelled to long standoffs at sea with no possibility both to land in the closest safe port and to rapidly access identification and asylum procedures, thereby investigating whether these practices can configure inhuman and degrading treatments and de facto deprivation of personal liberty under Articles 3 and 5 of the ECHR.

3 Prolonged Containment of Migrants at Sea: A Case of de facto Deprivation of Liberty?

In order for jurisdiction to arise under Article 1 of the ECHR, a State has to exercise effective control over the victims and the act that causes the human rights violation, and when performing such act, the authorities of the State have to know, or should have known, 'of the existence of a situation of real and imminent danger for the life of a specific individual or group of individuals, and fail to take the necessary measures within their area of responsibility that could reasonably be expected to prevent or to avoid that danger'.[35]
Once a State is aware of the distress situation, establishes (even visual) contact with the vessel or persons in danger and exercises its public powers by means of a territorially based decision to activate/non-activate/delay rescue services or close its ports, 'it starts at the same time to exercise authority and control over these persons, sufficient to trigger the application of the [relevant human rights treaty]'.[36] Therefore, even in the absence of direct physical force and contact, State's control can still be deemed 'effective' when it determines (even at a distance through, for instance, the use of helicopters or drones or the order not to enter their territo-

30 ECtHR, *B. G. and Others* v. *Italy*, App no. 5604/19 (29 January 2019).
31 ECtHR, *Rackete and Others* v. *Italy*, App no. 32969/19 (26 June 2019).
32 For a report on the role of private vessels engaged in rescue operations, *see* J.P. Gauci, *When Merchant Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations*, *BIICL* (2020).
33 ECtHR, *O.O. and O.A.* v. *Malta*, App no. 36549/20 (25 August 2020).
34 Rome's civil court ruling n. 229117/2019, which affirms that migrants falling under Italian jurisdiction have a *right to enter the Italian territory to lodge an asylum claim* in accordance with Art. 10(3) of the Italian Constitution (emphasis added).
35 Inter-American Court of Human Rights (IACtHR), *The Environment and Human Rights*, Advisory Opinion, OC-23/17 (15 November 2017), para. 120.
36 E. Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm', 21 *German Law Journal*, at 431 (2020).

rial waters/ports) the course of events bringing the persons in question under its jurisdiction.[37]

While the location (either territorial or extraterritorial) in which the sovereign authority nexus is established is immaterial in determining jurisdiction, what is instead needed is that 'effective control' is actually expressed, whether through physical contact and use of force, by means of the execution of a policy plan (it being a broader military, security or rescue/non-rescue/non-entrée operative framework), or via the enforcement of a piece of legislation or a court decision, which influences a certain situation and the position of those subjected to an exercise of public powers either domestically or outside territorial borders.[38]

The criteria developed by the Strasbourg organs with regard to the provision of adequate reception and dignified detention conditions have been primarily applied to the cases of both people deprived of their liberty and migrants/asylum-seekers physically present within the territory of the concerned States.[39] However, the ECHR also has an extraterritorial scope,[40] and breaches of Article 5, concerning the illegitimate deprivation of personal liberty, could be established also in cases of detention at sea of people placed under the respondent State's 'effective control'.[41] Therefore, the ECHR is not only applicable to people onboard rescuing vessels which are within the territorial waters of European coastal States, but it also applies on the high seas with regard to persons whose delay in disembarkation and prolonged permanence aboard a vessel in dire conditions is due to a 'no-entry' *order*, repeatedly issued by the authorities of a coastal State under whose remote surveillance they are placed.

The policy of 'closed ports' preventing people from disembarkation in Europe for several days has not only involved NGO rescuing boats on the high seas, but also coastguard assets, such as the Italian vessels *Diciotti* and *Gregoretti* moored in Italian territorial waters for a long time.[42] In these last instances, the indication of a place of safety by Italian authorities was de facto denied because of the lack of an agreement at the EU level on the distribution of the passengers after their landing at the port of Catania.

With regard to the compatibility of prolonged confinement of migrants on a rescuing vessel with Article 5 of the ECHR – whereby 'everyone has the right to liberty and security of person' – the Commissioner for Human Rights of the Council of Europe has affirmed that:

> human rights concerns may also arise from [delays in the disembarkation of migrants] when they result in the *de facto* deprivation of liberty of rescued persons by blocking their disembarkation from rescue vessels. When confinement on board is the result of State action, this may give rise to questions over the lawfulness of deprivation of liberty, and the existence of sufficient safeguards, such as judicial review under Article 5 of the Convention.[43]

As rescuing vessels have been used as a sort of *unconventional transit area* for migrants waiting for their disembarkation and admission, the case law of the ECtHR on transit zones can be of some assistance in making a few observations. In *Ilias and Ahmed* v. *Hungary*,[44] the Grand Chambre lists the following factors to determine whether 'confinement of foreigners in airport transit zones and reception centres' can be defined as deprivation of liberty:

a. the applicants' individual situation and their choices;
b. the applicable legal regime of the respective country and its purpose;
c. the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by the applicants pending the events; and
d. the nature and degree of the actual restrictions imposed on or experienced by the applicants.[45]

In *Ilias* v. *Hungary*, the Court held that confinement in the transit zone was not detention as it is an open zone

37 *Hirsi Jamaa and Others* v. *Italy*, App no. 27765/09 (23 February 2012), para. 180. *See also Women on Waves* v. *Portugal*, App no. 31276/05 (3 February 2009). On contactless jurisdiction, *see* M. Giuffré and V. Moreno Lax, 'The Raise of Consensual Containment: From "Contactless Control" to 'Contactless Responsibility' for Migratory Flows', in S. Juss (ed.), *The Research Handbook on International Refugee Law* (September 2019).

38 For a detailed examination of extraterritorial jurisdiction, *see* M. Giuffré, 'A Functional-Impact Model of Jurisdiction: Extraterritoriality before the European Court of Human Rights', *Questions of International Law* (2021), at 53-80.

39 *See* L. Tsourdi, 'EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?', in V. Chetail, P. de Bruycker & F. Maiani (eds.), *Reforming the Common European Asylum System* (2016).

40 On the extraterritorial application of the ECHR to migrants at sea, *see*, inter alia, *Hirsi Jamaa and Others* v. *Italy*, above n. 37; and *Women on Waves* v. *Portugal*, above n. 37. *See also* M. Giuffré, 'Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others* v. *Italy*', 61(2) *International and Comparative Law Quarterly* (2012), at 731-747.

41 *See, e.g.*, *Vassis and Others* v. *France*, App no. 62736/09 (27 June 2013); *Medvedyev and Others* v. *France* [GC], App no. 3394/03, ECHR 2010; *Rigopoulos* v. *Spain* (dec.), App no. 37388/97 (12 January 1999).

42 The legal tools used to prevent access to Italian ports have been the directives issues by the Ministry of the Interior (Directive 18 March 2019; Directive 4 April 2019; Directive 15 April 2019; Directive 15 May 2019) and then the so-called 'Decreto sicurezza-bis' (Law-Decree 14 June 2019 no 53, converted into law on 8 August 2019, no 77). For a thorough examination of the 'Security Decrees', *see* G. Cataldi, 'Euro-Mediterranean Experiences on Management of Migration Governance', 9 *EuroMediterranean Journal of International Law and International Relations* (2021), https://revistas.uca.es/index.php/paetsei/article/view/8099/8054; and S. Zirulia, 'Decreto Sicurezza-bis: novità e profili critici', *Diritto Penale Contemporaneo* (2019). https://archiviodpc.dirittopenaleuomo.org/d/6738-decreto-sicurezza-bis-novita-e-profili-critici.

43 Council of Europe Commissioner for Human Rights, *Lives Saved. Rights Protected. Bridging the Protection Gap for Refugees and Migrants in the Mediterranean*, at 31 (2019), https://archiviodpc.dirittopenaleuomo.org/upload/9457-mediterranean-paper-en-web.pdf.pdf.

44 ECtHR, *Ilias and Ahmed* v. *Hungary* (GC), App no. 47287/15 (21 November 2019). For an examination of the case, *see* V. Stoyanova, 'The Grand Chamber Judgment in *Ilias and Ahmed* v. *Hungary*: Immigration Detention and How the Ground Beneath Our Feet Continues to Erode', *Strasbourg Observers*, https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/.

45 *Ilias and Ahmed* v. *Hungary*, above n. 44, para. 217. *See also* ECtHR, *Z.A. and Others* v. *Russia*, App nos. 61411/15, 61420/15, 61427/15, 3028/16 (28 March 2017), para. 145.

doi: 10.5553/ELR.000232

that migrants can voluntarily leave to go back to Serbia. Likewise, in several other cases, the Court has accepted that containment of migrants on the Greek islands in semi-open facilities does not amount to unlawful detention under Article 5(1) and does not infringe Article 3.[46] In this respect, can rescuing vessels be labelled as open facilities? The shipwrecked would have concretely no possibility to safely leave the ship and lawfully enter a European country to have their case examined and potentially seek asylum – jumping overboard being their only option.

People held aboard vessels would be employed as a leverage to exercise pressure on the EU to reach an agreement with other Member States on migrants' relocation. Although deprivation of liberty for immigration-related purposes is permissible in certain circumstances (for example, to verify the aliens' right to enter), migrants confined on rescuing boats would be in a condition of *de facto deprivation of liberty*, which is arbitrarily justified on the basis of their status rather than a detention order.[47] The duration of their confinement would not be predictable, the statutory basis for their de facto deprivation of liberty would be uncertain as the underlying domestic rules are not sufficiently precise and foreseeable[48] and they would have no chance to access proceedings for challenging the lawfulness of their pre-admittance de facto detention. Therefore, being unable to enjoy procedural protection pending the event, they would be subjected to a measure of actual restriction with no individualised assessment[49] as to whether such de facto deprivation of liberty would be reasonable,[50] necessary[51] and proportionate.[52]

Protection of fundamental rights must always be 'practical and effective' rather than 'theoretical and illusory'.[53] As emphasised by the Court in *Khlaifia* – a case concerning detention of migrants aboard a vessel moored at the port of Palermo for 10 days – the aim of the ECHR is to 'protect […] human rights in a practical and effective manner'.[54] Accordingly, it affirms that no one should be deprived of his or her liberty in an arbitrary fashion, even in the context of a migration crisis.[55] Following the *Khlaifia* requirements, in the various cases of containment of migrants onboard military, NGO or merchant vessels, rescued persons were not the recipients of clear detention orders and there was no legal basis for their administrative detention. In some cases, for instance, the Ministry of the Interior rather justified their deprivation of personal liberty as a measure to protect Italian borders.

As a consequence, in the *Diciotti* case, the Italian Tribunal of Ministries, in January 2019, started a procedure requesting the Senate the authorisation to proceed against the Ministry of the Interior, Mr Salvini, for having deprived 177 migrants, including children, of their personal liberty.[56] They were indeed illegitimately forced to remain onboard the ship moored at the port of Catania for a long period of time.[57] Despite the Senate not conceding the authorisation to proceed against the Ministry, the case is particularly important as, for the first time, the judiciary acknowledged the unlawful compression of personal liberty onboard Italian vessels rescuing migrants at sea.

In the *Gregoretti* case, the Tribunal of Ministries held that Italy had an obligation to transfer the shipwrecked to a place of safety, and unlike the *Diciotti* case, the Italian Senate conceded the authorisation to proceed against the former Ministry of the Interior. Mr Salvini failed indeed to indicate a place of safety for 131 people rescued by the coastguard naval asset *Gregoretti* in July 2019, thereby constraining them onboard and limiting their freedom of movement.[58]

46 *See, e.g., J.R. and Others* v. *Greece*, App no. 22696/16 (25 January 2018); *O.S.A. and Others* v. *Greece*, App no. 39065/16 (21 March 2019); *Kaak and Others* v. *Greece*, App no. 34215/16 (3 October 2019).

47 With regard to the *Diciotti* case, *see* F. Cancellaro and S. Zirulia, *Border-Criminologies* (2018), www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/10/controlling.

48 On the general principle of legal certainty when deprivation of liberty is concerned, *see, e.g.*, the ECtHR *Khlaifia and Others* v. *Italy* (GC), App no. 16483/12 (15/12/2016), para. 92. On the concept of *'de facto deprivation of liberty'* of migrants held aboard rescuing vessels and whose disembarkation is significantly delayed, *see* F. Cancellaro, 'Dagli Hotspot ai "Porti Chiusi": Quali Rimedi per la Libertà "Sequestrata" Alla Frontiera?' *3 Diritto Penale Contemporaneo*, at 436 (2020), https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/DPC_Riv_Trim_3_2020_Cancellaro.pdf.

49 The Court has expressed reservations as to the practice of States to automatically detain asylum-seekers on dry land without an individual examination of their particular needs. *See, e.g., Thimothawes* v. *Belgium*, App no. 39061/11 (04 April 2017) para. 73; *Mahamed Jama* v. *Malta*, App no. 10290/13 (26 November 2015) para. 146.

50 The Court has confirmed that the length of the detention of foreign nationals subjected to a deportation order should not exceed that reasonably required for the purpose pursued. *See, e.g., A. and Others* v. *the United Kingdom*, App no. 3455/05, para. 164 (19 February 2009); *Yoh-Ekale Mwanje* v. *Belgium*, App no. 10486/10 (20 December 2011) para. 119.

51 On the test of necessity, with regard to Art. 5(1)(f) concerning the use of detention with a view to deportation, *see* ECtHR, *J.R. and Others* v. *Greece*, above n. 46, para. 111. The Court has paid particular attention to the specific situation of detainees, including the existence of any vulnerability that would render detention inappropriate. *See, e.g., Thimothawes* v. *Belgium*, App. no. 39061/11 (4 April 2017) paras. 73, 79-80.

52 Reasonableness, proportionality and necessity are principles that European States should adhere to also as contracting parties to the Covenant on Civil and Political Rights. *See* for example HRC, 'General Comment No 35: Article 9 (Liberty and Security of Person)' (2014) CCPR/C/GC/35, 18. On detention of migrants at sea in different geographical contexts, *see* V. Moreno-Lax, D. Ghezelbash, & N. Klein, 'Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia', *Leiden Journal of International Law*, at 715-740 (2019). With regard instead to the Court of Strasbourg and the principle of proportionality in cases of detention of aliens, *see, e.g., Saadi* v. *UK*, App no. 13229/03 (29 January 2008) paras. 68-74.

53 *See Hirsi Jamaa and Others* v. *Italy*, above n. 37, para. 175.

54 *Khlaifia and Others* v. *Italy*, above n. 48, para. 64.

55 *Ibid.*, para. 106.

56 *See* Tribunal of Catania, sez. Reati Ministeriali (23 January 2019), www.senato.it/Web/AutorizzazioniAProcedere.nsf/dfbec5c17bce92adc1257be500450dad/4c5c5e58bdf39bbac125838c00431f69/$FILE/Doc.%20IV-bis,%20n.%201.pdf. *See also* F. Cancellaro and S. Zirulia, 'Caso Diciotti: Il Tribunale dei Ministri Qualifica le Condotte del Ministro Salvini come Sequestro di Persona Aggravato e Trasmette al Senato la Domanda di Autorizzazione a Procedere', *Sistema Penale Contemporaneo* (28 January 2019).

57 According to the Tribunal of Ministries, the Ministry of the Interior, *'abusando dei suoi poteri (aveva) privato della libertà personale 177 migranti di varie nazionalità giunti al porto di Catania a bordo dell'unità navale di soccorso U. Diciotti della Guardia Costiera Italiana'*.

58 The Tribunal of Ministries held that *'l'omessa indicazione del 'place of safety' da parte del Dipartimento Immigrazione, dietro precise direttive del minis-*

To be more precise, being coercively forced to spend several days in a confined space at sea, whether onboard State vessels or NGO rescuing boats, implies a total annulment, rather than a mere limitation, of the freedom of movement.[59] For instance, in the *Open Arms* case concerning the vessel of the NGO *Proactiva*, which rescued more than a hundred persons in August 2019, the Italian Judge of Preliminary Investigations (GIP) explicitly recognised that the shipwrecked were subject to an 'illegal and deliberate deprivation of the personal liberty of rescued migrants, compelled onboard for a considerable lapse of time against their will […]',[60] in analogy with the *Diciotti* case.

These measures of de facto deprivation of personal liberty do not find a legal basis in the Italian legal system as they are not executed in accordance with the norms on the administrative detention of foreigners and can therefore amount to a violation of Article 5 of the ECHR. Moreover, as clarified by Cancellaro, while the shipwrecked formally had the possibility to challenge the ministerial order impeding their landing at the Italian ports, a remedy is considered effective under Article 5(4) of the ECHR only if the applicants can be immediately released upon determination of their unlawful detention.[61] However, as the *Open Arms* case demonstrates, despite the Administrative Tribunal of Lazio issuing an interim measure concerning their disembarkation, the rescuing vessel was forced at sea for another week because of the denial of a place of safety by the Ministry of the Interior. Additionally, it cannot be neglected that the difficulty for lawyers to reach people on the vessel made access to a remedy, in practice, not effective.

4 Prolonged Containment at Sea as Inhuman and Degrading Treatment

In most cases, the shipwrecked rescued in the Mediterranean are either migrants who have suffered atrocious treatment on their way to Europe, especially in Libyan detention camps, or asylum-seekers fleeing war or persecution in their home countries. Their high level of anxiety and uncertainty over their future, the risk of removal to Libya, past experiences of torture and a conflict-ridden relationship with other rescued people with whom they share confined and overcrowded spaces, in a status of promiscuity, inadequate sanitary facilities, limited possibility of movement, dearth of supplies and critical unhygienic conditions make their despair so unbearable that they often see suicide as the only way to escape the situation.[62] Such exacerbation of the conditions onboard also proves dangerous for the crew as tensions can suddenly escalate, and suicide threats force the rescuers to maintain constant vigil on the shipwrecked.[63] The increasing deterioration of the physical and mental health of the passengers is testified not only by numerous suicide attempts[64] but also by several emergency evacuations.

Despite the inevitable hurdles faced by people who are subjected to measures of 'contained mobility' at sea,[65] they should not be deprived of the benefit of the rights guaranteed by the ECHR. For instance, the reception conditions of asylum-seekers have been scrupulously gauged by the ECtHR,[66] with special attention to the rights of unaccompanied minors.[67] In the landmark *MSS* v. *Greece and Belgium* case, reception conditions were considered degrading under Article 3 as the applicant lived in Greece in extreme poverty without receiving any subsistence, accommodation or access to sanitary facilities. Due consideration should be given, according to the Court, to the vulnerability of the applicants because of the traumatic experiences they have endured before and during their journey to Europe.[68]

Likewise, in a case of removal of asylum-seekers to Italy (*Tarakhel* v. *Switzerland*), the Court, considering the applicants' inherent vulnerability, held that the reception conditions of an Afghan couple with six children gave rise to an issue under Article 3 of the Convention as the possibility that asylum-seekers were left in Italy without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, was not unfounded.[69] The conditions of confinement and its duration are both elements taken into account by the ECtHR in assessing whether immi-

tro dell'Interno, ha determinato una situazione di costrizione a bordo, con limitazione della libertà di movimento dei migranti'.

59 On the difference between Art. 5 and Art. 2 Protocol 4 of the ECHR, *see* F. Viganò, 'Art. 2 Prot. n. 4 Cedu: Libertà di circolazone', in G. Ubertis and F. Viganò (eds.), *Corte di Strasburgo e Giustizia Penale* (2016) at 353-59.

60 Translation by the author of the statement of the Italian GIP who described the Open Arms case as an '*illecita e consapevole privazione della libertà personale dei migranti soccorsi, costretti a bordo per un apprezzabile lasso di tempo contro la loro volontà*'. *See* Open (31 August 2019), www.open.online/2019/08/31/salvini-smentito-dal-giudice-ecco-perche-litalia-deve-accogliere-i-migranti/.

61 Cancellaro, above n. 48, at 15.

62 SeaEye, 'Attempted Suicide Aboard the Alan Kurdi After Ten Days of Blockade', https://sea-eye.org/en/attempted-suicide-aboard-the-alan-kurdi-after-ten-days-of-blockade/.

63 Reuters, 'Ship Captain Docked in Italy After Migrant Suicide Fears' (10 June 2019), www.thenationalnews.com/world/europe/ship-captain-docked-in-italy-after-migrant-suicide-fears-1.881128.

64 The Maritime Executive, 'Rescue Vessel Declares Emergency After Six Migrants Attempt Suicide', www.maritime-executive.com/article/rescue-vessel-declares-emergency-after-six-migrants-attempt-suicide. *See also* Procura della Repubblica presso il Tribunale di Agrigento, Decreto di sequestro preventivo di urgenza, at 10 (20 August 2019), www.asgi.it/wp-content/uploads/2019/08/2019_8_20_Agrigento_Open_Arms.pdf.

65 S. Carrera and R. Cortinovis, 'Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean: Sailing Away from Responsibility?', *CEPS Papers in Liberty and Security*, at 5 (2019).

66 *M.S.S.* v. *Belgium and Greece*, App no. 30696/09 (21 January 2011) para. 251; ECtHR, *N.H. and Others* v. *France*, App nos. 28820/13, 75547/13 and 13114/15 (02 October 2020) paras. 184-86.

67 *See, e.g., Khan* v. *France*, App no. 12267/16 (28 February 2019) para. 11; *SH.D. and Others* v. *Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, App no. 14165/16 (13 June 2019); *M.D.* v. *France*, App no. 50376/13 (10 January 2020); *Rahimi* v. *Greece*, App no. 8687/08 (5 July 2011) paras. 87-94.

68 *M.S.S.* v. *Belgium* and *Greece*, above n 66, paras. 232-238.

69 *Tarakhel* v. *Switzerland*, App no. 29217/12 (4 November 2014) paras. 120 and 122.

doi: 10.5553/ELR.000232

gration detention can raise issues under Article 3 of the Convention, especially in respect of accompanied children,[70] unaccompanied children[71] and adults with specific health needs,[72] including pregnant women.[73]
Article 3 of the Convention imposes on the authorities a positive obligation to guarantee detention conditions which are compatible with the principle of human dignity. Moreover, the modalities of execution of the measure must not subject the person concerned to distress or hardship of an intensity which exceeds the inevitable level of suffering inherent in detention, and the health and well-being of the person must be adequately ensured.[74]
Despite the inevitable hurdles faced by people who are subjected to measures of 'contained mobility' at sea,[75] they should not be deprived of the benefit of the rights guaranteed by the ECHR. Subjecting rescued people to hardship exceeding the unavoidable level of suffering inherent in situations of de facto deprivation of liberty, as well as State unwillingness to offer prompt dignified solutions and appropriate physical and psychological care to so many persons in need of humanitarian assistance, and in most cases in need of international protection, amounts to a serious breach of the prohibition of inhuman and degrading treatment under international law.[76]
Regarding the assessment of the severity of security measures applied to suspected terrorists, the Court has developed three criteria relative to the threshold of degrading treatment:

a. the conditions of detention, including their duration and stringency;
b. the continued relevance of the goal pursued by a certain measure; and
c. the impact of these measures on the personality of a detainee and on his/her physical and mental health.[77]

There is no reason why this trichotomy compositing the 'degrading treatment' threshold with regard to inland detainees should not also be applied to distressed migrants, who are not suspected of any crimes, but nevertheless are the addressees of special measures of remote surveillance and control, held in sub-standard conditions at sea, as if their presence in the territory of a European State could irremediably endanger its security and public safety, thus involving a sense of debasement and humiliation. Where States, with knowledge of both the circumstances and the potential unlawful consequences of their conduct, force shipwrecked on unfitting and overcrowded rescuing vessels for prolonged periods of time where they are de facto immobilised (with no concrete possibility to safely leave the boat), the ECHR is at risk of being breached. And where such overly stringent measures of containment at sea – pursuing the goal of keeping migrant people outside the territorial borders of a certain State – have an impact on the passengers' physical and mental health augmenting their sense of powerlessness, frustration and anguish for the uncertainty of their future (including the fear of being handed over to the agents of their past persecution and suffering), the risk of infringement of the Convention rights is even greater, thereby warranting the urgent intervention of either national or international judges.

5 A New 'Practical and Realistic Approach' Towards Migrants and Asylum-Seekers?

Numerous cases concerning pushbacks of migrants at the Southern and Eastern border of Europe, detention in transit zones, rescue, pullbacks and confinement at sea are currently pending before the Court of Strasbourg. Assessing the role of the Court as a guarantor of the fundamental rights of migrants and asylum-seekers in Europe is therefore even more pressing.
The Court's decisions in the last decade since the Arab Spring, despite the language of 'crisis' used to describe the current trend of European migration, have been more migrant-protective than its initial judgments on detention of newcomers.[78] Crisis discourses have had more influence when assessing, instead, the conditions of migrants' detention facilities, justifying, for instance, exclusion of violations of Article 3.[79]
Nevertheless, something has significantly changed over the last years to the point of wondering whether a new well-established approach of the Court heavily leaning towards recognising State sovereignty over migrants' liberty interest is on the rise. Indeed, in a substantive

70 *See Popov* v. *France*, App nos. 39472/07 and 39474/07 (19 January 2012) para. 22; *S.F. and Others* v. *Bulgaria*, App no. 8138/16 (7 December 2017).
71 *See Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium*, App no. 13178/03 (12 January 2007) para. 39; *Rahimi* v. *Greece*, above n. 67, paras. 87-94; *Abdullahi Elmi and Aweys Abubakar* v. *Malta*, App nos. 25794/13 and 28151/13) (22 November 2016); and *Moustahi* v. *France*, App no. 9347/14 (25 June 2020).
72 *Aden Ahmad* v. *Malta*, App no. 55352/12 (9 December 2013) para. 97; and *Yoh-Ekale Mwanje* v. *Belgium*, App no. 10486/10 (20 December 2011).
73 *Mahmundi and Others* v. *Greece*, App no. 14902/10 (31 July 2012).
74 *Torreggiani and Others* v. *Italy*, App nos. 43517/09, 46882/09, 55400/09 (8 January 2013) para. 65.
75 Carrera and Cortinovis, above n. 65, at 5.
76 For a critique of the policy of 'port closure', *see* Algostino, above n. 6.
77 *See* Y. Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR', 21(3) *Netherlands Quarterly of Human Rights* (2003), at 407.
78 *See, e.g., Saadi* v. *UK*, above n. 52. For a more migrants-protective approach, *see, e.g., Abdullahi Elmi and Aweys Abubakar* v. *Malta*, App nos. 25794/13 and 28151/13 (22 February 2017) (minor asylum-seekers); *O.M.* v. *Hungary*, App no. 9912/15 (5 October 2016) (LGBT asylum-seekers); *Abdi Mahamud* v. *Malta*, App no. 56796/13 (3 May 2016) (asylum-seekers with physical and psychological illnesses); *M.S.S.* v. *Belgium and Greece*, above n. 66 (destitute asylum-seekers). The Court has also implicitly stipulated that detention under the terms of Art. 5(1)(f) shall not be applicable to asylum-seekers. *See, e.g., S.D.* v. *Greece*, App no. 53541/07 (11 June 2009) para. 62; ECtHR, *Ahmade* v. *Greece*, App no. 50520/09 (25 September 2012) paras. 139, 143; *R.U.* v. *Greece*, App no. 2237/08 (7 June 2011) paras. 94-95.
79 *See, e.g., Khlaifia and Others* v. *Italy*, above n. 48; *J.R. and Others* v. *Greece*, above n. 46; and *Ilias and Ahmed* v. *Hungary*, above n. 44.

body of recent case law, the Court has prioritised States' prerogatives to both control borders and prevent access to their territory and to asylum, whether this is requested at the geographical frontier of a European country or through embassies and/or consular representations.[80]

Indignation as to the legal uncertainty for the fundamental rights of African migrants attempting to seek asylum in Europe has been sparked, for instance, by the Grand Chamber's conclusion in *ND and NT* v. *Spain*.[81] While it confirms that jurisdiction is fully engaged at border zones,[82] and that enough evidence had been submitted as to the summary return of the applicants as part of a State policy,[83] the Court surprisingly finds no violation of Article 4 of Protocol 4 (prohibition of collective expulsion) despite the lack of access to an individualised examination of the applicants' claims by Spanish authorities.

More specifically, the Court refers to a completely new test as not having access to theoretical means of legal entry constitutes 'own culpable conduct' for sub-Saharan African nationals attempting to cross into Spain from Morocco.[84] They are described as persons 'deliberately taking advantage of their large numbers and use force…to create a clearly disruptive situation which endangers public safety'. And even more questionable – considering it has been drafted by a member of the highest human rights court in Europe – is the attached Concurring Opinion by Judge Pejchal, which gives the impression that the protection of the Convention should be limited only to citizens from Europe as they are the only ones fulfilling their fiscal duties and paying their contributions to the Council of Europe.[85]

In punishing the victims, the Grand Chamber accents the right of States to control their borders,[86] a method already affirmed in *Ilias and Ahmed* v. *Hungary*,[87] stating that 'its approach should be practical and realistic, having regard to the present-day conditions and challenges'. In this case, the Grand Chamber departs from its previous jurisprudence concerning migrants and asylum-seekers by adding reference to the right of States to prevent 'foreigners circumventing restrictions on immigration'.[88] This argument, reiterated also in *ZA and Others* v. *Russia*,[89] fails to acknowledge that the persons attempting to irregularly cross the European border are asylum-seekers claiming protection, and that, as such, should not be penalised, as this would be at variance with Article 31 of the Refugee Convention.

At a time when far-right or populist movements proliferate, favouring a persistent criminalisation of migration, it is of paramount importance that the Court plays such a reinvigorated role. But as Barker observes, the incidents involving migrants and asylum-seekers are 'more complicated than the far-right or populist accounts allow'. People confined onboard stranded vessels 'are caught in a paradigm shift. They [are] caught in a historic movement away from humanism and human rights norms and toward resurgent nationalism and its darker undercurrents [which] are backed by the violence of the State.'[90]

The Court of Strasbourg is increasingly inclined to rely on a 'practical and realistic approach' in times of emergency, namely, 'a mass influx of asylum-seekers and migrants at the border, which [necessitates] rapidly putting in place measures to deal with what [is] clearly a crisis situation'.[91] However, despite current difficulties and States' pressure, the Court seems to have developed its own strong antibodies allowing it to return to (or consolidate) its more migrant-protective approach,[92] thereby challenging what may become a perpetual (rather than exceptional) emphasis on a migration crisis.[93]

6 Conclusion

The duty to rescue people at sea, which can be considered terminated only upon disembarkation in a *place of safety*, is a State obligation which prevails over ministerial directives and decrees closing ports to vessels transporting people saved at sea. These restrictive policies raise cogent questions also in relation to the health and well-being of stranded migrants. Indeed, the lack of appropriate actions by the State promptly denying a safe port to the shipwrecked may raise issues crossing over into Article 3 of the ECHR, Article 5 (right to personal liberty) and/or the substantive and/or procedural limb of Article 2 (right to life), when such omission results in the death of any of the passengers.[94] This article also emphasised the self-effacing role assumed by the ECtHR in those cases in which applicants have asked the Court to indicate interim measures to make the protection of shipwrecked' rights practical and effective. It did not only concede ample leeway to States in the management of their external borders, but it also failed to provide a sharp and clear answer on whether prolonged

80 *See, e.g.*, *MN and Others* v. *Belgium*, App no. 3599/18 (5 May 2020).

81 *N.D. and N.T.* v. *Spain* (GC), App nos. 8675/15 and 8697/15 (13 February 2020) para. 39. *See, e.g.*, Hakiki, '*N.D. and N.T.* v. *Spain:* Defining Strasbourg's Position on Push Backs at Land Borders?' *Strasbourg Observers*; N. Markard, 'A Hole of Unclear Dimensions: Reading *ND and NT* v. *Spain*', https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/.

82 *N.D. and N.T.* v. *Spain*, above n. 81, paras. 104-10.

83 *Ibid*., paras. 87-88.

84 *Ibid*., paras. 208 and 210. *See also* Hakiki, above n. 81.

85 *N.D. and N.T.* v. *Spain*, above n. 81, Concurring Opinion, para. 3.

86 *N.D. and N.T.* v. *Spain*, above n. 81, para. 167.

87 *Ilias and Ahmed* v. *Hungary*, above n. 44, para. 213.

88 *Ibid.*

89 *Z.A. and Others* v. *Russia*, App nos. 61411/15, 61420/15, 61427/15 and 3028/16 (21 November 2019) para. 135.

90 V. Barker, 'The Criminalization of Migration', in G. Shaffer and E. Aaronson (eds.), *Transnational Legal Ordering of Criminal Justice* (2020), at 155.

91 *Ilias and Ahmed* v. *Hungary*, above n. 44, para. 228. *See also* Stoyanova, above n. 44.

92 *See, e.g.*, *R.R.* v. *Hungary*, App. no. 36037/17 (2 March 2021).

93 A. Sinha, 'Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants', 50 *Columbia Human Rights Law Review*, at 226 (2019).

94 On lack of medical or specialist care leading to suicide, *see Coşelav* v. *Turkey*, App no. 1413/07(9 October 2012) para. 39.

doi: 10.5553/ELR.000232

confinement at sea could cause immediate, serious and irreparable harm to the shipwrecked. Overall, by requesting generic interim measures, the Court might run the risk of missing the opportunity to set higher human rights standards or be involved in ongoing crisis, wars or generalised emergencies.

Closing ports and refusing/delaying the indication of a place of safety to migrants at sea are questionable practices at least for two intertwined reasons. First, they can bring about paradoxical and tragic scenarios in which the rescued shipwrecked endlessly meander at sea waiting for a political agreement among States on their relocation, with an inevitable deterioration of both the humanitarian conditions onboard and the mental health of the passengers. Second, these policies are grounded on the short-sighted assumption that the duty to protect life is exhausted as soon as State authorities guarantee emergency care to the most vulnerable migrants,[95] thus proceeding, in some cases, to the evacuation of pregnant women, very ill persons and minors only. States bear an obligation to protect both the right to life and the right not to be subjected to inhuman and degrading treatments to *everyone* onboard.

Rescued people need immediate assistance and disembarkation on dry land in the *next place of safety*, as they all are, first and foremost, *shipwrecked* (not migrants attempting to irregularly cross the frontier)[96] and their mental health would be even more compromised should their permanence on the restrained environment of a vessel be prolonged. This principle applies to all persons rescued at sea, including male migrants travelling alone, a group traditionally neglected although they face the cumulative vulnerability of various traumatic events and migration-related contextual circumstances, such as a desperate journey, which continues even after rescue at sea; a better treatment meted out to other 'traditionally' well-recognized vulnerable sub-groups; and the ensuing deterioration of mental health linked to a sense of hopelessness, desperation and lack of self-esteem.[97]

Even though the changing context and the temporality of a state of emergency could lead to a softening of restrictive, security-driven or discriminatory measures, States must not lose sight of States' law of the sea obligations and human rights duties, including their protective orientation. Therefore, neither ministerial decrees and directives nor ordinary laws and policies can derogate from the international law obligation to disembark the shipwrecked in a place of safety closest to the area of distress. Indeed, any measures affecting the enjoyment of fundamental rights under international law (in particular, the right to life, the absolute right not to be subjected to torture, inhuman and degrading treatment and the right to personal liberty) would find an insurmountable hurdle in the pre-eminence of the individual and the core principle of human dignity.

95 For a detailed examination of the concept of 'vulnerability', *see* F. Ippolito, 'La vulnerabilità quale principio emergente nel diritto internazionale dei diritti umani?', 2 *Ars interpretandi* (2019), at 63-94.

96 For a similar argument, *see* C. Pitea and S. Zirulia, 'Friends, not foes:' qualificazione penalistica delle attività delle ONG di soccorso in mare alla luce del diritto internazionale e tipicità della condotta', *SIDIBlog* (26 July 2019).

97 J. Arsenijević et al., '"I Feel Like I Am Less Than Other People": Health-Related Vulnerabilities of Male Migrants Travelling Alone on Their Journey to Europe', 209 *Social Science & Medicine* 86 (2018), www.sciencedirect.com/science/article/pii/S0277953618302818?via%3Dihub.

doi: 10.5553/ELR.000232

Whither Criminal Cartel Enforcement in the EU?

A Law and Economics Assessment

Binit Agrawal*

Abstract

Cartels have been a persistent problem in the European internal market and despite strong enforcement, cartels continue to exist and be discovered by the Commission. This article proposes that the optimal way to deal with cartels requires the imposition of criminal sanctions against corporates and responsible executives. This is not a novel proposal in itself: the US has had criminal sanctions against cartels for over a century and the UK for a decade. But the EU's unique regulatory and governance structure requires that such a proposal must have a stronger evidentiary basis and must take into account its governance structure. This article does so by analysing statistics on cartel enforcement in the EU and the US to show that fines have not been able to sufficiently deter cartels. Second, normative reasoning based on harm theory, morality of criminalisation and public choice theory is employed to indicate that cartel activities are criminal in nature and that penalising them as such would not amount to overcriminalisation. Third, objective analysis is used to dissect the limitations of fines: when used in isolation they do not target the wrongdoers, are suboptimal and impose social costs. Fourth, it is shown that combining fines with criminal sanctions can help us redress these issues and improve the deterrence levels significantly. Lastly, principles are proposed to ensure that such a proposal considers the varying gravity of cartel activities, and is in sync with the EU's rule of law and governance structure and the Commission's leniency programme.

Keywords: cartel enforcement, competition law, criminalisation, corporate crimes, optimal deterrence.

1 Introduction

"Our competitors are our friends; our customers are the enemy"

Ringleader of a certain Cartel, quoted by OECD[1]

In this article, the author shall argue that criminal sanctions should be introduced in the European Union (EU) to effectively tackle and deter cartel activities. The word *cartel*, popularised amongst the masses through crime dramas, evokes strong public sentiments. Corporate cartels are depicted in popular media as a sign of a decadent corporate culture which has permeated our society.[2] Many believe that cartel activities constitute a public welfare crime and evil of the highest order.[3] The US Supreme Court did not mince words, when it referred to cartels as the supreme evil of antitrust.[4] The OECD too has pushed for the criminalisation of hardcore cartel activities for decades.[5] Nonetheless, the EU has continued to avoid criminal sanctions as a tool for cartel enforcement. Two reasons may explain this: first, there is a consensus at the European level that fines can have as much deterrence as imprisonment and that there does not exist sufficient justification in cartel activities to impose criminal deterrence.[6] Second, given EU's unique political structure, it is difficult to come up with a one-fits-all criminal enforcement system.[7]

As per scholars such as Milton and Sokol, criminalisation of individuals involved in cartel activities is a must, given that it has the probability of creating indefinite deterrence and providing a reasonable alternative to ever-burgeoning fines.[8] On the other hand, an equally large number of scholars argue that cartel activities should not be criminalised. Lewisch argued that criminal sanctions should only be used as an ultima ratio when other legal and institutional remedies fail to accomplish the required levels of deterrence effectively.[9] In the case of cartels, given the enforcement options

* Binit Agrawal, B.A., LLB, LLM, is a masterstudent of European Law and Economics at the Erasmus University Rotterdam, the Netherlands.

1 OECD, *Hard Core Cartels* (2000), at 5.

2 A. Stephan, 'The Battle for Hearts and Minds: The Role of the Media in Treating Cartels as Criminal', in C. Beaton-Wells and A. Ezrachi (eds.), *Criminalising Cartels* (2011) 111, at 129.

3 T.O. Barnett, 'Criminal Enforcement of Antitrust Laws: The U.S. Model', *United States Department of Justice* (2006), www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model (last visited 17 November 2022).

4 *Verizon Communications* v. *Law Offices of Curtis Trinko* (2004) 124 S. Ct. 872.

5 OECD, above n. 1, at 5.

6 P. Whelan, *The Criminalization of European Cartel Enforcement* (2014), at 44-78.

7 *Id.*, at 260-88.

8 E. Milton, 'Putting the Price-Fixers in Prison: The Case for the Criminalisation of EC Competition Law', 5 *Hibernian Law Journal* 159 (2005); D. Sokol, 'Reinvigorating Criminal Antitrust?', 60 *William & Mary Law Review* 1545 (2019).

9 P. Lewisch, 'Enforcement of Antitrust Law: The Way from Criminal Individual Punishment to Semi-Penal Sanctions in Austria', in K.J. Cseres, M.P.

doi: 10.5553/ELR.000239

available, Lewisch found it unnecessary to advocate individual criminal sanctions. Another set of scholars has relied on moral grounds to argue that cartels deserve criminal punishment, as they involve a high level of deceit.[10] They are countered by others who believe that the introduction of subjective morality in antitrust will undermine its rational basis in law and economics.[11]

This article seeks to present a perspective on this debate by making use of economic analysis and available statistics. Tools including the economic theory of harm, cost-benefit analysis of deterrence, Becker's optimal deterrence theory, normative analysis of sanctions and comparative analysis of enforcement statistics, primarily from the EU and the US, are utilised. The big question that this article addresses is whether the current cartel enforcement mechanism in the EU, based on ever-increasing amounts of corporate fines, is sufficient and justified, or must we introduce a criminal enforcement mechanism to supplement the deterrence framework? The allied questions that are dealt with in the article are: *first*, whether criminal sanction of individuals involved in cartel activities is theoretically and morally justified; *second*, how will criminal sanctions improve the deterrence effect; and *third*, how do we structure a possible criminal enforcement model and what basic principles must be followed?

In pursuance of these questions, the article first studies the divergent approaches to criminalisation of the cartel offence taken by various jurisdictions. The focus is on the law as it is in the US, the UK and the EU. This section also defines what is meant by the words *cartel activities* and *criminal liability* in the context of this article.

In Section 3, data on cartel busting in the EU and the US are surveyed. This survey aims to understand if there has been sufficient deterrence through the fine-based model used in the EU. The fact that new cartels are being discovered frequently even as the size of fines keeps on growing is often highlighted as proof that the current model may not be the optimal one.[12] This article digs deeper into this argument by investigating three statistics: number of cartel decisions adopted by the European Commission; the cumulative amount of the fines being imposed; and number of cartel investigations in the US. This analysis forms the basis of a claim that fines have not been creating optimal deterrence.

Section 4 tackles the question of whether cartel activities are a crime. It involves dealing with the question of what is a crime and when are criminal sanctions truly justified. After all, overcriminalisation is never a good option, and if there is doubt as to the necessity of criminal sanctions, it is better not to criminalise the activity.[13] In this section, making use of theories on criminal justice, the article shows that cartels constitute a criminal offence because they cause harm to the society at large, there is public opinion in favour of criminalisation, and there is sufficient moral reasoning to justify criminal sanctions.

Section 5 provides objective justifications for criminalisation. This is done by showing that exorbitant fines are not ideal deterrence tools as they do not target the actual wrongdoers, can never be optimum and are socially undesirable. This section further shows that criminal sanctions can help us stop the fines juggernaut and instead implement a less costly and effective tool of deterrence.

Section 6 grapples with the challenges which can arise with criminalisation and proposes three basic principles which must be followed in such a process. It first highlights various types of cartel activities which must be dealt with through different measures. Then it stresses the importance of procedural fairness and the need to create a criminal cartel enforcement system which is independent of the European Commission. Lastly, it discusses the importance of a leniency programme which is interlinked with leniency applications to the Commission.

2 A Divergence the Size of the Atlantic: Approaches to Cartel Enforcement

European countries and the US, both at the forefront of cartel enforcement, have a surprisingly major divergence when it comes to the use of criminal sanctions. While the EU relies primarily on a combination of fines, its leniency programme, and a whistle-blower tool to discover and punish cartels,[14] in the US, participating in cartel activities constitutes a major antitrust crime and has been so for almost a century. Section 1 of the Sherman Act, which was enacted as early as 1890, outlaws 'every contract, combination, or conspiracy in restraint of trade,' engaging in which may result in both fines and imprisonment up to 10 years (increased in 2004 from 3 years). In *Standard Oil* v. *United States* (1911), this was interpreted by the US Supreme Court to mean 'unreasonable' restraint. There are both historical and practical reasons behind the American reliance on criminal sanctions. Historically, the American public had an image of 'robber barons', which made cartel busting a very popular electoral demand, leading to imposition of criminal sanctions (which is also addressed in this arti-

Schinkel & F.O.W. Vogelaar (eds.), *Criminalization of Competition Law Enforcement* (2006) 290, at 303.

10 A. Macculloch, 'The Cartel Offence: Defining an Appropriate Moral Space', 8(1) *European Competition Journal* 73, at 93 (2012).

11 B. Fisse, 'The Proposed Australian Cartel Offence: The Problematic and Unnecessary Element of Dishonesty', *Sydney Law School Legal Studies Research Paper No 06/44* 2006.

12 K.J. Cseres, M.P. Schinkel & F.O.W. Vogelaar,' Law and Economics of Criminal Antitrust Enforcement: An Introduction', in K.J. Cseres, M.P. Schinkel & F.O.W. Vogelaar (eds.), *Criminalization of Competition Law Enforcement* (2006) 1, at 1-2.

13 P.J. Larkin, 'Public Choice Theory and Overcriminalization', 36(2) *Harvard Journal of Law & Public Policy* 715, at 760 (2013); D. Kim and I. Kim, 'Trade-offs in the Allocation of Prosecution Resources: An Opportunity Cost of Overcriminalization', 47(16) *Applied Economics* 1652, at 1669 (2015).

14 European Commission, 'Cartels Overview', https://competition-policy.ec.europa.eu/cartels/cartels-overview_en (last visited 29 January 2023).

cle in Section 4).[15] On a practical note, the US Antitrust Division, after extensive interviews and research has found, 'international cartels that operated profitably and illegally in Europe, Asia and elsewhere around the world did not expand their collusion to the United States solely because the executives decided it was not worth the risk of going to jail,' a very strong evidentiary basis to retain, enforce and even expand the criminal sanction.[16] Over 246 individuals were convicted for cartel-related crimes in the 2000-2010 decade.[17] In the 2011-2020 decade, over 350 individuals have been charged for engaging in cartels.[18]

On the other side, in Europe however, criminalisation of individuals and firms engaged in cartels has been lacklustre.[19] In the UK, even though criminalisation of cartels has been a priority, success has been limited (as of now, only one proper conviction and one plea-deal has been achieved).[20] In the UK, *Water Tanks* cartel case (2015), executives accused of cartel crimes were acquitted by the jury, exposing the dilemma of whether there is sufficient public disapprobation against cartel activities.[21] To enhance the effectiveness of the cartel offence, the country has made amendments to the definition of the offence by removing an element of dishonesty, elevating it to a strict liability crime.[22]

In the EU criminalisation of cartels has largely been absent. Some Member States like Greece,[23] France,[24] Romania[25] and Denmark[26] do criminalise various cartel activities, but rarely use these laws to imprison executives.[27] Other states like Germany, Hungary, Poland and Italy continue to have laws criminalising bid rigging, a form of cartels wherein state resources are abused.[28] These laws, however, are rarely used to imprison individuals.[29] It can safely be concluded that the preferred position in the EU is to deter and punish cartels through fines and private enforcement,[30] and criminal charges are not prominent in the equation. Article 101(1) TFEU prohibits various cartel activities. It reads,

> all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market shall be void.

Specifically, prohibited practices include price-fixing, production controls, market sharing and collusion to exclude competitors. The European Commission (EC or the 'Commission') is the primary watchdog implementing the law, and has used large fines to deter cartels.[31] As provided under the *Fining Guidelines* (2006), a fine of up to 10% of total global turnover may be imposed on the delinquent companies.[32]

Private enforcement has also been made a possibility after the CJEU judgement in *Courage*[33] and was also made relatively easier through the Damages Directive (2014/104/EU).[34]

15 D. Baker, 'Why Is the United States So Different from the Rest of the World in Imposing Serious Criminal Sanctions on Individual Cartel Participants', 12 *Sedona Conference Journal* 301, at 304 (2011).

16 US Department of Justice, 'Cartel Enforcement in The United States (and Beyond)' (6 February 2007), www.justice.gov/atr/speech/cartel-enforcement-united-states-and-beyond#N_5_ (last visited 29 January 2023).

17 B. Howell, 'Sentencing of Antitrust Offenders: What Does the Data Show?' (2010) www.ussc.gov/sites/default/files/pdf/about/commissioners/selected-articles/Howell_Review_of_Antitrust_Sentencing_Data.pdf (last visited 17 November 2022).

18 US Department of Justice, 'Criminal Enforcement Trend Charts' (16 November 2021), www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts (last visited 17 November 2022).

19 K. Jones and F. Harrison, 'Criminal Sanctions: An Overview of EU and National Case Law', *Concurrences N° 64713* (2015), http://awa2015.concurrences.com/articles-awards/business-articles-awards/article/criminal-sanctions-an-overview-of-eu-and-national-case-law (last visited 17 November 2022).

20 In 2017, a conviction was achieved in the *Precast Concrete Drainage Products*, [2017] CE/9705/12; and between 2003-2012 only one conviction in the Marine Hose cartel case was achieved as part of a plea deal – *Regina* v. *Whittle*, [2008] EWCA Crim 2560; 'U.K. Imposes First Criminal Sentences On Cartel Participants', *Cleary Gottlieb* (2 July 2008), www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/uk-imposes-first-criminal-sentences-on-cartel-participants.pdf (last visited 17 November 2022).

21 'The future of the criminal cartel offence in the UK', *NRF* (January 2021), www.nortonrosefulbright.com/en/knowledge/publications/51dd9da8/the-future-of-the-criminal-cartel-offence-in-the-uk (last visited 17 November 2022).

22 C. Swaine, 'Criminalising Competition Law: The Struggle for Real and Effective Enforcement in Ireland and beyond within the Reality of New Globalised European Order', 14 *Irish Journal of European Law* 203 (2007).

23 Art. 44, Greek Law 3959/2011.

24 Art. L420-6, French Commercial Code 2008.

25 Art. 63, Romanian Competition Law no. 21/1996.

26 A. Christensen and K.H. Skov, 'Increased Use of Personal Fines in Denmark for Competition Law Violations', *Antitrust Alliance*, http://antitrust-alliance.org/increased-use-of-personal-fines-in-denmark-for-competition-law-violations/ (last visited 17 November 2022).

27 Peter Whelan, 'Antitrust Criminalization as a Legitimate Deterrent', in T. Tóth (ed.), *The Cambridge Handbook of Competition Law Sanctions* (2021) 101; Jones and Harrison, above n. 19.

28 Sec. 298, German Criminal Code; Art. 353, Italian Criminal Code; Art. 305, Polish Penal Code (1997); and Art. 296/B, Hungarian Criminal Code (1978).

29 Jones and Harrison, above n. 19.

30 H. Ullrich, 'Private Enforcement of the EU Rules on Competition – Nullity Neglected', 52 *International Review of Intellectual Property and Competition Law* 606, at 635 (2021).

31 M. Mariniello, 'Do European Fines Deter Price Fixing?', *VoxEU* (22 September 2013), https://voxeu.org/article/do-european-fines-deter-price-fixing (last visited 17 November 2022).

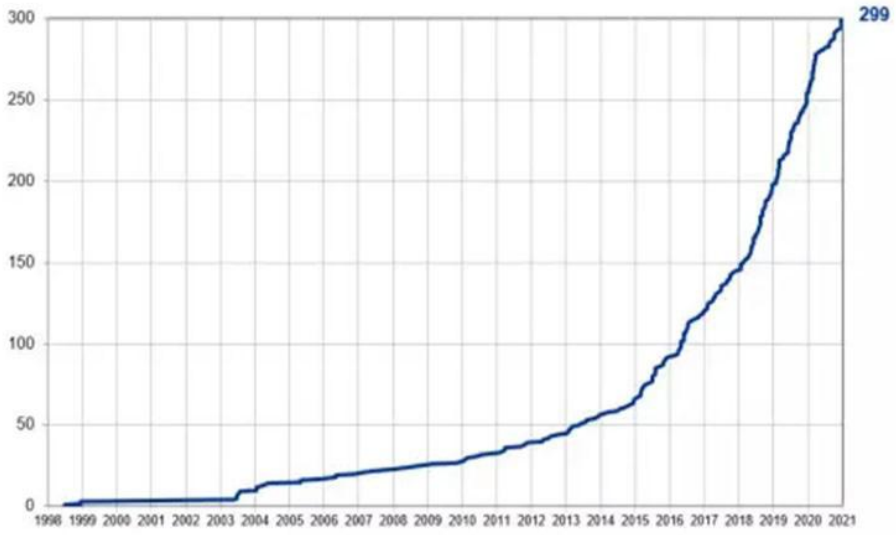
32 P. Chappatte and P. Walter, 'The Cartels and Leniency Review: European Union', *The Laws Reviews* (1 February 2022), https://thelawreviews.co.uk/title/the-cartels-and-leniency-review/european-union (last visited 17 November 2022); European Commission, Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).

33 C-453/99, *Courage Ltd* v. *Bernard Crehan*, [2001] ECR.

34 C. Migani, 'Directive 2014/104/EU: In Search of a Balance between the Protection of Leniency Corporate Statements and an Effective Private Competition Law Enforcement', 7 *Global Antitrust Review* 81 (2014); P.L. Parcu and M.A. Rossi, 'The Role of Economics in EU Private Antitrust Enforcement: Theoretical Framework, Empirical Methods and Practical Issues', in P.L. Parcu, G. Monti & M. Botta (eds.), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (2018) 62.

doi: 10.5553/ELR.000239

Figure 1 Rise in claims filed. (Laborde, above n. 35.)



Over fifty-eight damage awards have been handed by the national courts to claimants in over 299 claims filed.[35] As can be observed in Figure 1, this rise has been nothing short of sensational. The rise of private enforcement, nonetheless, has not improved deterrence as it has presented a Catch-22 situation with respect to leniency, which forms the backbone of detecting cartel cases.[36] Since those undertakings which disclose cartel activities under a leniency programme would still be subject to private claims, the rise of private claims has seen a concomitant decline in leniency applications.[37] As per a report, the number of leniency applications has declined, 'from forty-six in 2014, to thirty-two in 2015, twenty-four in 2016, eighteen in 2017, seventeen in 2018, fifteen in 2019, and just four in 2021'.[38] Thus, in one way or the other, it is fines, whether through public or private enforcement, which are central to cartel enforcement in the EU.

Before we move any further, it is also pertinent to clarify what is meant by *cartel activities*, which has been referred to continuously in this article. In the author's view, cartel activities include both, the actual anti-competitive collusion by firms and the preparatory activities undertaken by the agents of these firms. Thus, when the article talks about criminalisation of cartel activities, it refers to both corporate criminal liability and criminal liability for responsible executives. Both these liabilities are interlinked, given that corporate firms after all are non-living legal individuals. Criminal liability of corporates is satisfied through the identification doctrine, which involves identifying the individuals responsible for the actions of the firm or those who are the 'directing mind and will' behind the concerned decisions.[39] Corporate criminal liability, albeit, can also give rise to a broader responsibility for the directing minds as it also entails vicarious liability.[40]

It is also necessary to remark at this stage that the concept of corporate criminal liability has not evolved in the EU to the extent it has in common law countries. In common law, the historical development of corporate criminal liability was a natural consequence of misfeasance rulings in cases like *Queen* v. *Great North of England Railway Co*. (1846).[41] By 1909, the US Supreme Court had already held a corporation liable for criminal conduct in *New York Central & Hudson River Railroad Co*. v. *United States*.[42] In European countries, however, the principle of *societas delinquere non potest* was still applied until the late 80s.[43] This principle implies that societies or legal bodies cannot commit crimes. While that principle has since been abandoned and some countries have already introduced criminal liability for corporates,[44] many countries are yet to introduce laws on corporate criminal liability.

35 Jean-François Laborde, 'Cartel Damages Actions in Europe: How Courts Have Assessed Cartel Overcharges', *Concurrences* (September 2021), www.concurrences.com/en/review/issues/no-3-2021/pratiques/102086 (last visited 17 November 2022).

36 C. Aubert, P. Rey & W.E. Kovacic, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels', 24 *International Journal of Industrial Organization* 1241 (2006).

37 L. Hornkohl, 'A Solution to Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions with Fair Funds', *Kluwer Competition Law Blog* (18 February 2022), http://competitionlawblog.kluwercompetitionlaw.com/2022/02/18/a-solution-to-europes-leniency-problem-combining-private-enforcement-leniency-exemptions-with-fair-funds/ (last visited 17 November 2022).

38 E.A. Rodriguez and R. Noorali, 'Less Co-operation, More Challenge', 19(1) *Competition Law Insight* 1 (2020); 'Spill the Beans: The European Commission Publishes New Guidance on Its Leniency Policy and Practice', *Morrison Foerster* (15 November 2022), www.mofo.com/resources/insights/221115-spill-the-beans-the-european-commission#_ftn3 (last visited 29 January 2022).

39 S. Yoder, 'Criminal Sanctions for Corporate Illegality', 69 *Journal of Criminal Law & Criminology* 40 (1978).

40 UK Law Commission, *Corporate Criminal Liability: An Options Paper* (2022), at 13-19.

41 [1846] 115 Eng. Rep. 1294 (Q.B.); V.S. Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?', 109(7) *Harvard Law Review* 1477, at 1534 (1996).

42 [1909] 212 US 481.

43 L.H. Leigh, 'The Criminal Liability of Corporations and Other Groups: A Comparative View', 80(7) *Michigan Law Review* 1508, at 1528 (1982).

44 G. Vermeulen, W.D Bondt & C. Ryckman, *Liability of Legal Persons for Offences in the EU* (2012); J. Gobert & A.-M. Pascal, *European Developments in Corporate Criminal Liability* (2011).

Table 1

Period	Decisions
1990-1994	10
1995-1999	9
2000-2004	29
2005-2009	33
2010-2014	31
2015-2019	26
++2020-2022++	14

Germany, for instance, published a draft Corporate Sanctions Act introducing criminal liability, which has now been withdrawn.[45] Further, the European Public Prosecutor's Office (EPPO), the world's first supranational public prosecutor's office, started its work in 2021 and is tasked with investigating corporate financial offences. Thus, imposing corporate criminal liability for cartel delinquency in the EU may be difficult but is certainly possible.

3 The State of Cartels in the EU and in the US

For any argument for a change in the enforcement model to stand, it is pertinent to establish that the current model is unable to achieve optimum control over the malignant activities. While the next section will detail why cartels are problematic and how their optimum deterrence may be achieved, this section focuses on current statistics related to cartel operations in the EU. The three statistics that we are concerned with are: *first*, number of cartel decisions adopted by the Commission; *second*, the cumulative fines being imposed; and *third*, the number of cartel investigations in the US.

The number of cartel decisions adopted by the Commission would tell us if the current enforcement system would help to reduce the number of cartels in existence. If the number of cartel decisions being adopted is stagnant, it may lead to two alternate conclusions: *first*, it may mean that the number of cartels being prosecuted is stagnant because of an improvement in the rate of detection, even as the number of cartels in existence has reduced. As the Becker model has proven with simplicity, the incentive to commit a crime is a result of the net benefit (B) the criminal derives after deducting the expected cost of punishment (C) combined with the probability of detection (P).[46] If this number is positive, then crimes would continue unabated. To create optimal deterrence, the following result must be obtained: $0 > (B - PC)$. Thus, it is very probable that a stagnant number of cartels being prosecuted is a sign that the number of cartels has reduced due to optimal deterrence as a result of high fines and increased detection rates. This argument, however, would be deficient if it can be shown that there has been no concrete change in the rate of detection. In that case, a second conclusion would be more logical: that there has been no significant reduction in the number of cartels in existence.

The data is consistent with this analysis. After an initial spike in the number of decisions adopted in the 2000s, the number of decisions being adopted has more or less stagnated at around thirty decisions every 5 years, as can be observed in Table 1.[47]

One may also observe that the number of decisions being adopted peaked in the 2005-2009 period, and has since been on a gradual decline. This may be explained by the fact that after a temporary rise in the number of leniency applications, which gave a significant boost to cartel detection, detection has been on a decline.[48] During 2002-2005, over two-thirds of the decisions were based on leniency application.[49] The leniency regime has experienced a significant slowdown since then.[50] While a host of reasons including the risk of spillover effects and the introduction of the marker regime in 2006 are blamed, the disjunction with the 2014 damages directive, as mentioned in the introduction, is seen as

45 E. Brunelle et al., 'Global Enforcement Outlook: Europe's Evolving Corporate Criminal Liability Laws', *FBD* (25 January 2022), https://riskandcompliance.freshfields.com/post/102hh57/global-enforcement-outlook-europes-evolving-corporate-criminal-liability-laws (last visited 17 November 2022).

46 N. Garoupa, 'Economic Theory of Criminal Behavior', in G. Bruinsma and D. Weisburd (eds.), *Encyclopedia of Criminology and Criminal Justice* (2018) 1280, at 1286.

47 European Commission, 'Statistics on Cartel Cases', https://ec.europa.eu/competition-policy/cartels/statistics_en (last visited 17 November 2022).

48 A. Amos, 'Impact of the European Commission's Leniency Policy in Relation to Cartels', *New Jurist* (12 August 2016), https://newjurist.com/impact-of-the-european-commission-leniency-policy-in-relation-to-cartels.html (last visited 17 November 2022).

49 H.W. Friederiszick and F.P. Maier-Rigaud, 'The Role of Economics in Cartel Detection in Europe', in D. Schmidtchen, M. Albert & S. Voigt (eds.), *The More Economic Approach to European Competition Law* (2007) 179.

50 J. Ysewyn and S. Kahmann, 'The Decline and Fall of the Leniency Programme in Europe, *Concurrences* (2018), www.cov.com/-/media/files/corporate/publications/2018/02/the_decline_and_fall_of_the_leniency_programme_in_europe.pdf (last visited 17 November 2022).

doi: 10.5553/ELR.000239

Table 2

Period	Cumulative Fines (in Billion Euros)	Average Fines per Delinquent Undertaking (in Million Euros)
1990-1994	0.34	1.83
1995-1999	0.27	6
2000-2004	3.1	19.9
2005-2009	7.8	39.2
2010-2014	7.6	42.3
2015-2019	8.2	76.6

the primary reason behind the decline of leniency.[51] This is observed in the falling numbers of decisions being adopted and supports the possibility that the probability of detection remains low, and the number of cartels in existence continues to be stagnant.

This argument is also supported by economic analysis. A study of the birth and detection cycles of all cartels convicted in the EU between 1969 and 2007 showed that over these decades the detection rate averaged from about 12.9 to 13.3%.[52] The report found that despite changes in cartel enforcement regulations, cartels continued to exist without significant reduction in their numbers. They found that stricter fines and better detection merely changed the number of years a cartel remained in existence, making shorter periods of collusion more attractive. In another study of cartels convicted in the EU between 1975 and 2009, it was found that despite rising fines, the number of cartels in existence has been plentiful and cartelisation remains a profitable proposition.[53]

Another study, by Levenstein and Suslow, looked into cartel stability. Based on cartel lifetimes and collusion profitability studies, they found that cartels are very agile socio-economic institutions, which can counter changes in the legal scenario by adjusting collusion agreements, improving monitoring mechanisms and adjusting the cartel life cycle.[54] In another study, they also argued that cartels in some industries persist in a recurring manner in short intervals, making it even more difficult to detect them.[55] These studies combined with the data that the Commission continues to prosecute a more or less stagnant number of cartels, despite rising fines, show that deterrence of cartelisation has not seen a gradual improvement. In terms of the Becker equation, the probability (P) has remained unchanged and rising fines (C) have not generated much marginal deterrence due to cartel profitability.

The second key statistic is that of fines. Ever-increasing fines would be a clear indication that deterrence is not strong enough, if despite increased fines, similar numbers of cartels continue to be detected. This is how the second statistic of the total fines being imposed becomes relevant. We have already seen that while the number of cartels convicted is stagnant, the fines have increased by leaps and bounds.[56] If studied in 5-year periods (Table 2), the fines increased from just over 300 million Euros in the 1990-1994 period to over three billion Euros in the 2000-2004 period: a ten-fold leap.[57] In the 2015-2019 period, it further increased to eight billion Euros, an impressive 250% rise. This was the highest five yearly fine imposed in the EU. The US, in contrast, imposed around 4.5 billion dollars in fines in the same period.[58] These numbers look even more glaring when we take into account the fine imposed per undertaking. In 1990-1994, it was under two million Euros, increasing to twenty million Euros in 2000-2004. It again doubled to forty million Euros in 2010-2014, and redoubled to eight million Euros during 2015-2019. Thus, there is no denying that the size of fines in the EU has been increasing exponentially, consistent with Becker's theory that fines should be set to the maximum possible penalty to achieve the most cost-effective deterrence.[59] However, as has been established, larger fines have not led to a decrease in the number of cartels in existence, bringing into question the policy of placing sole reliance on fines.

51 *Id.*

52 E. Combe, C. Monnier & R. Legal, 'Cartels: The Probability of Getting Caught in the European Union', *BEER Paper No. 12* 2008.

53 E. Combe and C. Monnier, 'Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement', 56(2) *The Antitrust Bulletin* 235 (2011).

54 M.C. Levenstein and V.Y. Suslow, 'What Determines Cartel Success?', 44(1) *Journal of Economic Literature* 43 (2006).

55 M.C. Levenstein and V.Y. Suslow, 'Breaking Up Is Hard to Do: Determinants of Cartel Duration', 54 *Journal of Law & Economics* 455 (2011).

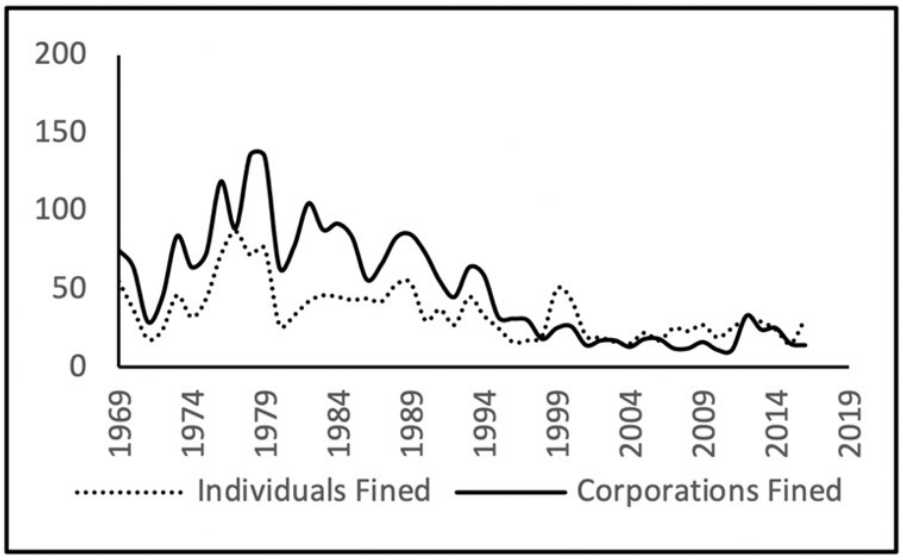
56 F.W. Papp, 'Compliance and Individual Sanctions in the Enforcement of Competition Law', in J. Paha (ed.), *Compliance and Individual Sanctions for Competition Law Infringements* 137-38 (2016).

57 European Commission, above n. 48.

58 US Department of Justice, above n. 18.

59 M. Polinsky and S. Shavell, 'The Optimal Use of Fines and Imprisonment', 24(1) *Journal of Public Economics* 89, at 99 (1984).

Figure 2 *Individual and corporate fines*



The third statistic of note is the number of cartel investigations in the US. Since the article seeks to propose that criminalisation of cartels should be undertaken, it is pertinent to display that the US has a better functioning deterrence system. While it is impossible to tell with certainty if the number of cartels in the US is in decline, but a good measure of the same is the number of cartel investigations being undertaken. The number of cartels prosecuted has shown an erratic but observable decline. While in 2012 over sixteen firms were prosecuted, by 2018 it was down to five. Similarly, the number of individuals charged has come down from sixty-three in 2012 to the range of twenty-five during 2018-2021. Similarly, a decline in the total penalty imposed has been observed. After peaking in 2015 at over 3.6 billion dollars, total fines and penalties imposed on cartels has not crossed 500 million dollars in any year, and has even been as low as sixty-seven million dollars in 2018.

As one can observe in Figure 2, this trend is also observable in longer time frames. The total number of individuals and corporations convicted has been in a precipitous decline after peaking in the 1970s.[60] These statistics can lead to two possible conclusions: one that the probability of cartel detection has fallen, leading to reduced prosecutions and fines; or that the level of detection is the same or better but the number of actual cartels has reduced due to improving deterrence. Since no significant policy change has taken place to justify the first conclusion, it makes for a valid claim that the deterrence against cartels has been increasing due to the increased use of criminal penalties against individuals involved in cartels.

Taken together, these three statistics tell us a lot about the state of cartels in the EU. They continue to exist without much deterrence emanating from the rising fines, whereas in the US, there has been a marked decline in the number of cartels, possibly due to criminal sanctions. This conclusion provides a very good reason for us to re-examine the current enforcement system and determine if it can be modified to include criminal sanctions in the form of individual fines, probation, reprimands, and in a worst-case scenario, imprisonment. But to make an effective proposal on imprisonment, two hurdles must be crossed: *first*, a normative one, displaying that criminal sanctions for cartel activities is justifiable; and *second*, an objective one, displaying that imprisonment can alter the deterrence level and that a further increase in fines is not optimal.

4 Can Criminal Sanctions for Cartel Activities Be Normatively Justified?

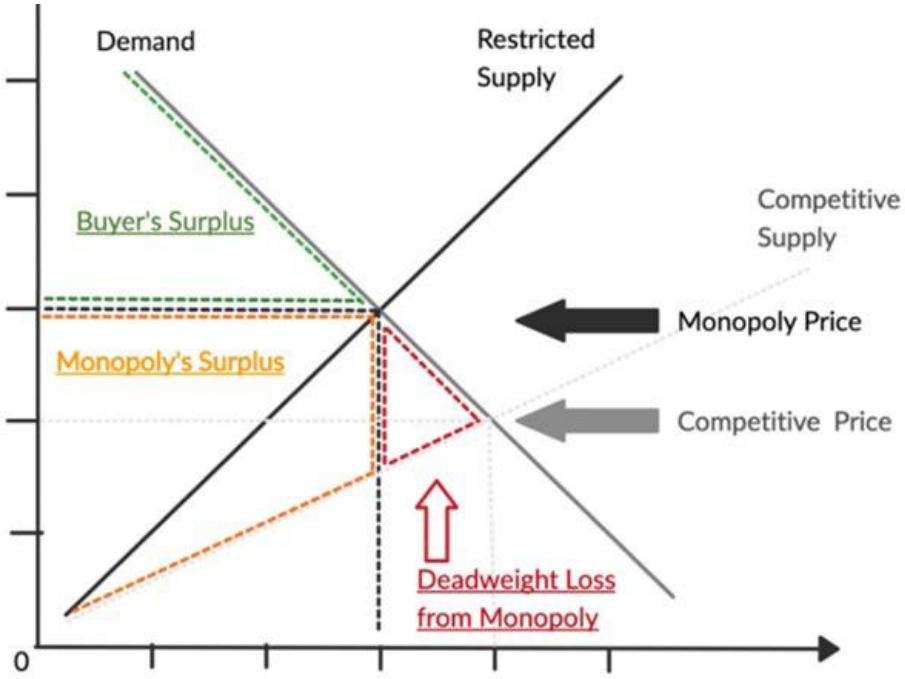
In this section, the article will display that criminalisation of cartels can be normatively and morally justified. Criminal justice scholar Bill Stuntz, a long-time critic of overcriminalisation and regulatory crimes, has justly argued that criminalisation should not be a recourse for mere regulatory offences but only for 'core' harm-based offences.[61] To achieve the high threshold of justifying the criminalisation of cartel activities, we must thus prove harm and display that such harm attacks the very 'core' of our being. For this, we must search for answers in the philosophy of criminal law and find out what makes crime a crime, and if cartel activities fit the bill. Criminal justice systems in most societies seek to control behaviour which may cause harm to others.[62] This proposition, however, has one difficulty: how do we

60 V. Ghosal and D. Sokol, 'The Rise and (Potential) Fall of U.S. Cartel Enforcement', 2020 *University of Illinois Law Review* 471 (2020).

61 D.C. Richman, 'Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz', in M. Klarman, D. Skeel & C. Steiker (eds.), *The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* 3-5 (2012).

62 A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007), at 87.

doi: 10.5553/ELR.000239



J.W. Coleman, 'State Energy Cartels', 42(6) Cardozo Law Review 2233 (2020).

identify if a certain activity is considered deviant enough by the entire society to be deserving of criminal sanctions? With some activities such as murder or theft, which are so shocking that almost the entire society considers them deviant, it is easy to find an answer. The source of such shock lies not in morality but in the fact that such activities have visible victims.[63] No society faces trouble raising the consensus to criminalise such activities.

Such a straightforward analysis may not, however, be possible for activities which do not have a visible victim or are victimless – like cartelisation. These activities do not generally shock the entire society. For instance, we do not criminalise public smoking even though we are aware of the huge social costs they impose on society, as the moral shock is absent. Thus, normative justification of criminalisation requires harm, but it also needs something more than that. Two things can be highlighted in this regard: *first*, actual public opinion; and *second*, an abstract element of injustice.

The second element was highlighted by JS Mill when he argued that a society feels compelled to criminalise a harm only when, 'means of success have been employed which is contrary to the general interest to permit – namely fraud or treachery, and force'.[64] This abstract element was also highlighted by Rawls in his 'veil of ignorance.' He used a hypothetical 'veil of ignorance' to identify what restrictions would generally be accepted by most humans in a given society, in a hypothetical pre-moral position if we were to be ignorant of the situations of our socio-economic existence.[65] According to this, an activity would deserve criminal sanctions if it were not just harmful but also unjust and fraudulent. Using the understanding espoused by these two theories as the backdrop, this section proffers three arguments: *first*, cartels cause harm; *second*, there is sufficient public disapproval to criminalise it; and *third*, cartel activities involve an element of injustice and fraud.

4.1 Cartels Cause Harm

Cartels impose outsized costs on society. These costs are much larger than what we can ever recover from the responsible firms.[66]

Cartels cause immense loss of welfare to the broader society. In simple terms, cartelisation is an attempt to raise the market prices to monopoly levels, away from competitive levels, even as oligopolistic number of firms exist. As can be observed in Figure 3, this helps transfer wealth from the consumers (and at times, from the government) to the cartelising firms. However, when this transfer takes place, deadweight loss is generated, which is a cost borne by society at large.[67] In economic terms, this is the cost of foregone consumption by consumers. It also includes two other costs. One is the cost of maintaining the cartel and coordinating its organisation.[68] The other cost is that of the loss to dynamic efficiency of the cartelised industry.[69] After all, if the firms are able to cartelise and increase their income without being subjected to competitive forces, they are very likely to spend

63 R. Nozick, *Anarchy, State and Utopia* (1974), at 65-71.
64 J.S. Mill, *On Liberty* (1859), at 179.
65 J. Rawls, *A Theory of Justice* (1999).
66 G.J. Werden and M.J. Simon, 'Why Price Fixers Should Go to Prison', 57 *Antitrust Bulletin* 569, at 577 (1987); P. Buccirossi and G. Spagnolo, 'Corporate Governance and Collusive Behaviour', *CEPR Discussion Paper No. DP6349* 2007.
67 G. Symeonidis, 'Profitability and Welfare: Theory and Evidence', 145 *Journal of Economic Behavior & Organization* 530 (2018).
68 M. Schiffbauer and S. Ospina, 'Competition and Firm Productivity', *International Monetary Fund Working Papers 10/67* 2010.
69 P. Aghion et al., 'Competition and Innovation: An Inverted-U Relationship', 120(2) *Quarterly Journal of Economics* 701 (2005).

less on innovation and research, and dynamic improvement of their competitive abilities. These three costs taken together represent wasted resources that could have been used efficiently.

In reality, however, this deadweight loss is much larger because of the scarce resources a society has. This scarce resource has to be allocated to various economic activities and cartels distort this allocation, leading to an allocative inefficiency.[70] When prices of a certain product increase, the society has to forego the consumption not only of that product but also of other products. This is especially true if the product which is subject to cartel prices is essential or has limited price elasticity. In that case, it is impossible to forego its consumption, distorting resource allocation in a significant way. A case of note is that of the European Truck Cartel which, over 14 years, worked to increase the prices of trucks which is the very basis of road transport industry and the demand for which is not very elastic. This cartel ended up distorting the entire economy by increasing the cost of commercial transport and limiting the resources available to invest in other productive sectors. As per one study, it caused allocative and deadweight losses to the tune of 15.5 billion Euros, this is in addition to the additional profits the firms must have earned through the overcharge.[71] The fines on the other hand amounted to 2.93 billion Euros.[72] While private damage claims are still being made in the courts, they are unlikely to account for the entire welfare loss suffered by society. And this is a case entailing the biggest fine ever imposed by the Commission on a cartel. In other cases, the gap between fines and damages imposed and welfare loss caused maybe even bigger.

Furthermore, it is not just that we are unable to impose enough fines on cartels to cover the net welfare loss, but fines do not even neutralise the profits earned by cartels as a totality. While some of the top cartels like the Truck Cartel had overcharges of approximately 10%,[73] most cartels have much larger overcharges. Two sample cases are that of the global citric acid cartel and the global graphite electrode cartel, both fined by the EC in 2001.[74] The first, as per the OECD, 'raised the prices by as much as 30% and collected overcharges estimated at almost $1.5 billion'; and the second, 'raised the price of graphite electrodes 50% in various markets, and extracted monopoly profits on an estimated $7 billion in worldwide sales.'[75] Was the Commission able to get this extra profits back in the form of fine? The citric cartel paid a fine of merely 135 million Euros and the electrode cartel a fine of 218.8 million Euros.[76] These fines in no way recover the estimated profits that these firms were able to earn.

If we were to extend this discussion and look not just at individual cartel profits, but profits of all the cartels as a whole, they are going to be much larger. Most studies put the detection rate of cartels at approximately 15-25%. In the context of the EU, Combe, Monnier and Legal estimated the rate of detection to be between 12.9 and 13.3%.[77] In the American context, Bryant and Eckard estimated the probability of detection to be between 13 and 17%.[78] Ginsburg & Wright estimate the detection rate to be around 25% in both the EU and the US.[79] Assuming that around one-fourth of all the cartels are detected and that the Commission is barely able to fine these cartels around 50% of the additional profits they earned, cartels as a whole are able to get away with seven-eighths of the additional profits they earn.

Connor and Lande have estimated that cartels overcharge anywhere between 28 and 54%.[80] Smuda, on the other hand, presented a more conservative mean of 20.7%.[81] Combe and Monnier agree with a similar rate of 20% overcharge.[82] Going with the conservative estimate of 20%, it can be claimed that cartels as a whole make the society pay approximately 17.5% extra for the goods and services offered by cartelised industries.[83] This is a rather big number and causes incalculable harm to the society at large. A lot of everyday people have less money than they would, each time they engage with one of the cartelised firms. This is not very different from being defrauded at the hands of a multilevel marketing scheme or a securities fraud. This harm, however, is victimless, and thus, may not appear as shocking as someone being murdered or someone being defrauded. It does not result in consequences like people losing their life deposits due to a security fraudster, and hence, does not easily fall in the bracket of criminal activities. But does the general public agree with such an assessment? Or do they see cartel activities as akin to other categories of crime?

70 A.C. Harberger, 'Monopoly and Resource Allocation', 44(2) *American Economic Review* 77 (1954); H. Leibenstein, 'Allocative Efficiency and X-Efficiency', 56 *American Economic Review* 392 (1966).

71 C. Beyer, K.V. Blanckenburg & E. Kottmann, 'The Welfare Implications of the European Trucks Cartel', 55 *Intereconomics* 120 (2020).

72 European Commission, 'Antitrust: Commission Fines Truck Producers € 2.93 Billion for Participating in a Cartel' (19 July 2016), https://ec.europa.eu/commission/presscorner/detail/ro/IP_16_2582 (last visited 17 November 2022).

73 Cartel Damage Claims, 'Trucks', https://carteldamageclaims.com/cases/on-going-cases/ (last visited 17 November 2022).

74 OECD, above n. 1.

75 *Id.*

76 EU Fines Price-Fixing Citric Acid Cartel, *Food Navigator* (18 July 2008), www.foodnavigator.com/Article/2001/12/06/EU-fines-price-fixing-citric-acid-cartel (last visited 17 November 2022); European Commission, 'Commission Fines Eight Companies in Graphite Electrode Cartel' (18 July 2001), https://ec.europa.eu/commission/presscorner/detail/en/IP_01_1010 (last visited 17 November 2022).

77 Combe and Monnier, above n. 54.

78 P.G. Bryant and E.W. Eckard, 'Price Fixing: The Probability of Getting Caught', 73(3) *Review of Economics and Statistics* 531, at 536 (1991).

79 D. Ginsburg and J. Wright, 'Antitrust Sanctions', *George Mason University Law and Economics Research Paper Series 6(2)* 2010.

80 J. Connor and R. Lande, 'How High Do Cartels Raise Prices?', 80 *Tulane Law Review* 513 (2005); J. Connor, 'Overcharges: Legal and Economic Evidence', 22 *Research in Law and Economics* 59 (2007).

81 Combe and Monnier, above n. 54.

82 F. Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law', 10(1) *Journal of Competition Law and Economics* 63 (2014).

83 17.5% is derived by multiplying 20% overcharge with 7/8 probability that they would get to keep the overcharge.

doi: 10.5553/ELR.000239

4.2 Public Opinion

The second limb of the normative justification is to show that there is sufficient public resentment against cartel activities to justify their criminalisation. After all, it is what the society at large thinks of an activity which provides a basis for its criminalisation, even if such an assessment may not always be correct (e.g. criminalisation of homosexuality, marijuana consumption, and refugee influx).[84] While the number of surveys is limited in number, a major study conducted by the US-based Centre for Competition Policy in 2014 studied public opinion in four jurisdictions: the US, Germany, the UK and Italy.[85] It found that a large majority of the public across these four jurisdictions agreed with the following assessments: *first*, they agreed that secretive collusion by cartelists has a negative consequence on consumers by leading to increased prices; *second*, they opined that secretive price-fixing was immoral, dishonest and criminal; *third*, they were of the understanding that price-fixing practices are widespread across business sectors; *fourth*, they agreed that cartel activities must be punished in some form; and *fifth*, individuals involved in price-fixing deserve some form of criminal punishment.[86]

The more or less consistent results across the four countries were shocking as they are different stages of criminalising cartels: while the US has done so for a century, the UK is still attempting to effectively criminalise, and Germany and Italy do not criminalise general cartel activities. For example, a question on whether cartelisation is more or as serious an offence compared to pure criminal fraud or theft. Across the four jurisdictions, over 90% of the people agreed with this statement.[87] The only explanation may be an instinctive human thought process and social conditioning, which identifies dishonesty and deception as major delinquency. Another study which was conducted in the Netherlands, also found that cartel activities were seen as serious offences by the Dutch public. Most of them were aware that cartels are illegal, considered them to be immoral and agreed that they have a negative effect on social welfare.[88] Based on these studies, it is safe to assume that public opinion favours some form of criminal sanctions for cartelists. However, further sociological research in this regard may be required to concretise this claim. In any case, our normative argument has a third and stronger pillar to stand on: that cartels are vehicles of injustice in our market-based societies.

84 H.M. Hart, 'The Aims of the Criminal Law', 23 *Law & Contemporary Problems* 401 (1958); J. Hall, *Principles of Criminal Law* (1947), at 157.

85 A. Stephan, 'Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA', *Centre for Competition Policy Working Paper No. 15-8* 2015.

86 *Id.*

87 Stephan, above n. 88.

88 P.T. Dijkstra and L. van Stekelenburg, 'Public Attitude in the Netherlands towards Cartels in Comparison to Other Economic Infringements', 17(3) *Journal of Competition Law & Economics* 620 (2021).

4.3 The Abstract Element: Are Cartels Unjust?

Posner has argued that we cannot allow abstract moral reasoning to draft antitrust laws. According to him, it would lead to antitrust's collapse into, 'a weak field, a field in disarray, a field in which consensus is impossible to achieve in our society'.[89] However, criminalisation cannot be based simply on law and economics, it has to be complemented with moral reasoning. As per Simester and Von Hirsch, criminal law 'speaks with a moral voice'.[90] This section would show that significant injustice is meted out by cartel activities and they carry an extraordinary level of dishonesty. Influence is drawn from the moral limits to criminal law as can be gleaned from the works of Mill and Rawls, as mentioned earlier, and of Feinberg, who has displayed that only those harms which affect our most fundamental interests are chargeable with criminal law's coercive powers.[91] While it may be argued that non-criminal institutional remedies can help protect the interests subverted by cartel activities, this article shall present arguments to the contrary. This section has two bases: *first*, cartel activities are inherently deceptive and fraudulent; and *second*, cartel activities affect the most fundamental element of our society: the free market.

4.3.1 Cartels are Inherently Deceptive and Fraudulent in Nature

This is what most people surveyed in the studies mentioned in Section 4.2 believe. That is a reasonable public opinion because usually the cartel offence arises out of an urge to steal, deceive and cheat. As Blackstone noted in his commentary, 'an unlawful act is consequent upon such vicious will.'[92] Scholars identify two constituents to inherent wrongfulness of an activity: culpability and the nature of the activity.[93] Culpability refers to the degree to which the perpetrator is delinquent and their state of mind when they committed the questionable actions. Nature of the activity refers to the immoral content of the activity itself and if on its own it is dishonourable.

On culpability of the individuals involved, there is no doubt that those engaging in cartels are not gullible or uninformed individuals. They are not tricked or coerced into taking part in elaborate negotiations, brainstorming the numbers, implementing an organisation-wide pricing policy, and swearing into an oath of secrecy.[94] They are more often than not highly paid and well-advised individuals with a choice not to engage in an activ-

89 R.A. Posner, 'Law and Economics is Moral', 24 *Valparaiso University Law Review* 163 (1990).

90 A.P. Simester and A. von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalization* (2011).

91 J. Feinberg, *Harm to Others* (1984), at 11; *Also see,* J. Feinberg, *Offense to Others* (1985).

92 F.B. Sayre, 'Public Welfare Offenses', 33 *Columbia Law Review* 55 (1933).

93 N. Abrams, 'Criminal Liability of Corporate Officers for Strict Liability Offenses – A Comment on Dotterweich and Park', 28 *UCLA Law Review* 463 (1981).

94 OECD, above n. 1, at 15; OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (2002), at 8 [which noted cartel members' efforts to keep their activities secret, their burning bid files in bonfires and hiding computer files in the eaves of one employee's grandmother's house].

doi: 10.5553/ELR.000239

ity that causes society-wide harm. The presence of intent, free will to steal and cause harm makes those engaging in cartel activities culpable. A host of similar activities, whether it is securities fraud or embezzlement or bribery, are all criminalised and there is little evidence that cartel conspiracies are any different. In fact, there is ample evidence from many cartel prosecutions that cartelists go through significant troubles to devise sinister schemes to avoid detection and disrupt potential investigations.[95] Strategies such as hiring cryptographers and experts to advise on undetectable price-fixing or bid-rigging designs are common.[96] Thus, it can be said that there is sufficient culpability of the actors of a cartel scheme.

Coming to the nature of the activity itself, some have argued that cartelisation is nothing more than 'aggressive business behavior.'[97] Kadish argues that the nature of cartel activities lacks the immoral content which core crimes carry. It is not akin to theft as the victims are not subjected to a feeling of having lost their possessions. It is not similar to robbery as there is no use of force. Unlike most crimes, there is no invasion into bodily privacy or physical safety.[98] However, the deficit in these arguments is that the ambit of core crimes is broader than those where the victims are a subject of mental or physical trauma. Since the industrial revolution, almost all societies have deemed it just to criminalise many victimless crimes which have broad welfare consequences.[99]

The most recent welfare crime, still in evolution, is the environmental crime.[100] The Commission has already submitted a proposal on 'the protection of the environment through criminal law and replacing Directive 2008/99/EC' to the European Parliament.[101] There is no immediate victim of manipulating the emissions of vehicles you make or of causing deforestation in a region. But we still deem the negative effects of these practices on society to be high enough to make them immoral and criminal.[102] In fact, most corporate practices affecting the environment are done with the same pursuit as those for cartel activities: bigger profits. Thus, this article proffers that the nature of the proposed cartel offence is similar to other welfare crimes already on the statute books. By transferring wealth, leaving a lot of people poorer, reducing consumption opportunities, disturbing resource allocation in the economy, harming honest businesses, promoting a corporate culture where conspiracies are rewarded, abusing state resources, creating unfair rules in the market, and most importantly, by intently deceiving the general public, the nature of the cartel offence is inherently immoral, unjust and deserves our social disapproval.

4.3.2 Cartel Activities Affect the Most Fundamental Element of Our Society: Free Market

While in the economic analysis of law, criminalisation is often thought of as a tool to create deterrence, the apparent purpose of criminalisation is much larger. Criminal justice systems in modern society are meant 'to apply the rule of law as a means of providing social stability'.[103] Social stability is what concerns most people when they think of crimes. This stability is specific to each society and its physical, temporal and moral situation. Social stability in post-industrial societies, as per Hayek, is a result of market competition and network coordination.[104] Durkheim too argued that social cohesion and cooperation are a result of the division of labour and the presence of market forces.[105] Adam Smith's indivisible hand also refers to market forces as the primary tool of social organisation today.[106] As Ross theorised in 1907, a variety of economic sins were bound to emerge in post-industrial society and would have to be treated with the same attitude as we dealt with physical harm.[107] Taken together, the work of these theorists supports a claim that the market and its competitive forces are essential to our social stability and any attempt to subvert them should be treated with utmost reaction.

However, competitive markets are not just essential from a sociological point of view. From the perspective of justice and fairness, too, they are important as they are an essential redistributive mechanism. Free markets, by creating opportunities, providing choice and creating competitive prices ensure that people can exchange their intellect, resources and abilities at the best possible prices. Looking at it through Rawls 'Veil of Ignorance' one could pose a question as to whether one would want to be on the losing side (whether as a consumer or a firm not participating in the cartel) if the market is unfair and uncompetitive. The obvious answer would be that every person behind this veil would support the protection of the voluntary nature of the transaction, unadulterated by price-fixing practices. The free market ensures, to a certain extent, this goal of attaining equality. Cartels affect this fundamental element of

95 C. Harding and J. Edwards, *Cartel Criminality: The Mythology and Pathology of Business Collusion* (2015), at 20.

96 M.B. Clinard and R. Quinney, *Criminal Behavior Systems* (1967).

97 S.H. Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations', 30 *University of Chicago Law Review* 423 (1963)

98 *Id.*

99 K.A. Swanson, 'Mens Rea Alive and Well: Limiting Public Welfare Offenses–In re C.R.M.', 28 *William Mitchell Law Review* 1265 (2002); A. Leavens, 'Beyond Blame – Mens Rea and Regulatory Crime', 46 *University of Louisville Law Review* 1 (2007).

100 'The EU Steps Nearer to Tougher Regime to Fight Environmental Crime', *Osborne Clarke* (11 January 2022), www.osborneclarke.com/insights/eu-steps-nearer-tougher-regime-fight-environmental-crime (last visited 17 November 2022).

101 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and Replacing Directive 2008/99/EC' (2021/0422).

102 M.G. Faure and G. Heine, *Criminal Penalties in EU Member States' Environmental Law* (2022).

103 R.D. Hunter and M.L. Dantzker, *Crime and Criminality: Causes and Consequences* (2012), at 13.

104 J. Birner and R. Ege, 'Two Views on Social Stability: An Unsettled Question', 58(4) *American Journal of Economics and Sociology* 749 (1999).

105 E. Durkheim, *The Division of Labour in Society* (1893).

106 E. Rothschild, 'Adam Smith and the Invisible Hand', 84(2) *American Economic Review* 319 (1994).

107 E.A. Ross, *Sin and Society: An Analysis of Latter-Day Inequity* (1907).

doi: 10.5553/ELR.000239

our social stability by creating hidden rules and in the process hurt the process of ensuring fairness and justice. This provides a very strong normative justification for their criminalisation.

5 The Limitations of Corporate Fines

That fines have not been deterrent enough has already been displayed in Section 3. In this section, the article shall assert that corporate fines have certain inherent limitations as a deterrence function. It shall also propose that a combination of fines and criminal sanctions would provide the best possible deterrence effect. These arguments shall have three components: *first*, corporate fines do not target the actual wrongdoers; *second*, to achieve optimality, fines would have to be much larger than they currently are and reach a socially undesirable level; *third*, criminal sanctions will add an incalculable value to deterrence and limit the need to enlarge fines to socially undesirable levels.

5.1 Fines and Skewed Corporate Governance: An Agency Problem

The current enforcement model of progressive fines does not take into account the issue of inferior corporate governance.[108] Most corporations are managed by a set of executives who are agents of the shareholders, the actual owners. While elaborate rules on corporate governance are in place, the presence of the agency problem is widespread and corporate governance issues are common.[109] As Clarke has shown, corporate governance rules are essentially cyclical and misplaced incentives due to self-interest of the agents find one way or the other to creep into the governance institutions.[110] Power is inherently asymmetric in bureaucratic contexts and the same is true for corporate enterprises.[111] This gives rise to moral hazards as there might be sufficient motivation for the agents to resort to anti-competitive practices, even though they might be aware that if detected it may impose costs on the firm and the owners.[112] These may be the result of managerial incentive schemes like annual profit-related bonuses or economic cycles, as there may be an incentive during economic downturns to engage in cartels to improve the baseline.[113] There is also a possibility of corporate corruption by way of personal kickbacks for taking part in cartels.[114]

The true perpetrators of cartel activities thus are the managers who do not usually own the company or own a minuscule part of it. Of all the listed companies in the world, only 7% of the shareholding belongs to strategic individuals and corporate executives.[115] They, however, have an overwhelming majority of the decision-making power. Their practices may often escape the monitoring mechanisms. In such a scenario, simply relying on corporate fines is inappropriate as it sanctions the owner-shareholders, not the managers. This is becoming especially problematic due to increasing public shareholding of corporations.

Today, 56% of the shareholding in all publicly listed companies the world over is owned by institutional investors (incl. pensions funds, mutual funds, insurance companies etc.) and governments, which are indirectly funded by the general public.[116] Another 27% is directly owned by retail investors and other free-floats.[117] Thus, any fine imposed on corporations, if it is optimal, is indirectly a fine on the general public owners but for the fault of their agents. This does not allow for the sanction to be internalised by the actual doers, limiting its deterrence effect.[118] What makes the problem worse is that voting power in most corporations is concentrated in the hands of promoters and founders, with spread-out retail and minority investors having limited control over company affairs.[119] This problem is also aggravated by the fact that corporations have limited ability to punish executives.[120] These individuals are often protected with the help of elaborate contracts, wherein not only is dismissal difficult but also comes with high costs to the corporation. While the shareholders may take punitive or preventive action against the management in the form of shareholders litigation seeking damages or by firing the management. However, shareholder damage suits continue to remain a rarity in Europe and have found limited success.[121] This is due to entrenched executive power and interconnected power relations.

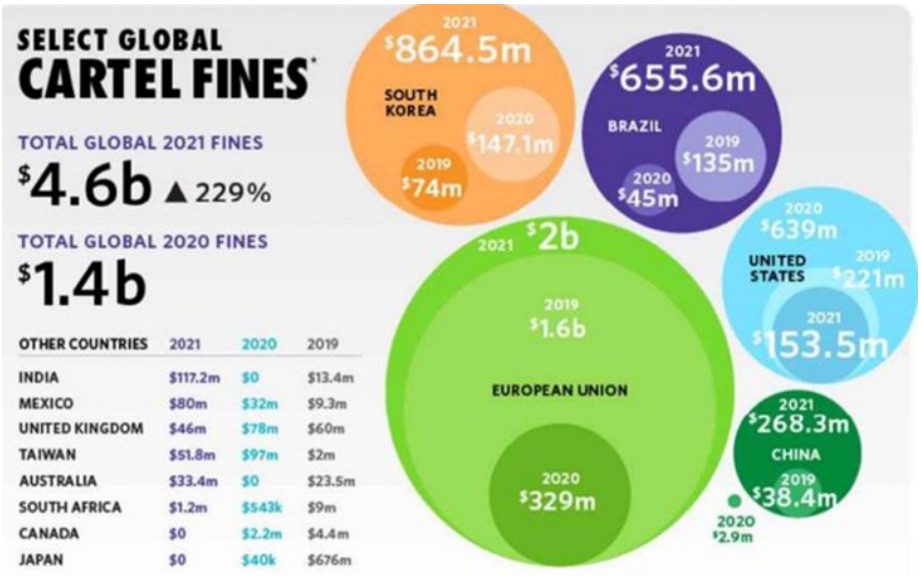
5.2 Truly Optimal Fines Would Be Socially Undesirable

Optimality of fine refers to a state when each additional euro of fine results in more than a euro worth of benefit for the society at large.

108 Buccirossi and Spagnolo, above n. 68.
109 F. Thépot, *The Interaction Between Competition Law and Corporate Governance – Opening the 'Black Box'* (2019).
110 T. Clarke, 'Cycles of Crisis and Regulation: The Enduring Agency and Stewardship Problems of Corporate Governance', 12(2) *Corporate Governance* 153 (2004).
111 D. Band, 'Corporate Governance: Why Agency Theory is Not Enough', 10(4) *European Management Journal* 453, at 459 (1992).
112 C. Argenton and E.E.C. van Damme, 'Optimal Deterrence of Illegal Behavior Under Imperfect Corporate Governance', *TILEC Discussion Paper No. 53* 2014.
113 Cseres, Schinkel & Vogelaar, above n. 12.
114 A. Stephan, 'Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures', 37(2) *Journal of Law and Society* 345 (2010).
115 OECD, *Owners of the Worlds Listed Companies* (2019), at 11.
116 *Id.*
117 OECD, above n. 118.
118 Argenton and Damme, above n. 115.
119 D. Leech, 'Shareholder Voting Power and Corporate Governance: A Study of Large British Companies', 27(1) *Nordic Journal of Political Economy* 33 (2001).
120 R.H. Lande and J.M. Connor, 'Cartels as Rational Business Strategy: Crime Pays', 34 *Cardozo Law Review* 427 (2012).
121 K. Hopt, 'Modern Company Law Problems: A European Perspective Keynote Speech', OECD (2001); M. Gelter, 'Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?', 37 *Brooklyn Journal of International Law* 843 (2012).

doi: 10.5553/ELR.000239

Figure 4 *Global Cartel Enforcement Report 2021, Morgan Lewis, www.morganlewis.com/pubs/2022/01/global-cartel-enforcement-report-2021 (last visited 17 November 2022).*



This means that fines would be optimal only when the expected punishment can completely neutralise the expected gain.[122] Since the expected punishment is the cost of sanction multiplied by the probability of getting caught, the actual cost of sanction must be equal to expected gain divided by the probability of getting caught.[123]

To illustrate,

Expected gain: 100 Euros
Expected cost of punishment (if the probability of getting caught is ¼): Sanction * 1/4.
Sanction is optimal when
Sanction × ¼ = 100 Euros = Sanction = 100 × 4 = 400 Euros.

While it is impossible to measure the exact gain an average cartel makes and the probability of their detection, various scholars have made an attempt to measure it. As per Wils, the expected gains of a cartel are around 20% of their actual mark-up over the course of 5 years, which is equivalent to 50% of their annual turnover; and the probability of detection has an upper limit of 33%.[124] According to this calculation, optimal fines should be somewhere around 150% of annual turnover. As per Werden, the probability of detection is around 25%, thus increasing the optimal fines to 200% of annual turnover.[125] As has already been displayed in Section 4.1, detection rates were pegged at 15-25% by most studies. Thus, it can be concluded that an optimal fine would be equal to 200% of annual turnover: an exorbitantly large and undesirable amount of fine. Already the current cap of 10% of annual turnover is seen by many as unreasonable.[126] Further, there are concerns about many productive companies heading to bankruptcy because of enlarging fines.[127] It is one of the key reasons behind capping fines at the level of 10% of the turnover or lower, which is not enough to deter cartel activities.

5.3 Criminal Sanctions Will Help Cap Fines at Socially-Desirable Levels

As can be observed in Figure 4, the fines in the EU are already leaving behind the rest of the world by a huge margin and are constantly rising. They are, as this section has shown, of limited versatility. Even though Becker's modelling would show that fines can indefinitely be raised, our socio-economic realities and need for stability require that the fines should have a reasonable limit.[128] This reasonable limit may not be enough to deter, given that the expected benefits of cartelising are much higher and also because the source of the implicated activities (executive-agents) and the landing of the fine's impact (shareholder-owners) do not overlap. In such a scenario, complementing fines with criminal sanctions would allow us to significantly improve the deterrence effect of the cartel enforcement system in the EU.
While an argument may be presented that deterrence can also be created by using personal administrative sanctions against the executives, instead of criminal sanctions, there are two obstacles to this argument. First, as mentioned earlier, the deterrence effect of criminal sanctions is indefinite, whereas administrative fines are easy to handle for highly placed executives. This is especially true when they have the security of

122 K. Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective', 23 *Melbourne University Law Review* 440 (1999).
123 Whelan, above n. 27.
124 W. Wils, 'Is Criminalization of EU Competition Law the Answer?', in K.J. Cseres, M.P. Schinkel & F.O.W. Vogelaar (eds.), *Criminalization of Competition Law Enforcement* (2006) 60.
125 G. Werden, 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime', 5(1) *European Competition Journal* 19, at 24 (2009).
126 Jones and Harrison, above n. 19.
127 B. Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (2013), at 95-100.
128 P. Buccirossi and G. Spagnolo, 'Optimal Fines in the Era of Whistleblowers – Should Price Fixers Still Go to Prison?', in V. Ghosal and J. Stennek (eds.), *The Political Economy of Antitrust* (2007) 81, at 107-8.

doi: 10.5553/ELR.000239

director and officer's insurance.[129] Second, fines on executives too would have to be prohibitively high for it to be effective, when they may be adequately compensated for any fine by favourable employment contracts.[130] As such, fines alone may not be sufficient.

Criminal sanctions, as has been noted many times, have incalculable costs for most white-collared individuals. They entail costly restrictions on liberty, have reputational costs and significantly affect career prospects. This means that the cost of the punishment increases much beyond just the economic costs and creates a strong deterrence effect. In addition, criminal sanctions on the 'directing minds and will' who got the company into a cartel will ensure that the crime and punishment are congruent: the one who commits it is the one who is punished. This, on its own, will improve deterrence. Further, as displayed in Section 3, the US is already having a slowdown in cartel activities due to its penal sanctions. As per one study of antitrust practitioners amidst the US executives, the threat of imprisonment and criminal sanctions had the biggest deterrent effect on their clients. Fines, in fact, were the third main instrument, preceded by the threat of private damage suits. These facts, taken together, show that criminal sanctions make for an ideal tool to use and mere reliance on fines is not ideal.

6 The Challenge of Criminalisation: Laying Down Some Principles

Whenever a strong policy proposal is made, it is pertinent to follow the principle of Occam's Razor; that is to say, we should use state power to restrict liberties only to the extent it is necessary, and in accordance with basic rule of law principles. If the restraints are too arduous, extreme and commonplace, it is very likely that good executives would avoid working within the EU and management quality may downgrade. Three principles can be highlighted with respect to criminalisation of cartel enforcement.

First, that cartel crimes should not have an omnibus definition. Four different types of cartel activities can be identified and must be differentiated in how they are sanctioned:[131] first, where the customer is duly informed about a price-fixing agreement. In such a case there is no crime because the intent to deceive is absent and there is no element of secrecy.[132] Second, where there is complete secrecy and a price-fixing agreement is carried out with mutual consent between various competitors. This certainly qualifies as a 'hardcore cartel' and those involved in negotiating the agreement deserve criminal sanctions of varying levels as per their role in the scheme. Third, where some of the competitors were forced to join the cartel through the use of force, coercion or fraud. In this case, while the officials of the victimised company are free of any liability, the rest of the individuals have committed an even graver crime and deserve a higher degree of punishment. Fourth, one where a party was aware of the cartelisation but did not report it to the authorities.[133] Any attempt at criminalisation must be cognizant of the various cartel activities and accordingly create distinct categories of cartel crimes.

Second, criminalisation should have a strong basis in procedural fairness and cannot be implemented by the Commission. The Commission, given its administrative nature, lacks separation of powers.[134] It has legislative powers, investigative powers and adjudicatory powers. This is not a particular problem with civil fines, but when it comes to criminal sanctions, a strict separation of powers in these three types of functions is important to ensure due process and justice.[135] Thus, any attempt at criminalisation at the EU-wide level has to necessarily start at national levels, in accordance with due process and human rights standards.[136] This would be compliant with the Lisbon Treaty, which to a great extent nationalised criminal enforcement measures.[137] The two processes of civil and criminal investigations may run parallelly but should be independent of each other.

One may argue that this leads to 'double jeopardy' since the same activity is being punished twice: once, an administrative penalty in the form of a fine; and second, a criminal penalty under national criminal laws. This is an important issue since it goes to the very root of due process and implicates Article 50 of the Charter of Fundamental Rights of the European Union (CFREU), which protects against double jeopardy. The ECJ rendered a clear position on this matter this year in its simultaneous judgements in *bpost SA* v. *Commission*[138] and *Bundeswettbewerbsbehörde* v. *Nordzucker*.[139] It agreed that administrative actions under competition laws are covered under double jeopardy. However, it went on to hold that parallel proceedings under different legislations, having distinct but complementary objectives and processes,

129 N.R. Mansfield, J.T.A. Gabel, K.A. McCullough & S.G. Fier, 'The Shocking Impact of Corporate Scandal on Directors' and Officers' Liability', 20 *University of Miami Business Law Review* 211 (2012).

130 P. Henning, 'Why It is Getting Harder to Prosecute Executives for Corporate Misconduct', *Columbia Law School Blue Sky Blog* (13 June 2017), https://clsbluesky.law.columbia.edu/2017/06/13/why-it-is-getting-harder-to-prosecute-executives-for-corporate-misconduct/ (last visited 17 November 2022); J. Stewart, 'In Corporate Crimes, Individual Accountability is Elusive', *The New York Times* (9 February 2015), www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html (last visited 17 November 2022).

131 *Norris* v. *Government of the United States*, [2010] UKSC 9.

132 *For e.g.*, the 'Customer Notification' exclusion in the UK law at Sec. 30, Enterprise Act (2002).

133 Swaine, above n. 22.

134 B. Ganglmair and A. Günster, 'Separation of Powers: The Case of Antitrust', *SSRN Electronic Journal* 3, 17 (2011).

135 C. Teleki, *Due Process and Fair Trial in EU Competition Law* (2021), at 1-26.

136 Whelan, above n. 6, at 34-40.

137 P. Csonka and O. Landwehr, '10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?', 4 *EUCrim* 261 (2019).

138 Case C-117/20 (2022).

139 Case C-151/20 (2022).

do not violate double jeopardy.[140] Thus, a distinct, parallel and complementary proceeding under national criminal legislations would not give rise to the problem of double jeopardy.

Third, parallel investigations must have a mutually linked leniency programme. As has already been witnessed, the lack of a common leniency programme for private damages and public fines has reduced the number of leniency applications.[141] A similar outcome would result if leniency applicants do not get respite from criminal sanctions in addition to civil fines. This would plummet detection rates significantly since almost two-thirds of the cartels are detected through leniency applications.[142] This is undesirable from a deterrence perspective, and hence, a leniency exception must be present in legislation criminalising cartel crimes.

7 Conclusion and Some Afterthoughts

There is no doubt that criminalisation is a double-edged sword. Every time we criminalise an activity we impinge on individual liberty and take a step closer to a police state. As Dr. Ferris in Ayn Rand's *Atlas Shrugged* observed, 'when one declares so many things to be a crime that it becomes impossible for men to live without breaking laws.'[143] This is not the proposal of this article. Overcriminalisation comes with many costs for society, whether it is the cost of maintaining prisons, creating costly investigative agencies or the mental cost to individuals at risk of wrongful sanctions.[144] In some societies, where democracies are non-functional and police power lacks due procedure, a criminal sanction for cartels cannot be normatively justified for the risk of wrongful prosecution would be too large.

That is not the case with the EU. The courts are a powerful and effective check on the executive power. Procedural rights are strong and human rights standards at the pan-EU level are highly progressive. In such a scenario, an activity which is imposing great harm on society, is challenging its very basis (of fair markets) and is morally unjust deserves to be duly punished. As has been displayed, fines alone have not sufficiently deterred cartel activities. A lot of planning and funds are being invested into creating effective and profitable cartel schemes. This must be stopped. Criminal sanctions, which are normatively justified for wilful and harmful activities like this, are the right tool. They would allow us to control the ever-rising fines which, as has been displayed in Section 5, are becoming socially undesirable by imposing high costs on shareholder-owners and not effectively sanctioning the executive-agents.

The article recognises that this is not going to be an easy endeavour. As can be gauged from the British experience, criminal sanctions are not easy to implement. In fact, some countries like Austria, which had criminal sanctions for cartels abolished it due to practical difficulties in implementation. Unlike the US, which has had cartel crimes since over a century and has the jurisprudence required to carry out due adjudication, European countries will face many legal and procedural obstacles. This becomes a bigger problem since criminalisation at the EU-wide level is only possible through individual country-level consensus. This is a tall order and is ridden with political challenges. However, practical difficulties have to be contented with when the question is about hundreds of billions of Euros (if not trillions) worth of harm to the public and the creation of an unequal market with unfair rules. 'A crime is born in the gap between the morality of society and that of the individual,' wrote the author Håkan Nesser.[145] This article believes that such a gap exists in the case of cartel crimes.

140 Case C-117/20, *bPost SA* v. *Commission*, [2022] at 53-6; Case C-151/20, *Bundeswettbewerbsbehörde* v. *Nordzucker*, [2022] at 50-7.

141 *See* Section 2 of the article.

142 Friederiszick and Maier-Rigaud, above n. 50.

143 A. Rand, *Atlas Shrugged* (1957), at 411.

144 E. Luna, 'The Overcriminalization Phenomenon', 54 *American University Law Review* 703, at 719-39 (2005).

145 H. Nesser, *Hour of the Wolf* (1998).

doi: 10.5553/ELR.000239

Doing Business in Xinjiang

Import Bans in the Face of Gross Human Rights Violations against the Uyghurs

Marie de Pinieux & Nadia Bernaz*

Abstract

The involvement of business actors in gross human rights abuses and international crimes is not a new phenomenon, as exemplified by the Holocaust or the Rwandan genocide. Nowadays, many European and US-based companies doing business in China, specifically in the Xinjiang province where Uyghurs are persecuted, may be connected to severe human rights abuses. The current business and human rights legal framework, which has developed to include human rights due diligence laws and civil litigation, may not be robust enough for preventing companies from doing business in the region, and punishing them when they do and become connected to abuse. We contend that this framework could be strengthened so as to enhance corporate accountability in the face of gross, state-orchestrated human rights abuses in the region. We consider specific laws that the United States and the European Union have adopted to address this situation, namely the 2022 US Uyghur Forced Labor Prevention Act and the EU Proposal for a regulation on prohibiting products made with forced labour on the Union market.

Keywords: business and gross human rights abuses, Uyghurs, forced labour, import bans, criminal liability, US Uyghur Forced Labor Prevention Act.

1 Introduction

The participation of business actors in gross human rights abuses, which may constitute international crimes, has a long history. The colonisation of India by the East India Company;[1] German corporations using slave labour during the Second World War;[2] Western companies selling arms, computers and vehicles to the Apartheid regime;[3] media companies inciting racial hatred during the Rwandan genocide[4] and companies trading conflict minerals from Sierra Leone illustrate such involvement.[5]

Nowadays, companies doing business in China, specifically in the so-called region of 'Xinjiang', may also be connected to gross human rights abuses. Respect for human rights in China generally has been a concern for a long time. An important literature documents the involvement and possible complicity of foreign companies in these human rights violations. In a report published in 2009, Amnesty International drew attention on 'the human rights challenge' faced by corporations with business activities in China. They underlined, among other issues, the bad working conditions[6] and the use of forced labour[7] or child labour[8] in Chinese factories. Freedom of speech is also regularly violated which is another challenge for corporations.[9] In the past few years, media attention has focused on the Uyghurs and other Muslim minorities, who have been living in the Northwest of China, deprived of their most basic rights.[10]

In this article, we focus on the Uyghur situation for two reasons. First, the serious human rights abuses, already labelled as genocide,[11] are directly orchestrated by China, which is not just any state. China is the second biggest economy in the world and is at the heart of global supply chains.[12] Responses from other States and from companies themselves cannot ignore that fact. Second, we note a well-documented connection between this re-

* Marie de Pinieux is a Lecturer of Law at Paris 1 Panthéon-Sorbonne University, Paris, France. Nadia Bernaz is an Associate Professor of Law at Wageningen University and Research, Wageningen, the Netherlands.

1 E. Erikson, *Between Monopoly and Free Trade: The English East India Company*, 1600-1757 (2014).

2 United Nations War Crimes Commission, 1949.

3 2d Cir., *Khulumani* v. *Barclay National Bank Ltd*, 2007.

4 ICTR, Appeals Chamber, *Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze* v. *The prosecutor*, 2007.

5 Truth and Reconciliation Commission of Liberia, 2009; Court of Appeal in *'s-Hertogenbosch*, *The Public Prosecutor* v. *Guus Kouwenhoven*, 2017.

6 Amnesty International, 'Doing Business in China: The Human Rights Challenge', 2009:12. Accessible at: https://www.sinoptic.ch/textes/eco/2009/2009_Amnesty.Switzerland_Guidance.on.doing.business.in.China.pdf.

7 *Ibid*., at 20.

8 *Ibid*., at 28.

9 In 2007, a lawsuit was filed against Yahoo in California because of the company's role in the imprisonment of journalists and human rights defenders; Business and Human Rights Resource Center, Yahoo! lawsuit (Re China), 2007, www.business-humanrights.org/en/latest-news/yahoo-lawsuit-re-china/; J. Nolan, 'The China Dilemma: Internet Censorship and Corporate Responsibility', 4(1) *Asian Journal of Comparative Law* (2009), https://ssrn.com/abstract=1402442.

10 S. Roberts, *The War on the Uyghurs: China's Internal Campaign against a Muslim Minority* (2020).

11 BBC, 'US: China Committed Genocide against Uighurs', 20 January 2021, www.bbc.com/news/world-us-canada-55723522; BBC, 'Canada's Parliament Declares China's Treatment of Uighurs "genocide"', 23 February 2021, www.bbc.com/news/world-us-canada-56163220; Newlines Institute for Strategy and Policy, *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention* (2021), at 1-51; Reuters, *French Parliament Passes Motion Condemning China "genocide" against Uyghurs* (2022).

12 EU-ILO-OECD, Responsible Supply chains in Asia – China, https://mneguidelines.oecd.org/EU-ILO-OECD-Responsible-Supply-Chains-in-Asia-CHINA.pdf.

doi: 10.5553/ELR.000248

gion and prominent European and US-based companies. Studies have shown that well-known brands are linked to these human rights abuses through their supply chain.[13] However, so far, few articles have been written on this topic.[14] This lack of legal scholarship is particularly surprising considering that the Uyghur persecution has led to specific legislation, namely forced labour import bans.[15]

Since the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs), which is arguably the most authoritative international instrument in the area of business and human rights,[16] States have mostly focused on disclosure laws and mandatory human rights due diligence (HRDD) laws.[17] But other legislative responses are possible. In 2021, the United States enacted the Uyghur Forced Labour Prevention Act (UFLPA) in 2021 to help the Customs and Border Protection (CBP) enforce Section 307 of the Tariff Act, which prohibits the importation of goods made with forced labour into America and on the US market.[18] Since then, other States have adopted or are considering adopting import bans. Conforming to the United-States-Mexico-Canada agreement, a trade agreement entered into force on 1 July 2020, Canada[19] and Mexico[20] now prohibit the importation of goods made with forced labour into the countries and on their market. A similar prohibition could be introduced in Australia,[21] in the United Kingdom[22] and in the European Union.[23] In September 2022, the European Commission issued a proposal for a regulation on prohibiting products made with forced labour on the Union market.

In this article, we map the legislative responses to the Uyghur persecution in the United States and in the European Union and identify the mains strengths and shortcomings of these responses to tackle State-imposed forced labour. As Deva pointed out, the Uyghur situation shows that the current business and human rights legal framework, focusing on disclosure and HRDD legislations is not sufficient in case of gross human rights abuses, especially when they are state-orchestrated.[24] States shall consider other options as part of their duty to protect under Pillar I of the UNGPs. We contend that this framework must be strengthened in the face of gross, state-orchestrated human rights abuses in the region, and we discuss the extent to which import ban legislation can reinforce this framework.

The article is organised as follows. We begin by giving an overview of the human rights abuses in the Xinjiang province and showing how companies can be involved in the Uyghur persecution (Section 2). Next, we map and evaluate recent legal initiatives that States have considered to prevent and sanction the involvement of business actors in the Uyghur persecution and which, from our perspective, could strengthen the current BHR framework, if they are correctly implemented.[25] In January 2022, the US Congress passed the *Uyghur Forced Labor Prevention Act* which aims to ban imports from the region. Because the US import ban is the only one in place, and even if the literature on its effectiveness is limited,[26] we identify its main strengths and shortcomings. Here the goal is to learn from this experience as the European Union is now designing its own proposal (Section 3). In September 2022, the European Commission released a *proposal for a regulation on prohibiting products made with forced labour on the Union market*. This promising initiative could usefully complement the Corporate Sustainability Reporting Directive (CSRD) and the Directive Proposal on Sustainable Due Diligence (CSDDD). Disclosure laws and HRDD laws are not a panacea and must be reinforced when gross human rights abuses are at stake. The BHR framework must rely on a mix of legal measures (Section 4). We end with a brief conclusion (Section 5).

13 Australian Strategic Policy Institute, *Uyghurs for Sale* (March 2020); US Department of State, *Xinjiang Supply Chain Business Advisory, Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses in Xinjiang* (2020 – updated 2021), at 1-36; Amnesty International, '"Like We Were Enemies in a War" China's Mass Internment, Torture and Persecution of Muslims in Xinjiang', 2021:1-52.

14 R. Polaschek, 'Responses to the Uyghur Crisis and the Implications for Business and Human Rights Legislation', 6(3) *Business and Human Rights Journal* 567-75 (2021); A. Hellweger, 'International Commercial Law and the US Uyghur Forced Labor Prevention Act', 165(10) *Solicitors' Journal* 24-27 (2022); A. Fruscione, 'Article: The European Commission Proposes a Regulation to Ban Products Made with Forced Labour', 18(3) *Global Trade and Customs Journal* 120-4 (2023).

15 European Parliament, *Trade-Related Policy Option for a Ban* (2022), at 7.

16 L.-C. Backer, 'On the Evolution of the United Nations "Protect-Respect-Remedy Project": The State, the Corporation and Human Rights in a Global Governance Context', 9 *Santa Clara Journal of International Law* 37 (2011).

17 N. Bueno and C. Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability', 69 *International & Comparative Law Quarterly* 789, 794 (2020); M. Krajewski, K. Tonstad & F. Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' 6(3) *Business and Human Rights Journal* 550-8 (2021); S. Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' 36 *Leiden Journal of International Law* 389 (2023).

18 Canada has also an import ban in place but this legislation suffers from a lack of enforcement, https://gflc.ca/wp-content/uploads/2020/10/Forced-Labour-Import-Bans.pdf.

19 Ropes and Gray, 'Canada to Implement New Modern Slavery Reporting Requirements and Child Labor Import Ban – Slotting into Global Compliance by U.S.-based Multinationals', 8 May 2023, www.ropesgray.com/en/newsroom/alerts/2023/05/canada-to-implement-new-modern-slavery-reporting-requirements-and-child-labor-import-ban#:~:text=As%20required%20by%20the%20United,having%20ties%20to%20forced%20labor.

20 Ropes and Gray, Mexico Bans Imports Made with Forced Labor in Alignment with the USMCA, 6 March 2023.

21 Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2022, No., 2022 (*Senator Steele-John*), A Bill for an Act to amend the *Customs Act 1901*, and for related purposes; Moulislegal, 'Modern Slavery and the Supply Chain – From Reporting on Risks to Destroying Effected Products', 8 March 2023, https://moulislegal.com/knowledge/modern-slavery-and-the-supply-chain-from-reporting-on-risks-to-destroying-affected-products/.

22 Governing Forced Labour in Supply Chains, 'Literature Review: Forced Labour Import Bans', 5 January 2023, https://gflc.ca/wp-content/uploads/2020/10/Forced-Labour-Import-Bans.pdf.

23 *Ibid.*; https://gflc.ca/wp-content/uploads/2020/10/Forced-Labour-Import-Bans.pdf.

24 Deva, above n. 17, at 1.

25 European Commission, 'Questions and Answers: Prohibition of products made by forced labour in the Union Market', 2022, https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_5416.

26 Governing Forced Labour in Supply Chains, above n. 22, p. 2.

doi: 10.5553/ELR.000248

2 Doing Business in the Xinjiang Province

While there have been long-standing tensions in the region between the Uyghurs who seek autonomy and Chinese authorities who want to keep control over it, the situation has deteriorated in recent years.[27] Accurately documenting human rights violations in the Xinjiang province is difficult due to a lack of publicly available data and various restrictions.[28] Nevertheless, several reports based on testimonies, satellite imagery and leaked government papers have revealed that the People's Republic of China (PRC) government, since at least 2017, has intensified its persecution of Muslim minority groups living in the Xinjiang area.[29] For example, we note reports about internment camps where the Uyghurs live in inhuman conditions,[30] are tortured or subjected to other cruel, inhuman or degrading treatment,[31] including, allegedly, forced organ harvesting.[32] Severe violations of human rights have also been carried out outside the camps, notably through massive surveillance of the Uyghurs through facial recognition cameras, homestays by government agents who live with families and access their personal communications.[33] The Uyghurs have also suffered from restrictions on freedom of religion in their daily lives. Many traditional practices in Islam such as wearing a veil, having a beard, praying regularly or avoiding alcohol and pork meat seem to be considered as 'extremist' under Chinese laws.[34] Many mosques and other Islamic sacred sites have been destroyed.[35] Muslim minorities have also been forced to work and exposed to other labour abuses in factories located in the Uyghur territory and in other regions of China. Credible evidence suggests that the PRC government has facilitated the mass transfer of Uyghurs from their land to factories across China where they are forced to work.[36] Some States have labelled these practices as 'genocide'.[37]

27 A. Kriebitz, 'The Xinjiang Case and Its Implications from a Business Ethics Perspective', 21(3) *Human Rights Review* 250 (2020).
28 Amnesty International, above n. 13, at 15.
29 A. Lehr and M. Bechrakis, 'Connecting the Dots in Xinjiang: Forced Labour, Forced Assimilation and Western Supply Chains', *A Report of the CSIS Human Rights Initiative, Center for Strategic and International Studies* 2019:1-44; V. Xiuzhong Xu, D. Cave, J. Leibold, K. Munro & N. Ruser, 'Uyghurs for Sale "Re-education", Forced Labour and Surveillance beyond Xinjiang', *Report n°26/2020* 2020.
30 European Parliament resolution of 19 December 2019 on the situation of the Uyghurs in China (China Cables) (2019/2945(RSP)) E.
31 Amnesty International, above n. 13, at 96.
32 European Parliament resolution of 12 December 2013 on organ harvesting in China (2013/2981(RSP)); *The Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China*, China Tribunal, 1er mars 2020.
33 Amnesty International, above n. 13, at 35.
34 *Ibid.*, at 27.
35 Australian Strategic Policy Institute, *Cultural Erasure. Tracing the Destruction of Uyghur and Islamic Spaces in Xinjiang* (2020).
36 US Department of State, above n. 13, at 2.
37 BBC, above n. 11; BBC, above n. 11; Newlines Institute for Strategy and Policy, above n. 11; Reuters, above n. 11.

Thus, while doing business in China was already complex for Western companies from the perspective of meeting the corporate responsibility of respecting human rights as defined in the UNGPs, the Uyghur situation makes it even more challenging. In July 2020, the US Departments of State, Treasury, Commerce and Homeland Security released a document showing that companies can be involved in the Uyghur persecution in various ways. Business actors can participate in the Uyghur persecution by supplying '*commodities, software, and technology to entities engaged in such surveillance and forced labor practices*'.[38] In this regard, some US technology companies – such as Microsoft, Dell or IBM – were suspected of supplying China with equipment and software for monitoring populations in the Xinjiang province.[39] Business actors can also be linked to the Uyghur persecution by

> "assisting or investing in the development of surveillance tools for the PRC government in Xinjiang, including tools related to genetic collection and analysis";[40] or by "aiding in the construction and operation of internment facilities used to detain Uyghurs and members of other Muslim minority groups, and/or in the construction and operation of manufacturing facilities that are in close proximity to camps and reportedly operated by businesses accepting subsidies from the PRC government to subject minority groups to forced labor".[41]

But above all, business actors can be involved in the Uyghur persecution through their supply chains by sourcing

> goods from Xinjiang, or from entities elsewhere in China connected to the use of forced labor of individuals from Xinjiang, or from entities outside of China that source inputs from Xinjiang.[42]

As previously mentioned, forced labour is not only located in the Xinjiang province. The government has facilitated the transfer of Uyghurs to factories across China which makes the situation even more challenging for companies supplying goods from this country. The Australian Strategic Policy Institute has identified eighty-two well-known brands in a variety of sectors, suspected to benefit indirectly from Uyghur forced labour through their supply chains. Forced labour is a major concern for companies in the textile sector. Around 80% of China's cotton is produced in the Xinjiang province, representing around 22% of the global market in 2018-2019.[43]

38 US Department of State, above n. 13.
39 V. Weber and V. Ververis, 'China's Surveillance State: A Global Project – How American and Chinese Companies Collaborate in the Construction and Global Distribution of China's Information Control Apparatus', 2021, www.top10vpn.com/assets/2021/07/Chinas-Surveillance-State.pdf.
40 US Department of State, above n. 13.
41 *Ibid.*
42 *Ibid.*
43 Investor Alliance for Human Rights, An initiative from ICCR, Human Rights Risks in Xinjiang Uyghur Autonomous Region PRACTICAL GUIDANCE FOR INVESTORS (2020), at 5. The report is also accessible online: https://

doi: 10.5553/ELR.000248

Some major brands of the garment sector have been blamed for sourcing products from Chinese factories selling cotton products tainted with coercive labour.[44] Some of these brands such as Nike, C&A, State of the Art, Inditex or Uniqlo are even under investigation for *aiding and abetting* the Chinese government with its forced labour programme.[45] Forced labour is, however, not only a concern for companies in the textile/apparel sector. Other industries are at risks such as the solar energy sector. As mentioned by the US Departments of State, Treasury, Commerce and Homeland Security:

> *mounting evidence indicates that solar products and inputs at nearly every step of the production process, from raw silicon material mining to final solar module assembly, are linked to known or probable forced labor programs*.[46]

This is highly problematic considering that Chinese companies play a crucial role in the solar supply chains.[47] Importation of tomatoes by the food industry or of components used in the automotive and electronic industry could also be tainted with forced labour.[48] The Australian Strategic Policy Institute identified, for instance, Chinese factories using forced labour that could supply brands such as Apple.[49]

In reaction, some States have passed laws or are considering passing laws aiming to avoid the importation of goods made with forced labour in the Xinjiang province.

investorsforhumanrights.org/sites/default/files/attachments/2020-08/InvestorGuidanceonHRRisksXinjiang08.03.20.pdf; see also US Department of State, above n. 13, at 8.

44 Xinjiang Supply Chain Business Advisory, 'Risks and Considerations for Businesses and Individuals with Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses linked to Xinjiang, China' (2021), at 6, www.state.gov/wp-content/uploads/2021/07/Xinjiang-Business-Advisory-13July2021.pdf.

45 In this regard, in France, a criminal lawsuit was filed in April 2021 against four corporations – Uniqlo France, SMCP, Inditex and Skechers – from the textile sector. The complaint shows the existence of ties between these companies and entities from the Xinjiang province. In July 2021, an investigation was opened into the crime of concealment of crimes against humanity and forced labor – Art. 321-1 of the French Penal Code. It was dismissed in April 2023 on the ground that the public prosecutor lacked jurisdiction. A new lawsuit was filed in May 2023 and is ongoing at the time of writing (Le Monde, *Complaint Filed against French Fashion Groups over Uyghur Forced Labor*, 17 May 2023). Similarly, criminal lawsuits were brought against companies in Germany in September 2021, mainly in the textile sector. They were accused of *aiding and abetting* the Chinese government with its forced labour programme (ECCHR, 2021a). At the time of writing, the case is pending before the Federal Court of Justice (ECCHR, 2021a). In December 2021 in the Netherlands, a criminal complaint was also brought against Patagonia, Nike, C&A and State of the Art for allegations of complicity in crimes against humanity (ECCHR, 2021b).

46 US Department of State, above n. 13, at 8.

47 *Ibid*., at 8 – The report mentions that "*In 2020, PRC solar companies controlled 70 percent of the global supply for solar-grade polysilicon, and 45 percent was manufactured in Xinjiang. China also controls market shares of the downstream solar supply chain, including the production of wafers, solar cells, and solar panels. Some of the world's largest suppliers of solar panel materials and components reportedly have ties to U.S.-sanctioned XPCC*".

48 Australian Strategic Policy Institute, above n. 13.

49 *Ibid*.

3 The US Response

Several measures have been adopted in the United States to sanction and punish persons involved in the Uyghur persecution which create legal, reputational and economic consequences for companies.[50] The *Uyghur Human Rights Policy Act* was enacted in 2020.[51] It authorises the US President to impose sanctions such as travel restrictions[52] and assets freeze[53] against officials and entities responsible for human rights abuses in the Uyghur region.[54] Restrictions on exports to Chinese persons that are implicated in gross human rights abuses in the Uyghur region have also been adopted. The Bureau of Industry and Security of the US Department of Commerce has developed an *Entity List*, and foreign persons who are included on this list face restriction to access US goods. Many Chinese companies and Chinese officials responsible for human rights abuses in the Xinjiang province have been added to this list. For instance, in June 2021, five Chinese companies in the energy sector were added to the *Entity List* for utilising forced labour in the Uyghur land.[55] In July 2021, 14 companies in the IT sector were also added.[56] Doing business in violation of this prohibition may expose business actors to civil and/or criminal penalties.

Restrictions on imports have also been adopted. Section 307 of the Tariff Act of 1930 prohibits merchandise produced in whole or in part by forced labour from being imported in the United States. The scope of this law is very broad. It applies to every importer and to products of any type and any origin.[57] Section 307 is implemented by the US CBP which has issued '*Withhold Release Orders*' (WROs) on certain goods suspected to be produced with forced labour in the Xinjiang province. For instance, in January 2021, the CBP issued a new WRO on all cotton products and tomato products from this area.[58] The CBP explained that it will not tolerate entrance of products made by using forced labour because it hurts '*American businesses that respect human rights and also expose unsuspecting consumers to unethical purchases*'.[59] In June 2021, a WRO was also issued on silica products from *Hoshine Silicon Industry Co., Ltd*.[60] Once the CBP has denied entry to those goods, they may be seized and forfeited, and civil penalties may be issued against the importer.

50 US Department of State above n. 13, at 2.

51 Uyghur Human Rights Policy Act of 2020.

52 Uyghur Human Rights Policy Act, 6/c.

53 *Ibid*.

54 Uyghur Human Rights Policy Act, 6/a.

55 US Department of State, above n. 13, at 22.

56 *Ibid*.

57 Global Trade Policy Blog, 'Measures Banning Products Made with Forced Labor: US, EU and UK Approach', 7 November 2022, www.steptoe.com/en/news-publications/global-trade-policy-blog/measures-banning-products-made-with-forced-labor-us-eu-and-uk-approach.html.

58 U.S. Customs and Border Protection, *CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang* (2021).

59 *Ibid*.

60 US Department of State, above n. 13, at 22.

doi: 10.5553/ELR.000248

This system was later strengthened in order to help the CBP to enforce Section 307. In December 2021, President Biden signed the *UFLPA*.[61] It aims to ensure that goods produced in violation of Uyghur rights do not enter the US market. It establishes a rebuttable presumption that goods manufactured or produced in the Xinjiang province, or goods produced by certain entities implicated in the forced labour programme outside of Xinjiang, are made using forced labour and shall not enter the United States. Whereas with Section 307, the CBP must establish that the product could have been made by forced labour, with the adoption of the UFLPA, the burden of proof is reversed and relies on the importers. The presumption applies unless it is shown that the goods were not produced by forced labour or that the UFLPA does not apply.[62] To be eligible for an exception to the UFLPA's presumption, companies must demonstrate that they use '*due diligence*, *effective supply chain tracing*', and '*supply chain management measures*' to ensure that they do not import any goods made wholly or in part with forced labour from the Xinjiang province.[63] Whereas there is no general mandatory HRDD law in the United States, this requirement incentivises companies to undertake a meaningful human rights due diligence process in an *indirect* way.[64]

Section 307 and the UFLPA hold great potential. It has been shown in the past, though admittedly in a different context, that forced labour bans can have positive effects, as illustrated by the 'Top Glove' case.[65] In July 2020, the CBP issued a WRO against goods produced by Top Glove in Malaysia due to forced labour issues. To obtain the lifting of the ban, Top Glove took measures to address the problem, including reimbursement of approximately US$36 million to around 13,000 workers.[66] The situation is, however, quite different in the Uyghur case. Unlike in Malaysia, it is not an isolated case of forced labour. In Xinjiang, forced labour is massively imposed by the State.[67] Thus, while the positive impact that forced labour import bans may have in this situation is unclear,[68] stopping purchasing and sourcing products tainted by forced labour from this region signals moral disapprobation and puts some pressure on China.[69]

Some have shed light on the unintended consequences of forced labour import bans such as factories' closing that would put workers in worse conditions.[70] Tensions with climate change policies can also arise. As mentioned, China plays a significant role in the production of solar panels and the CBP seized many shipments of solar energy components. Reuters reported in 2022:

> "*The level of seizures, which has not previously been reported, reflects how a policy intended to heap pressure on Beijing over its Uyghur detention camps in Xinjiang risks slowing the Biden administration's efforts to decarbonize the U.S. power sector to fight climate change*".[71]
>
> This situation is problematic in the context of the energy transition.[72]

Import bans have also been described as '*political instruments and protectionist trade measures rather than human rights tool*'.[73] The UFLPA was introduced in the context of an ongoing trade war between the United States and China.[74] Some authors pointed out that most of the WROs issued by the CBP since 2015 have been directed against Chinese products whereas forced labour is endemic in other countries.[75] According to them, this lack of impartiality undermines the credibility of forced labour bans.[76] Consequently, '*a clear decision-making framework for imposing and lifting restrictions is essential for effective implementation*'.[77]

Despite its imperfections, the American model based on forced labour ban has been a source of inspiration for the EU which is now designing its own proposal. Much can be learned from the US experience.

61 H.R.1155 – Uyghur Forced Labor Prevention Act.
62 *Ibid.*
63 *Ibid.*
64 GFLC, above n. 22, at 4.
65 P. Bengtsen, 'Debt Bondage Payouts Flow to Workers in Malaysia's Glove Industry', The Diplomat, 14 September 2021, https://thediplomat.com/2021/09/debt-bondage-payouts-flow-to-workers-in-malaysias-glove-industry/; J. LaFianza, 'Threatening Ill-Gotten Gains: Analyzing the Effectiveness of a Forced Labor Import Ban in the European Union', European Union Law Working Paper No. 60, Stanford-Vienna Transatlantic Technology Law Forum, 2022, http://law.stanford.edu/wp-content/uploads/2022/05/EU-Law-WP-60-LaFianza.pdf; I. Pietropaoli, O. Johnstone & A. Balch, 'Effectiveness of Forced Labour Import Ban [Policy Brief], Modern Slavery and Human Rights Policy and Evidence Centre', 2021, https://modernslaverypec.org/assets/downloads/PEC-Policy-Brief-Effectiveness-Forced-Labour-Import-Bans.pdf.
66 GFLC, above n. 22, at 2.
67 J. Cockayne, 'Making Xinjiang Sanctions Work: Addressing Forced Labour through Coercive Trade and Finance Measures', The University of Nottingham, 2022, www.xinjiangsanctions.info/wpcontent/uploads/2022/07/Making-Xinjiang-Sanctions-Work-FINAL.pdf.
68 GFLC, above n. 66.
69 J. Cockayne, *Making Xinjiang Sanctions Work: Addressing Forced Labour through Coercive Trade and Finance Measures* (2022).
70 Anti-Slavery International and European Center for Constitutional and Human Rights' position on import controls to address forced labour in supply chains June 2021, p. 4. Accessible online https://www.antislavery.org/wp-content/uploads/2021/06/Anti-Slavery-International-ECCHR-Import-Controls-Position-Paper-1.pdf; LaFianza, above n. 65, at 25.
71 Reuters, *Exclusive: U.S. Blocks More than 1,000 Solar Shipments over Chinese Slave Labor Concerns* (2022).
72 British Academy, 'The Energy of Freedom'? Solar Energy, Modern Slavery, and the Just Transition', www.thebritishacademy.ac.uk/documents/4198/Just-transitions-energy-freedom.pdf.
73 T. Fanou, *Governing Forced Labour in Supply Chains, Literature Review: Forced Labour Import Bans* (2023); S. Shehadi and B. van der Merwe, 'Why Doesn't Forced Labour in Supply Chains Matter to Western Governments?' Investment Monitor, 2021, https://www.investmentmonitor.ai/features/forced-labour-supply-chainswestern-governments/.
74 *Ibid.*
75 Shehadi and van der Merwe, above n. 73.
76 Schwarz et al., 'External Policy Tools to Address Modern Slavery and Forced Labour', European Parliament, 2022, www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2022)653664.
77 GFLC, above n. 22, at 2.

4 The EU Response: Proposal for a Regulation on Prohibiting Products Made with Forced Labour on the Union Market

In March 2021, the European Union adopted sanctions (asset freeze, travel ban and restrictions on receiving any EU funds) against Chinese officials and entities involved in human rights violations in the Xinjiang province. To do so, the Council used the European Union's global human rights sanctions regime enacted in December 2020.[78] This system allows the European Union to impose sanctions on persons who are responsible for serious human rights abuses. Anyone who provides financial, technical or material support, or is otherwise involved in human rights abuses or associated with the perpetrators may also be targeted with restrictive measures which includes legal persons such as corporations.[79] This mechanism is a powerful tool to sanction business actors involved in the Uyghur persecution.

But more interestingly from a business and human rights perspective, the European Union announced that specific legislation will be adopted. In September 2022, inspired by the US model, and based on the European Parliament's Motion for a Resolution on the Human Rights situation in Xinjiang (2022), the EU Commission published a *proposal for a regulation on prohibiting products made with forced labour on the Union market*.[80]

The proposal aims to prevent the circulation of goods made with forced labour on the European market. Article 3 declares that '*Economic operators shall not place or make available on the Union market products that are made with forced labour, nor shall they export such products*.' Like Section 307 in the United States, the scope of Article 3 is very broad. All economic operators, irrespective of size or sector, seem to be covered by the proposal. Article 2 states that economic actor '*means any natural or legal person or association of persons who is placing or making available products on the Union market or exporting products*'. Considering the seriousness of such abuses, all business actors shall be prohibited from using forced labour in their supply chains. This is in line with the UNGPs which emphasise that all business actors, regardless of their size, should respect human rights. The scope of the proposal remains, however, unusual in the European Union. So far, the European Union's BHR framework has mainly focused on the biggest companies. This is, for instance, the case of the CSRD or of the draft Corporate Sustainability Due Diligence Directive (CSDDD). In the proposal, the Commission only asks competent authorities to '*take into account the size and economic resources of the economic operators*' before deciding to launch an investigation[81] but the prohibition to place goods made with forced labour on the market applies to all economic operators. Besides 'all economic actors', the proposal applies to every product, like Section 307 of the American Tariff Act. However, competent authorities shall follow a *risk-based approach*[82] which means that they will have to focus their enforcement efforts on 'high-risks' products. The Commission will also release a database of forced labour risks in some geographic areas or sectors.[83] This database could help corporations identify their business relationships using, or susceptible to use, forced labour.

If there is a '*substantiated concern of a violation of Article 3*', competent authorities designated by Member States for carrying out the obligations set out in the regulation[84] will have the full power to investigate.[85] Whether an economic actor has implemented a forced labour due diligence process will be considered by competent authorities before initiating an investigation.[86] The Commission has planned to issue guidelines to help business actors conduct a proper HRDD process to eradicate forced labour from their operations.[87]

At the end of their investigation, if it appears that Article 3 has been violated, competent national authorities can decide that the economic operator subjected to investigation must be prohibited from placing its goods on the European market or shall withdraw its products from the market.[88] A decision made by one authority must be enforced by competent authorities in other Member States.[89] At least 30 days shall be given to the economic operator to comply with the order.[90] Customs authorities will have to control whether they effectively comply. If the economic operator shows that it has eliminated forced labour from its supply chains – by adopting measures or by cutting its business relationships – competent authorities shall withdraw their decision for the future.[91]

As pointed out in an in-depth analysis requested by the European Parliament, this proposal could usefully complement the CSRD and the CSDDD.[92] Overall, the proposal for a regulation on prohibiting products made with forced labour on the Union market would force EU-based companies to meaningfully address forced labour in their HRDD process. Otherwise, as it was mentioned by the Commission, withdrawal of goods from the mar-

78 Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses.

79 Art. 3.

80 Restriction on import/circulation of prohibited products already exist in other areas in the EU (animal welfare policy, consumer protection law, environmental policy); See, European Parliament, *Trade-related Policy Options of a Ban on Forced Labour Products* (2022).

81 Art. 5.

82 Art. 4.

83 Art. 11.

84 Art. 12.

85 Arts. 4-5.

86 Art. 4.

87 Art. 23.

88 Art. 6.

89 Art. 14.

90 Art. 7.

91 Arts. 6-6.

92 See, European Parliament, *Trade-related Policy Options of a Ban on Forced Labour Products* (2022), at 7.

doi: 10.5553/ELR.000248

ket could have significant financial consequences for them. Companies will bear the costs of disposing of the prohibited product which '*will provide a strong deterrent and incentive for companies to comply*' and to eradicate coercive labour from their supply chains.[93] Taken together with the CSDDD, the proposal for a regulation on forced labour would be a step-up in terms of ensuring companies do carry out due diligence in relation to forced labour.

The proposal is, however, perfectible. In the current draft, the burden of proof is entirely on the competent authorities who would have to establish that the good is made with forced labour. It is an important difference with the UFLPA.[94] For the EU Parliament, '*this is a key element that may hinder the successful implementation of a forced labour products prohibition due to enforcement difficulties*'.[95] Even if competent authorities have large powers to initiate an investigation and gather evidence,[96] it has been recommended to reverse the burden of proof, at least when goods are from countries with State-imposed forced labour like in the Xinjiang province. Importers would have to demonstrate that their products are free from coercive labour.

The proposal does not address the situation of victims' either.[97] To address this shortcoming, a group of experts have recommended that the economic operator pay a fine[98] which can be used to fund remedial projects to assist affected workers.[99] Another option would be to require that companies implement appropriate remediation measures as a condition for lifting the ban.[100] It was also suggested that where a company was sanctioned by a competent authority under the draft regulation, it should be presumed that due diligence obligations established under the draft CSDDD were also breached.[101]

Whatever solution is adopted, it is crucial '*to create a worker-centred Regulation*'[102] and the law must '*be designed to incentivise the provision of remediation to workers trapped in forced labour*'.[103] Here again, this will be difficult to achieve in a situation of State-imposed forced labour, and the future regulation will mainly be a tool to express moral disapprobation and put some pressure on China.[104]

93 European Commission, above n. 25.
94 Global Trade Policy Blog, above n. 57.
95 See, European Parliament, above n. 92, at 8.
96 Art. 5.
97 BRIEFING Commission Proposal for a Regulation on prohibiting products made with forced labour on the Union market: The issue of remedies, 2023.
98 GreensEFA and *alii*, Progressing the proposed EU Regulation on prohibiting products made with forced labour: a model law, November 2022.
99 LaFianza, above n. 65.
100 BRIEFING Commission, above n. 97, at 10.
101 *Ibid*., at 10.
102 A model law with the key elements for an EU Regulation to prohibit the import and export of products made or transported with forced labour, at 7, www.antislavery.org/wp-content/uploads/2022/11/2022.05-Forced-Labour_A-Model-Law_Updated-4.pdf.
103 *Ibid*., at 7.
104 J. Cockayne, 'Making Xinjiang Sanctions Work: Addressing Forced Labour through Coercive Trade and Finance Measures', The University of Nottingham, 2022, www.xinjiangsanctions.info/wpcontent/uploads/2022/07/Making-Xinjiang-Sanctions-Work-FINAL.pdf.

The EU Proposal may raise another question that has not been addressed so far. Is the destruction of goods that have been withdrawn from the European market an acceptable solution?[105] Other options, such as giving them to charities, could also be explored.[106]

5 Conclusion

In this article, we aimed to map the legislative response to the Uyghur persecution in the United States and in the European Union and specifically to explore the growing interest for forced labour import bans legislation. Overall, and even if the literature on the effectiveness of forced labour bans remains limited, due to the fact that fewer bans are currently in place and enforced, we contend that they make a compelling addition to disclosure and HRDD laws. European countries should use forced labour bans to strengthen their legal framework. Disclosure, HRDD and restrictions on imports and exports can usefully complement each other. The European Commission precisely recommended this two-pronged approach in its proposal for a regulation on prohibiting products made with forced labour on the Union market. Experience (Top Glove) shows that the type of measures included in the proposal could contribute to addressing forced labour and generally improving workers' labour conditions. While this positive impact is more uncertain when faced with State-imposed forced labour, at least import bans send a strong message that some human rights abuses, because they are too severe, are no longer acceptable. They may also be used to pressure States.

Adopting legislation, however, is not enough. Once import bans are in place, competent authorities may face implementation challenges. To avoid those, they must be properly funded, and be in a position to work efficiently. In this regard, shifting the burden of proof, and asking companies to demonstrate they are *not* selling goods made with forced labour is an important requirement to include in legislation on import bans.

Forced labour import bans must be carefully designed to avoid being instrumentalised and used as '*political instruments and protectionist trade measures*'.[107] Relevant actors also need to understand the possible unintended consequences of import bans such as worsening the situation of workers, and the tensions they may create with other policy areas such as climate policy and the energy transition.

105 Art. 6.
106 See ABA – BALANCING BUYER AND SUPPLIER RESPONSIBILITIES Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0.
107 GFLC, above n. 22, at 2.

doi: 10.5553/ELR.000248