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THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW: PAST, PRESENT AND FUTURE

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VOLUME 22 • N. 2 • 2025
THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW: PAST, PRESENT AND FUTURE

Editorial: Introduction au numéro spécial

Pierre-François Mercure*

Harvey Mpoto Bombaka**

En janvier 2025, la Revue brésilienne de droit international a lancé un appel à contributions pour un numéro spécial intitulé **« The Common Heritage of Mankind in International Law: past, present and future »**, placé sous la direction scientifique des professeurs Pierre-François Mercure et Harvey Mpoto Bombaka. Les textes publiés dans ce numéro spécial reflètent une grande diversité géographique, avec des auteurs provenant du Canada, de la France, de l'Inde, d'Israël, de la République démocratique du Congo, de l'Espagne et du Vietnam.

La Troisième Conférence des Nations Unies sur le droit de la mer avait marqué un tournant majeur en droit international, en introduisant le concept de patrimoine commun de l'humanité, destiné à protéger les espaces et ressources situés au-delà des juridictions nationales. Plus de trente ans après l'entrée en vigueur de la CNUDM, la question de la portée exacte de ce principe se pose avec une grande acuité dans le contexte actuel.

Ce questionnement est d'autant plus pressant face aux défis planétaires : réchauffement climatique, élévation du niveau des mers, acidification des océans et fonte des glaces polaires. Ces bouleversements exigent une réflexion renouvelée sur la valeur et l'application du patrimoine commun, en droit de la mer comme dans d'autres domaines tels que le droit économique, l'environnement, la gestion durable des ressources forestières et la préservation des biens culturels et scientifiques. C'est dans cette perspective que s'inscrivent les contributions de ce numéro spécial, puisqu'elles analysent des aspects du patrimoine commun de l'humanité et proposent un regard critique sur ses évolutions et applications contemporaines.

Le premier texte, **« Activities in the Area for the benefit of "mankind as a whole" – who is 'mankind'? », écrit par Shani Friedman,** examine de manière critique le terme « humanité » afin de déterminer qui sont les bénéficiaires du principe du « patrimoine commun de l'humanité » (CHM) dans la CNUDM. Avec le début prévu de l'exploitation des fonds marins internationaux (la Zone), la question de l'identité des bénéficiaires deviendrat cruciale. L'auteure soutient que le terme « humanité » dans la CNUDM désigne uniquement les États comme bénéficiaires. Cela a une incidence sur la compétence de l'Autorité internationale des fonds marins (AIFM) et sur les mécanismes appropriés concernant la répartition des avantages. Cet article est d'une grande pertinence, car il analyse un des concepts pivots du concept de PCH, celui d'humanité. Bien que ce concept ait déjà été l'objet de publications, il est abordé à la lumière de développements doctrinaux récents. L'article apporte un éclairage nouveau sur la question.

Cette réflexion trouve un écho direct dans **« Equitable benefit sharing in the exploitation of common heritage of mankind areas according to the provisions of UNCLOS 1982: current situation, challenges and prospects »,** dont les auteurs sont **Yen Thi Hong Nguyen, Thang Toan Nguyen et Hiep Dinh Trong.** Ils montrent que les pratiques

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d'exploitation des ressources dans la Zone et les activités de l'Autorité internationale des fonds marins ont mis en évidence des défis importants dans la mise en œuvre du principe du partage équitable des avantages entre les pays. Les petits États, en particulier ceux qui disposent de ressources scientifiques, technologiques et financières limitées, sont souvent confrontés à des désavantages systémiques dans l'accès aux avantages tirés de la Zone. Par conséquent, des réformes juridiques internationales sont indispensables pour garantir une répartition équitable et durable des avantages tirés de ce bien commun mondial. Dans ce contexte, cet article examine tout d'abord les dispositions de la Convention des Nations unies sur le droit de la mer et d'autres normes internationales pertinentes concernant le statut juridique du patrimoine commun de l'humanité et le principe du partage équitable des avantages. En outre, l'article aborde les principaux défis à relever pour parvenir à un partage équitable des avantages dans le cadre du patrimoine commun. Enfin, il propose des recommandations visant à favoriser un partage équitable et durable des avantages entre les pays.

Dans la même veine, **« Le partage des avantages financiers issus de l'exploitation des grands fonds marins : Une illustration des mutations récentes de la notion de patrimoine commun de l'humanité ? »,** écrit par **Marie Guimezanes,** démontre que le partage juste et équitable des avantages issus de l'exploitation des ressources de la Zone est considéré comme un élément essentiel de définition du patrimoine commun de l'humanité. Les termes et modalités de ce partage se précisent actuellement dans le cadre d'une éventuelle exploitation des ressources minérales de la Zone. Or, les discussions au sein de l'AIFM semblent s'éloigner de la vision interétatique du PCH au sein de la CNUDM pour favoriser au contraire une conception intergénérationnelle. L'auteure montre clairement que ce glissement vers une vision cosmopolitique du PCH s'explique par les changements dans les contextes de négociation, qui ont présidé aux discussions relatives à la Zone en 1982, 1994 et aujourd'hui.

À cet égard, **« Le 'patronage de complaisance' dans le cadre des activités de la Zone : une épée de Damoclès sur la protection uniforme du patrimoine commun de l›humanité (PCH) »,** rédigé par **Harvey Mpoto Bombaka,** analyse la dérive du 'patronage de complaisance', qui détourne l'esprit inclusif de la CNUDM et menace le principe du patrimoine commun de l'humanité. L'auteur montre que cette pratique permet aux multinationales de contourner leurs obligations en se plaçant sous le parrainage de petits États dépourvus de moyens de contrôle, dans une logique comparable aux « pavillons de complaisance » du droit maritime. Les risques identifiés sont multiples : affaiblissement de la protection uniforme du milieu marin, dilution de la diligence requise et transfert de responsabilité environnementale et juridique vers les États fragiles. Des exemples comme Nauru Ocean Resources Inc. et The Metals Company illustrent la concentration de contrats, la captation des bénéfices par un oligopole transnational et l'opacité des données environnementales. La gouvernance de l'Autorité internationale des fonds marins apparaît affaiblie, tandis que la répartition des coûts et bénéfices demeure profondément inéquitable, les profits allant aux pays développés et les risques étant assumés par les pays en développement. Pour répondre à ces failles, l'auteur propose de renforcer directement les obligations des entreprises contractantes, d'élargir les exigences environnementales, d'appliquer une due diligence stricte et évolutive et d'encadrer le contrôle effectif ainsi que le patronage conjoint. En conclusion, il souligne que sans une réforme, le patronage de complaisance risque de priver le principe du patrimoine commun de toute sa portée et de transformer la Zone en un espace de rente privatisée, contraire aux idéaux de justice et d'équité interétatique.

L'ouverture vers d'autres biens communs se retrouve dans **« Marine Biodiversity Management from the Global Commons: Analysing the Expanded Scope of Common Heritage of mankind Principle »,** dont les auteures sont **Kavitha Chalakkal et Simi K K.** Elles soulignent que la portée des biens communs mondiaux dans le cadre du nouvel accord BBNJ (accord sur la biodiversité en haute mer) conclu au titre de la Convention des Nations unies sur le droit de la mer (CNUDM 1982) comprend la reconnaissance des droits historiques et le partage, la répartition et l'attribution justes et équitables des ressources et des avantages qui en découlent. En outre, l'évaluation de la valeur des droits d'utilisation, de la valeur en tant que propriété et en tant que ressource, la reconnaissance de la propriété ou des droits communaux, le cas échéant, et le coût d'acquisition et d'application des droits de propriété nécessitent une attention immédiate de la part de la communauté internationale, fondée sur concept de patrimoine commun de l'humanité (PCH). Dans ce contexte, il est important

d'identifier la nature des ressources génétiques marines par rapport aux concepts de propriété existants pour les ressources communes. Les auteures mettent l'accent sur l'importance du droit international dans la gouvernance des océans en examinant la gouvernance des biens communs mondiaux. Elles rappellent enfin qu'un consensus mondial au sein de la communauté internationale est nécessaire sur l'applicabilité des principes et approches coutumiers pour traiter ces questions, notamment la durabilité de l'exploration et de l'exploitation, la réglementation de l'accès et la garantie d'un partage juste et équitable des avantages.

Dans un registre distinct, mais complémentaire, **« Le Projet international Ice Memory : les carottes de glace sont-elles patrimoine commun de l›humanité », proposé par Pierre-François Mercure**, s'interroge sur le statut juridique des carottes de glace prélevées pour préserver la mémoire climatique des générations futures. Après avoir rappelé la valeur scientifique et environnementale de ces échantillons, l'auteur examine les différents concepts du droit international public pouvant leur être appliqués. Les notions d'apanage de l'humanité, de préoccupation commune et d'intérêt de l'humanité sont jugées insuffisantes car trop imprécises ou dépendantes de la souveraineté étatique. Le concept de patrimoine mondial de l'UNESCO est également écarté, puisqu'il repose sur la reconnaissance de la souveraineté des États et ne permet pas une gestion internationale ni un partage équitable des bénéfices. En revanche, le concept de patrimoine commun de l'humanité (PCH), consacré par la CNUDM et l'Accord sur la Lune, apparaît comme le plus pertinent. Ses six caractéristiques – non-appropriation, accès universel à la recherche, gestion supranationale, partage équitable des bénéfices, usage pacifique et protection pour les générations futures – trouvent une application adaptée aux carottes de glace. L'auteur propose donc qu'un traité international consacre leur statut de PCH, confiant leur gestion à la Fondation Ice Memory, et garantissant à l'humanité entière, présente et future, un droit sur cette ressource unique. En conclusion, les carottes de glace, en tant que mémoire scientifique vitale, devraient être reconnues comme patrimoine commun de l'humanité, nécessitant une gouvernance internationale et solidaire.

Enfin, **« La cultura del vino como patrimonio inmaterial », dont l'auteur est Luis Javier Capote-Pérez,** met en lumière la production viticole comme secteur particulièrement important dans le secteur primaire presque partout dans le monde. La consommation de vin est présente dans toutes sortes d'activités sociales et culturelles et le vin a développé autour de lui une culture active et en constante évolution. L'auteur examine le traitement du vin et de son environnement culturel du point de vue de la réglementation du patrimoine culturel, en accordant une attention particulière au traitement qui lui est réservé dans la catégorie des biens immatériels. Il soutient que nous pouvons parler du patrimoine viticole comme d'une catégorie transversale au sein des concepts de base du patrimoine culturel matériel et immatériel, où l'on trouve des exemples typiques de ce que l'on appelle les « biens-choses » et les « biens-activités », et qu'il peut être intégré dans le concept de patrimoine culturel mixte.

Pris ensemble, ces travaux témoignent de la force d'un concept, celui de patrimoine commun, dont la fécondité ne cesse de se réinventer face aux enjeux contemporains de justice, d'équité et de durabilité. Nous remercions l'ensemble des auteurs pour leurs contributions de grande qualité, qui confèrent à ce numéro spécial une richesse intellectuelle et académique appelée à nourrir durablement la réflexion sur ce principe fondateur du droit international.

Professeurs **Pierre-François Mercure** et **Harvey Mpoto Bombaka**

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1 Introdução

A trigésima sessão do Conselho da Autoridade Internacional dos Fundos Marinhos (ISA) ocorreu em sua primeira parte entre os dias 17 e 28 de março de 2025 e em sua segunda parte entre os dias 7 e 18 de julho de 2025, avançando nas discussões do desenvolvimento do Código de Explotação de recursos minerais nos fundos marinhos (na terminologia da Convenção de Montego Bay, na Área). Houve, ainda, reuniões dos outros órgãos da Autoridade tais como a Comissão Jurídica e Técnica e a Assembleia.[1] Tratou-se da primeira sessão coordenada pela Secretária-Geral Letícia Carvalho, oceanógrafa com longa experiência profissional no Programa das Nações Unidas sobre Meio Ambiente (PNUMA), primeira mulher e primeira brasileira a assumir essa posição nesta Organização Internacional.

Essa crônica pretende analisar: 1) os avanços gerais relacionados às últimas negociações; 2) os avanços gerais relacionados a temas que impactam a ISA e o Brasil; 3) a mineração dos fundos marinhos como ameaça à vida marinha e à obtenção de bioativos ainda desconhecidos.

2 Avanços gerais relacionados às últimas negociações

O ciclo de negociação 2024-2025 construiu principalmente a arquitetura processual do regime de explotação de recursos minerais na Área (negociação do texto consolidado revisado, capítulos sobre inspeção/conformidade,

[1] INTERNATIONAL SEABED AUTHORITY. *The 30th Session of the International Seabed Authority*. [2025]. Disponível em: https://www.isa.org.jm/sessions/30th-session-2025/. Acesso em: 29 ago. 2025.

planos ambientais, garantias), mas sem definir de forma detalhada as obrigações de diligência dos Estados patrocinadores. Em outras palavras, sabe-se melhor "como fazer" e "quem faz o quê", mas de modo ainda impreciso "o que é devido em termos substantivos e não negociáveis"[2].

O regime ainda é amplamente processual. As obrigações mais substanciais, como de transferência de tecnologia ou reforço de capacidades, são frequentemente formuladas em termos de melhores esforços, remetidas a futuras diretrizes sem um mecanismo vinculante claro, o que enfraquece o alcance real do tratamento diferenciado entre os Estados. Além disso, a carga de diligência devida continua sem modulação, uma vez que as obrigações de supervisão e controle impostas aos Estados patrocinadores – tais como cooperação, estudos de impacto ambiental, garantias financeiras ou mesmo inspeção – são idênticas para todos, sem levar em conta as capacidades diferenciadas dos Estados. A norma é, portanto, uniforme, mesmo que os meios para cumpri-la sejam distribuídos de forma desigual, o que enfraquece a posição dos Estados em desenvolvimento face a essas exigências. Por fim, na ausência de mecanismos de apoio robustos, alguns Estados em desenvolvimento são usados como fachada por operadores privados transnacionais, o que desvirtua o sentido do tratamento diferenciado e o transforma em uma vulnerabilidade estrutural por meio da prática do "patrocínio de complacência".

Em março de 2025[3], o Conselho concentrou-se na segunda leitura do texto consolidado do Projeto de Regulamento de Explotação, cobrindo os regulamentos 1 a 55. Participaram mais de 250 delegados representando todos os 36 membros do Conselho, o que sinaliza a amplitude da atenção dedicada ao processo[4]. Nesta fase, cerca de 30 Estados defenderam uma moratória, suspensão ou proibição das atividades de mineração nos fundos marinhos, até que fosse concluído um marco regulatório adequado. Essa posição foi registrada como uma das principais dinâmicas políticas do encontro, especialmente no contexto de divergências sobre a "regra de dois anos" acionada por Nauru para acelerar a aprovação do Regulamento e, consequentemente, de contratos de explotação.

No final da reunião de março, Nauru insistiu em incluir no debate a questão da validade dos contratos de explotação ainda sem Código em vigor. O tema gerou forte reação no Conselho, com o Brasil propondo o adiamento da discussão para julho, posição que contou com o apoio do Chile e de outros países. Tal postura reforça a orientação precautória de alguns países latino-americanos, no sentido de que a mineração nos fundos marinhos não pode ser autorizada sem que haja um Código de Explotação completo, claro e operacional[5].

Já em julho de 2025, o Conselho retomou a segunda leitura, cobrindo os regulamentos 56 a 107 do texto consolidado. Mais uma vez, mais de 250 delegados (representando 33 membros) participaram, e a Assembleia, ao final do mês, reuniu mais de 300 representantes. A segunda parte da 30ª. Sessão, ocorrida em julho de 2025, avançou no objetivo de se chegar a um "rascunho limpo" do Código, embora tenha ficado claro que a adoção integral do regulamento em 2025 ainda não é viável[6].

As discussões em julho confirmaram a continuidade do apoio à moratória ou à pausa precautória, mantendo-se o grupo de mais de 30 países que já havia defendido

[2] INTERNATIONAL SEABED AUTHORITY. *Draft regulations on exploitation of mineral resources in the area*: compiled text (second reading, 29 November 2024). Kingston: ISA, 2024. Disponível em: https://isa.org.jm/files/files/documents/ISBA30-C-CRP1-2024.pdf. Acesso em: 29 ago. 2025.; INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT. Summary of the 30th Session of the International Seabed Authority. *Earth Negotiations Bulletin*, Kingston, 18-29 mar. 2024. Disponível em: https://enb.iisd.org/international-seabed-authority-isa-30th-session-kingston-summary. Acesso em: 29 ago. 2025.

[3] INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT. Summary report 17-28 March 2025. International Seabed Authority (ISA) Council 30, Part I. *Earth Negotiations Bulletin*, 2025. Disponível em: https://enb.iisd.org/international-seabed-authority-isa-council-30-1-summary. Acesso em: 30 ago. 2025.

[4] Também participaram 24 Estados não integrantes do Conselho e 26 observadores. Press Release 29 March 2025. Disponível em: https://www.isa.org.jm/news/the-council-of-the-international-seabed-authority-concludes-part-i-of-its-thirtieth-session/. Acesso em: 30 ago. 2025.

[5] INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT. Summary report 7-25 July 2025. International Seabed Authority (ISA) Council 30, Part II and Assembly. *Earth Negotiations Bulletin*, 2025. Disponível em: https://enb.iisd.org/international-seabed-authority-isa-council-30-2-summary. Acesso em: 30 ago. 2025.

[6] INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT. Summary report 7-25 July 2025. International Seabed Authority (ISA) Council 30, Part II and Assembly. *Earth Negotiations Bulletin*, 2025. Disponível em: https://enb.iisd.org/international-seabed-authority-isa-council-30-2-summary. Acesso em: 30 ago. 2025.

tal posição em março[7]. Países latino-americanos, como Brasil e Chile, reafirmaram seu alinhamento a essa abordagem, insistindo que nenhum contrato de explotação pode ser aprovado sem base normativa consolidada.

A Assembleia de julho também teve importância simbólica e política, ao comemorar os 30 anos da criação da ISA e deliberar sobre a necessidade de uma política geral de proteção ambiental para a Área. Foi decidida a operacionalização da Comissão de Planejamento Econômico pelo Conselho, com a previsão de que o Comitê Financeiro submeta relatório sobre as suas implicações econômicas em 2026[8]. Além disso, reafirmou-se a centralidade da ISA e da UNCLOS diante do anúncio da empresa The Metals Company USA em 2025 de buscar licenças para explotar a Área sob o direito interno dos Estados Unidos. Os Estados Membros reiteraram que qualquer atividade de mineração somente pode ocorrer sob a autoridade da ISA[9], rechaçando veementemente qualquer autorização unilateral, adicionalmente pelo fato de os Estados Unidos não serem Parte da UNCLOS e tampouco membro da ISA.

Em função da divergência de interesses entre as Partes, foram criados grupos informais e o grupo "Friends of the President" para continuarem os debates entre as sessões e depois de julho, com o objetivo de construir consenso e facilitar o processo de elaboração das regras e regulamentos. Entre as questões abordadas pelos grupos, destacam-se: os direitos e deveres dos Estados costeiros; o patrimônio cultural subaquático; o controle efetivo; a mineração experimental; os mecanismos de inspeção, conformidade e fiscalização; e planos regionais de gestão ambiental (REMPs)[10].

Entre os argumentos centrais, destacam-se as obrigações de proteção ambiental que permeiam as negociações: a aplicação da abordagem precautória, a conservação da integridade ecológica, a adoção de planos de gestão ambiental regional (REMP da sigla em inglês) e o uso das melhores evidências científicas disponíveis. Há também instrumentos jurídicos específicos que impõem avaliações de impacto ambiental, transparência na tomada de decisões e uso das melhores práticas técnicas e ambientais. Outro eixo argumentativo é o da partilha equitativa de benefícios: grupos de trabalho têm desenvolvido metodologias para cálculo de royalties, a fim de assegurar que os benefícios da explotação não sejam apropriados de maneira desigual por poucos Estados ou empresas.

Em síntese, a primeira parte de março caracterizou-se por avanços textuais até o regulamento 55 e pelo agravamento de tensões políticas (moratória e "two-year rule"), enquanto a segunda parte de julho aprofundou o debate até o regulamento 107, consolidou a posição de diversos países em defesa da precaução e reafirmou a necessidade de que o Código seja finalizado antes de qualquer início de mineração. Brasil e Chile desempenharam um papel relevante, propondo e sustentando o adiamento de decisões precipitadas e reforçando o compromisso com um marco regulatório robusto e ambientalmente responsável. Além desses avanços, seguem os avanços gerais relacionados a temas que impactam a ISA e o Brasil.

3 Avanços gerais relacionados a temas que impactam a ISA e o Brasil

Entre os temas de destaque que impactam a ISA e o Brasil, podem ser citados: o risco de continuidade da possibilidade de patrocínio de conveniência e a possibilidade de mineração nos fundos marinhos por Estados que não sejam membros da ISA.

Para serem elegíveis para atividades na Área, quaisquer interessados em realizar um contrato com a ISA precisam ser patrocinados por um Estado, sendo ele o Estado de sua nacionalidade ou que exerça controle efetivo sobre eles. Isso é necessário para que os contratantes cumpram os regulamentos internacionais e sejam responsabilizados em caso de danos. Contudo, a ISA deixou a critério dos Estados e suas respectivas legislações como tal requisito de controle efetivo seria preenchido. Isso permite que os Estados disciplinem tal requisito conforme julguem conveniente, deixando em aberto a possibilidade de que empresas originalmente

[7] DEEP SEA CONSERVATION COALITION. *Opportunities for the ISA under a deep-sea mining moratorium*. abr. 2025. Disponível em: https://deep-sea-conservation.org/wp-content/uploads/2025/04/Opportunities-for-the-ISA-under-a-Deep-Sea-Mining-Moratorium.pdf. Acesso em: 30 ago. 2025.

[8] Decisão ISBA/30/C/17.

[9] ROBB, Samantha. Deep-seabed mining: key take-aways from the International Seabed Authority's July 2025 Council & Assembly Meeting. *Ocean Legal Vision*, 2025. Disponível em: https://oceanlegalvision.org/deep-seabed-mining-key-take-aways-isa-july-2025. Acesso em: 30 ago. 2025.

[10] The Council of the International Seabed Authority concludes Part I of its thirtieth session - International Seabed Authority.

OLIVEIRA, Carina Costa de; LIMA, Robson José Calixto de; LUZ, Gustavo Leite Neves da; BARROS-PLATIAU, Ana Flávia; BOMBAKA, Harvey Mpoto; JOVANE, Luigi. Crônica sobre as negociações no âmbito da Autoridade Internacional dos Fundos Marinhos (ISA): rumo ao Código de Explotação?. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 19-30, 2025.

baseadas em outros países criem subsidiárias em países sem capacidade de realizar atividades na Área a fim de beneficiarem-se de leis mais flexíveis. Em outras palavras, os Estados podem agir como patrocinadores de conveniência, haja vista que são as empresas que controlam as atividades, por serem mais capacitadas do ponto de vista tecnológico e mais poderosas do que os Estados, que são pequenas ilhas em desenvolvimento no caso em tela. Ademais, é notório que os Estados em desenvolvimento têm capacidade extremamente limitada de processar uma empresa estrangeira, em caso de litígio ou de acidente, como ocorreu nos casos de Brumadinho e Mariana no Brasil.

Algumas situações nitidamente enquadram-se como envolvendo patrocinadores de conveniência. Por exemplo, a empresa The Metals Company possui dois contratos por meio de suas subsidiarias Nauru Ocean Resources Inc. e Tonga Offshore Mining Ltd, ambas realizando atividades de exploração em Nauru e Tonga respectivamente. Apesar disso, a Comissão Jurídica e Técnica da ISA considerou a aplicação para tais contratos dentro das normas aplicáveis[11]. Outro exemplo mais recente de contrato controverso foi o realizado pela Blue Minerals Jamaica Ltd. tendo como a Jamaica como patrocinadora. Apesar de ser registrada na Jamaica, a empresa é uma subsidiária da empresa suíça Allseas Group[12].

Outros casos entram em uma zona cinzenta, e a sua classificação como patrocínio de conveniência não é clara. O contrato da Cook Islands Investment Corporation, empresa estabelecida nas Ilhas Cook, é realizado em acordo conjunto com a empresa belga Global Sea Mineral Resources NV. Nesse acordo, a empresa belga é responsável por fornecer a sua capacidade técnica e financeira. Contudo, quaisquer potenciais responsabilidades por danos oriundas das atividades do contrato serão de encargo da empresa Cook Islands Investment Corporation, uma vez que detém o contrato de exploração, ou em caso, de culpa, do seu patrocinador Ilhas Cook[13]. Outro exemplo é o contrato da empresa de Kiribati Marawa Research and Exploration Ltd. e o seu acordo com a empresa The Metals Company[14]. Muitas informações não foram esclarecidas sobre a capacidade da Marawa Research and Exploration Ltd. de execução do contrato. Além disso, vale ressaltar que todos os contratos supracitados foram realizados em áreas reservadas para Estados em desenvolvimento[15].

Apesar desses esforços por parte de países desenvolvidos e suas empresas operando com os Estados supracitados para início das atividades de explotação, as atividades na Área ainda não seriam lucrativas. Em outros termos, a viabilidade econômica das atividades de aproveitamento dos recursos minerais depende de fatores externos, como a demanda e a oferta no mercado internacional, além do acesso a tecnologias mais baratas e seguras. Logo, depreende-se que o que está em jogo não é o lucro no curto prazo, mas sim a apropriação de espaços e direitos, em contexto de alta incerteza científica relativa à biodiversidade marinha e os impactos da mineração marinha. Neste cenário, o princípio da precaução é ainda mais relevante que a história recente demonstra que na época da negociação da CNUDM, o foco era a mineração, e não o interesse comercial nos recursos vivos. Assim, as atividades de explotação ainda não foram iniciadas devido à não conclusão dos regulamentos necessários nas negociações da ISA. Além disso, cada vez mais países vêm adotando uma posição

[11] INTERNTIONAL SEABED AUTHORITY. *Report and recommendations to the Council of the International Seabed Authority relating to an application for the approval of a plan of work for exploration for polymetallic nodules by Tonga Offshore Mining Limited*. Submitted by the Legal and Technical Commission. 8 July 2011. ISA Doc. ISBA/17/C/10*, para. 19 e 32. Disponível em: https://digitallibrary.un.org/record/733128?ln=en. Acesso em: 30 ago. 2025.; INTERNATIONAL SEABED AUTHORITY. *Report and recommendations to the Council of the International Seabed Authority relating to an application for the approval of a plan of work for exploration by Nauru Ocean Resources Inc*. 11 July 2011. ISA Doc. ISBA/17/C/9, para. 19. Disponível em: https://digitallibrary.un.org/record/733109?ln=en. Acesso em: 30 ago. 2025.

[12] INTERNATIONAL SEABED AUTHORITY. *Report and recommendations of the Legal and Technical Commission to the Council of the International Seabed Authority relating to an application for approval of a plan of work for exploration for polymetallic nodules by Blue Minerals Jamaica Ltd*. 6 aug. 2020. ISA Doc. ISBA/26/C/22. Disponível em: https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA_26_C_22-E.pdf. Acesso em: 30 ago. 2025.

[13] GREENPEACE INTERNATIONAL. *Deep trouble*: the murky world of the deep sea mining industry. Amsterdam: Greenpeace International, 2020. p. 17.

[14] INTERNATIONAL SEABED AUTHORITY. *Report and recommendations of the Legal and Technical Commission to the Council of the International Seabed Authority relating to an application for the approval of a plan of work for exploration for polymetallic nodules by Marawa Research and Exploration Ltd*. 18 July 2012. ISA Doc. ISBA/18/C/18. Disponível em: https://digitallibrary.un.org/record/732869?ln=en. Acesso em: 30 ago. 2025.

[15] WILLAERT, Klaas; SINGH, Pradeep. Deep sea mining partnerships with developing states: favourable collaborations or opportunistic endeavours?. *The International Journal of Marine and Coastal Law*, v. 36, n. 199, p. 214, 2021.

favorável a uma pausa precautória, a uma extensão da moratória ou ao banimento total da explotação na Área.

Em 24 de abril de 2025, os Estados Unidos emitiram uma Ordem Executiva intitulada "*Unleashing America's Critical Offshore Minerals and Resources"* com o objetivo de acelerar a explotação de recursos minerais do fundo do mar dentro e fora da jurisdição dos EUA. Entre suas principais disposições, a ordem instrui a "acelerar o processo de revisão e emissão de licenças de exploração mineral do fundo do mar e autorizações de recuperação comercial em áreas além da jurisdição nacional sob a *Deep Seabed Hard Mineral Resources Act*", aprovada em 1980 pelos Estados Unidos, enquanto se esperava pelo regime de mineração da ISA[16]. A subsidiária estadunidense da The Metals Company apresentou um pedido de autorização de recuperação comercial apenas cinco dias depois, marcando o primeiro passo concreto em direção à atividade de explotação unilateral fora do regime da ISA. Tal tendência pode ganhar força diante do preterimento do multilateralismo e as parceiras Estado-empresa de conveniência, pelas grandes potências do setor, verificado nos últimos anos.

Conclui-se que o avanço normativo - com padrões e diretrizes, além de regras, regulamentos e procedimentos - no âmbito da ISA é imprescindível para equilibrar interesses econômicos, ambientais e geopolíticos. O caso da Elevação do Rio Grande[17], espaço que fazia parte da Área e agora é solicitado à Comissão de Limites da ONU como extensão da plataforma continental brasileira, mostra que o Brasil precisa atuar de modo estratégico, conciliando sua posição de país com uma extensa plataforma continental com sua responsabilidade no regime internacional. A legislação nacional ainda possui diversas lacunas que podem prejudicar a garantia de obrigações nacionais[18] e internacionais e há um aumento significativo nos pedidos de exploração da plataforma continental[19]. O fortalecimento da governança ambiental global depende não apenas do conteúdo do futuro Código de Explotação, mas também da implementação de princípios jurídicos que garantam a melhor sustentabilidade possível da atividade minerária na plataforma continental dos Estados e na Área. Assim, o direito internacional deve cumprir uma função regulatória e preventiva, ao mesmo tempo em que se abre ao diálogo interdisciplinar com as ciências naturais e sociais para assegurar a proteção dos fundos marinhos como patrimônio comum da humanidade.

4 Mineração dos Fundos Marinhos como ameaça à vida marinha e à obtenção de bioativos ainda desconhecidos

As incertezas científicas relacionadas à explotação dos fundos marinhos ameaçam a vida marinha e a obtenção de bioativos ainda desconhecidos. No Século XIX já se sabia que os fundos marinhos além da plataforma continental eram ricos em nódulos polimetálicos, pois estoques desses nódulos foram encontrados no Mar de Kara, no Oceano Ártico, em 1868 e em outros espaços, durante a Expedição Científica realizada pelo Navio H.M.S. Challenger (1872-1876)[20]. Esses nódulos, por serem composto por cerca de 29% de manganês, ficaram conhecidos como "nódulos de manganês", mas também continham ferro (6%), silício (5%), alumínio (3%), níquel (1,4%), cobre (1,3%), cobalto (0,25%), entre outros[21]. Crostas de ferromanganês em montes submarinos cobrem grandes áreas de substratos duros do fundo do mar, em especial no Pa-

[16] UNITED STATES. Congress. U.S. interest in seabed mining in areas beyond national jurisdiction: brief background and recent developments. *Library of Congress*, [*S. d.*]. Disponível em: https://www.congress.gov/. Acesso em: 30 ago. 2025.

[17] BENITES, Mariana; GONZÁLEZ, Javier; HEIN, James; MARINO, Egidio; REYES, Jesus; MILLO, Christian; JOVANE, Luigi. Controls on the chemical composition of ferromanganese crusts from deep-water to the summit of the Rio Grande Rise, South Atlantic Ocean. *Marine Geology*, v. 462, 2023.

[18] LAMBRANHO, Lúcio. Brecha na legislação permite extração mineral no fundo do mar sem licenciamento ambiental. *Observatório da Mineração*, 18 fev. 2025. Disponível em: https://observatoriodamineracao.com.br/exclusivo-brecha-na-legislacao-permite-extracao-mineral-no-fundo-do-mar-sem-licenciamento-ambiental/. Acesso em: 31 ago. 2025.

[19] LAMBRANHO, Lúcio. Interesse explode e metade dos pedidos para mineração no mar brasileiro foram feitos nos últimos 5 anos. *Observatório da Mineração*, 04 fev. 2025. Disponível em: https://observatoriodamineracao.com.br/interesse-explode-e-metade-dos-pedidos-para-mineracao-no-mar-brasileiro-foram-feitos-nos-ultimos-5-anos/. Acesso em: 31 ago. 2025.

[20] INTERNATIONAL SEABED AUTHORITY. *Polymetallic nodules*. 2022. Disponível em: https://www.isa.org.jm/wp-content/uploads/2022/06/eng7.pdf. Acesso em: 22 abr. 2025.

[21] HALBACH, P.; KRIETE, C.; PRAUSE, B.; PUTEANUS, D. Mechanisms to explain the platinum concentration in ferromanganese seamount crusts. *Chemical Geology*, v. 76, p. 95-106, 1989. Disponível em: https://www.sciencedirect.com/science/article/abs/pii/0009254189901307. Acesso em: 22 abr. 2025.

cífico Central[22]. De modo mais recente há mais estudo relacionado à biodiversidade marinha, mas ainda com um longo caminho que será potencializado pelo recente acordo sobre Biodiversidade marinha além da jurisdição nacional (BBNJ), adotado no âmbito da ONU, mas ainda aguardando entrada em vigor. A fim de evidenciar as incertezas ambientais, políticas, econômicas e jurídicas será apresentado o contexto ambiental e econômico da explotação dos fundos marinhos e os riscos ambientais do início dessas atividades.

Se o estudo das crostas de ferromanganês como um recurso potencial para cobalto ganhou destaque no início da década de 1980, o entusiasmo pela mineração nos fundos marinhos decresceu até a década de 2000, devido a preços baixos dos metais nos mercados globais, mas as pesquisas para a prospecção mineral continuaram[23]. Os sistemas de fontes (ou plumas) hidrotermais foram descritos pela primeira vez em 1977, quando cientistas a bordo do submersível "Alvin", da Instituição Oceanográfica Woods Hole, estavam explorando o fundo do mar, a cerca de 2.500m, nas proximidades das Ilhas Galápagos e inesperadamente encontraram comunidades de vermes gigantes, anêmonas, mexilhões, caranguejos, entre outras espécies marinhas[24]. Investigações posteriores mostraram que as águas quentes nas proximidades dessas plumas continham grandes populações de bactérias e arqueias quimiossintéticas (quimiotróficas) que, em ambiente de pouca luz, fixavam CO2 a partir da energia retirada da oxidação de sulfetos provenientes das fontes hidrotermais[25]. Nessas áreas de fontes hidrotermais ocorrem, também, além dessas novas comunidades e populações marinhas, depósitos minerais maciços de sulfetos de ferro e cobre, sulfato de cálcio e outros sulfetos complexos[26].

Os interesses recorrentes têm sido em níquel, cobre e manganês para nódulos polimetálicos, cobalto, níquel e manganês para as crostas e cobre, zinco e ouro para sulfetos maciços do fundo do mar[27]. Contudo, pesquisas realizadas demonstraram a ocorrência de metais raros e elementos de terras raras, como potenciais subprodutos da mineração dos principais metais de interesse[28]. Muitos desses metais são de interesse da alta tecnologia, tecnologia relacionadas a supercondutores, de tecnologias verdes ou emergentes[29].

Todavia o interesse por esses minerais se pautou na visão isolada dos ativos como riqueza, tão somente em seus aspectos econômicos e comerciais, sem levar em conta os recursos vivos associados, em termos de biodiversidade, serviços ambientais e como bioativos. Mesmo quando da adoção da UNCLOS 1982, que incorporou em seu art. 136 o conceito de proveniente da Resolução 2749 (XXV), de 1970, de que a Área e seus recursos são patrimônio comum da humanidade, a visão era estreita, focada no potencial mineral que poderia estar disponível e auferir lucros e dividendos, a serem repartidos, com distribuição equitativa dos benefícios resultantes das atividades de exploração e explotação (art. 140, 2), tendo particularmente em conta os interesses e as necessidades dos Estados em desenvolvimento (art. 140, 1). Na ocasião, acreditava-se que a riqueza do fundo do mar era quase ilimitada de minerais e que sua

[22] HALBACH, P.; KRIETE, C.; PRAUSE, B.; PUTEANUS, D. Mechanisms to explain the platinum concentration in ferromanganese seamount crusts. *Chemical Geology*, v. 76, p. 95-106, 1989. Disponível em: https://www.sciencedirect.com/science/article/abs/pii/0009254189901307. Acesso em: 22 abr. 2025.

[23] HEIN, J. R.; MIZELL, K.; KOSCHINSKY, A.; CONRAD, T. A. Marine ferromanganese deposits as a source of rare metals for high – and green –technology applications: comparison with land-based deposits. *Ore Geology Reviews*, v. 51, p. 1-14, 2013. Disponível em: https://oceanfdn.org/sites/default/files/Deep-ocean+mineral+deposits+as+a+source+of+critical+metals+for+high-+and+green-technology+application-+Comparison+with+land+based+resources.compressed.pdf. Acesso em: 22 abr. 2025.

[24] MUNN, C. B. *Marine microbiology*: ecology and applications. 3. ed. Boca Raton: CRC Press; Taylor & Francis Group, 2020.

[25] MUNN, C. B. *Marine microbiology*: ecology and applications. 3. ed. Boca Raton: CRC Press; Taylor & Francis Group, 2020.

[26] MUNN, C. B. *Marine microbiology*: ecology and applications. 3. ed. Boca Raton: CRC Press; Taylor & Francis Group, 2020.

[27] HEIN, J. R.; MIZELL, K.; KOSCHINSKY, A.; CONRAD, T. A. Marine ferromanganese deposits as a source of rare metals for high – and green –technology applications: comparison with land-based deposits. *Ore Geology Reviews*, v. 51, p. 1-14, 2013. Disponível em: https://oceanfdn.org/sites/default/files/Deep-ocean+mineral+deposits+as+a+source+of+critical+metals+for+high-+and+green-technology+application-+Comparison+with+land+based+resources.compressed.pdf. Acesso em: 22 abr. 2025.

[28] MELLO, S. L. M.; QUENTAL, S. H. A. J. Depósitos de sulfetos metálicos no fundo dos oceanos. *Revista Brasileira de Geofísica*, v. 18, n. 3, 2000. Disponível em: https://www.scielo.br/j/rbg/a/YbF7b5VcmmZXVrND3HKh3ZK/?lang=pt&format=pdf. Acesso em: 30 ago. 2025.

[29] HEIN, J. R.; MIZELL, K.; KOSCHINSKY, A.; CONRAD, T. A. Marine ferromanganese deposits as a source of rare metals for high – and green –technology applications: comparison with land-based deposits. *Ore Geology Reviews*, v. 51, p. 1-14, 2013. Disponível em: https://oceanfdn.org/sites/default/files/Deep-ocean+mineral+deposits+as+a+source+of+critical+metals+for+high-+and+green-technology+application-+Comparison+with+land+based+resources.compressed.pdf. Acesso em: 22 abr. 2025.

exploração oferecia uma chance de acabar com a pobreza mundial, sem se pensar muito que a exploração física, com perfuração, raspagem, dragagem, geração de ruídos de embarcações e maquinários empregados em ambiente silencioso, utilização de luz em ambiente onde está ausente, além de produtos químicos nocivos associados, representariam ameaças aos recursos vivos que vivem próximos ou fixados aos fundos marinhos[30]. A UNCLOS prevê em diversos artigos a preservação do ambiente marinho, mas com um foco mais direcionado à poluição do que à conservação da biodiversidade marinha.

A mineração nos fundos marinhos pode resultar em desequilíbrio químico-físico do fundo do mar e da coluna d'água e perda de biodiversidade[31]. A importância dessa perda para o funcionamento do ecossistema é desconhecida. Ademais, propostas de medidas de compensação não poderiam replicar a biodiversidade e os serviços ecossistêmicos perdidos pela mineração do fundo do mar[32]. Para alguns autores[33], a restauração ecológica dos fundos marinhos é ainda objeto de estudo, sendo que os custos estimados para cenários hipotéticos de restauração em águas profundas podem ser de duas a três ordens de magnitude maiores por hectare do que os custos para esforços de restauração em sistemas marinhos de águas rasas. Diante desse contexto de incertezas científicas, a abordagem precautória é elevada à primeira necessidade[34] em função dos potenciais danos decorrentes da mineração dos fundos marinhos e do conhecimento ainda limitado quanto aos processos físicos, químicos e biológicos do sistema oceânico global. O próprio Banco Europeu de Investimento considerou como inaceitável a extração de depósitos minerais dos fundos marinhos, em termos climáticos e ambientais[35].

Sabe-se que há bastante interesse no âmbito empresarial tanto nos recursos minerais quanto nos bioativos. Neste ponto vale mencionar o relatório sobre indústrias excepcionais capazes de transformar o cenário empresarial do McKinsey Global Institute[36]. Este identificou que: (a) 12 arenas que mostraram crescimento e dinamismo extraordinários entre os anos de 2005 a 2020, sendo que em 2005 geraram menos de 10% (U$55 bilhões) do lucro econômico global total, mas em 2019 já representavam metade do total ($250 bilhões); e (b) 18 potenciais arenas do futuro que podem remodelar a economia global, gerando entre US$ 29 trilhões e US$ 48 trilhões em receitas até 2040. Entre as 12 arenas está a indústria de biofármacos e entre as 18 está a de biotecnologia não médica, classificada entre as emergentes, fornecendo produtos biotecnológicos em mercados como agricultura, proteínas alternativas, biomateriais e bioquímicos, e produtos de consumo. O relatório apresenta, ainda, estimativas de receitas do setor de biotecnologia não médica, que deverão crescer de US$ 140 bilhões em 2022 para US$ 340 bilhões em 2040, em patamar inferior, e de US$ 900 bilhões até 2040, em cenário de patamar superior.

Esses números são muito expressivos e não podem ser desconsiderados em uma análise fria sobre os seus potenciais benefícios para sociedade humana, a serem

[30] CHRISTIANSEN, S.; GINZKY, H.; SINGH, P.; THIELE, T. The international seabed: the common heritage of mankind. *IASS Policy Brief*, jul. 2018. Disponível em: https://www.umweltbundesamt.de/sites/default/files/medien/2875/dokumente/chm_policy_brief.pdf. Acesso em: 30 ago. 2025.; OLIVEIRA, C. C. *et al*. The principle of common heritage of humankind as a bridge between deep seabed mining and biodiversity conservation. *In*: LIU, N.; SCOTT, S. V. (org.). *The law of the sea and the planetary crisis*. London: Routledge, 2025.

[31] NINER, H. J.; ARDRON, J. A.; ESCOBAR, E. G.; GIANNI, M.; JAECKEL, A.; JONES, D. O. B.; LEVIN, L. A.; SMITH, C. R.; THIELE, T.; TURNER, P. J.; VAN DOVER, C. L.; WATLING, L.; GJERDE, K. M. Deep-sea mining with no net loss of biodiversity: an impossible aim. *Frontiers in Marine Science*, v. 5, p. 53, 2018. Disponível em: https://www.frontiersin.org/journals/marine-science/articles/10.3389/fmars.2018.00053/full. Acesso em: 30 ago. 2025.

[32] KHRIPOUNOFF, Alexis; CAPRAIS, Jean-Claude; CRASSOUS, Philippe; ETOUBLEAU, Joël. Geochemical and biological recovery of the disturbed seafloor in polymetallic nodule fields of the Clipperton-Clarion Fracture Zone (CCFZ) at 5,000-m depth. *Limnology and Oceanography*, v. 51, n. 5, p. 2033-2041, 2006.

[33] VAN DOVER, C. L.; ARONSON, J.; PENDLETON, L.; SMITH, S.; ARNAUD-HAOND, S.; MORENO-MATEOS, D.; BARBIER, E.; BILLETT, D.; BOWERS, K.; DANOVARO, R.; EDWARDS, A.; KELLERT, S.; MORATO, T.; POLLARD, E.; ROGERS, A.; WARNER, R. Ecological restoration in the deep sea: desiderata. *Marine Policy*, v. 44, p. 98-106, 2014. DOI: https://doi.org/10.1016/j.marpol.2013.07.006.

[34] CHRISTIANSEN, S.; GINZKY, H.; SINGH, P.; THIELE, T. The international seabed: the common heritage of mankind. *IASS Policy Brief*, jul. 2018. Disponível em: https://www.umweltbundesamt.de/sites/default/files/medien/2875/dokumente/chm_policy_brief.pdf. Acesso em: 30 ago. 2025.; SEAS AT RISK. *The unsustainability of deep-sea mining*: unearthing threats to the UN Sustainable Development Goals. Brussels, 2023. Disponível em: https://seas-at-risk.org/wp-content/uploads/2023/03/The-unsustainability-of-deep-sea-mining-Unearthing-threats-to-the-UN-Sustainable-Development-Goals.pdf. Acesso em: 30 ago. 2025.

[35] EUROPEAN INVESTMENT BANK. *EIB eligibility, excluded activities and excluded sectors list*. 2022. Disponível em: https://www.eib.org/attachments/publications/eib_eligibility_excluded_activities_en.pdf. Acesso em: 30 ago. 2025.

[36] CKINSEY GLOBAL INSTITUTE. *The next big arenas of competition*. out. 2024. Disponível em: https://www.mckinsey.com/mgi. Acesso em: 31 ago. 2025.

confrontados com as receitas e danos provenientes da mineração dos fundos marinhos. Especialmente quando se noticia que a expedição recente em águas profundas na costa do Chile identificou mais de 100 espécies marinhas até então desconhecidas e montanhas subaquáticas nunca antes vistas, sendo que a maior delas de quatro vezes o tamanho do edifício mais alto do mundo. Pesquisadores[37] observaram que a maioria das espécies encontradas vivia em habitats vulneráveis, como corais de água fria e jardins de esponjas, considerando-os suscetíveis a danos causados pela pesca de arrasto e mineração em alto mar.

Há muito por se descobrir sobre o potencial econômico e benefícios para a humanidade relacionados aos bioativos marinhos, ainda mais quando se conhece pouco sobre a fauna e a flora existentes nos fundos marinhos. A destruição de habitats de espécies marinhas ainda pouco conhecidas pode acelerar a liberação de gases de efeito estufa (GEE), carbono e metano, fazendo com que o serviço ambiental de sequestro de GEE seja convertido em desserviço, ou seja, o oceano seria paulatinamente transformado de sumidouro a fonte de GEE. A produção de *dark oxygen* nas zonas abissais e, portanto, sem envolver a luz é outro tema incerto que também desafia os cientistas e traz ainda mais incertezas para os fundos marinhos[38].

Com a adoção do Acordo sob a Convenção das Nações Unidas sobre o Direito do Mar sobre a Conservação e Uso Sustentável da Diversidade Biológica Marinha de Áreas Além da Jurisdição Nacional (BBNJ), em 2023, os recursos vivos da Área mudaram de status e foram colocadas em evidência como ativos, em termos de recursos genéticos e biotecnológicos, por conseguinte com potencial de gerar receitas, corrigindo lacuna deixada na UNCLOS e colocando-os em mesmo patamar de importância e interesse com nódulos, crostas e sulfetos. E mais, explicita que o acesso aos recursos genéticos marinhos das áreas além da jurisdição nacional e às informações sobre suas respectivas sequências digitais[39], o que se pode contrapor à mineração dos fundos marinhos, o que tornaria a preservação difícil, de forma direta ou indireta. Para alguns[40], evitar a mineração dos fundos marinhos seria a única maneira de alcançar resultados sem danos ou perdas líquidas, em vistas de que os impactos gerados seriam imutáveis no tempo e no espaço, sendo as melhores opções o planejamento espacial marinho e a definição de áreas de alta biodiversidade e valor de serviço ecossistêmico como áreas proibidas.

5 Considerações finais

A Autoridade Internacional dos Fundos Marinhos e seus Estados Membros avançaram na redação do Código de explotação, mas ainda não se vê com clareza quando o regulamento de explotação será finalizado. Ainda há bastante incerteza científica, econômica, jurídica e política que reduzem a segurança necessária para que as atividades de explotação de minerais dos fundos marinhos possam ocorrer com a devida regulação. A abordagem precautória ainda permanece viva nas negociações, com apoio brasileiro e de outros países latino-americanos. O patrocínio de complacência ainda precisa ser diretamente enfrentado a fim de garantir diligência devida em todo o processo de exploração e explotação de recursos. O acordo BBNJ adiciona mais um elemento no cenário das incertezas, tendo em vista que a biodiversidade também adquire natureza de patrimônio comum da humanidade dotada de uma futura institucionalização que exigirá ainda maior equilíbrio na conservação e no uso sustentável do ambiente marinho.

Entre os argumentos centrais da aplicação da abordagem precautória em todo o processo de negociação na ISA, destacam-se: as obrigações de proteção am-

[37] LIVE SCIENCE. *'Mind-blowing' deep sea expedition uncovers more than 100 new species and a gigantic underwater mountain*. 22 fev. 2024. Disponível em: https://www.livescience.com/animals/mind-boggling-deep-sea-expedition-uncovers-100-new-species-and-a-gigantic-underwater-mountain?. Acesso em: 24 abr. 2025.

[38] SWEETMAN, Andrew K.; SMITH, Alycia J.; DE JONGE, Danielle S. W.; HAHN, Tobias; SCHROEDL, Peter; SILVERSTEIN, Michael; ANDRADE, Claire; EDWARDS, R. Lawrence; LOUGH, Alastair J. M.; WOULDS, Clare; HOMOKY, William B.; KOSCHINSKY, Andrea; FUCHS, Sebastian; KUHN, Thomas; GEIGER, Franz. Evidence of dark oxygen production at the abyssal seafloor. *Nature Geoscience*, v. 17, n. 8, p. 737-739, ago. 2024. DOI: https://doi.org/10.1038/s41561-024-01480-8.

[39] UNITED NATIONS. *Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*. 2023. Disponível em: https://www.un.org/bbnjagreement/sites/default/files/2024-08/Text%20of%20the%20Agreement%20in%20English.pdf. Acesso em: 31 ago. 2025.

[40] FAUNA & FLORA INTERNATIONAL. *The risks and impacts of deep-seabed mining to marine ecosystems*. Executive Summary. Version 1, mar. 2020. Disponível em: https://www.fauna-flora.org/wp-content/uploads/2023/05/FFI_2020_The-risks-impacts-deep-seabed-mining_Executive-Summary.pdf. Acesso em: 31 ago. 2025.

biental que permeiam as negociações; a argumentação da conservação da integridade ecológica; a adoção de planos de gestão ambiental regional (REMP da sigla em inglês) e o uso das melhores evidências científicas disponíveis. Há também instrumentos específicos que impõem avaliações de impacto ambiental e transparência na tomada de decisões. Outro eixo argumentativo é o da partilha equitativa de benefícios: grupos de trabalho têm desenvolvido metodologias para cálculo de royalties, a fim de assegurar que os benefícios da explotação não sejam apropriados de maneira desigual por poucos Estados ou empresas. O Brasil desempenhou um papel relevante, propondo e sustentando o adiamento de decisões precipitadas e reforçando o compromisso com um marco regulatório robusto e ambientalmente responsável.

O regulamento de explotação, que completará o Código de mineração, ainda precisa garantir mecanismos que regulem dificuldades substanciais como o "patrocínio de complacência". É de bom alvitre sublinhar a questão relativamente recente de parcerias entre ilhas e empresas de países desenvolvidos, que escapam totalmente do contexto de negociação da UNCLOS. Em síntese, naquela época não fora prevista esta possibilidade, da forma que tem sido realizada. Além disso, a ISA vem aceitando contratos de exploração que deveriam ter sido avaliados de forma mais criteriosa, dada a novidade do contexto de atuação das empresas e da assimetria de poder que elas detêm em relação aos Estados ilhas partes ao contrato, como Jamaica, Tonga, Kiribati, Ilhas Cook, Nauru mencionadas aqui. Uma das consequências graves é que tais empresas terão acesso a áreas que destinadas a Estados em desenvolvimento.

A ISA está sendo pressionada por Estados e por empresas como a The Metals Company a avançar no Regulamento de Explotação a fim de que possa começar a fase de explotação. Cabe ao Brasil, e a outros Estados em desenvolvimento, desacelerar o processo a fim de que outras negociações avancem e tragam maior evidência às incertezas científicas, econômicas e jurídicas ainda existentes. Resta a saber qual é a correlação entre o avanço das negociações em Kingston e as condições para que a pausa precautória seja implementada.

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Activities in the Area for the benefit of "mankind as a whole": who is 'mankind'?

Atividades na Área em benefício da "humanidade como um todo": quem é a 'humanidade'?

Shani Friedman

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Activities in the Area for the benefit of "mankind as a whole": who is 'mankind'?*

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Shani Friedman**

Abstract

This paper critically examines the term 'mankind' to determine who are the beneficiaries of the 'common heritage of mankind' (CHM) principle in UNCLOS. The definition of the term is not clear, for example whether it includes also states who are not parties to UNCLOS or whether it includes entities other than states. With the prospective beginning of exploitation of the International Seabed (the Area) the question of benefit-sharing and the identity of the beneficiaries would become critical. Yet, this issue did not gain sufficient scholarly attention. This paper seeks to fill this theoretical-legal gap by employing a legal analysis in accordance with the rules of treay interpretation in international law and by employing a comparative methodology. The paper supports the conclusion that the term 'mankind' in UNCLOS includes only states as the beneficiaries. This affects the competence of the International Seabed Authority (ISA) and the appropriate mechanisms concerning the distribution of the benefits.

Keywords: the international seabed; deep-sea mining; common heritage of mankind; benefit-sharing; the Area.

Resumo

em outro idioma Este artigo examina criticamente o termo "humanidade" a fim de determinar quem são os beneficiários do princípio do "patrimônio comum da humanidade" (PCH) na CNUDM. A definição do termo não é clara, por exemplo, se inclui também Estados que não são Partes da CNUDM ou se abrange entidades que não sejam Estados. Com a perspectiva do início da exploração dos Fundos Marinhos Internacionais (a Área), a questão da partilha de benefícios e da identidade dos beneficiários tornar-se-á crucial. Contudo, essa temática não tem recebido atenção acadêmica suficiente. Este artigo busca preencher essa lacuna teórico-jurídica por meio de uma análise jurídica em conformidade com as regras de interpretação de tratados no direito internacional, aliada a uma metodologia comparativa. O estudo sustenta a conclusão de que o termo "humanidade", na CNUDM, inclui apenas os Estados como beneficiários. Tal entendimento afeta a competência da Autoridade Internacional dos Fundos Marinhos (AIFM) e os mecanismos adequados relativos à distribuição dos benefícios.

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Palavras-chave: fundos marinhos internacionais; mineração em águas profundas; patrimônio comum da humanidade; partilha de benefícios; a Área.

1 Introduction

This Article aims to critically examine the definition of the term 'mankind' under the legal regime of the law of the sea (LOS), and specifically the international seabed (the Area). This question is important to determine who are the beneficiaries that are entitled to the benefits under this legal regime (e.g., the resources in the Area). The term 'mankind', as discussed below, has not been defined nor did it receive sufficient attention from scholars and practitioners despite its significance. Thus, this article contributes to the legal literature by offering an analysis that aims to answer this question.

The UN convention on the Law of the Sea (UNCLOS) defines the Area and its resources as the 'common heritage of mankind' (CHM).[1] UNCLOS also provides that activities in the Area (e.g., marine research and mineral exploration and extraction) must be carries out for the benefit of mankind as a whole. The International Seabed Authority (ISA) must ensure the equitable sharing of benefits deriving from such activities.[2]

The term 'mankind',[3] does not clarify who exactly has a claim to the benefits from activities in the Area and who should receive a share of those benefits. For example, there is a question whether non-party states can be considered beneficiaries. Arguably, many of UNCLOS's provisions reflect customary norms or have become customary rules since its inception.[4] Thus, the term 'mankind' could include states and such entities recognized in resolution 1514 (XV) that are not party to UNCLOS.

However, some argue that Part XI regulating the Area does not reflect customary international law.[5] This is because much of this part establishes and regulates a treaty body – the ISA, which is not an issue that can become customary law.[6] Furthermore, this part cannot be considered as customary law as it was amended by the 1994 agreement on the implementation of UNCLOS Part XI (Part XI agreement), which prevails over Part XI in case of any inconsistency.[7]

Considering the above, the definition of the term 'mankind' in UNCLOS is not clear. Furthermore, there is a question whether it includes only states as beneficiaries, or also non-state actors such as individuals. While the Convention mentions the term 'mankind as a whole' in connection to the issue of the beneficiaries, it also refers to states, whether coastal or land-locked, and specifically to developing states and self-governing entities recognized by the General Assembly resolution 1514 (XV),[8] i.e., entities that have high level of socio-political institutional arrangement. Thus, it is unclear whether non-state actors have an actual claim to the resources in the Area and can be direct beneficiaries under UNCLOS.

This is complicated further by the position of the ISA's secretariat and the Finance Committee is that the eligible beneficiaries are the members of the ISA, i.e., states parties to UNCLOS, as representatives of humanity.[9] However, as discussed in-depth in section 2.1.1 below, the position of the ISA is inconsistent, referring to other possible beneficiaries.

Considering the conflicting positions regarding the term 'mankind', this article seeks to fill this theoretical-legal gap, as this issue has not gained sufficient scho-

[1] United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS), Article 136.

[2] Articles 137(2), 140, 160(f)(i); ISA. *Equitable sharing of financial and other economic benefits from deep-sea mining*. 2022. Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/policy_brief_benefit_sharing_01_2022-1.pdf.

[3] Today the term used is 'humankind' to represent all peoples rather than just men, see e.g., *Gender and the Law of the Sea* (Irini Papanicolopulu ed, 2019); TRINDADE, A. A. Cançado. *International law for humankind*: towards a new jus gentium. 3rd. ed. [*S. l.: s. n.*], 2020.

[4] Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Merits) [1982] ICJ Rep 18; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Merits) [1984] ICJ Rep 246; Continental Shelf (Libyan Arab Jamahiriya/Malta) (Merits) [1985] ICJ Rep 13.

[5] See for example, CHURCHILL, R. The 1982 United Nations Convention on the Law of the Sea. *In*: ROTHWELL, D. *et al.* (ed.). *The Oxford handbook of the law of the sea.* [*S. l.: s. n.*], 2015. p. 37.

[6] CHURCHILL, R. The 1982 United Nations Convention on the Law of the Sea. *In*: ROTHWELL, D. *et al.* (ed.). *The Oxford handbook of the law of the sea.* [*S. l.: s. n.*], 2015. p. 37.

[7] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted on 28 July 1994, entered into force 28 July 1996), 1836 UNTS 3 (Part XI agreement), Art 2(1).

[8] UNCLOS (n 1) Art 140(1).

[9] ISA. *Equitable sharing of financial and other economic benefits from deep-sea mining.* 2022. Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/policy_brief_benefit_sharing_01_2022-1.pdf.

larly attention. With the prospective beginning of exploitation of the Area,[10] the question of benefit-sharing and the identity of the beneficiaries from operations in the Area would become critical. Thus, there is a need to examine who is included in the legal term 'mankind' under the LOS framework.

The structure of the article is as follows: section 2 analysis the term 'mankind' in accordance with the rules of treaty interpretation in international law. Section 3 provide comparative analysis to other regimes concerning the management of the global commons that reflect or address the CHM principle. Section 4 addresses possible practical issues concerning the term 'mankind' and the implementation of the CHM principle. Section 5 discusses possible implications of the analysis in the previous chapters. Section 6 concludes.

2 Who is 'mankind'?

The term 'mankind' is a vague and general term, which does not address specific subjects of international law. Thus, there is a need for a legal interpretation of the term, to determine who exactly are the beneficiaries of the CHM principle. In accordance with the rules on treaty interpretation, to understand the term 'mankind' in UNCLOS, one should look at the ordinary meaning, their context, and the object and purpose of the Convention.[11]

The dictionary defines 'mankind' as including every human being, i.e., all individuals in the world.[12] However, looking at the object and purpose of UNCLOS it seems that, while there is a reference to all people of the world, states are the ones that have rights and claims under UNCLOS.[13] Thus, the link between 'mankind' and rights over the resources in the Area[14] indicate that the subjects included in 'mankind' are essentially states.

The context also does not provide clear answer: on the one hand, UNCLOS recognizes that 'persons' may also have a claim, at least to the minerals in the Area.[15] Furthermore, comparing to similar provisions, the use of the term 'mankind' may be intentional. Consider for example Article 82 that governs coastal States' payments for exploitation of the extended continental shelf. The Article specifically provides that payments should be through the ISA to *States Parties*.[16] Comparing Article 82 to Part XI may imply that the choice of the term 'mankind' is intentional and has broader interpretation than just states. On the other hand, Part XI refers mostly to states' rights and obligations.[17] In addition, as mentioned above, the term 'mankind as a whole' is immediately followed by reference to states and self-governing entities.[18] In other words, the focus is on states and state-like entities who are a party to the Convention.[19]

Interpretation of the context can rely on any agreement relating to UNCLOS which was made between all the parties.[20] The ISA 'Mining Code' is one such instrument. The Mining Code is a legally binding set of rules, regulations and procedures issued by ISA to regulate prospecting, exploration and exploitation of marine minerals in the Area. The ISA developed the Mining Code within the legal framework of UNCLOS Part XI and the 1994 Agreement relating to the implementation of Part XI of UNCLOS.[21]

The regulations on exploration of the Area address the general principle that the Area should be explored and exploited for the benefit of 'mankind as a whole.'[22]

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[10] See ROSENBERG, D. The legal fight over deep-sea resources enters a new and uncertain phase. *EJIL*: Talk! Blog, 22 Aug. 2023.; JAECKEL, A. *et al.* Sharing benefits of the common heritage of mankind: is the deep seabed mining regime ready?. *Marine Policy*, v. 70, p. 199, 2016.

[11] UNITED NATIONS. Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Art 31.

[12] MANKIND. *Merriam-Webster dictionary*. Available at: https://www.merriam-webster.com/dictionary/mankind.

[13] UNCLOS (n 1) Preamble.

[14] Art 137(2).

[15] Art 137(3).

[16] Art 82(4).

[17] Art 138, 139.

[18] N 8.

[19] UNCLOS (n 1) Art 305.

[20] VCLT (n 10) Art 31(2).

[21] See ISA. *The Mining Code*. Available at: https://www.isa.org.jm/the-mining-code/.; BLANCHARD, C. *Nauru and deep-sea minerals exploitation*: a legal exploration of the 2-year rule. 2021. Available at: https://site.uit.no/nclos/2021/09/17/nauru-and-deep-sea-minerals-exploitation-a-legal-exploration-of-the-2-year-rule/.

[22] The ISA developed so far regulation only with respect to exploration of the Area. See Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA, 19th Sess, UN Doc ISBA/19/C/17 (22 July 2013) (Polymetallic Nodules regulations), Annex; Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA, 18th Sess, UN Doc ISBA/18/A/11 (22 October 2012) (Cobalt Crusts regulations), Annex; Regulations on prospecting and exploration for polymetallic sulphides in the Area, ISA,16th Sess, UN Doc ISBA/16/A/12/Rev.1 (15 November 2010) (Polymetallic Sulphides regulations), An-

However, there is no specification as to who the beneficiaries are. The draft regulations concerning exploitation of the Area include more reference to the term 'mankind' but likewise does not specify who the beneficiaries are.[23]

2.1 Subsequent Agreement and Practices in the Application of the Treaty

Interpretation of the context can also rely on any subsequent agreement of the parties or practice in the application of the treaty which establishes the agreement of the parties regarding an interpretation.[24] Thus, documents of the ISA, which represents the parties to UNCLOS, concerning its work as the trustee of the CHM principle, and the protocols of the Meeting of the States Parties (SPLOS) to UNCLOS, which reflects states' positions, may provide insights concerning the interpretation of the beneficiaries of the CHM principle within LOS.

2.1.1 ISA documents

ISA documents also seem to indicate that the beneficiaries of the CHM principle are states; referring to all states, but especially developing states and self-governing entities recognized in UNCLOS.[25]

However, the ISA also recognizes that the global political situation is different from the situation in the 1980s, when UNCLOS was adopted. The formal rules do not provide for the participation of non-state actors (NSAs) as beneficiaries, although in practice they might be considered as such. Although the ISA seems to promote a broad interpretational approach, to include NSAs as beneficiaries, it also raises a question concerning the ability to ensure that these beneficiaries actually receive the benefits in practice.[26] Practical issues aside, the ISA acknowledges that each individual may have an equal claim to the benefits from activities in the Area.[27] Furthermore, the ISA recognizes the need to consider future generations' rights and possible economic welfare in the context of benefit-sharing.[28]

However, it is not clear what is the legal basis for such assertion. While some delegates supported broad interpretation of the term 'mankind' and the inter-temporal notion and the need for such considerations during UNCLOS III negotiations, ultimately these considerations were rejected and were not included in the final text.[29] In addition, while UNCLOS confers upon the ISA competence to establish a mechanism for benefit-sharing,[30] this mandate does not include the competence to decide who the beneficiaries are.

2.1.2 The meeting of the states parties (SPLOS)

The Meeting of the States Parties (SPLOS) to UNCLOS is a body established in the Convention that was entrusted to elect the members of the International Tribunal for the Law of the Sea (ITLOS) and members of the Commission on the Limits of the Continental Shelf (CLCS). SPLOS also deals with budgetary and administrative matters, receives information provided by the Secretary-General of the International Seabed Authority and the Chairman of the CLCS on the activities of these bodies.[31] Although SPLOS has no formal interpretive competences, in practice it influences the development and interpretation of UNCLOS.[32] SPLOS is also a forum where states address different issues, thus it reflects their positions through their delegations and representatives. Considering the informal competences of this body, its protocol may provide useful insights as to the interpretation of the CHM principle and the identity of the beneficiaries.

Within SPLOS framework, some states express their position concerning the CHM principle. Some states maintained that the beneficiaries of this principle are states, whether developed or developing.[33] However, in

nex.

[23] Draft Regulations on Exploitation of Mineral Resources in the Area, ISA, 25th Sess, UN Doc ISBA/25/C/WP.1 (22 March 2019).

[24] VCLT (n 10) Art 31(3).

[25] ISA Study No. 31 (n 2) 25.

[26] 26, 28.

[27] 31, 65.

[28] 27, 28, 33.

[29] See discussion in section 2.3.2 below concerning UNCLOS III negotiations.

[30] N 2.

[31] See UNITED NATIONS. *Meetings of States Parties to the 1982 United Nations Convention on the Law of the Sea*. Available at: https://www.un.org/depts/los/meeting_states_parties/meeting_states_parties.htm.

[32] See e.g., UNITED NATIONS. SPLOS, 16th Mtg., UN Doc SPLOS/148 (28 July 2006), paras 81, 93; SPLOS, 19th Mtg., UN Doc SPLOS/203 (24 July 2009), paras 11, 73, 114.

[33] See e.g., Chile's note verbal, SPLOS, 32nd Sess, UN Doc

some instances, some delegations highlighted that the CHM principle includes ideas such as "social justice for all people of the world."[34] Although it is unclear whether this reflects a concrete legal principle or just a moral position. Some delegations noted that equitable sharing have "an intergenerational dimension," although without explaining the basis for this concept.[35] Still, the distribution of resources and associated benefits seems to be only between states.[36]

2.2 Relevant Rules of International Law

In accordance with the rules of treaty interpretation, there are other elements that can be considered together with the context for the purpose of the interpretation of a treaty; one of which is relevant rules of international law applicable in the relations between the parties of that treaty.[37]

2.2.1 International treaty law

For example, relevant rules could be other rules in the Vienna Convention on the Law of Treaties (VCLT), not just the provisions on treaty interpretation. The VCLT provides that a treaty between states cannot create rights or obligations for third states without their consent.[38] If states cannot grant rights to other states that are not parties to a treaty, even if they are recognized subjects of international law, then *a fortiori* they cannot grant rights to other actors that are not parties and are not necessarily recognized as subjects of international law or have a more limited legal personality.[39] In other words, UNCLOS can obligate (states) parties to consider the interests of other NSAs, such as future generations or individuals, but it cannot grant rights to such entities.[40] Even if such entities have an interest under UNCLOS, they don't necessarily have a right or standing to enforce its implementation.[41]

It is noteworthy that human rights law (IHRL) is the exception to the analysis above; IHRL does address the rights of individuals, however this framework mostly addresses the protection of such rights by creating obligations for states to promote and protect individuals' rights that can be enforced in national courts and international institutions.[42] Furthermore, IHRL creates rights that are mostly negative rights (i.e., freedoms) or standards for conditions of living. Still, even the exception of IHRL does not create a specific right for individuals to own resources. In other words, there is no obligation or duty to provide individuals with resources under international law.[43]

2.2.2 International property law

While there is no concrete and unified framework for "international property law", there are specific frameworks that create property rights in international law.[44] However, there is a question regarding what property these frameworks address. For example, while

SPLOS/32/14 (17 June 2022), Annex, p. 2; position paper submitted by Australia, Fiji, Marshall Islands, Micronesia (Federated States of), Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu, SPLOS, 11th Mtg., UN Doc SPLOS/67 (10 May 2001).

[34] UNITED NATIONS. SPLOS, 22nd Mtg., UN Doc SPLOS/251 (11 July 2012), para 103.

[35] UNITED NATIONS. SPLOS, 24th Mtg., UN Doc SPLOS/277 (14 July 2014), para 18; SPLOS, 26th Mtg., UN Doc SPLOS/303 (2 August 2016), para 95.

[36] UNITED NATIONS. SPLOS/277 (n 34) para 18; SPLOS, 27th Mtg., UN Doc SPLOS/316 (10 July 2017), paras 46, 103.

[37] VCLT (n 10) Art 31(3)(c).

[38] VCLT (n 10) Art 34, 36.

[39] See e.g., NIJMAN, J. E. *Non-state actors and the international rule of law*: revisiting the 'realist theory' of international legal personality. 2009. Available at: https://ssrn.com/abstract=1522520.; TOMUSCHAT, C. International organizations as third parties under the law of international treaties. *In*: CANNIZZARO, E. (ed.). *The law of treaties beyond the Vienna Convention*. [*S. l.: s. n.*], 2011.

[40] This argument leaves aside the question of international organizations. First, international law recognizes them as subjects with legal personality and the ability to bear rights and obligations (although more limited than states). See e.g., TOMUSCHAT, C. International organizations as third parties under the law of international treaties. *In*: CANNIZZARO, E. (ed.). *The law of treaties beyond the Vienna Convention*. [*S. l.: s. n.*], 2011.; PROELSS, A. Article 34. *In*: DÖRR, O.; SCHMALENBACH, K. (ed.). *Vienna Convention on the Law of Treaties*: a commentary. [*S. l.: s. n.*], 2018. p. 661. Second, the issue of the beneficiaries of the CHM principle does not specifically address rights of international organizations but rather of 'mankind', i.e., individuals and peoples.

[41] PROELSS, A. Article 34. *In*: DÖRR, O.; SCHMALENBACH, K. (ed.). *Vienna Convention on the Law of Treaties*: a commentary. [*S. l.: s. n.*], 2018. p. 671.

[42] See e.g., SHELTON, D.; GOULD, A. Positive and negative obligations. *In*: SHELTON, D. (ed.). *The Oxford handbook of international human rights law*. [*S. l.: s. n.*], 2013.; RYNGAERT, C. Non-state actors: carving out a space in a state-centred international legal system. *Neth. Int. Law Rev.*, v. 63, 2016.

[43] SHELTON, D.; GOULD, A. Positive and negative obligations. *In*: SHELTON, D. (ed.). *The Oxford handbook of international human rights law*. [*S. l.: s. n.*], 2013.

[44] SPRANKLING, J. G. *The international law of property*. [*S. l.: s. n.*], 2014. p. 3.

IHRL may create individuals' rights for property, there is no indication that such rights include resources or property that is global commons. IHRL addresses states obligations with respect to property under national law.[45]

UNCLOS does create property rights in the global commons, providing that "rights in the resources of the Area are vested in mankind."[46] However, the context of this provision is the status of the resources, rather than the definition of the beneficiaries. In addition, this phrasing does not mean that it creates private property rights for individuals. While private companies can exploit the Area, it is under the auspices of a state.[47] Furthermore, this framework does not mean that other NSAs have right to receive benefits, i.e., property, from the companies' exercise of rights.

It is noteworthy that UNCLOS Article 140 does not grant ownership rights to the global commons, but a right to enjoy or use benefits from such resources. This is similar to usufruct in national civil law; a right to enjoy things that are owned by others.[48] Under such framework, NSAs such as individuals may be secondary beneficiaries of the CHM principle, but states are the owners or primary beneficiaries.

2.2.3 Sources of international law

The rules concerning the sources of international law (i.e., where to find legal rules concerning rights and obligations), may also be relevant to the interpretation of the term 'mankind' to determine who are the beneficiaries of the CHM principle. Judicial decisions and academic literature are not included in the relevant materials under the laws on treaty interpretation. However, these materials are subsidiary source of international law, which can help identify international rules and their content.[49] Thus, these sources can be used for interpretation of the CHM principle as relevant rules of international law.

2.2.3.1 Case-law

There is scarce case-law concerning the CHM principle. However, there are few references that may provide some insights regarding the beneficiaries of the principle. Some judges recognized that the term "common heritage of mankind" in UNCLOS is not defined in a clear and precise manner.[50] In the advisory opinion on responsibilities of states with respect to activities in the Area, ITLOS's Seabed Dispute Chamber (SDC) focused on examining states obligations in conducting such activities, rather than who benefits from such activities. However, within this analysis, the SDC focused on the rights of developing states.[51] Thus, the focus of the advisory opinion might imply that the beneficiaries of the CHM principles are indeed states, rather than 'all people.'[52]

2.2.3.2 Scholarship on CHM

There is scarce reference to the question of the beneficiaries of the CHM principle in the current literature. Out of the existing literature that does address this issue, while there are those who maintain that the beneficiaries are states,[53] most scholars seem to agree

[45] SPRANKLING, J. G. *The international law of property*. [*S. l.: s. n.*], 2014. p. 10-26. See also section 2.2.1.

[46] UNITED NATIONS. UNCLOS (n 1) Art 137(2).

[47] UNITED NATIONS. UNCLOS Annex III, Art 4.

[48] SPRANKLING, J. G. *The international law of property*. [*S. l.: s. n.*], 2014. p. 29.

[49] Statute of the International Court of Justice, San Francisco, 24 October 1945, Article 38(1)(d) (ICJ Statute).

[50] See e.g., Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar) (Judgment of 14 March 2012) ITLOS Reports 2012, Separate Opinion of Judge Gao, para 85.

[51] Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, para 157.

[52] This is supported by states and international organizations' written statements to the Tribunal, see e.g., INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. *Written Statement of the Republic of Nauru*. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/C17_Written_Statement_Nauru.pdf., paras. 5, 16; INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. *Written Statement of the International Union for Conservation of Nature*. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/C17_Written_Statement_IUCN.pdf., para. 86 and footnote 58. ICUN refers to benefits that are "internationally shared." The term 'international' implies states rather than a broader meaning. See also INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. *Written Statement of the People's Republic of China*. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/C17_Written_Statement_China.pdf., para. 11; INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. *Written Statement of the United Nations Environment Programme*. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/C17_Written_Statement_UNEP.pdf. p. 2.

[53] RANA, H. S. The common heritage of mankind and the final frontier: a revaluation of values constituting the international legal regime for outer space activities. *Rutgers L. J.*, v. 231, n. 26, 1994.

that 'mankind' is a broader term that includes not only states, especially in more recent scholarship.

Some scholars argue that the CHM principle by reference to the term 'mankind' apply not only to present generation (represented by states) but also to future generations.[54] Not only that, but the CHM principle reflect the idea of inter-generational equity.[55] Others compare the terms 'mankind' and 'states' to argue that the beneficiaries could also be individuals, although they acknowledge that the term 'mankind' may refer to the collective goods rather than the beneficiaries.[56]

Some scholars argue that NSAs, including future generations, are not only entitled to benefits from activities in the Area, but they are subjects of international law.[57] However, individuals are generally not the subject of international law. Individuals may have some rights, but the exercise of these rights are generally through states as the mechanism.[58]

These positions do not give any legal reason to such interpretation embedded in modern international law. Some scholars refer to religious law and philosophy or roman property law as a basis for the broader interpretation of the term 'mankind'.[59] While these sources are important for the development of international law, the modern framework relies on other sources as formal sources of law (e.g., treaties and customary rules). Other sources can be considered secondary sources that can used for interpretation;[60] however, in case of contradiction, the later sources prevail (i.e., treaties and customary law), as states are bound by them.[61] As indicated above, current legal development in modern international law may contradict these reasonings regarding the rights of NSAs.

Some scholars base their argument on linguistic interpretation. For example, the rights of future generations denote from the term 'heritage',[62] or the inclusion of individuals derives from the term 'mankind'.[63] However, these arguments do not address weather such interpretation applies in the context of international law or means granting *legal rights and obligations* to all these NSAs. As analyzed above, a linguistic interpretation in accordance with the rules of treaty interpretation does not yield a clear answer. In addition, recognizing NSAs as subjects in international law does not necessarily mean that they automatically have *all* the rights that states have.[64] Such argument needs to be based in international law, meaning there should be evidence that states, as the law-makers in international law, support this interpretation and perceive it as legally binding.

[54] See reference to Proelss in Robb (n 21). The author claims this position is 'commonly accepted'. Although it is noteworthy that this post only addresses states, whether of current generation or of future ones. See also e.g., BOURREL, M. *et al.* The common of heritage of mankind as a means to assess and advance equity in deep sea mining. *Marine Policy*, v. 313, n. 95, 2018.; WILDE, D. *et al.* Equitable sharing of deep-sea mining benefits: more questions than answers. *Marine Policy*, v. 2, n. 151, 2023.

[55] TLADI, D. The common heritage of mankind and the proposed treaty on biodiversity in areas beyond national jurisdiction: the choice between pragmatism and sustainability. *Yearbook of International Environmental Law,* v. 25, n. 1, p. 127, 2015.

[56] WILDE, D. *et al.* Equitable sharing of deep-sea mining benefits: more questions than answers. *Marine Policy*, v. 2, n. 151, 2023. See also SQUIRES, D. *Sharing the benefits from the deep sea*: presentation for the webinar "Benefit sharing and the common heritage of humankind: what constitutes equitable distribution?". Available at: https://www.resolve.ngo/benefitsharing_commonheritage.htm.

[57] Although this position seems to also address states. As cited in VAN DOORN, E. Environmental aspects of the mining code: preserving humankind's common heritage while opening Pardo's box?. *Marine Policy*, v. 70, p. 193, 2016.

[58] See also WANG, C.; CHANG, Y. C. A new interpretation of the common heritage of mankind in the context of the international law of the sea. *Ocean and Coastal Management,* v. 3, n. 191, 2020. In addition, individuals and peoples have no duties or obligations under international law, which is pertinent to having international legal personality. Influence does not necessarily mean international personality. Arguably, individuals have been recognized in the context of Human Rights Law and International Criminal Law. See SHAW, M. N. *International law.* 9th. ed. [*S. l.: s. n.*], 2021. p. 235-236. However, there is nothing to suggest that such actors are subjects in the context of the Law of the Sea.

[59] See in VAN DOORN, E. Environmental aspects of the mining code: preserving humankind's common heritage while opening Pardo's box?. *Marine Policy*, v. 70, p. 193, 2016.

[60] ICJ Statute (n 49).

[61] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 58th Sess, UN Doc A/CN.4/L.702 (18 July 2006). See also VCLT (n 10) Art 30, 59.

[62] JOYNER, C. C. Legal implications of the concept of the common heritage of mankind. *International and Comparative Law Quarterly*, v. 35, n. 195, 1986. p. 127.

[63] TANAKA, Y. *Protection of community interests in international law*: the case of the law of the sea. [*S. l.*]*:* Max Planck Yearbook of United Nation Law, 2011. p. 339-340.

[64] See e.g., the ICJ statement with respect to international organizations. Reparation for injuries suffered in the service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174, at 180. With respect to individuals, they have certain rights under international human rights law. However, there is nothing in international law that suggest they have rights to marine resources independently from their states.

2.3 Supplementary Means of Interpretation

Treaty interpretation can also rely on supplementary means such as the preparatory work of the treaty and the circumstances of its conclusion, to confirm the interpretation resulting from the application of Article 31 of the VCLT.[65] Therefore, UNCLOS's negotiation protocols and the materials used to prepare the drafts for negotiations, can assist in determining the meaning of the term 'mankind'.

Previous practice

The CHM principle in UNCLOS is based on the UN General Assembly (UNGA)'s resolution concerning the seabed beyond national jurisdiction.[66] The resolution determines that exploration and exploitation of the seabed beyond national jurisdiction shall be for the benefit of mankind as a whole. However, after the term 'mankind', the resolution refers to states.[67] Furthermore, the resolution addresses the need to establish a new international treaty for the management of the Area and its resources. The resolution specifically and explicitly mentions that such treaty would "ensure the equitable sharing by States in the benefits derived therefrom…".[68] States' positions, reflected in the protocol of this resolution, also support the conclusion that states are the beneficiaries of the CHM principle.[69]

The protocols of the Ad-Hoc Committee for Sea-Bed and Ocean Floor Study, on which work the UNGA's resolution is based, does not give clear answer as to who are the beneficiaries of the CHM principle. While the UN Secretary-General (UNSG) mentions that the exploitation of the seabed is for "the benefit of all mankind,"[70] the activities themselves should be in accordance with the "purposes and principles of the Chart of the United Nation."[71] In other words, the context suggests States as bearers of rights and obligations.

The *note verbale* from the permanent mission of Malta to the UN, which triggered the process leading to the above UNGA's resolution, supports the conclusion that the term 'mankind' referred to states, at least in the 1960s. The *note verbale* addressed the need to declare the seabed beyond national jurisdiction as CHM and drafting a new treaty that would reflect several relating principles. One of these principles is to "safeguarding the interests of mankind."[72] However, the following sentence maintained that benefits for exploitation of this zone would primarily go to "poor countries."[73] Furthermore, Malta envisioned the creation of an international agency (what would become the ISA) that would act as trustee "for all countries."[74]

The analysis above indicates that previous materials regarding the Area, which were used as preparatory materials for UNCLOS, imply that the term 'mankind' refers to states, as the beneficiaries of the CHM principle, in accordance with the international rules on treaty interpretation.

[65] VCLT (n 10) Art 32.

[66] UNITED NATIONS. UNGAOR, 1933rd Plen Mtg, UN Doc A/RES/2749(XXV) (17 December 1970).

[67] UNITED NATIONS. UNGAOR, 1933rd Plen Mtg, UN Doc A/RES/2749(XXV) (17 December 1970). para 7.

[68] UNITED NATIONS. UNGAOR, 1933rd Plen Mtg, UN Doc A/RES/2749(XXV) (17 December 1970). para 9.

[69] UNITED NATIONS. UNGAOR, 1933rd Plen Mtg, UN Doc A/PV.1933 (17 December 1970). Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N73/770/01/PDF/N7377001.pdf?OpenElement. paras 87, 105, 171, 175.

[70] UNITED NATIONS. *Statement by the Secretary-General.* 1968. Available at: https://search.archives.un.org/uploads/r/united-nations-archives/c/7/3/c735473b40cc2c3e8812db970ebe70d4094ca020de3d3a30ccec83088a4c205a/S-0885-0001-01-00001.PDF. p. 4 of the file.

[71] UNITED NATIONS. *Statement by the Secretary-General.* 1968. Available at: https://search.archives.un.org/uploads/r/united-nations-archives/c/7/3/c735473b40cc2c3e8812db970ebe70d4094ca020de3d3a30ccec83088a4c205a/S-0885-0001-01-00001.PDF. p. 4 of the file.

[72] Request for the Inclusion of a Supplementary Item in the Agenda of the Twenty-Second Session: Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and of the Ocean Floor, Underlying the Seas Beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind, 22nd Sess, UN Doc A/6595 (18 August 1967). p. 2, para 3(c).

[73] Request for the Inclusion of a Supplementary Item in the Agenda of the Twenty-Second Session: Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and of the Ocean Floor, Underlying the Seas Beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind, 22nd Sess, UN Doc A/6595 (18 August 1967). p. 2, para 3(c).

[74] Request for the Inclusion of a Supplementary Item in the Agenda of the Twenty-Second Session: Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and of the Ocean Floor, Underlying the Seas Beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind, 22nd Sess, UN Doc A/6595 (18 August 1967). p. 3, para 4.

2.3.1 UNCLOS negotiation process

During the negotiation process it seems that most references to the 'common heritage of mankind' or 'mankind as a whole' were done without explanation to whom these terms refer, just accepting the existence of the principle as part of international law.[75] Despite this, most of the little reference that does address the scope of 'mankind' indicates that UNCLOS's drafters envisioned the term 'mankind' as referring to states.[76] In other words, states are the beneficiaries of CHM.[77]

Additional indications may support the conclusion that 'mankind' equals states. For example, some delegates stressed that the principle of CHM addresses those who in the past could not participate in resources exploitation.[78] While not specifically explaining who is included in the beneficiaries of this principle, this position implies that the focus is on states as they have the right to explore and exploit marine resources under LOS.[79] Other delegates addressed the scope of 'mankind' through negative definition, emphasizing that this principle does not include multinational corporations.[80] This suggests that 'mankind' does not include at least some NSAs, although it is silent on the question of other types of NSAs such as individuals. Some delegates held the view that the CHM principle should include also states not parties to the future convention. However, some argue that the right of participation should be reserved to those legally bound by the future convention.[81] Despite being vague, the above examples refer mostly to states as the beneficiaries of the CHM principle.

However, there are some indications that at least some delegates perceived the term 'mankind' as including other actors beside states. Some delegations indicated that 'mankind' also include 'people' or 'human beings' and not only states, and thus should receive their share of the benefits.[82] Furthermore, some delegations supported the position that 'mankind' include also future generations.[83]

Still, this interpretation appeared to be the minority in the overall discourse during the negotiations. Most references address states as the bearer of rights and the beneficiaries of the Area. In addition, reference to individuals was mostly with respect to the definition of CHM itself, but there was almost no regard to their specific right to receive benefits. In other words, there seems to be a distinction between the CHM principle that defines the Area, and the question of benefit-sharing. And lastly, there was no consensus during the negotiation on the scope and meaning of the term CHM itself.[84] Thus, the broader interpretation of the term

[75] UNITED NATIONS. UNCLOS III, 1st Cmte, 2nd Sess, 11th Mtg, UN Doc A/CONF.62/C.1/SR.11 (6 August 1974), para 35; UNCLOS III, 1st Cmte, 2nd Sess, 17th Mtg, UN Doc A/CONF.62/C.1/SR.17 (27 August 1974), para 23; UNCLOS III, 1st Cmte, 3rd Sess, 20th Mtg, UN Doc A/CONF.62/C.1/SR.20 (28 April 1975), para 35; UNCLOS III, 1st Cmte, 5th Sess, 37th Mtg, UN Doc A/CONF.62/C.1/SR.37 (14 September 1976), para 12; UNCLOS III, Resumed 9th Sess, 138th Plen Mtg, UN Doc A/CONF.62/SR.138 (26 August 1980), para 29.

[76] See for example, UNITED NATIONS. UNCLOS III, 1st Cmte, 2nd Sess, 2nd Mtg, UN Doc A/CONF.62/C.1/SR.2 (11 July 1974), para 3; UNCLOS III, 1st Cmte, 2nd Sess, 4th Mtg, UN Doc A/CONF.62/C.1/SR.4 (15 July 1974), paras 1, 10; UNCLOS III, 1st Cmte, 2nd Sess, 5th Mtg, UN Doc A/CONF.62/C.1/SR.5 (16 July 1974), paras 36, 56; UNCLOS III, 1st Cmte, 2nd Sess, 6th Mtg, UN Doc A/CONF.62/C.1/SR.6 (16 July 1974), para 16; UNCLOS III, 1st Cmte, 2nd Sess, 7th Mtg, UN Doc A/CONF.62/C.1/SR.7 (17 July 1974), paras 45, 60; UNCLOS III, 1st Cmte, 2nd Sess, 8th Mtg, UN Doc A/CONF.62/C.1/SR.8 (17 July 1974), paras 27, 35, 41; UNCLOS III, 1st Cmte, 2nd Sess, 13th Mtg, UN Doc A/CONF.62/C.1/SR.13 (8 August 1974), para 18; UNCLOS III, 1st Cmte, 3rd Sess, 19th Mtg, UN Doc A/CONF.62/C.1/SR.19 (26 March 1975), para 9; UNCLOS III, Reports of the Committees and Negotiating Groups, Reports of the Committees and Negotiating Groups on negotiations at the resumed 7th Sess, UN Doc A/CONF.62/RCNG/1 (19 May 1978), p. 26.

[77] UNITED NATIONS. UNCLOS III, 1st Sess, 1st Plen Mtg, UN Doc A/CONF.62/SR.1 (3 December 1973), para 16.

[78] A/CONF.62/C.1/SR.5 (n 76) paras 25, 40.

[79] See UNITED NATIONS. UNCLOS (n 1) Art 56, 77, 87 and Part XI. While non-state actors can conduct activities in the Area, it has to be under the auspices of a state. See, Art 153.

[80] A/CONF.62/C.1/SR.6 (n 76) para 23.

[81] A/CONF.62/C.1/SR.17 (n 75) para 9. See also reference to parties, UNCLOS III, 1st Cmte, 5th Sess, 30th Mtg, UN Doc A/CONF.62/C.1/SR.30 (27 August 1976), para 16.

[82] See for example UNITED NATIONS. UNCLOS III, 2nd Sess, 37th Plen Mtg, UN Doc A/CONF.62/SR.37 (11 July 1974), para 49; A/CONF.62/C.1/SR.2 (n 76) para 10; A/CONF.62/C.1/SR.7 (n 76) para 40; UNCLOS III, 1st Cmte, 3rd Sess, 22nd Mtg, UN Doc A/CONF.62/C.1/SR.22 (28 April 1975), para 25; UNCLOS III, 1st Cmte, 5th Sess, 36th Mtg, UN Doc A/CONF.62/C.1/SR.36 (14 September 1976), para 11, 50. See also reference to "develop of world economy", which indicate that not only states should benefit from activities in the Area, A/CONF.62/C.1/SR.5 (n 76) para 78; UNCLOS III, Resumed 11th Sess and Final Part 11th Sess and Conclusion, 188th Mtg, UN Doc A/CONF.62/SR.188 (7 December 1982), para 167.

[83] UNITED NATIONS. UNCLOS III, 1st Cmte, 3rd Sess, 21st Mtg, UN Doc A/CONF.62/C.1/SR.21 (28 April 1975), para 39; UNCLOS III, 2nd Sess, 36th Plen Mtg, UN Doc A/CONF.62/SR.36 (10 July 1974), para 57.

[84] For example, UNITED NATIONS. UNCLOS III, 8th Sess, 116th Plen Mtg, UN Doc A/CONF.62/SR.116 (27 April 1979), pa-

'mankind' was ultimately not reflected in the final text of UNCLOS.

Considering the analysis above, there are more indications that UNCLOS's drafters perceived the term 'mankind' as referring to states, as the beneficiaries of the CHM principle. This, in turn, affects the interpretation of the term 'mankind' in accordance with the rules of treaty interpretation in international law.

3 Comparison to other legal regimes concerning the CHM

An inquiry concerning the beneficiaries of the CHM principle in UNCLOS could benefit from comparison to other legal regimes that addressed the management and benefits from activities concerning common interests and resources and specifically mention the CHM principle. These regimes, some prior to UNCLOS and some a progression of the Convention, may help identifying relevant positions and practices that may provide new insights to the meaning of the term 'mankind' and to the possible beneficiaries of the CHM principle.[85]

3.1 Outer Space

The CHM principle was articulated prior to UNCLOS III, in the 1950s, with respect to outer space but it was not a concrete legal principle until the 1960s.[86] The 1967 Outer Space Treaty recognized the interest of 'all mankind' and believed that the use of outer space should be for the benefit of *all people*.[87] However, its operable provisions determine that the beneficiaries of benefits from exploration and use of outer space are states, while the area is defined as "province of all mankind."[88] The outer space treaty relied on the UNGA's resolution that provided that states are the beneficiaries,[89] although the resolution also referred to 'mankind' as beneficiaries.[90] At that time, scholars noted that the term 'mankind' was sometimes used for to say 'all states' and sometime to indicate 'all people'.[91]

The 1979 Moon Treaty supports the argument that states are the beneficiaries of activities on the moon by referring to the UN Charter and the interests of states parties,[92] and by specifically providing that while the moon is 'province of all mankind', the benefits (and interests) would be for states.[93] This interpretation may also affect the interpretation of the Outer Space Treaty regarding the "province of all mankind." The treaty also provides that the interests of current and future generations should be considered.[94] Thus, the Moon Treaty recognized the interests of entities other than

ras 128, 132.

[85] It is noteworthy that the legal regime concerning Antarctica will not be addressed in this research. First, while the legal regime concerning Antarctica may be relevant as it reflects some aspects of the CHM principle, it addresses an area that might be under national jurisdiction of several states. This is opposite to the CHM principle in UNCLOS, which addresses an area beyond national jurisdiction. See e.g., submissions of Chile and Argentina to extended continental shelf in Antarctica's areas, UNITED NATIONS. Division for Ocean Affairs and the Law of the Sea. *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982.* Available at: https://www.un.org/depts/los/meeting_states_parties/meeting_states_parties.htm. The Antarctic treaty recognizes sovereignty claims made before the treaty entered into force. In addition, the treaty recognizes the existence of claims to territorial sovereignty in Antarctica but does prevent exercise of such claims in practice. See the Antarctic Treaty. Available at https://documents.ats.aq/keydocs/vol_1/vol1_2_AT_Antarctic_Treaty_e.pdf, Article 4. In addition, while mentioning the "interests of all mankind", the Antarctic framework does not address the question of the beneficiaries. See SECRETARIAT OF THE ANTARCTIC TREATY. *Compilation of key documents of the Antarctic Treaty System.* 3rd. ed. 2017. Available at: https://documents.ats.aq/atcm40/ww/ATCM40_ww014_e.pdf. Furthermore, environmental law is also outside the scope of this research. While this legal regime addresses management of common interests, it concerns the protection of a common resource for mankind, rather than sharing concrete and physical benefits.

[86] WOLFRUM, R. *Common Heritage of Mankind.* [*S. l.*]: Max Planck Encyclopedia of Public International Law, 2009. para. 5.

[87] Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (adopted on 1 January 1967, entered into force 10 October 1967) 610 UNTS 205 (outer space treaty), preamble.

[88] Art 1; RANA, H. S. The common heritage of mankind and the final frontier: a revaluation of values constituting the international legal regime for outer space activities. *Rutgers L. J.*, v. 231, n. 26, p. 240, 1994.

[89] UNITED NATIONS. UNGAOR, 1280th Plan. Mtg., UN Doc A/RES/1962 (XVIII) (13 December 1963), preamble, para 6.

[90] UNITED NATIONS. UNGAOR, 1280th Plan. Mtg., UN Doc A/RES/1962 (XVIII) (13 December 1963), preamble, para 1.

[91] FASAN, E. 'The Meaning of the Term Mankind in Space Legal Language'. *J. Space L.* v. 128, n. 2, p. 130, 1974.

[92] Agreement governing the Activities of States on the Moon and Other Celestial Bodies (adopted on 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (Moon Treaty), Art 2.

[93] Agreement governing the Activities of States on the Moon and Other Celestial Bodies (adopted on 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (Moon Treaty), Art 4(1).

[94] Agreement governing the Activities of States on the Moon and Other Celestial Bodies (adopted on 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (Moon Treaty),

states. However, as indicated above, it seems that only states would have rights or entitlement to benefits under the Moon Treaty.[95] In 1997 the UNGA clarified that the exploration and use of outer space is for the benefit of *all states*.[96] This was also reflected in more recent resolutions.[97]

Considering the above, it seems that the beneficiaries of the CHM principle in space law are states. One argument in the context of space law was that mankind (at that time) was not a legal subject, and thus not entitled to property rights, since it did not have an administrative body to represent and exercise rights in its name.[98] In contrast, within LOS, there is now an institution that can exercise rights in the name of 'mankind' (the ISA), however this does not mean that humankind is now a legal subject in international law. At most, like outer space law, UNCLOS recognizes that this collective entity has an interest regarding resources beyond national jurisdiction.[99] However, having an interest is not equal to having rights or entitlements to these resources or benefits derive from them.

3.2 The 1958 LOS Conventions

In 1957, the UNGA decided to convene the first United Nations Conference on the Law of the Sea (UNCLOS I). Four separate conventions were adopted by the Conference: The Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas (HSC); the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf (CSC).[100]

The HSC and the CSC were essentially copied into UNCLOS. During the negotiations of these conventions the term 'mankind' was addressed and mentioned several times. Thus, it may be useful to compare UNCLOS to other instruments within LOS framework, to determine who the beneficiaries of the CHM principle are. It is noteworthy that the CHM as a legal principle may not have existed during the HSC's negotiations, still the interpretation of the term 'mankind' in past practices may help here, even if it goes beyond the rules of treaty interpretation concerning past practices.[101]

While the 'benefit of all mankind' was addressed several times during the conference, there was almost no reference to the possible subjects included in this term. The scarce reference to the scope of 'mankind' does not yield clear answer. Most of the references that do exist indicate that 'mankind' refers to states.[102] However, some states differentiate between 'mankind' and 'coastal States.[103] This could imply that the term 'mankind' includes not only states. however, this could also imply that the distinction is between 'coastal States' and 'all states.' Thus, there is still a question regarding the beneficiaries of the CHM principle, although there are more indications that the beneficiaries of the CHM principle are states.

[95] Agreement governing the Activities of States on the Moon and Other Celestial Bodies (adopted on 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (Moon Treaty), Art 11(7)(d).

[96] Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, UNGAOR, 51st Sess, UN Doc A/RES/51/122 (4 February 1997).

[97] While the resolution refers to benefits of all humankind, it also explicitly refers to states as beneficiaries, see Declaration on the fiftieth anniversary of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, UNGAOR, 72nd Sess, UN Doc A/RES/72/78 (14 December 2017), paras 6, 14.

[98] FASAN, E. The meaning of the term mankind in space legal language. *J. Space L.*, v. 128, n. 2, p. 131, 1974.

[99] See also with respect to the outer space regime, RANA, H. S. The common heritage of mankind and the final frontier: a revaluation of values constituting the international legal regime for outer space activities. *Rutgers L. J.*, v. 231, n. 26, p. 229, 1994.

[100] See UNITED NATIONS. Office of Legal Afairs. *Homepage*. Available at: https://www.un.org/ola/en. Access on: 30 abr. 2025.

[101] See section 2.3 above. Only past practices that relate to the preparatory work of UNCLOS would be considered under the rules of treaty interpretation.

[102] See e.g., UNITED NATIONS. UNCLOS I, Vol. I, UN Doc A/CONF.13/5 and Add. 1 to 4 (23 October 1957), p. 98; UNCLOS I, Vol. III, 5th Mtg., UN Doc A/CONF.13/C.1/SR.1-5 (5 March 1958), para 18, although it was in the 1st Committee relating to the territorial sea and Contiguous Zone. See also UNCLOS I, Vol. III, 6th Mtg., UN Doc A/CONF.13/C.1/SR.6-10 (6 March 1958), para. 1, referring to 'mankind' obligated by customary law, i.e., states (as only states are bound by such rules unless specifically provided otherwise). See also reference to the "community of nations", UNCLOS I, Vol. III, 13th Mtg., UN Doc A/CONF.13/C.1/SR. 11-15 (13 March 1958), para 17. See also the interchangeable use between 'mankind' and coastal States with respect to the exploitation of the continental shelf, UNCLOS I, Vol. VI, 13th Mtg., A/CONF.13/C.4/SR.11-15 (20 March 1958), para 4.

[103] UNITED NATIONS. UNCLOS I, Vol. I, UN Doc A/CONF.13/5 and Add. 1 to 4 (23 October 1957), p. 106; UNCLOS I, Vol. V, 7th Mtg., UN Doc A/CONF.13/C.3/SR.6-10 (13 March 1958), para 12; UNCLOS I, Vol. V, 22nd Mtg., UN Doc A/CONF.13/C.3/SR.21-25 (3 April 1958), para 2; UNCLOS I, Vol. VI, 8th Mtg., UN Doc A/CONF.13/C.4/SR.6-10 (12 March 1958), para 16.

3.3 The BBNJ

On June 19, 2023 the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ or the treaty) was adopted.[104] Although the treaty is not in force yet,[105] it may provide useful insights concerning the current interpretation of the CHM principle.

The BBNJ specifically refers to the CHM principle only as a theoretical concept or a general principle in UNCLOS, rather than an operational rule in the context of the BBNJ.[106] Instead, the treaty provides that activities regarding marine genetic resources (MGRs) are for the benefit of "all humanity."[107] While the interests and needs of developing states are addressed after the term 'humanity', it seems broader, in terms of the beneficiaries, than the relevant provision in UNCLOS.[108] The BBNJ does not define the terms 'mankind' (or 'humankind' as it appears in the treaty) or 'humanity'. However, it does address some elements of the CHM principle such as benefit-sharing. Thus, we can infer who the beneficiaries are.

Unlike previous legal regimes, there seems to be a distinction between different benefits, which may be intended for different beneficiaries. For example, capacity-building is intended for states.[109] In addition, the beneficiaries of monetary benefits, such as funding, are states, and specifically developing states.[110] In contrast, the beneficiaries of non-monetary benefits, such as access to MGRs, may also include other actors, although the language of the BBNJ is vague and contradictory on this issue.[111]

Despite the progressive approach of the BBNJ, it is not clear who the beneficiaries of the CHM principle or its elements. However, it seems that there are more indications that states are the beneficiaries, and particularly developing states, especially with respect to monetary benefits and capacity-building.

4 Practical constrains concerning the term 'mankind'

The analysis above reveals that while there is no clear and definite answer regarding the beneficiaries of the CHM principle under UNCLOS, there are more indications that the legal regime considers as the beneficiaries rather than all people. Even if we accept that the term 'mankind' includes individuals, peoples, and other NSAs, there may be institutional constraints that would affect the practical implementation of this term. Thus, while the doctrinal analysis above is not conclusive, although strongly indicative, practical constraints may tip the scale and provide support to the indication above (i.e., that the beneficiaries under the legal regime are states).

The main obstacle for a broad interpretation of the term 'mankind' is that it raises a question concerning the participation of NSAs in the decision-making process at the ISA. The interest of individuals and peoples are usually represented by NGOs. While some of these actors have been granted an observer status at the ISA, they don't have a right to vote and participate in the decision-making process beyond raising awareness of specific issues. They are also excluded from certain meetings, which limits their influence.[112] If individuals and other NSAs are the beneficiaries but cannot parti-

[104] Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UNGAOR, Further resumed 5th Sess, UN Doc A/CONF.232/2023/4 (19 June 2023) (BBNJ agreement).

[105] In accordance with article 68(1), the agreement will enter into force 120 days after the date of deposit of the 60th instrument of ratification, approval, acceptance or accession. As of February 2024, there are only 86 signatories and 1 ratification. See the UNITED NATIONS. *Law of the sea*. Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en.

[106] BBNJ agreement (n 104) preamble, Art 7(b). See also UNITED NATIONS. *AOSIS textual submission on president's revised text*. 2 feb. 2020. Available at: https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_-_15_april_2020.pdf. p. 61.

[107] BBNJ agreement (n 104) Art 10(6).

[108] Especially comparing to earlier drafts that are more similar to UNCLOS Art 140 than the final text, see Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 3rd Sess, UN Doc A/CONF.232/2019/6 (17 May 2019), Art 9(4); UNCLOS (n 1) Art 140(1).

[109] BBNJ agreement (n 104) Art 9(b), 14(2)(f), 52(3).

[110] BBNJ agreement, Art 14(5), 52(12)-52(14).

[111] See reference to "current international practice", but also to possible preferential treatment of developing states. Art 14(2), 14(4).

[112] BOURREL, M. *et al.* The common of heritage of mankind as a means to assess and advance equity in deep sea mining. *Marine Policy*, v. 313, n. 95, 2018.

cipate in decisions on the division of benefits, it would hinder the implementation of the CHM principle. In practice, the representation problem essentially means that states are the beneficiaries that would act as trustees for [hu]mankind.[113]

A second practical issue is the division mechanism. Even if we accept that NSAs are entitled to the benefits from activities in the Area, it does not mean that they can directly receive them. First, while future generations may have interest that should be considered, physically they are not here to directly receive the benefits, nor do they have representatives that could accept the benefits in their name. While NGOs may represent the interests of NSAs, including future generations, they are not competent to hold 'property' belonging to others. Such competence would require consent from every NSA in the world and also future ones, which of course would not be able to give their consent. In any case, this would require a legal operation that may not be possible.

It is noteworthy that the possibility that the term 'mankind' includes only states is not without practical problems. As mentioned in the introduction, there is a question whether the beneficiaries include only states and semi-states that are parties to UNCLOS, or also those who are not. As mentioned above, Part XI is not considered as customary law and thus cannot obligate non-parties.[114] Furthermore, as mentioned, a treaty cannot create rights or obligations for third states without their consent.[115] However, in the case of a treaty that grant *rights* to third states or to all states, the consent is presumed unless indicated otherwise.[116] Thus, while obligations can only apply to parties or to third parties (states) under customary law, rights can apply to non-parties unless they explicitly objected.

The assertion above relies on the distinction between right and benefit, implying that the need for consent (and the ability to confer upon third-parties to begin with) would not apply to the latter.[117] However, given that the ISA has obligation to distribute benefits from activities in the Area, this means that someone has a right (entitlement) to receive these benefits.[118] It is noteworthy that with respect to NSAs, the argument above addressed their possible interests rather than a right to the benefits. The difference between states and NSAs in this context may be the ability to enforce the right, where NSAs might not be able to do so as such actors do not have standing in relevant tribunals.[119]

5 Implications for the implementation of the chm principle

As analyzed above, there are more indications that the term 'mankind' within the framework of LOS refers to states. In other words, states are the beneficiaries of the CHM principle and should receive the benefits from activities in the Area. This conclusion may affect the implementation of the CHM principle in the context of deep-sea mining and other activities in the Area in practice and may also affect the competence of the ISA to distribute the benefits as provided in UNCLOS.

The ISA, implementing the CHM principle, must provide a mechanism to distribute benefits from activities in the Area to the beneficiaries, i.e. mankind.[120] The identity of the beneficiaries could affect the mechanism for benefit-sharing. In essence, if states are indeed the beneficiaries of the CHM principle, then any benefits, especially monetary benefits, should be directly distributed or paid to states.[121]

Considering this, the ISA's Financial Committee's suggestion to create a fund ('Sustainability Fund') that would accumulate the benefits from activities in the

[113] WOLFRUM, R. *Common Heritage of Mankind*. [*S. l.*]: Max Planck Encyclopedia of Public International Law, 2009. paras 15, 27.

[114] N 5.

[115] N 38; VILLIGER, M. E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. [*S. l.: s. n.*], 2009. p. 467.

[116] VCLT (n 10) Art 36(1); PROELSS, A. Article 36. *In*: DÖRR, O.; SCHMALENBACH, K. (ed.). *Vienna Convention on the Law of Treaties*: a commentary. [*S. l.: s. n.*], 2018.

[117] See PROELSS, A. Article 34. *In*: DÖRR, O.; SCHMALENBACH, K. (ed.). *Vienna Convention on the Law of Treaties*: a commentary. [*S. l.: s. n.*], 2018. p. 671.

[118] On the link between rights, obligations, and other legal concepts see HOHFELD, W. N. Fundamental legal conceptions as applied in judicial reasoning. *The Yale Law Journal,* v. 26, n. 8, 1917. This research, although not contemporary, is considered a basic material in legal philosophy on this issue and is the basis for more recent scholarship. See also Proelss (n 116) 718; VILLIGER, M. E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. [*S. l.: s. n.*], 2009. p. 484.

[119] See discussion in PROELSS, A. Article 34. *In*: DÖRR, O.; SCHMALENBACH, K. (ed.). *Vienna Convention on the Law of Treaties*: a commentary. [*S. l.: s. n.*], 2018. p. 671.

[120] UNCLOS (n 1) Art 140(2), 160(2)(f)(i).

[121] WILDE, D. *et al.* Equitable sharing of deep-sea mining benefits: more questions than answers. *Marine Policy*, v. 2, n. 151, 2023.

Area for various purposes and investments,[122] may not be within the competence of the ISA. Such action would require explicit consent of all states (parties and non-parties) not just for the creation of the fund, but also for the ISA's role as a trustee and holder of the benefits. This legal construction may require an amendment of UNCLOS or a decision of SPLOS, as the Convention provides that the ISA is competence to create a mechanism for benefit-sharing, but not to hold or manage the benefits.

Furthermore, even if such fund is with the competence of the ISA, it may pose a challenge in terms of distribution of the benefit to the beneficiaries (i.e., states). At least some of the intended purposes of the fund, such as research or environmental protection and rehabilitation, would not reach states directly. In addition, such purposes would be enjoyed by other actors that are not the designated beneficiaries, which essentially conflicts with UNCLOS. In contrast, other purposes, such as capacity-building, would only benefit some states (mainly developing states), and thus not all beneficiaries would receive the benefits as prescribed in UNCLOS.

6 Concluding Remarks

This paper critically analyzed the term 'mankind' to determine who are the beneficiaries of the CHM principle as prescribed in UNCLOS. First, the paper followed the relevant rules of treaty interpretation in international law. Second, the paper offered a comparative analysis to other legal regimes that govern the global common and address benefits for 'mankind'. While there is no definite answer as to whom are the beneficiaries in accordance with the term 'mankind', there are more indications that the term should be interpreted narrowly to include only states (whether parties to UNCLOS or not).

Despite contrary claims, mostly in the literature, there is nothing in current international law that suggest that there is an entity of '[hu]mankind' that has rights and obligations, i.e., is a subject of international law, independently from specific NSAs that were recognized as having legal personality in specific contexts within international law. Furthermore, while UNCLOS recognizes the *interest* of individuals and groups that comprise 'mankind', this does not mean that such actors have *right* to the benefits from activities in the Area under UNCLOS, as there is no specific obligation for such distribution of the benefits.[123]

The paper also addressed practical constrains to the broader interpretation of the term 'mankind' as promoted in the literature, i.e., that 'mankind' includes all people. A broad interpretation would create problems for the implementation of the CHM principle, mostly in term of participation or lack of participation of the intended beneficiaries in the decision-making process concerning their rights.

Lastly, the paper discussed possible effects of the narrow interpretation of the term 'mankind' as reflected in the analysis. The interpretation of the term 'mankind' may affect the mechanism for benefit-sharing. If states are indeed the only beneficiaries, then any mechanism established by the ISA must distribute the benefits directly to them. This poses a challenge to the current suggestions for a fund that would hold the benefits in trust and utilize it in a way that would not distribute the benefits directly to individual states, or to all states.

Considering the above, support for a broad interpretation of the term 'mankind' or obligations for states on how to utilize the benefits would require an amendment to UNCLOS or an explicit decision on the issue in a forum that can provide broad participation and consideration of all relevant issues, such as SPLOS. Alternatively, an explicit decision to determine the interpretation of the term 'mankind', especially if it is broad interpretation, or obligations for states on what to do with the benefits, may affect other regimes of the global commons that reflect the CHM principle. As such, any decision on the issue should be within a forum that allows the broadest participation, including NSAs (at least as observers), such as the UNGA. While the UNGA's resolutions are generally not binding, unanimous resolution may indicate a development of binding customary rules.

[122] ISA. Technical Study No. 31, Equitable sharing of financial and other economic benefits from deep-seabed mining (2021) (ISA Study No. 31). p. 64-67.

[123] On the different between rights, duties, and interests see e.g., WENAR, L. The nature of rights. *Philosophy and Public Affairs,* v. 33, n. 3, 2005. See also SCHAUER, F. A comment on the structure of rights. *Georgia Law Review,* v. 27, 1993.

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Equitable benefit sharing in the exploitation of common heritage of mankind areas according to the provisions of UNCLOS 1982: current situation, challenges and prospects

Partilha equitativa de benefícios na exploração das áreas de patrimônio comum da humanidade segundo as disposições da CNUDM de 1982: situação atual, desafios e perspectivas

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Equitable benefit sharing in the exploitation of common heritage of mankind areas according to the provisions of UNCLOS 1982: current situation, challenges and prospects*

Partilha equitativa de benefícios na exploração das áreas de patrimônio comum da humanidade segundo as disposições da CNUDM de 1982: situação atual, desafios e perspectivas

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Abstract

The Common Heritage of Mankind, referred to as "the Area" under the 1982 United Nations Convention on the Law of the Sea, constitutes a global asset collectively owned by humanity. It cannot be claimed, possessed, or owned by any state, organisation, or individual. The exploration and exploitation of the Area's resources must be conducted solely for the benefit of all humankind, and the International Seabed Authority administers the financial and economic benefits of these activities to ensure their equitable distribution. Some studies have shown that the practices of resource exploitation in the Area and the operations of the International Seabed Authority have exposed significant challenges in implementing the principle of equitable benefit sharing among countries. Smaller States, particularly those with limited scientific, technological, and financial resources, often face systemic disadvantages in accessing the benefits derived from the Area. Consequently, international legal reforms are imperative to ensure the fair and sustainable distribution of benefits derived from this global commons. Based on this practical context, to clarify the legal issues and international practices related to ensuring the principle of equity in the exploration, exploitation, and distribution of benefits among nations in the Area, as well as to guarantee that the exploitation and use of resources in the Area are fair and sustainable, this article will first examine the provisions of the United Nations Convention on the Law of the Sea and other pertinent international laws regarding the legal status of the common heritage of mankind and the principle of equitable benefit sharing by combining various scientific research methods. It will then analyze the International Seabed Authority's role in implementing a fair benefit-sharing system. Additionally, the article will address the primary challenges faced in achieving equitable benefit sharing within the common heritage framework. Finally, it will propose recommendations to foster equitable and sustainable benefit-sharing among countries.

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Keywords: UNCLOS 1982; common heritage of mankind; equitable benefit sharing; ISA; deep seabed resources.

Resumo

O Patrimônio Comum da Humanidade, referido como "a Área" na Convenção das Nações Unidas sobre o Direito do Mar de 1982 (CNUDM), constitui um bem global de titularidade coletiva da humanidade. Não pode ser reivindicado, possuído ou apropriado por qualquer Estado, organização ou indivíduo. A exploração e o aproveitamento dos recursos da Área devem ser realizados exclusivamente em benefício de toda a humanidade, sendo a Autoridade Internacional dos Fundos Marinhos responsável por administrar os benefícios financeiros e econômicos dessas atividades para garantir a sua distribuição equitativa. Estudos demonstram que as práticas de exploração de recursos na Área e as operações da Autoridade Internacional dos Fundos Marinhos revelam desafios significativos na implementação do princípio de partilha equitativa de benefícios entre os países. Estados menores, especialmente aqueles com recursos científicos, tecnológicos e financeiros limitados, frequentemente enfrentam desvantagens sistêmicas no acesso aos benefícios derivados da Área. Consequentemente, reformas jurídicas internacionais mostram-se imprescindíveis para assegurar a distribuição justa e sustentável desses benefícios. Com base nesse contexto prático, e visando clarificar as questões jurídicas e as práticas internacionais relacionadas à garantia do princípio da equidade na exploração, no aproveitamento e na distribuição de benefícios entre as nações na Área, bem como assegurar que o uso e a exploração de seus recursos sejam justos e sustentáveis, o presente artigo examinará inicialmente as disposições da CNUDM e de outros instrumentos internacionais pertinentes quanto ao estatuto jurídico do patrimônio comum da humanidade e ao princípio da partilha equitativa de benefícios, combinando diversos métodos de investigação científica. Em seguida, analisará o papel da Autoridade Internacional dos Fundos Marinhos na implementação de um sistema justo de partilha de benefícios. Adicionalmente, abordará os principais desafios enfrentados na concretização da partilha equitativa de benefícios no âmbito do patrimônio comum. Por fim, serão apresentadas recomendações para promover uma partilha de benefícios equitativa e sustentável entre os países.

Palavras-chave: CNUDM 1982; patrimônio comum da humanidade; partilha equitativa de benefícios; AIFM; recursos dos fundos marinhos profundos.

1 Introduction

1.1 The term "Common Heritage of Mankind"

The Area means the seabed and subsoil of the submarine areas beyond the limits of national jurisdiction[1]. Reflecting on the history of the formation of the 1982 Convention on the Law of the Sea (hereinafter abbreviated as UNCLOS), Tullio Scovazzi asserts in his research that

> while other significant aspects of the United Nations Convention on the Law of the Sea, such as the exclusive economic zone and the regulations for protecting the marine environment, have evolved naturally within international maritime law, the concept of the common heritage of mankind is revolutionary. This concept introduces a third type of regime that differs from the traditional sovereignty applied in territorial waters and the freedom that governs the high seas[2].

The term "Common Heritage of Mankind" (hereinafter abbreviated as CHM) is a key concept and principle in environmental law and the law of the sea. It asserts that certain areas and resources are the collective property of all humanity. This principle emphasizes that these resources should be utilized for the benefit of everyone, taking into account the needs of future generations and the interests of developing countries[3]. In case of a dispute, the international dispute resolution

[1] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 1.

[2] SCOVAZZI, T. The concept of common heritage of mankind and the genetic resources of the seabed beyond the limits of national jurisdiction. *Agenda Internacional*, year 14, n. 25, p. 11-14, 2007.

[3] MICKELSON, Karin. Common heritage of mankind as a limit to exploitation of the global commons. *European Journal of International Law*, v. 30, n. 2, p. 635-663, May 2019. TLADI, Dire. The common heritage of mankind in the proposed implementing agreement. *In*: NORDQUIST, Myron H.; MOORE, John Norton; LONG, Ronán (ed.). *Legal Order in the World's Oceans*: UN Convention on the Law of the Sea. Leiden: Brill, 2018. chapter 2.

mechanism will be activated, and the legal sources referenced will be the provisions of international law of the sea and environmental law[4].

It should be noted that, in this study, the authors will not address the specific regime of archaeological and historical nature found in the Area. Issues related to this matter may refer to relevant articles published in the special issue of this journal[5]. The term "the Common Heritage of Mankind" examines the Area's general legal status and serves as the foundation for the principle of equitable benefit sharing. In the study *Benefiting from the Common Heritage of Humankind: From Expectation to Reality* in 2020, Jaeckel also stated that the concept of CHM is the heart of the Area's regime. Its expression in the UNCLOS aims to build a unique regime centered on solidarity and trusteeship to manage some of Earth's most remote natural resources[6]. The concept was first presented in the 1960s amid debates regarding its scope, content, status, and relationship to other legal terms[7]. In 1967, this term was further mentioned by Maltese Ambassador Arvid Pardo during his address to the United Nations General Assembly[8]. In his speech, he contended that the Geneva Convention permits states to extend their continental shelf to the extent that their capacity for exploitation allows, which would lead to competition among countries in the race to occupy the seabed[9]. Moreover, this competition is unfair to countries with less advanced science and technology. Therefore, he urged "[…] the establishment of an effective international regime for the seabed and ocean floor outside clearly defined national jurisdictions"[10]. Some research indicates that the CHM term has a much longer history, and Pardo drew on it to develop the CHM into a legal concept for the ocean[11]. However, Mr. Arvid Pardo's speech generated significant momentum, capturing the attention of numerous countries and laying the groundwork for successful agreements in the UNCLOS regarding the legal status of the CHM area. The establishment of the Area marked the first time in the history of international maritime law that a resource management regime was created on a global scale, supported by an international organization[12].

1.2 The principle of equitable benefit sharing in the area

To ensure all States, especially developing States, stood to benefit, the Area and its mineral resources were declared the CHM through the UNCLOS, and benefits were to be shared with all[13]. According to Article 136 of the UNCLOS, the Area is open to use exclusively for peaceful purposes by all States, whether coastal or land-locked[14].

> No state shall assert or exercise sovereignty or sovereign rights over any part of the Area or its resources. Additionally, no state, individual, or legal entity shall appropriate any portion of the Area or its resources. Such claims, exercises of sovereignty, or appropriations will not be recognized[15].

[4] Regarding the rules of environmental litigation, see also TRUILHÉ-MARENGO, Eve. La progressive harmonisation des règles du procès environnemental : manifestation de l'émergence d'un droit global ?. *Revista de Direito Internacional = Brazilian Journal of Law and Public Policy*, v. 14, 2017.

[5] MOUSTAIRA, Elina. The underwater cultural heritage regime: some problems and possible solutions. *Revista de Direito Internacional*, v. 17, n. 3, p. 412-422, 2020.

[6] JAECKEL, Aline. Benefitting from the common heritage of humankind: from expectation to reality. *The International Journal of Marine and Coastal Law*, v. 35, n. 4, p. 660-680, 2020.

[7] JAECKEL, Aline. Benefitting from the common heritage of humankind: from expectation to reality. *The International Journal of Marine and Coastal Law*, v. 35, n. 4, p. 660-680, 2020.

[8] UNITED NATIONS. *General Assembly*: twenty-second session: oficial records. New York, 1 Nov. 1967. Available at: http://www.un.org/depts/los/convention_agreements/texts/pardo_ga1967.pdf. JAECKEL, Aline. Benefitting from the common heritage of humankind: from expectation to reality. *The International Journal of Marine and Coastal Law*, v. 35, n. 4, p. 660-680, 2020.

[9] JAECKEL, Aline. Benefitting from the common heritage of humankind: from expectation to reality. *The International Journal of Marine and Coastal Law*, v. 35, n. 4, p. 660-680, 2020.

[10] JAECKEL, Aline. Benefitting from the common heritage of humankind: from expectation to reality. *The International Journal of Marine and Coastal Law*, v. 35, n. 4, p. 660-680, 2020.

[11] MICKELSON, Karin. Common heritage of mankind as a limit to exploitation of the global commons. *European Journal of International Law*, v. 30, n. 2, p. 635-663, May 2019.

[12] SCOVAZZI, T. The concept of common heritage of mankind and the genetic resources of the seabed beyond the limits of national jurisdiction. *Agenda Internacional*, year 14, n. 25, p. 11-14, 2007.

[13] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 136. JAECKEL, Aline. Benefitting from the common heritage of humankind: from expectation to reality. *The International Journal of Marine and Coastal Law*, v. 35, n. 4, p. 660-680, 2020.

[14] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 141.

[15] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 137.

The above-mentioned provisions showed that the UNCLOS has established a crucial international legal framework for countries to reasonably and equally exploit natural resources in the Area. The key distinction between the legal status of the Area and the high seas lies in resource exploitation. In the Area, any exploitation of resources must be conducted under the supervision of the International Seabed Authority (ISA). In contrast, countries have the freedom to take the initiative and implement resource exploitation on the high seas. This distinction demonstrates that the concept of CHM is specifically applied to a certain type of resource within a particular maritime area. It does not replace the traditional regimes of sovereignty or freedom concerning other resources and maritime spaces. However, it offers a radically innovative and much more equitable approach[16].

In accordance with Articles 136 and 141 of the UNCLOS, the Convention established the principle that all activities conducted in the Area, including mineral exploitation, must be for the benefit of all humanity, regardless of the geographical location of the States. To uphold this principle, the UNCLOS requires the ISA to provide for equitable sharing of financial and other economic benefits on a non-discriminatory basis[17]. In fact, fairness is a complex term that must be interpreted contextually[18]. The principle of common heritage, as articulated in Part XI of the UNCLOS, encompasses several fundamental elements, such as (i) the Convention designates the seabed as the common heritage of mankind. It represents the idea that certain resources are considered the common heritage of all humanity and should be managed and conserved in a way that benefits present and future generations, and ISA serves as its trustee[19]. Consequently, the members of the ISA, which consists of countries that are parties to the UNCLOS, will benefit from these resources. They are considered as representatives of all humanity. However, mankind is perceived not as an active participant in activities related to the deep seabed but rather as a beneficiary whose interests must be taken into account[20]. Each participating country is equal, so fairness in benefit distribution can be achieved through sharing rules that the ISA considers appropriate to its needs[21]; (ii) non-ownership and non-appropriation rules. According to the rule, claims or exercises of sovereignty or sovereign rights over the deep seabed and its resources, as well as any appropriation of these resources, are prohibited[22]; (iii) the use of the deep seabed and its resources must adhere to the following principles: peaceful utilization, protection of the marine environment, and activities that benefit all of humanity[23]. These elements will be analyzed more deeply in the following part of the article.

Undoubtedly, the Area and its resources are of the utmost importance and indispensable to each country's prosperity development[24]. However, the practice of

[16] SCOVAZZI, T. The concept of common heritage of mankind and the genetic resources of the seabed beyond the limits of national jurisdiction. *Agenda Internacional*, year 14, n. 25, p. 11-14, 2007.

[17] INTERNATIONAL SEABED AUTHORITY. Equitable sharing of financial and other economic benefits from deep-sea mining. *Policy Brief*, n. 01, 2022. Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/policy_brief_benefit_sharing_01_2022-1.pdf. Access on: 10 Jan. 2025.

[18] INTERNATIONAL SEABED AUTHORITY. *Equitable sharing of financial and other benefits from deep-seabed mining*: ISA technical study no 31. Kingston: ISA, 2021. Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/ISA_Technical_Study_31.pdf. Access on: 10 Jan. 2025.

[19] WOLFRUM, Riidiger. *The principle of the common heritage of mankind*. c1983. https://www.zaoerv.de/43_1983/43_1983_2_a_312_337.pdf. Access on: 25 Dec. 2024. TAGHIZADEH, Zakieh. Marine genetic resources as common heritage of mankind under the BBNJ agreement; the international community toward a pragmatic benefit-sharing approach? *Biodiversity and Conservation*, v. 34, p. 131-153, Nov. 2024. Available at: https://doi.org/10.1007/s10531-024-02962-2 Access on: 10 Jan. 2025.

[20] WOLFRUM, Riidiger. *The principle of the common heritage of mankind*. c1983. https://www.zaoerv.de/43_1983/43_1983_2_a_312_337.pdf. Access on: 25 Dec. 2024.

[21] WOLFRUM, Riidiger. *The principle of the common heritage of mankind*. c1983. https://www.zaoerv.de/43_1983/43_1983_2_a_312_337.pdf. Access on: 25 Dec. 2024.

[22] WOLFRUM, Riidiger. *The principle of the common heritage of mankind*. c1983. https://www.zaoerv.de/43_1983/43_1983_2_a_312_337.pdf. Access on: 25 Dec. 2024. TAGHIZADEH, Zakieh. Marine genetic resources as common heritage of mankind under the BBNJ agreement; the international community toward a pragmatic benefit-sharing approach? *Biodiversity and Conservation*, v. 34, p. 131-153, Nov. 2024. Available at: https://doi.org/10.1007/s10531-024-02962-2 Access on: 10 Jan. 2025.

[23] WOLFRUM, Riidiger. *The principle of the common heritage of mankind*. c1983. https://www.zaoerv.de/43_1983/43_1983_2_a_312_337.pdf. Access on: 25 Dec. 2024. TAGHIZADEH, Zakieh. Marine genetic resources as common heritage of mankind under the BBNJ agreement; the international community toward a pragmatic benefit-sharing approach? *Biodiversity and Conservation*, v. 34, p. 131-153, Nov. 2024. Available at: https://doi.org/10.1007/s10531-024-02962-2 Access on: 10 Jan. 2025.

[24] DO, Huu Tung *et al*. Phân cấp quản lý tài nguyên khoáng sản: Kinh nghiệm thế giới và bài học tham khảo đối với Việt Nam/ Decentralization of mineral resource management: World experience and lessons for Vietnam. *Tạp chí Cộng sản*, 20 Mar. 2023. Available at: https://www.tapchicongsan.org.vn/web/guest/thuc-tien-kinh-nghiem1?p_p_auth=0N8Dz0aB&p_p_id=49&p_p_lifecycle=1&p_p_state=normal&p_p_

benefit sharing among countries reveals an imbalance between developed and developing nations, particularly regarding access to and exploitation of resources. This disparity is largely due to the technological advantages of deep-sea mining and the abundant financial resources available to developed countries. Although the UNCLOS provides for revenue sharing from resource exploitation to developing countries, the benefits shared are minimal and do little to bridge the economic gap for these countries. Under ISA's annual report in 2024, the ISA has issued 31 contracts to 22 contractors for the exploration of three types of mineral resources in the Area are PMN (Polymetallic Nodules), PMS (Polymetallic Sulphides) and CFC (Cobalt-Rich Ferromanganese). The leading countries in terms of contracts for deep-sea mining exploration only are developed countries like China, Russia, Germany, South Korea, the UK, and Poland. There is a very small number of contracts that come from developing countries[25]. In addition, There has been considerable debate over the financial benefits of deep-sea mining in recent years, with several studies indicating that countries are likely to gain economically insignificant advantages. This report estimates that the ISA Member States could receive between $42,000 and $7.35 million each year from corporate income tax and royalties related to deep-sea mining. Some countries believe these amounts are unfair[26] and too small compared to the size of most national economies[27]. A growing concern is the actual capacity of the ISA. Its operating mechanism is ineffective and lacks transparency in monitoring the distribution of benefits to countries. This undermines the principle of fairness established by the UNCLOS and leads to perceptions that this principle is merely a "formality." As a result, the interests of countries, particularly developing countries, are negatively affected.

1.3 The research hypothesis and methodology

This study is conducted to discuss the legal issues and international practices related to applying the principle of equity in the exploration, exploitation of resources, and benefit-sharing among States in the Area to ensure the effective implementation of UNCLOS and other relevant legal instruments. Additionally, it aims to guarantee that the exploitation and use of resources in the Area are fair and sustainable. The article is structured into the following key sections: (i) examine the provisions of the UNCLOS and other pertinent international legal instruments concerning the legal status of the common heritage of mankind and the principle of equitable benefit-sharing, (ii) assess the role of the International Seabed Authority in developing and implementing a mechanism to ensure fair and equitable benefit-sharing, (iii) identify and analyze the primary challenges to realizing equitable benefit-sharing under the common heritage regime, and finally, (iv) propose recommendations aimed at fostering equitable and sustainable benefit-sharing among states.

To achieve the research objectives, the authors employed a comprehensive methodology that integrates both quantitative and qualitative approaches to address pertinent legal and practical issues. Through the application of well-recognized scientific research methods, including analysis, comparison, explanation, and case study examination, the authors systematically analyzed and processed a wide range of documents and data, yielding clear and substantiated findings. Notably, the development of the article is grounded in the meticulous selection and processing of information from offi-

mode=view&_49_struts_action=%2Fmy_sites%2Fview&_49_groupId=20182&_49_privateLayout=false. Access on: 15 Jan. 2025.

[25] INTERNATIONAL SEABED AUTHORITY. *Finance and resources*: secretary-general annual report 2024. Kingston: ISA, 2024. Available at: https://www.isa.org.jm/wp-content/uploads/2024/06/ISA_Secretary_General_Annual_Report_2024_Chapter8.pdf. Access on: 26 Jan. 2025. INTERNATIONAL SEABED AUTHORITY. *Secretary-General*: annual Report 2024. Kingston: ISA, 2024. Available at: https://www.isa.org.jm/secretary-general-annual-report-2024/. Access on: 10 Jan. 2025. INTERNATIONAL SEABED AUTHORITY. Exploration contracts. *ISA*, [17 Mar. 2022]. Available at: https://www.isa.org.jm/exploration-contracts/. Access on: 10 Jan. 2025. HAUGAN, P. M. *et al.* What role for ocean-based renewable energy and deep-seabed minerals in a sustainable future? *In*: LUBCHENCO, Jane; HAUGAN, Peter M. (ed.). *The blue compendium*: from knowledge to action for a sustainable ocean economy. [*S. l.*]: Springer International Publishing, 2023. p. 51-89. Available at: https://doi.org/10.1007/978-3-031-16277-0_3. Access on: 10 Jan. 2025

[26] ALGERIA. *Statement on Behalf of The African Group by Mr. Mehdi REMAOUN First Secretary At the, 25th Session of the Council of the International Seabed Authority, Agenda Item 11*: Financial Model. Kingston, 25 February 2019. Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/1-algeriaoboag_finmodel.pdf. Access on: 10 Jan. 2025.

[27] ALGERIA. *Statement on Behalf of The African Group by Mr. Mehdi REMAOUN First Secretary At the, 25th Session of the Council of the International Seabed Authority, Agenda Item 11*: Financial Model. Kingston, 25 February 2019. Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/1-algeriaoboag_finmodel.pdf. Access on: 10 Jan. 2025.

cial sources like the articles, reports/comments issued by international organizations, such as the ISA and the International Tribunal on the Law of the Sea, which serve as critical references in supporting and strengthening the article's arguments.

2 Equitable benefit sharing in the common heritage of mankind under the UNCLOS

2.1 Key components of the system

Provisions relating to the equitable sharing of benefits from activities in the Area are directly found in articles 140(2), 155(1)(f), 160(2)(f)(i) and (g), and 162(2)(o)(i) of the UNCLOS and in section 9(7)(f) of the annexe to the 1994 Agreement relating to the Implementation of Part XI of the UNCLOS 1982 (1994 Agreement). Relevant provisions can also be referred to in articles 171 and 173(2)[28]. Based on such foundations, the Equitable Benefit Sharing system comprises three elements, namely:

The first element is the non-appropriation of the Area and its resources. Accordingly, the Convention denies the principle of sovereignty in the CHM. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources[29]. It is important to note that the UNCLOS 1982 not only disallows the appropriation of the Area as a maritime zone, but also extends this prohibition to its resources. This simultaneously negates the principle of *res communis*, which allows all states to explore and exploit resources and may endeavor to maximize benefits[30]. In this way, the Equitable Benefit Sharing system has excluded two common principles from international law of the sea.

The second element concerns the beneficiaries of activities in the Area. Deriving from the exclusion of two principles often associated with States, the aim of the Equitable Benefit Sharing system to serve all of mankind[31]. The idea of the benefit of mankind as a whole is clearly opposed to the state-centric approach, commonly found in many other provisions of the Convention. Moreover, the term 'mankind' is used to convey both spatial and temporal meanings. On the one hand, it encompasses all individuals on the planet, regardless of their location or national identity[32]. On the other hand, the sharing of benefits is not only intended to serve current goals but also for future generations. Therefore, all benefits obtained in the Area that do not comply with the above criteria cannot be alienated[33].

The third element of the system relates to the sustainable development of all kinds of countries and peoples. To fulfil the mission for the benefit of all mankind, promoting sustainable development among these subjects is crucial. Accordingly, the Benefit Sharing System is designed to provide parties with financial support and other economic benefits derived from activities in the Area[34]. Furthermore, the allocation of benefits to countries will not depend on their geographical location, whether coastal or landlocked. At the same time, Benefit Sharing will also be based on the development level of the countries and the independence status of the people[35]. All these requirements aim to ensure that benefits are shared among members in an equitable manner, rather than an equal one.

To ensure the effectiveness of the system, the 1994 Agreement has established the Finance Committee. The Committee consists of 15 members with appropriate qualifications related to financial matters. This organ of the ISA is expected to contribute to the research and

[28] INTERNATIONAL SEABED AUTHORITY. *Equitable sharing of financial and other benefits from deep-seabed mining*: ISA technical study no 31. Kingston: ISA, 2021. Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/ISA_Technical_Study_31.pdf. Access on: 10 Jan. 2025.

[29] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 137.

[30] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 137.

[31] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 140(1).

[32] PROELß, Alexander (ed.). *United Nations Convention On The Law Of The Sea*: a commentary. German: CH Beck Hart Nomos, 2017.

[33] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 137(2).

[34] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 140.

[35] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 137.

development of a fair Benefit Sharing Mechanism. Accordingly, one of the tasks of the Finance Committee in the ISA's Strategic Plan for the period 2019-2023 is to conduct a study on the equitable sharing of financial and other economic benefits from deep seabed mining. The completion of this objective in 2019 has helped the ISA move toward the next goal in the Strategic Plan for the period 2024-2028, which is to find an appropriate mechanism to provide for the equitable sharing of financial and other economic benefits derived from activities in the Area on a non-discriminatory basis.

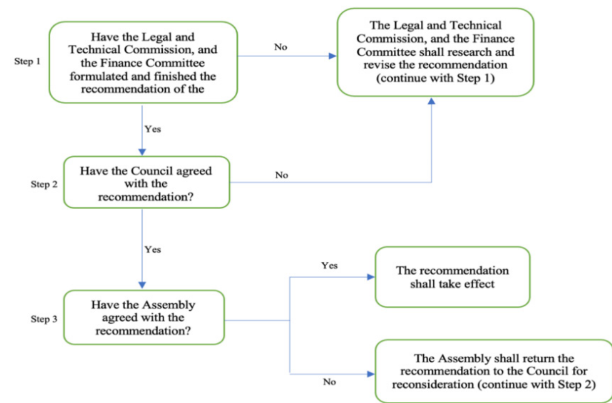
The issue of sustainable development not only includes benefit-sharing policies but also encompasses certain obligations for countries operating in the Area. Accordingly, the activities of countries in the Area must ensure compliance with obligations related to using the Area exclusively for peaceful purposes, obligations to cooperate in scientific research, obligations to protect the marine environment, and obligations for the protection of human life[36]. Notably, the Convention also establishes the transfer of technology between countries as a distinct obligation under Article 144. In contrast, under the 1994 Agreement, the transfer of technology must meet certain requirements for fair trade. If the Enterprise or developing States are unable to obtain the technology, related States are only obliged to cooperate with the Authority in facilitating its acquisition on terms that are consistent with the effective protection of intellectual property rights[37]. Thus, these conditions seem to address objections from some developed state parties,[38] rather than facilitating a smoother transfer of technology.

2.2 The role of the international seabed authority in the equitable benefit sharing system

As a representative of mankind as a whole in the Area, the ISA is granted legislative and enforcement jurisdiction concerning all activities in this zone[39]. This has enabled the ISA to be the direct authority managing the Equitable Benefit Sharing System.

Regarding legislative power in the system, the ISA has the authority to establish rules, regulations, and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area[40]. The procedure for enacting these documents will include the following steps.

Figure 1 - The process of approving Equitable Benefit Sharing rules by the ISA



Source: United Nations[41]

One important point to note is that each body of the ISA will undertake a specific task in developing these rules. Specifically, the Legal and Technical Commission will have the duty of considering all relevant factors, including assessments of the environmental implications of activities in the Area. Meanwhile, the Council and the Assembly will be responsible for considering the interests and needs of developing States and peoples who have not attained full independence or other self--governing status.

In the process of developing laws on benefit-sharing from activities in the Area, the economic benefits derived from extraction activities and the necessity of

[36] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 141, 143, 145, 146.

[37] UNITED NATIONS. General Assembly. *Agreement Relating to the Implementation of Part XI of UNCLOS 1982*. c2001. Available at: https://www.un.org/depts/los/convention_agreements/texts/agreement_part_xi/agreement_part_xi.htm#section5. Access on: 15 Jan. 2025.

[38] BROWN, E. D. The 1994 Agreement on the implementation of part xi of the UN Convention on the Law of the Sea: breakthrough to universality? *Marine Policy*, v. 19, n. 1, p. 5-20, 1995.

[39] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 17(1).

[40] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 160(2).

[41] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 160(2), 162(2), 165(2).

environmental protection are regarded as the most important factors. This not only ensures the goals of sustainable development but also helps maintain biodiversity and protect sensitive ecosystems in the Area. As such, the UNCLOS also grants the ISA the authority to adopt appropriate rules, regulations, and procedures for protecting and conserving the environment from the harmful effects of activities such as drilling, dredging, and excavation in the Area[42]. Besides, the subsequent 1994 Agreement also emphasizes that the adoption of rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment is one of the matters on which the Authority needs to concentrate during the time between the entry into force of the Convention and the approval of the first plan of work for exploitation[43]. Thus, the obligation to protect the environment will be one of the core objectives of the laws of the ISA. Only when environmental standards are ensured can there be a basis for granting permits for exploitation in the Area.

Figure 2 - ISA currently contributes to 12 of the 17 SDGs through the implementation of its mandate

In the draft strategic plan of the ISA for the period 2024-2028, the ISA has outlined several strategic directions to protect the marine environment from the harmful effects of activities in the Area. This includes developing an adaptive regulatory framework based on best environmental practices, conducting regional environmental assessments and management plans for mineral provinces, and ensuring public access to environmental information while enhancing stakeholder participation[44]. Additionally, the ISA also aims to establish robust monitoring programs to assess potential risks to the ecological balance and develop regulations to prevent and control pollution and other hazards, ensuring compliance with the protection requirements outlined in Part XII of the Convention. Through these strategic initiatives, the ISA has demonstrated its commitment to safeguarding the marine environment while facilitating responsible exploration and exploitation in the Area.

Concerning enforcement jurisdiction, the Convention grants the ISA the exclusive privilege of supervising and licensing resource extraction activities in the Area[45]. Furthermore, Article 153 confers on the ISA the right to take at any time any measures provided for under Part XI to ensure compliance with its provisions and the exercise of the function of control and regulation assigned to it thereunder or under any contract[46]. This means that the ISA has the authority to revoke the licenses of parties operating and extracting resources in the Area if they fail to comply with the requirements set forth by the UNCLOS and the ISA. This oversight aims to ensure that all activities are conducted sustainably and adhere to principles of environmental protection as well as the rights of other member states. Only by meeting such requirements can the resources obtained from extraction activities be alienated from the market[47].

[42] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 145.

[43] UNITED NATIONS. General Assembly. *Agreement Relating to the Implementation of Part XI of UNCLOS 1982*. c2001. Available at: https://www.un.org/depts/los/convention_agreements/texts/agreement_part_xi/agreement_part_xi.htm#section5. Access on: 15 Jan. 2025.

[44] INTERNATIONAL SEABED AUTHORITY. *Strategic Plan of the International Seabed Authority for the Period 2024-2028*. 26 May 2023. Available at: https://www.isa.org.jm/wp-content/uploads/2023/05/Draft-SP-2024-2028v.1-26.05.23.pdf. Access on: 10 Jan. 2025.

[45] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 151.

[46] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 153.

[47] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 137(2).

2.3 Financial mechanisms and benefits distribution of the ISA

2.3.1 Financial mechanisms

Article 171 of the UNCLOS lists various financial sources of the ISA from multiple activities in the Area. These revenue sources have since been amended and interpreted by the 1994 Agreement. Therefore, the funding sources of the ISA currently include: assessed contributions made by States that are members of the Authority; agreed contributions, as determined by the Authority, made by international organizations members of the Authority in accordance with annexe IX to the Convention; funds received by the Authority pursuant to Annex III, Art. 13 (2) of the UNCLOS and Section 8 of the Annex to the 1994 Agreement; funds transferred from the Enterprise in accordance with Annex IV, Art. 10 of the UNCLOS; voluntary contributions made by members or other entities; and such other funds to which the Authority may become entitled or may receive, including income from investment[48]. However, the financial resources of the ISA will not be immediately allocated for sharing with mankind according to Article 140 of the Convention. Instead, they will need to be deducted for several costs. The UNCLOS stipulates that these deductions include the ISA's administrative costs, funds to capitalize the Enterprise, and the economic adjustment assistance fund[49].

The ISA's administrative costs cover the costs associated with running the Secretariat, including staff costs. In the financial period 2023-2024, the administrative expenses of the ISA amount to USD 14,413,000 out of a total budget of USD 22,712,940[50]. After deducting the ISA's administrative costs, the next deduction is the funds to capitalize the Enterprise, which are necessary to maintain the operations of the Enterprise in the Area. This organ of the ISA is not expected to operate until 2023, with a budget for the period 2023-2024 amounting to USD 456,940[51]. The economic adjustment assistance fund is designed to assist developing countries facing significant adverse effects on their export earnings or economies due to reduced prices or export volumes of affected minerals caused by activities in the Area[52]. The financial report for the ISA for the period 2023-2024 does not itemize this fund separately; instead, it includes a single line item for the programmatic activities of the ISA, which may encompass this fund, with a cost of USD 3,123,000[53]. It is important to note that the UNCLOS does not limit the deductions from the ISA's budget to just these three items. The ISA may expand this list in the future[54].

2.3.2 Benefits distribution

After deducting all the aforementioned costs, the remaining funds will be used for benefit-sharing purposes based on the principle of fairness according to Article 140. Additionally, the Convention allows member states to provide input during the Review Conferences to assess whether the system has resulted in the equitable sharing of benefits derived from activities in the Area[55]. This enables members to voice their concerns in cases of inequity within the benefit-sharing system.

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[48] PROELß, Alexander (ed.). *United Nations Convention On The Law Of The Sea*: a commentary. German: CH Beck Hart Nomos, 2017.

[49] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 173.

[50] INTERNATIONAL SEABED AUTHORITY. *Finance and resources*: secretary-general annual report 2024. Kingston: ISA, 2024. Available at: https://www.isa.org.jm/wp-content/uploads/2024/06/ISA_Secretary_General_Annual_Report_2024_Chapter8.pdf. Access on: 26 Jan. 2025.

[51] INTERNATIONAL SEABED AUTHORITY. *Finance and resources*: secretary-general annual report 2024. Kingston: ISA, 2024. Available at: https://www.isa.org.jm/wp-content/uploads/2024/06/ISA_Secretary_General_Annual_Report_2024_Chapter8.pdf. Access on: 26 Jan. 2025. WILDE, Daniel; LILY, Hannah; CRAIK, Neil; CHAKRABORTY, Anindita. Equitable sharing of deep-sea mining benefits: more questions than answers. *Marine Policy*, v. 151, May 2023. Available at: https://www.sciencedirect.com/science/article/pii/S0308597X23000994.

[52] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 151.

[53] INTERNATIONAL SEABED AUTHORITY. *Finance and resources*: secretary-general annual report 2024. Kingston: ISA, 2024. Available at: https://www.isa.org.jm/wp-content/uploads/2024/06/ISA_Secretary_General_Annual_Report_2024_Chapter8.pdf.

[54] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 173.

[55] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 155.

Under Article 140, the Benefit-sharing will be divided into financial support and other economic benefits[56]. While 'financial benefits' can be defined as a direct cash disbursement to governments[57], the phrase 'other economic benefits' is somewhat unclear. At first glance, this could include the transfer of technology as outlined in Article 150(d)[58]. Recently, the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement) has purportedly clarified additional benefits that can be shared within the system, namely marine genetic resources and their associated digital sequence information. Previous instruments, such as the Convention on Biological Diversity (CBD), merely required member states to strive to create conditions to facilitate access to genetic resources for other countries[59]. The use of a weak formulation made the sharing of genetic resources seem like an obligation of conduct rather than an obligation of result. In contrast, the BBNJ Agreement specifically emphasizes the principle of Equitable Benefit Sharing arising from marine genetic resources, including financial and non-financial benefits[60]. Additionally, the Agreement also sets forth several conditions, including the requirement for the due date of sharing data in an accessible repository, in order to ensure effective implementation by the parties[61]. Obviously, the BBNJ Agreement has marked a significant development of the Equitable Benefit Sharing system.

3 Key challenges in equitable benefit sharing in the exploitation of common heritage of mankind areas

The deep seabed mining (DSM) regime is governed by the UNCLOS and the newly established agreement on marine biodiversity beyond national jurisdiction (BBNJ). It aims to regulate the extraction of minerals from the seabed located beyond national jurisdiction, known as the "Area." This Area is recognized as the common heritage of mankind, according to the UNCLOS. As a result, the principle of benefit sharing is fundamental to the DSM regime. However, despite decades of discussions and development, the DSM framework has yet to provide effective mechanisms for benefit sharing. This failure is due to various legal, institutional, environmental, and economic challenges.

3.1 Transparency issue

The principle of the CHM relies heavily on transparency to ensure equitable governance and benefit-sharing. This principle underpins the operations of the ISA, which oversees seabed mining and related activities. Since its establishment, there have been persistent concerns regarding the transparency of the Legal and Technical Commission (LTC), a key decision-making body within the ISA. As interest in seabed mining grows, so does the demand for more open and inclusive governance processes. This sentiment was evident during the ISA's 2014 annual session, where strong interest was expressed in enhancing transparency and fostering dialogue on the LTC's activities. The ISA has acknowledged these concerns, prompting efforts such as drafting a stakeholder consultation and participation strategy to address transparency deficits[62].

A particularly critical area for transparency is the development and implementation of regulations on finan-

[56] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 140.

[57] ASCENCIO-HERRERA, Alfonso; NORDQUIST, Myron H. *The United Nations Convention On The Law Of The Sea, part xi regime and the international seabed authority*: a twenty-five year journey Leiden: Brill Nijhoff, 2022.

[58] UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Art. 150(d).

[59] UNITED NATIONS. Secretariat of the Convention on Biological Diversity. *Convention on biological diversity:* text and annexes. Montreal: Secretariat of the Convention on Biological Diversity, 2011. Available at: https://www.cbd.int/doc/legal/cbd-en.pdf. Art. 15(2).

[60] UNITED NATIONS. *Agreement under The United Nations Convention on The Law of The Sea on The Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*. 2023. Available at: https://www.un.org/bbnjagreement/sites/default/files/2024-08/Text%20of%20the%20Agreement%20in%20English.pdf. Access on: 15 Jan. 2025. Art. 14.

[61] UNITED NATIONS. AGREEMENT UNDER THE UNITED NATIONS Convention on The Law of The Sea on The Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction. 2023. Available at: https://www.un.org/bbnjagreement/sites/default/files/2024-08/Text%20of%20the%20Agreement%20in%20English.pdf. Access on: 15 Jan. 2025. Art. 14.

[62] WOOD, M. C. International seabed authority: the first four years. *Max Planck Yearbook of United Nations Law*, v. 3, n. 1, p. 173-241, Jan. 1999.

cial benefits, a responsibility shared by the ISA's Finance Committee. This committee is pivotal in ensuring the fair distribution of benefits derived from the DSM activities, especially in developing States. Without robust transparency in the Finance Committee's auditing and reporting processes, it becomes challenging to guarantee compliance from States and contractors. A lack of openness could erode trust among stakeholders, particularly for developing nations relying on DSM-related financial benefits to support their development goals. Thus, transparency in financial governance is essential to uphold the CHM principle and the ISA's credibility[63].

Incorporating transparency into the ISA governance structures is a procedural necessity and a moral imperative. Transparency ensures that decision-making processes are inclusive, allowing the international community—especially marginalized stakeholders—to hold governance bodies accountable. Furthermore, it promotes fairness in benefit-sharing, particularly for developing States, which are central to the CHM principle. As global attention on seabed mining increases, the ISA must proactively address these transparency challenges. Failure to do so risks undermining the fundamental principles of equitable resource sharing and collaborative stewardship of the seabed, which the CHM concept seeks to uphold[64].

3.2 Unclear sharing benefits mechanisms

While the UNCLOS establishes the ISA to oversee resource activities in the Area, the mechanisms for distributing benefits remain underdeveloped. Questions around revenue-sharing formulas and operationalization of the common heritage principle have hindered progress.

Developing a fiscal regime for DSM has long been challenging and contentious. During the negotiations of the UNCLOS, the complexities of resource payments and financial benefit-sharing highlighted differing priorities among nations. Today, as seabed mining moves closer to reality, the ISA must establish clear rules, regulations, and procedures to govern financial transactions. Central to these efforts is ensuring alignment with the CHM principle, which emphasizes equitable sharing of resources and benefits among all nations. That will require the ISA to address financial risks for humankind while ensuring that it receives its fair share of the benefits derived from seabed mining activities[65].

A significant point of contention is defining a fair and equitable fiscal regime under the CHM framework. Beyond monetary considerations, this regime may need to account for the loss of natural capital and associated ecosystem services that benefit humankind. Extracting resources from the seabed could damage marine ecosystems, affecting biodiversity and long-term ecological health. The financial implications of such losses, including potential compensation for present and future generations, have not been thoroughly addressed. This omission raises questions about the long-term sustainability and ethical dimensions of the financial structures being developed[66].

Integrating considerations for ecosystem losses into the DSM fiscal regime would represent a progressive and holistic approach to governance. It would acknowledge marine ecosystems' intrinsic value and importance to global well-being. Developing such a framework, however, requires extensive dialogue among stakeholders, robust scientific assessments, and mechanisms to ensure that financial benefits are equitably distributed while mitigating environmental impacts. By proactively addressing these challenges, the ISA can set a precedent for sustainable resource management that aligns with the principles of CHM and ensures a fair balance between economic gains and environmental stewardship[67].

The BBNJ significantly enhances benefit-sharing principles to effectively tackle marine genetic resources (MGRs) and the broader aspects of biodiversity in areas

[63] JAECKEL, Aline; ARDRON, Jeff. A.; GJERDE, Kristina M. Sharing benefits of the common heritage of mankind – is the deep seabed mining regime ready? *Marine Policy*, v. 70, p. 198-204, Aug. 2016.

[64] ARMAS-PFIRTER, Frida M. The "Common Heritage of Mankind" principle and the equitable sharing of benefits. *In*: ASCENCIO-HERRERA, Alfonso; NORDQUIST, Myron H. *The United Nations Convention On The Law Of The Sea, part xi regime and the international seabed authority*: a twenty-five year journey Leiden: Brill Nijhoff, 2022. chapter 3.

[65] TAGHIZADEH, Zakieh. Marine genetic resources as common heritage of mankind under the BBNJ agreement; the international community toward a pragmatic benefit-sharing approach? *Biodiversity and Conservation*, v. 34, p. 131-153, Nov. 2024. Available at: https://doi.org/10.1007/s10531-024-02962-2 Access on: 10 Jan. 2025.

[66] MASSIMI, Michela. The fraught legacy of the common heritage of humankind principle for equitable ocean policy. *Environmental Science & Policy*, v. 153, Mar. 2024.

[67] RANGANATHAN, Surabih. Ocean floor grab: international law and the making of an extractive imaginary. *European Journal of International Law*, v. 30, n. 2, p. 573-600, May 2019.

beyond national jurisdiction. Article 14 introduces various forms of non-monetary benefit sharing, yet critical details are intentionally reserved for future decisions by the Conference of the Parties (COP). These decisions will be crucial for establishing the mechanisms for distributing monetary benefits from commercializing marine genetic resources and ensuring adherence to the Agreement. To fulfil the aims of this Agreement, Part II sets forth vital guidelines for regulating MGR-related activities, ensuring that monetary and non-monetary benefits are distributed equitably. This proactive approach empowers future Parties to guarantee that all entities within their jurisdiction comply with the innovative regulations and requirements embedded in the Agreement, paving the way for a more sustainable and fair utilization of our ocean's resources[68].

A cornerstone of the BBNJ Agreement is the creation of an Access and Benefit-Sharing Committee and a Clearing-House Mechanism to manage the equitable sharing of the MGRs and related data. These mechanisms are designed to enhance transparency and facilitate the exchange of information among countries and organizations, advancing scientific research and innovation. The Clearing-House Mechanism provides a notification system that tracks MGRs-related activities across various value chain stages, ensuring compliance with the agreement's provisions. This system supports international collaboration and ensures that the utility of MGRs is distributed fairly[69].

The agreement requires that monetary benefits from MGRs activities be deposited into a "special fund." This fund will support capacity-building initiatives and other assistance programs, especially for developing countries, to help achieve the goals of the BBNJ Agreement. Developed countries are responsible for contributing to this fund, including milestone-based contributions, commercialization fees, and other financial mechanisms determined by the COP. By establishing these financial structures, the BBNJ Agreement aims to ensure that benefits from MGRs-related activities are shared fairly and reinvested into the conservation and sustainable use of marine biodiversity[70].

Significant uncertainties remain regarding implementing fair and equitable benefit-sharing mechanisms under the BBNJ Agreement. Questions persist about defining and operationalizing fairness and equity in benefit-sharing, particularly in addressing disparities in stakeholders' access to monetary and non-monetary benefits. Ensuring compliance with transparency requirements is another concern, as the mechanisms for monitoring and enforcing these obligations are not fully detailed. These challenges are further compounded by existing imbalances in the capacity of different nations to access and utilize MGRs, making it essential to establish transparent and inclusive frameworks that address these inequalities[71].

Moreover, the ambiguous definition of marine scientific research within the framework of the UNCLOS and the BBNJ Agreement raises additional complexities. This lack of clarity could hinder the equitable sharing of research results and the effective transfer of technology, which are critical components of benefit-sharing. Balancing states' rights, freedoms, and responsibilities in marine scientific research in areas beyond national jurisdiction (ABNJ) requires careful negotiation and clear guidelines. Addressing these challenges will be pivotal in future COP, which must delve deeper into these issues to create a more robust and equitable benefit-sharing regime that aligns with the objectives of the BBNJ Agreement[72].

3.3 Capacity building and technology transfer

Justice issues surrounding marine bioprospecting in ABNJ primarily stem from disparities in access to and utilization of MGRs. A small number of countries and a limited number of companies within them dominate

[68] TAGHIZADEH, Zakieh. Marine genetic resources as common heritage of mankind under the BBNJ agreement; the international community toward a pragmatic benefit-sharing approach? *Biodiversity and Conservation*, v. 34, p. 131-153, Nov. 2024. Available at: https://doi.org/10.1007/s10531-024-02962-2 Access on: 10 Jan. 2025.

[69] MORGERA, Elisa. The need for an international legal concept of fair and equitable benefit sharing. *European Journal of International Law*, v. 27, n. 2, p. 353-383, May 2016.

[70] VADROT, A.; LANGLET, A.; TESSNOW-VON WYSOCKI, I. Who owns marine biodiversity? contesting the world order through the 'common heritage of humankind' principle. *Environmental Politics*, v. 31, n. 2, p. 226–250, 2022.

[71] DE LUCIA, Vito. After the dust settles: selected considerations about the new treaty on marine biodiversity in areas beyond national jurisdiction with respect to ABMTs and MPAs. *Ocean Development & International Law*, v. 55, n. 1-2, p. 115-136, 2024.

[72] HARDEN-DAVIES, Harriet. Marine science and technology transfer: can the intergovernmental oceanographic commission advance governance of biodiversity beyond national jurisdiction? *Marine Policy*, v. 74, p. 260-267, Dec. 2016.

the patent filings and technological advancements related to MGRs. In contrast, many developing countries remain excluded from these activities and are significantly underrepresented in marine taxonomic research. This imbalance highlights a critical gap in capabilities, a fundamental barrier to achieving distributive justice, as it restricts equitable participation in and benefits from MGR-related initiatives[73].

Interestingly, there is limited evidence of patents or commercial products being specifically or exclusively derived from MGRs sourced from ABNJ as opposed to other marine areas. That underscores the challenge of distinguishing the unique contributions of ABNJ resources to scientific and commercial applications. Nevertheless, the broader inequality in research and technological capabilities raises concerns about the fairness of benefit-sharing frameworks. Addressing these disparities will require targeted capacity-building initiatives, more inclusive research collaborations, and mechanisms that enable developing countries to participate meaningfully in bioprospecting and benefit-sharing activities, ultimately advancing the goals of equity and justice in marine governance[74].

Developing states face significant challenges in participating in and benefiting from seabed mining activities, deepening existing inequalities in marine resource governance. While both the UNCLOS and the BBNJ Agreement acknowledge the importance of capacity-building and technology transfer, the mechanisms to provide concrete and sustained support remain underdeveloped. That leaves many developing nations unable to fully engage in critical areas such as research, resource exploitation, and benefit-sharing negotiations. The technological divide between advanced states and developing nations persists, as the latter often lack access to expensive marine technologies like remote sensing, underwater robotics, and advanced data analysis tools[75].

The potential for meaningful technology transfer is further hindered by the reluctance of technologically advanced countries to share cutting-edge tools and knowledge due to concerns over national security, economic competition, and commercial interests. Moreover, training programs and technology transfer initiatives often lack long-term strategies, leading to short-lived and fragmented benefits for developing states. Without sustained efforts to address these barriers, developing nations remain marginalized in the global management of seabed resources. Bridging these gaps will require robust, well-funded, and inclusive capacity-building initiatives to foster long-term participation and equitable benefit-sharing for all states[76].

3.4 Partially towards a sustainable equity approach

Sustainable equity underscores the obligation to ensure that the present exploitation and use of shared resources do not hinder the rights and opportunities of future generations. This paradigm is rooted in the balance between inter-generational and intra-generational equity. Inter-generational equity focuses on the responsibility of the current generation to preserve and manage marine natural resources sustainably, ensuring that future generations can also derive benefits and meet their needs. It emphasizes a long-term perspective, prioritizing conservation and sustainable use over short-term gains[77].

In contrast, intra-generational equity addresses fairness and justice within the present generation, emphasizing the equitable distribution of resources and opportunities among communities and states. It advocates for reducing disparities in access to resources, technology, and benefits, particularly between developed and developing nations. These two dimensions of sustainable equity aim to create a holistic approach that balances immediate and long-term needs, fostering a framework where marine natural resources are managed responsibly and equitably across time and space. This dual focus

[73] VIERROS, Marjo K.; HARDEN-DAVIES Harriet. Capacity building and technology transfer for improving governance of marine areas both beyond and within national jurisdiction. *Marine Policy*, v. 122, Dec. 2020.

[74] POPOVA, Ekaterina *et al.* Ecological connectivity between the areas beyond national jurisdiction and coastal waters: safeguarding interests of coastal communities in developing countries. *Marine Policy*, v. 104, p. 90-102, June 2019.

[75] HARDEN-DAVIES, Harriet *et al.* How can a new UN ocean treaty change the course of capacity building? *Aquatic Conservation*: Marine and Freshwater Ecosystems, v. 32, n. 5, p. 907-912, Feb. 2022.

[76] GRANIERI, Massimiliano; BASSO, Andrea. Building capacity building in technology transfer: an introduction. *In*: GRANIERI, Massimiliano; BASSO, Andrea (ed.). *Capacity building in technology transfer:* the european experience. [*S. l.*]: Springer International Publishing, 2019.

[77] MORGERA, Elisa. The need for an international legal concept of fair and equitable benefit sharing. *European Journal of International Law*, v. 27, n. 2, p. 353-383, May 2016.

is critical in shaping policies that ensure justice across and within generations while promoting the sustainable use of marine resources[78].

The benefit-sharing mechanism outlined in the BBNJ Agreement can be critiqued for not fully balancing the requirements of equitable benefit-sharing with the anthropological and forward-looking principles derived from the CHM concept. While the Agreement incorporates elements of sustainable equity, it does so partially, leaving critical gaps in addressing how the shift towards a more pragmatic benefit-sharing framework impacts the broader sustainability paradigm. This partial integration raises concerns about how the BBNJ Agreement adequately supports inter-generational equity, which focuses on preserving resources for future generations, and intra-generational equity, which emphasizes fairness among present-day stakeholders.

By not fully embracing the principles of sustainable equity and the CHM, the Agreement risks undermining its ability to achieve its overarching objectives of conservation and equitable use of marine resources. A fragmented approach to benefit-sharing could hinder the realization of fair outcomes across communities and nations while failing to ensure the long-term preservation of biodiversity. For the BBNJ Agreement to fully capitalize on the potential of the CHM concept and advance the sustainability paradigm, it will need to adopt a more integrated and balanced approach that effectively bridges the gap between present-day practicalities and future-focused responsibilities[79].

3.5 Enforcement and monitoring gaps

Ensuring compliance with benefit-sharing obligations under both the UNCLOS and the BBNJ Agreement framework is critical to achieving equity and sustainability in the use of marine resources. However, both frameworks face challenges due to inadequate monitoring and enforcement mechanisms. While the UNCLOS outlines general benefits-sharing obligations, mainly through the ISA, it lacks specific, binding provisions for ensuring that states and private actors fulfill their commitments. This limitation has resulted in inconsistent application and accountability, particularly regarding monetary and non-monetary benefits. Without stringent compliance mechanisms, the aspirations of equitable sharing remain challenging[80].

The BBNJ Agreement, though more recent and expansive, similarly falls short in enforcing benefit-sharing obligations. While it emphasizes transparency, particularly through the deposition of MGRs and associated Digital Sequence Information (DSI) in public repositories, it does not clearly define penalties or remedial measures for non-compliance. This creates loopholes that could allow states or entities to exploit resources without sharing the resulting benefits equitably. For example, states are expected to notify and deposit data with the Clearing-House Mechanism, but no robust mechanism exists to monitor compliance or sanction those who fail to comply[81].

One significant challenge lies in the absence of a global enforcement authority capable of overseeing compliance across jurisdictions. The decentralized nature of high-seas governance makes monitoring activities and ensuring benefit-sharing compliance particularly challenging. Both frameworks rely heavily on voluntary commitments and goodwill, which often fall short in the face of competing national interests or commercial priorities. Furthermore, the lack of standardized protocols for reporting, verification, and enforcement adds complexity to ensuring that benefit-sharing obligations are upheld consistently[82].

[78] BLAIS, François. The fair and equitable sharing of benefits from the exploitation of genetic resources: a difficult transition from principles to reality. *In*: PRESTRE, Philippe G. (ed.). *Governing Global Biodiversity*. London: Routledge, 2002.

[79] TAGHIZADEH, Zakieh. Marine genetic resources as common heritage of mankind under the BBNJ agreement; the international community toward a pragmatic benefit-sharing approach? *Biodiversity and Conservation*, v. 34, p. 131-153, Nov. 2024. Available at: https://doi.org/10.1007/s10531-024-02962-2 Access on: 10 Jan. 2025.

[80] VADROT, A.; LANGLET, A.; TESSNOW-VON WYSOCKI, I. Who owns marine biodiversity? contesting the world order through the 'common heritage of humankind' principle. *Environmental Politics*, v. 31, n. 2, p. 226–250, 2022.

[81] MORGERA, Elisa. The role of fair and equitable benefit-sharing in environmental peacebuilding. *In*: JONG, Daniëlla Dam-de; SJÖSTEDT, Britta. (ed.). *Research handbook on international law and environmental peacebuilding*. Cheltenham: Edward Elgar Publishing, 2023. chapter 4.

[82] POPOVA, Ekaterina *et al.* Ecological connectivity between the areas beyond national jurisdiction and coastal waters: safeguarding interests of coastal communities in developing countries. *Marine Policy*, v. 104, p. 90-102, June 2019.

4 Proposed solutions for equitable benefit sharing

The principles of equitable benefit-sharing underpin global efforts to manage and utilize marine resources beyond national jurisdiction. The UNCLOS and the recent the BBNJ Agreement represent significant steps toward fostering fairness and sustainability in using these resources. However, both frameworks face persistent challenges in operationalizing benefit-sharing, including gaps in transparency, capacity-building, technology transfer, and enforcement. These challenges are compounded by disparities between developed and developing nations in accessing and utilizing marine resources, particularly in the context of seabed mining and MGRs. To address these issues, it is essential to develop robust mechanisms that ensure monetary and non-monetary benefits are distributed equitably while promoting the long-term sustainability of marine ecosystems. By adopting the necessary measures, the international community can bridge existing gaps and create a more inclusive framework that aligns with equity, justice, and the CHM principles.

4.1 Transparent and inclusive governance

Mandatory transparency protocols for key decision-making bodies, such as the ISA's Legal and Technical Commission and Finance Committee, are essential to ensuring equitable benefit-sharing in the governance of marine resources. These bodies play a pivotal role in regulating seabed mining and MGRs activities, and their decisions have far-reaching implications for global equity and sustainability. By mandating transparency, these bodies can open their processes to greater scrutiny and participation, ensuring that stakeholders, particularly from developing nations, have access to the information needed to hold them accountable. Such measures align with the (CHM principle, emphasizing fairness, inclusivity, and shared stewardship of global resources[83]).

A public online platform for publishing financial reports, environmental assessments, and real-time benefit-sharing agreements would further enhance transparency and accessibility. Such a platform could serve as a central repository for key information, allowing governments, organizations, and civil society to track compliance with agreed protocols and the distribution of benefits. By making this data readily available, stakeholders can assess whether financial and environmental obligations are being met, fostering a sense of shared responsibility and collaboration. Additionally, this openness can reduce potential conflicts and mistrust among nations by providing clear, verifiable information about managing marine resources.

Independent audits of seabed mining and MGRs activities would provide an additional layer of oversight, ensuring that transparency requirements are declared and effectively implemented. Independent auditors, operating free from the influence of vested interests, could evaluate compliance with financial and environmental commitments and identify areas where improvements are needed. These audits would provide an unbiased perspective, reinforcing the credibility of decision-making bodies and enhancing their accountability. For developing countries, in particular, such audits could serve as a critical safeguard, ensuring that their interests are protected and that they receive their fair share of benefits.

Together, these measures build trust among stakeholders, particularly those from developing countries, who often lack the resources to monitor and verify compliance independently. Transparency and accountability are cornerstones of the CHM principle, which seeks to ensure that the benefits of global resources are shared equitably among all humanity. By fostering a transparent and inclusive governance framework, these initiatives can help bridge the trust deficit, promote equitable resource management, and reinforce global commitments to sustainability and justice[84].

4.2 Strengthened benefit-sharing mechanisms

Establishing clear and enforceable guidelines for revenue-sharing formulas is essential for promoting equity in the governance of marine resources. These formulas should emphasize the fair distribution of fi-

[83] JAECKEL, Aline; ARDRON, Jeff. A.; GJERDE, Kristina M. Sharing benefits of the common heritage of mankind – is the deep seabed mining regime ready? *Marine Policy*, v. 70, p. 198-204, Aug. 2016.

[84] TAGHIZADEH, Zakieh. Marine genetic resources as common heritage of mankind under the BBNJ agreement; the international community toward a pragmatic benefit-sharing approach? *Biodiversity and Conservation*, v. 34, p. 131-153, Nov. 2024. Available at: https://doi.org/10.1007/s10531-024-02962-2 Access on: 10 Jan. 2025.

nancial benefits, particularly prioritizing the needs of developing nations that cannot often fully participate in resource extraction activities. Transparent and equitable revenue-sharing frameworks can help bridge existing disparities, ensuring that all nations can access the benefits derived from MGRs and seabed mining regardless of their technological or economic status. This approach aligns with the CHM principle, emphasizing shared responsibility and fairness.

Incorporating compensatory measures for ecosystem losses and biodiversity degradation into the fiscal regime is critical to aligning financial benefits with sustainability goals. Resource extraction and bioprospecting activities often result in ecological disruptions, impacting marine biodiversity and the long-term health of ecosystems. By integrating compensation for these losses into revenue-sharing mechanisms, stakeholders can mitigate environmental damage while ensuring that financial benefits reflect the actual cost of resource exploitation. These measures can include funding for restoration projects, biodiversity conservation programs, and research initiatives to understand and mitigate the impacts of marine resource utilization.

Developing specific monetary and non-monetary benefit-sharing modalities during future Conferences of the Parties under the BBNJ Agreement framework will further enhance the fairness and effectiveness of benefit-sharing mechanisms. Monetary benefits may include royalties, milestone payments, and periodic contributions, while non-monetary benefits could encompass capacity-building initiatives, technology access, and scientific data sharing. By clearly defining these modalities, the COP can provide a roadmap for equitable benefit-sharing that is comprehensive and adaptable to the needs of diverse stakeholders. Such a framework would ensure compliance with the BBNJ Agreement and foster global collaboration and inclusivity.

Implementing these measures clarifies financial obligations, reduces inequalities, and ensures that benefits align with ecological and equity principles. By addressing the economic and environmental dimensions of marine resource governance, these actions contribute to a holistic framework supporting sustainable development and intergenerational equity. Moreover, clear and enforceable guidelines strengthen trust among stakeholders, fostering a cooperative environment that prioritizes the collective good over individual interests. This approach ensures that the governance of marine resources is fair and transparent but also sustainable and forward-looking[85].

4.3 Enhanced capacity-building and technology transfer

Establishing a dedicated global fund, financed primarily by developed countries, is critical to support capacity-building programs for small island developing states (SIDS) and least developed countries (LDCs). These nations often face significant financial and technical barriers that limit their ability to participate effectively in marine resource management and benefit--sharing initiatives. A well-funded mechanism can provide training, infrastructure development, and research resources, ensuring that these countries are not left behind in the global effort to manage marine biodiversity sustainably. Such a fund would embody the principle of equity, addressing disparities and empowering vulnerable states to contribute to and benefit from marine governance frameworks.

Facilitating partnerships between developed and developing countries can further advance this goal by enabling the transfer of marine technologies and expertise. These collaborations should focus on providing affordable and adaptable tools, such as remote sensing equipment, underwater robotics, and data analysis software, tailored to the unique needs of developing nations. Knowledge transfer programs, including joint research projects and technical training, can help bridge the technological divide, fostering a more inclusive and equitable approach to managing marine resources. By leveraging the resources and expertise of developed countries, these partnerships can empower developing nations to participate actively in scientific innovation and benefit-sharing.

To ensure the sustainability and effectiveness of capacity-building initiatives, long-term strategies must be implemented, including monitoring and periodic evaluations. Regular assessments can identify areas for improvement, track progress, and ensure that programs remain aligned with their objectives. This approach

[85] BROGGIATO, Arianna *et al.* Fair and equitable sharing of benefits from the utilization of marine genetic resources in areas beyond national jurisdiction: bridging the gaps between science and policy. *Marine Policy*, v. 49, p. 176-185, Nov. 2014.

enhances the quality and impact of training programs and builds confidence among stakeholders by demonstrating accountability and measurable outcomes. Reducing technological disparities and enabling broader participation can foster scientific innovation and equitable resource management in underrepresented regions, contributing to a more balanced and inclusive global marine governance framework[86].

4.4 Addressing equity in marine bioprospecting and adopting a holistic approach to sustainable equity

Inclusive participation of developing nations and Indigenous Peoples in marine taxonomic research and bioprospecting initiatives is vital for ensuring equity in marine resource governance. By actively involving these groups, the global community can address the disparities in representation and access to MGRs. Their participation enriches research efforts with diverse perspectives and traditional knowledge and empowers underrepresented countries and communities to contribute to and benefit from the sustainable use of marine biodiversity. Ensuring that these stakeholders are integral to decision-making and research activities aligns with the broader goals of equity and justice in the governance of shared global resources.

Access to the DSI and research findings through public repositories is another critical step in achieving fairness in marine governance. Requiring such access ensures that all states can utilize data and research outcomes for scientific and commercial purposes, irrespective of their economic or technological capabilities. To further support equity, mechanisms must be developed to share profits from the commercialization of MGRs-based products in a way that prioritizes underrepresented countries. By ensuring a fair distribution of both scientific and financial benefits, these measures can bridge existing inequalities, promote collaborative innovation, and uphold principles of justice and inclusivity in the global management of marine resources.

Integrating inter-generational and intra-generational equity principles into benefit-sharing frameworks is essential for achieving immediate and long-term sustainability goals. Inter-generational equity ensures that current resource utilization does not compromise the ability of future generations to meet their needs, emphasizing the preservation and sustainable management of marine biodiversity. Intra-generational equity, on the other hand, focuses on the fair distribution of resources and benefits among present-day stakeholders, particularly between developed and developing nations. Embedding these principles into benefit-sharing agreements fosters a holistic approach that balances the needs of diverse stakeholders across time and geography.

Achieving this balance requires deliberately aligning short-term economic gains with long-term ecological preservation. This can be done by incorporating robust environmental safeguards into mining and bioprospecting agreements, ensuring that resource extraction activities are conducted responsibly and sustainably. Furthermore, the COP should be encouraged to formalize policies reflecting sustainable equity's dual focus, providing clear guidelines for equitable resource management and environmental protection. By addressing the needs of current and future generations, these measures ensure the sustainable and just utilization of marine resources while preserving the health of ocean ecosystems for years to come[87].

4.5 Improving monitoring and enforcement mechanisms

The establishment of an independent global enforcement body under the BBNJ Agreement framework is essential for ensuring compliance with benefit-sharing and transparency obligations. Such a body would provide an impartial mechanism to monitor and enforce adherence to agreed-upon rules, addressing gaps in the current decentralized governance structure. By overseeing compliance, this enforcement body would ensure that benefit-sharing activities are conducted fairly and in alignment with the principles of equity and sustainability. It would also serve as a neutral arbiter, resolving disputes and fostering stakeholder trust, particularly between developed and developing nations.

[86] SANTO, E. M. De. *et al*. Protecting biodiversity in areas beyond national jurisdiction: an earth system governance perspective. *Earth System Governance*, v. 2, Apr. 2019.

[87] LEARY, David. Agreeing to disagree on what we have or have not agreed on: the current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction. *Marine Policy*, v. 99, p. 21-29, Jan. 2019.

Standardized protocols for reporting and verifying benefit-sharing activities should be implemented to further enhance compliance. These protocols would ensure uniformity across jurisdictions, creating a consistent framework for assessing whether obligations are being met. Additionally, penalties for non-compliance, such as restricted access to future marine genetic resources or mandatory financial contributions to capacity-building funds, would deter violations and incentivize adherence. Promoting accountability and closing enforcement gaps would strengthen the BBNJ Agreement framework, ensuring that benefit-sharing agreements are upheld and that the exploitation of marine resources is conducted equitably and sustainably[88].

The above solutions collectively address the gaps and challenges, providing a comprehensive roadmap for achieving equitable benefit-sharing, sustainable resource management, and stronger governance under the UNCLOS and the BBNJ Agreement.

5 Conclusion

The principle of equitable benefit-sharing is central to the Area's governance as a part of the CHM under the UNCLOS and the newly established the BBNJ Agreement. While significant progress has been made in conceptualizing this principle, its implementation faces persistent challenges, including a lack of transparency, limited capacity-building mechanisms, insufficient technology transfer, and weak enforcement frameworks. These challenges disproportionately affect developing nations and marginalized communities, undermining the foundational goals of equity, justice, and sustainability.

Addressing these issues requires a multifaceted approach incorporating robust governance structures, clear benefit-sharing frameworks, and a commitment to capacity-building and inclusivity. Measures such as mandatory transparency protocols, independent enforcement bodies, and mechanisms for equitable resource distribution are critical to fostering trust among stakeholders and ensuring that the benefits of marine resource exploitation are shared fairly. Additionally, long-term capacity-building and technology transfer strategies must be implemented to enable developing nations to participate meaningfully in marine governance.

Integrating inter-generational and intra-generational equity principles into benefit-sharing agreements is essential to balancing current and future resource needs while preserving marine biodiversity. By emphasizing sustainability, inclusivity, and accountability, the international community can align its practices with the CHM's overarching goals. The BBNJ Agreement framework, emphasizing transparency and equitable benefit-sharing, presents an opportunity to address these gaps and set a precedent for fair and sustainable marine resource governance.

In conclusion, realizing equitable benefit-sharing requires a global effort to reform existing frameworks, prioritize inclusivity, and uphold the principles of equity and sustainability. By bridging gaps and addressing disparities, the international community can create a fairer and more resilient system that benefits all of humanity, ensuring the long-term preservation and responsible use of the ocean's resources for current and future generations.

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Le partage des avantages financiers issus de l'exploitation des grands fonds marins: Une illustration des mutations récentes de la notion de patrimoine commun de l'humanité?*

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Marie Guimezanes**

Résumé

Cette contribution vise à analyser la notion de patrimoine commun de l'humanité (PCH) du point de vue de sa mise en œuvre en droit international de la Mer. Dans ce cadre, le partage juste et équitable des avantages issus de l'exploitation des ressources de la Zone est considéré comme un élément essentiel de définition du patrimoine commun de l'humanité. Les termes et modalités de ce partage se précisent actuellement dans le cadre d'une éventuelle exploitation des ressources minérales de la Zone. Or, les discussions au sein de l'AIFM semblent s'éloigner de la vision interétatique du PCH au sein de la CNUDM pour favoriser au contraire une conception intergénérationnelle. Notre hypothèse est que ce glissement vers une vision cosmopolitique du PCH s'explique par les changements dans les contextes de négociation, qui ont présidé aux discussions relatives à la Zone en 1982, 1994 et aujourd'hui. Cette contribution adopte une méthodologie basée sur une analyse textuelle et historique de la CNUDM et de l'Accord de mise en œuvre de 1994, ainsi que des débats actuels au sein de l'AIFM afin d'apprécier cette évolution.

Mots-clés: Patrimoine commun de l'humanité, CNUDM, AIFM, partage financier, ressources minérales marines

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Abstract

This contribution aims to analyse the concept of the common heritage of humankind (CHM) from the perspective of its implementation in the international law of the sea. In this context, the fair and equitable sharing of benefits arising from the exploitation of the resources of the Area is considered an essential element in defining the CHM. The terms and modalities of this sharing are currently being clarified in the context of a potential exploitation of the mineral resources of the Area. However, discussions within the International Seabed Authority (ISA) appear to be moving away from the inter-State vision of the CHM embodied in UNCLOS, favouring instead an intergenerational conception. Our hypothesis is that this shift towards a cosmopolitan vision of the CHM can be explained by changes in the negotiation contexts that have shaped discussions relating to the Area in 1982, 1994, and today. This contribution adopts a methodology based on a textual and historical analysis of UNCLOS and the 1994 Implementation Agreement, as well as current debates within the ISA, in order to assess this evolution.

Keywords : Common heritage of humankind, UNCLOS, ISA, financial benefit-sharing, marine mineral resources

Resumo

Esta contribuição tem como objetivo analisar o conceito de patrimônio comum da humanidade (PCH) sob a perspectiva de sua implementação no direito internacional do mar. Nesse contexto, a partilha justa e equitativa dos benefícios resultantes da exploração dos recursos da Área é considerada um elemento essencial na definição do PCH. Os termos e modalidades dessa partilha estão atualmente sendo definidos no contexto de uma possível exploração dos recursos minerais da Área. No entanto, as discussões no âmbito da Autoridade Internacional dos Fundos Marinhos (AIFM) parecem afastar-se da visão interestatal do PCH consagrada na CNUDM, favorecendo, ao contrário, uma concepção intergeracional. Nossa hipótese é que essa mudança para uma visão cosmopolita do PCH se explica pelas transformações nos contextos de negociação que orientaram as discussões relativas à Área em 1982, 1994 e atualmente. Esta contribuição adota uma metodologia baseada em uma análise textual e histórica da CNUDM e do Acordo de Implementação de 1994, bem como dos debates atuais no âmbito da AIFM, a fim de avaliar essa evolução.

Palavras chave : Patrimônio comum da humanidade, CNUDM, AIFM, partilha financeira, recursos minerais marinhos

1 Introduction

Dans son discours à l'Assemblée Générale des Nations Unies le 17 août 1967, l'Ambassadeur de Malte Arvid Pardo plaide pour l'utilisation des ressources des fonds marins dans l'intérêt de l'humanité et appelle l'Assemblée à adopter une résolution intégrant plusieurs principes.[1] Le premier de ces principes est le fait que « le lit des mers et des océans constitue le patrimoine commun de l'humanité et devrait être utilisé et exploité à des fins pacifiques dans l'intérêt exclusif de l'humanité tout entière. Les besoins des pays pauvres, représentant la partie de l'humanité qu'il est le plus nécessaire d'aider, devraient être étudiés par priorité dans le cas où des avantages financiers seraient tirés de l'exploitation du lit des mers et des océans à des fins commerciales. »[2] Ce principe trouve son application juridique dans l'article 140 de la Convention des Nations Unies sur le droit de la mer (CNUDM)[3] : « Les activités menées dans la Zone le sont [...] dans l'intérêt de l'humanité tout entière, indépendamment de la situation géographique des Etats, qu'il s'agisse d'Etats côtiers ou sans littoral, et compte tenu particulièrement des intérêts et besoins des Etats en développement et des peuples qui n'ont pas accédé la pleine indépendance ou à un autre régime d'autonomie reconnu par les Nations Unies [...] »

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1 PARDO, Arvid. Note verbale, Examen de la question de l'affectation à des fins exclusivement pacifiques du lit des mers et des océans ainsi que de leur sous-sol, en haute mer, au-delà des limites de la juridiction nationale actuelle, et de l'exploitation de leurs ressources dans l'intérêt de l'humanité. AGNU, 22ème session, 1er novembre 1967, A/C.1/PV.1515 et A/C.1/PV.1516. Pour un historique de la notion avant 1967: ARMAS-PFIRTER, Frida M. The Common Heritage of Mankind" Principle and the Equitable Sharing of Benefits. *In:* ASCENCIO-HERRERA, Alfonso; NORDQUIST, Myron H. *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority:* A Twenty-Five Year Journey. Leiden: Brill | Nijhoff, 2022.

2 *Ibid.*, A/C.1/PV.1516, §12-13.

3 LES NATIONS UNIES. Convention des nations unies sur le droit de la mer. 10 déc. 1982, 1834 RTNU 3 (entrée en vigueur: 16 nov. 1994).

Ainsi, le concept de patrimoine commun de l'humanité (PCH) semble, dès l'origine, intrinsèquement lié au partage des avantages et aux besoins spécifiques des pays pauvres. Les autres ressources bénéficiant du statut de patrimoine commun de l'humanité, telle que la lune et les autres astres célestes[4], ou devant être gérées selon ce principe, telles que les ressources génétiques marine en Haute Mer[5], sont également soumises au régime du partage des avantages. Si le partage des avantages constitue en revanche un ensemble de mécanismes plus large, sa dimension inter-étatique est également indissociable de celle de patrimoine commun de l'humanité[6] en ce qu'il permet le partage des avantages monétaires et non-monétaires issus de l'exploration et de l'exploitation de ressources communes, situées en dehors des juridictions nationales[7].

Le cas des ressources minérales se trouvant sur le sol et dans le sous-sol des grands fonds marins est particulièrement intéressant car il est aujourd'hui à la croisée des chemins. En effet, les Etats parties à la CNUDM discutent actuellement au sein de l'Autorité Internationale des Fonds Marins (AIFM) des règles à appliquer dans le cadre de l'exploitation de ces ressources. Cela implique notamment de déterminer les règles, règlements et procédures s'appliquant au partage des avantages[8]. Si le partage des « autres avantages économiques »[9] constitue un processus déjà en place, par le biais notamment de la coopération scientifique ou des transferts de technologie, le partage des avantages financiers n'est quant à lui envisagé que dans le cadre de l'exploitation des ressources minérales. La potentielle extraction puis commercialisation de ces ressources ouvrent ainsi de nouvelles opportunités mais soulèvent aussi de nouvelles questions s'agissant du partage des avantages.

La commission des finances de l'AIFM a, dès les années 2010, discuté de mécanismes visant à opérer ce partage, qui devront être approuvés par le Conseil puis l'Assemblée de l'AIFM avant l'autorisation de tout plan de travail[10]. Ces propositions ont fortement évolué dans le temps et les dernières propositions modifient sensiblement la vision du Patrimoine commun de l'humanité qui avait été envisagé en 1982.

Nous estimons que les discussions actuelles au sujet du partage des avantages financiers peuvent conduire à une redéfinition du Patrimoine commun de l'humanité. En effet, les Etats et institutions internationales semblent prendre leurs distances par rapport à la vision interétatique du PCH, axée sur les pays en développement, et se rapprocher d'une vision cosmopolitique du Patrimoine, devant être préservé pour les générations actuelles et futures. Cette contribution s'insère ainsi dans la lignée d'autres réflexions traitant du partage des avantages plus généralement[11] et permet d'apporter un éclairage spécifique s'agissant des avantages financiers, notamment suite aux dernières propositions faites par la Commission des Finances dans le cadre de l'élaboration du code minier.

Nous considérons que cette mutation du PCH conduit à limiter les perspectives de redistribution pour les pays en développement et s'intègre ainsi dans une histoire de déceptions successives s'agissant du régime de la Zone. Notre objectif de recherche sera donc d'analyser le concept de PCH en droit de la Mer au prisme du partage des avantages financiers. Cette analyse sera menée grâce à différentes sources de données. La méthodologie utilisée se basera avant tout sur une analyse des dispositions relatives au partage équitable des avanta-

[4] *ACCORD régissant les activités des États sur la Lune et les autres corps célestes (ALACC)*, 5 déc. 1979, 1363 RTNU 3 (entrée en vigueur : 11 juil. 1984)

[5] *ACCORD se rapportant à la Convention des Nations Unies sur le droit de la mer et portant sur la conservation et l'utilisation durable de la diversité biologique marine des zones ne relevant pas de la juridiction nationale*, 19 juin 2023, C.N.203.2023.TREATIES-XXI.10 (non encore en vigueur)

[6] ARMAS-PFIRTER, Frida M. The Common Heritage of Mankind" Principle and the Equitable Sharing of Benefits. *In:* ASCENCIO-HERRERA, Alfonso; NORDQUIST, Myron H. *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority:* A Twenty-Five Year Journey. Leiden: Brill | Nijhoff, 2022: "CHM is the reason and basis for arranging an equitable sharing of the benefits of deep-sea mining; it is beyond doubt the underlying principle".

[7] MORGERA, Elisa. The Need for an International Legal Concept of Fair and Equitable Benefit Sharing. *European Journal of International Law*, v. 27, n. 2, p. 353–383, 2016.

[8] SINGH, Pradeep A. The Invocation of the 'Two-Year Rule' at the International Seabed Authority: Legal Consequences and Implications. *The International Journal of Marine and Coastal Law*, v. 37, n. 3, p. 375-412, 2022.

[9] LES NATIONS UNIES. *Convention des Nations Unies sur le droit de la mer.* (n. 3), art. 140 § 2

[10] SINGH, Pradeep A. The Invocation of the 'Two-Year Rule' at the International Seabed Authority: Legal Consequences and Implications. *The International Journal of Marine and Coastal Law*, v. 37, n. 3, p. 375-412, 2022. p. 394

[11] SHEN, Hao. Critical assessment of the international seabed authority's implementation of the common heritage of mankind principle from the perspective of benefit-sharing regime. *International Environmental Agreements*: Politics, Law and Economics, v. 23, n. 3, p. 355-371, 2023; WILLAERT, Klaas. The Interests of Developing States in the Area: Promoted or Neglected?. *The International Journal of Marine and Coastal Law*, v. 39, p. 742-767, 2024; JAECKEL, Aline. Benefitting from the Common Heritage of Humankind: From Expectation to Reality. *The International Journal of Marine and Coastal Law*, v. 35, p. 660–681, 2020.

ges dans la CNUDM, dans l'Accord de 1994 et dans les projets de règlements relatifs au partage des avantages discutés actuellement au sein de l'AIFM. Des références aux travaux préparatoires, ainsi qu'aux commentaires et propositions des Etats parties aux négociations seront utilisés pour expliciter les enjeux de ces discussions, notamment pour les pays en développement.

Nous reviendrons dans un premier temps sur le concept de Patrimoine Commun de l'Humanité, envisagé dans le cadre de la CNUDM mais aussi de l'Accord de mise en œuvre de 1994 (I), avant d'aborder les réflexions actuelles sur le partage des avantages financiers et leurs conséquences sur la redéfinition de la notion de PCH (II).

I – Le patrimoine commun de l'humanité, une notion axée sur les inégalités entre Etats

La notion de patrimoine commun de l'humanité n'est pas définie en droit international. Elle a cependant fait l'objet de nombreuses réflexions doctrinales en raison des perspectives qu'elle ouvre en termes de coopération internationale[12]. Avant d'aborder sa mise en œuvre dans le cadre du droit international de la Mer (B), il est donc important de clarifier les contours de cette notion en droit international (A).

A) **La notion de PCH:** une victoire des pays en développement teintée d'incertitudes

La notion de patrimoine commun de l'humanité se retrouve dans deux traités internationaux déterminant le régime de ressources hors juridictions nationales : la CNUDM au sujet de la Zone et l'Accord régissant les activités des Etats sur la Lune et les autres corps célestes (ALACC) pour les ressources situées dans les astres du système solaire. Si les points communs de ces conventions laissent entrevoir un régime unifié (1), des incertitudes subsistent quant à la définition de l'humanité pour le compte de laquelle sont gérées ces ressources (2).

1) Le patrimoine commun: un régime unifié pour les ressources situées hors des juridictions nationales

La reconnaissance de la notion de PCH résulte des efforts menés par les pays du Sud, au moment de leur indépendance, pour renverser un ordre international basé sur la perpétuation des rapports de force entre les pays du Nord et les pays du Sud au-delà des mouvements de décolonisation. Ces efforts se sont traduits par des résolutions, adoptées par l'Assemblée Générale des Nations Unies (AGNU), déclarant l'établissement d'un nouvel ordre économique mondial[13], reconnaissant certains principes économiques traduisant l'indépendance et la souveraineté des pays du Sud sur leurs propres ressources[14], ainsi qu'un statut spécifique pour des ressources se situant en dehors des juridictions nationales[15]. La notion de PCH s'est ensuite concrétisée s'agissant des ressources se situant sur la lune et les autres corps célestes du système solaire en 1979 et dans la Zone en 1982.

Le statut de patrimoine commun de l'humanité implique plusieurs caractéristiques[16] : les ressources relevant du PCH ne peuvent faire l'objet d'une appropriation par un Etat[17], les activités menées dans cet espace ne peuvent l'être que dans un but pacifique[18] et les bénéfices tirés de l'exploitation des ressources doivent être partagés équitablement[19].

La notion de PCH peut également inclure, selon certains auteurs, d'autres aspects tels que la préservation

[12] KISS, Alexandre C. La notion de patrimoine commun de l'humanité. *RCADI*, v. 119, 1983; VUKAS, Budislav. *Chapter 9 Common Heritage of Mankind*: A Legal Concept for the Survival of Humanity. In The Law of the Sea. Leiden: Brill | Nijhoff, 2004; BRUNNÉE, Jutta. Common Areas, Common Heritage, and Common Concern. *In:* BODANSKY, Daniel *et al.* (ed.). *The Oxford Handbook of International Environmental Law*. Oxford: Oxford Handbooks, 2008; WOLFRUM, Rüdiger. *Common Heritage of Mankind*. [*S. l.*]: Max Planck Encyclopedias of International Law, 2009; SHACKELFORD, Scott J. The tragedy of the common heritage of mankind. *Stanford Environmental Law Journal*, v. 28, n. 1, p. 109-[ii], 2009; NOYES, John E. The common heritage of mankind: past, present, and future. *Denver Journal of International Law and Policy*, v. 40, n. 1-3, p. 447-471, 2011; ORAL, Nilüfer. The common heritage of mankind under international law: An overview. *In*: TASSIN CAMPANELLA, Virginie. *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, 2023. p. 33-47.

[13] AGNU. *Déclaration concernant l'instauration d'un nouvel ordre économique international*. Rés. 3201 (S-VI), 1er mai 1974, A/RES/S-6/3201.

[14] AGNU. *Souveraineté permanente sur les ressources naturelles*. Rés. 1803 (XVII), 14 déc. 1962, A/RES/1803(XVII).33; AGNU. *Déclaration sur le droit au développement*. Rés. 41/128, 4 déc. 1986, A/RES/41/128.

[15] AGNU. *Charte des droits et devoirs économiques des Etats*. Rés. 3281 (XXIX), 12 déc. 1974, A/RES/3281(XXIX), art. 29.

[16] En ce sens, voir notamment KISS, Alexandre C. La notion de patrimoine commun de l'humanité. *RCADI*, v. 119, p. 117, 1983; JOYNER Christopher C. Legal implications of the concept of the common heritage of mankind. *Int Comp Law Q.*, v. 35, p. 190–199,1986.

[17] Art. 137 CNUDM, art. 11 ALACC.

[18] Art. 146 CNUDM, art. 3 ALACC.

[19] Art. 140 CNUDM, art. 11 ALACC.

de l'environnement[20]. Selon nous, ce dernier aspect ne relève pas directement du PCH. En effet, cette préservation se retrouve dans de nombreux pans du droit en dehors des domaines spécifiques au PCH, à la fois dans le droit conventionnel[21] et coutumier[22]. Au sein de la CNUDM, la préservation de l'environnement marin dépasse largement le cadre de la Zone[23]. Enfin, la Charte des droits et devoirs économiques des Etats distingue bien le patrimoine commun de l'humanité et la préservation de l'environnement[24].

Ainsi, en droit international, le patrimoine commun de l'humanité doit s'envisager non pas comme un outil de préservation ou de non-exploitation de ces ressources afin de préserver l'environnement, mais bien comme un instrument permettant l'exploitation des ressources, dans un cadre rationnel et équitable[25]. Cette exploitation doit permettre de réduire les inégalités mondiales induites par un système économique basé sur une dynamique de pouvoir qui prend sa source dans la colonisation. Cette conception est renforcée par une vision interétatique et non cosmopolitique de la notion d'humanité.

2) Les bénéficiaires du patrimoine commun : une humanité perçue à travers le prisme de l'Etat

Un point de discussion particulièrement intéressant pour nos développements concerne la dimension temporelle du concept de PCH. Alors que le traité sur la lune prend soin de mentionner qu'il « est dûment tenu compte des intérêts de la génération actuelle et des générations futures »[26], la CNUDM est silencieuse sur ce point. L'humanité est tantôt mentionnée sans plus de précision, tantôt associée aux situations de pays considérés comme défavorisés, du fait de leur situation géographique[27], de leur niveau de développement économique ou de leur situation politique[28], voire de la combinaison de plusieurs éléments[29]. Des différents projets présentés à l'ONU en 1971, seul le projet de Malte, rédigé par l'Ambassadeur Pardo, faisait référence explicitement aux générations futures[30].

Les générations futures ne sont pas pour autant absentes des discussions et réflexions liées au sujet des ressources. On a ainsi pu constater une opposition de la part des pays en développement à la notion de justice intergénérationnelle, qui pourrait être considérée comme allant à l'encontre de la justice intragénérationnelle[31]. Ainsi, la gestion rationnelle des ressources[32], qui est confiée aux institutions en charge de préserver le patrimoine commun, peut s'entendre différemment selon que l'on considère l'intérêt des générations actuelles

[20] JAECKEL, Aline. Benefitting from the Common Heritage of Humankind: From Expectation to Reality. *The International Journal of Marine and Coastal Law*, v. 35, p. 660–681, 2020. Pour une discussion à ce sujet, voir WOLFRUM, Rüdiger. *Common Heritage of Mankind*. [*S. l.*]: Max Planck Encyclopedias of International Law, 2009. § 22.

[21] On peut citer, comme dernier exemple en date s'agissant du droit de la mer, l'Accord BBNJ (n. 5) qui distingue clairement, dans son préambule, la préservation de la biodiversité et le principe de PCH tel qu'entendu dans la Convention.

[22] Ainsi, l'obligation de prévention met à la charge de tout Etat une obligation de due diligence quant au préjudice causé par des activités se déroulant sur son territoire à l'environnement d'un autre Etat (CIJ. *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay*). Haia, 20 avr. 2010).

[23] Alors que la Partie XI énonce le caractère de patrimoine commun de l'humanité dans la Zone, la Partie XII porte sur la Protection et la préservation du milieu marin dans son ensemble.

[24] AGNU (n. 15) art. 29 et 30.

[25] Art. 150 CNUDM.

[26] Art. 4 ALACC.

[27] Préambule CNUDM, al. 7: « que la zone du fond des mers et des océans, ainsi que de leur sous-sol, au-delà des limites de la juridiction nationale et les ressources de cette zone sont le patrimoine commun de l'humanité et que l'exploration et l'exploitation de la zone se feront dans l'intérêt de l'humanité tout entière, indépendamment de la situation géographique des Etats »

[28] Art. 155 CNUDM: « le régime international visant à son exploitation équitable au bénéfice de tous les pays, en particulier des Etats en développement, et l'existence d'une autorité chargée d'organiser, de mener et de contr81er les activités dans la Zone. »

[29] Préambule CNUDM, al. 6 : « il serait tenu compte des intérêts et besoins de l'humanité tout entière et, en particulier, des intérêts et besoins spécifiques des pays en développement, qu'ils soient côtiers ou sans littoral » ; art. 140 CNUDM : « Les activités menées dans la Zone le sont [...] dans l'intérêt de l'humanité tout entière, indépendamment de la situation géographique des Etats, qu'il s'agisse d'Etats côtiers ou sans littoral, et compte tenu particulièrement des intérêts et besoins à des Etats en développement et des peuples qui n'ont pas accédé la pleine indépendance ou à un autre régime d'autonomie »

[30] PROJET de traité sur l'espace marin - document de travail présenté par Malte (A/Ac.138/53), article 91. *In*: AGNU. *Rapport du comité sur l'utilisation pacifique du fond des mers et des océans au-delà de la juridiction nationale* 26ème session, Supplément n° 21 (A/8421), 1971. Le rapport indique à ce sujet : « Pour des dispositions analogues, voir les paragraphes 1 et 8 de l'article IV du projet de statuts au régime des océans établi par Mme E. Borgese du Centre for Democratic Institutions, Santa Barbara (Etats-Unis) » (p. 156).

[31] MOLINARI, Claire. Principle 3: From a Right to Development to Intergenerational Equity. *In:* VIÑUALES, Jorge E. (ed.). *The Rio Declaration on Environment and Development: A Commentary*, Oxford Commentaries on International Law. Oxford: Oxford Academic, 2015. p. 76; SCHOLTZ, Werner. Equity. *In:* RAJAMANI Lavanya *et al.* (ed.) *The Oxford Handbook of International Environmental Law.* Oxford: Oxford Handbooks, 2021. p. 345

[32] Art. 150 CNUDM. Ce principe figure également dans la Déclaration Pardo (§ 4) .

ou futures[33]. En effet, elle peut constituer un manque à gagner pour les générations actuelles, notamment dans le cadre du partage des avantages. Or, il semble que la rédaction et les débats qui ont entouré l'adoption de la CNUDM penchent davantage en faveur de la conception que le PCH constitue un ensemble de ressources à exploiter[34]. Les générations futures ne sont abordées que dans un cadre étatique. En effet, la gestion rationnelle des ressources doit se faire dans l'intérêt actuel et futur des pays défavorisés. En ce sens, le PCH possède à la fois un « caractère compensatoire » des inégalités de développement actuelles et « un caractère préventif car il permettrait à ceux qui n'avaient ni les connaissances ni la technologie pour exploiter ces ressources de se réserver une portion de ce qui ne leur était pas accessible en ce moment, mais qui le deviendrait lorsqu'ils auraient la possibilité de procéder »[35].

Si le concept de PCH était entendu à l'origine comme visant en priorité le bien-être des générations actuelles, on peut observer ces dernières années une résurgence de la notion d'équité intergénérationnelle. Ainsi, l'objectif de préservation de l'environnement, qui peut d'ailleurs bénéficier à la fois aux générations actuelles et futures, a connu un regain d'intérêt après la signature de la CNUDM, avec la Déclaration de Rio de 1992[36]. Son principe 3 énonçant que « Le droit au développement doit être réalisé de façon à satisfaire équitablement les besoins relatifs au développement et à l'environnement des générations présentes et futures » a eu des conséquences directes sur la manière dont est envisagée le PCH[37]. L'influence sur la gouvernance des océans, si elle n'est pas évidente du point de vue des traités, s'inscrit dans la pratique de l'AIFM, par l'intégration du concept de développement durable[38]. Cette influence n'est d'ailleurs pas univoque. Pour certains, elle impose un moratoire sur l'exploitation des ressources minérales[39] ; pour d'autres, elle impose cette exploitation de ressources essentielles à la transition vers une économie bas-carbone[40]. Les discussions actuelles sur le partage des avantages peuvent constituer un exemple de cette nouvelle dimension du PCH (*infra*).

La CNUDM va beaucoup plus loin que le Traité sur la Lune en définissant les modalités de gestion du PCH. Elle crée une architecture institutionnelle poussée et centralisée permettant à la fois la gestion du PCH et le partage des avantages. Le rôle et le fonctionnement de l'autorité et de son bras commercial, l'Entreprise, a été profondément modifié par l'Accord relatif à l'application de la Partie XI adopté en 1994[41]; ce qui a eu pour effet de réduire considérablement les espoirs des pays en développement s'agissant du partage des avantages résultant de l'exploitation des ressources relevant du PCH.

B) **L'institutionnalisation du PCH dans le cadre de la CNUDM :** le rôle de l'AIFM et de l'Entreprise, diminué par l'Accord de New York (1994)

Les dispositions de la Convention de 1982 ont été largement modifiées par l'Accord de 1994. L'adoption

[33] ATAPATTU, Sumudu. Global South Approaches. *In:* RAJAMANI Lavanya *et al.* (ed.). *The Oxford Handbook of International Environmental Law*. Oxford: Oxford Handbooks, 2021. p. 183-199.

[34] SCHOLTZ, Werner. Common heritage: saving the environment for humankind or exploiting resources in the name of eco-imperialism. *Comparative and International Law Journal of Southern Africa*, v. 41, n. 2, p. 273-293, 2008; EGEDE, Edwin. The Legal Status of the Area: Common Heritage of Mankind and African States. *In:* AFRICA and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind. Springer, 2011; DUPUY, René-Jean. Droit de la mer et communauté internationale. *In:* LE DROIT international: unité et diversité. Mélanges offerts à Paul Reuter. Paris: Pedone, 1981. p. 221-241; FEICHTNER, Isabel. Sharing the riches of the sea: The redistributive and fiscal dimension of deep seabed exploitation. *European Journal of International Law*, v. 30, p. 604, 2019.

[35] MERCURE, Pierre-François. L'échec des modèles de gestion des ressources naturelles selon les caractéristiques du concept de patrimoine commun de l'humanité. *Ottawa Law Review*, v. 28, n. 1, p. 50, 1996.

[36] AGNU. Déclaration de Rio sur l'environnement et le développement, 12 août 1992, A/CONF.151/26 (Vol. I)

[37] MOLINARI, Claire. Principle 3: From a Right to Development to Intergenerational Equity. *In:* VIÑUALES, Jorge E. (ed.). *The Rio Declaration on Environment and Development: A Commentary*, Oxford Commentaries on International Law. Oxford: Oxford Academic, 2015.

[38] VASCIANNIE, Stephen. Deep Seabed Mining: The Debate Continues. *In*: ASCENCIO-HERRERA, Alfonso; NORDQUIST, Myron H. *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority*: A Twenty-Five Year Journey. Leiden: Brill | Nijhoff, 2022.

[39] DEEP-SEA CONSERVATION COALITION. Deep-sea mining: growing support for a moratorium", Fact Sheet, Oct. 2023; SINGH, Pradeep A. *et al.* A Pause or Moratorium for Deep Seabed Mining in the Area? The Legal Basis, Potential Pathways, and Possible Policy Implications. *Ocean Development & International Law*, v. 56, n. 1, p. 18-44, 2025.

[40] MURDOCK, Ryan. Deep Sea Mining and the Green Transition. *Harvard International Review*, Oct. 2023.

[41] ACCORD relatif à l'application de la Partie XI de la Convention des Nations Unies sur le droit de la mer du 10 décembre 1982. New York, 28 juillet 1994. 1836 RTNU 3 [entrée en vigueur: 28 juillet 1996].

de ce dernier constituait pour les pays développés une condition préalable à leur ratification, de la CNUDM et donc à son entrée en vigueur. Le partage des avantages qui était au cœur de la négociation de cet accord, a conduit à modifier à la fois les règles de fonctionnement de l'AIFM (1) et à limiter le rôle de l'Entreprise dans l'exploitation des ressources (2).

1) L'AIFM, pièce maitresse de l'institutionnalisation du PCH, soumise aux décisions d'un groupe restreint d'Etats

La CNUDM énonce : « L'humanité tout entière, pour le compte de laquelle agit l'Autorité, est investie de tous les droits sur les ressources de la Zone. Ces ressources sont inaliénables. Les minéraux extraits de la Zone ne peuvent, quant à eux, être aliénés que conformément à la présente partie et aux règles, règlements et procédures de l'Autorité. »[42]

L'AIFM qui est le mandataire de l'humanité fixe ainsi les règles qui encadreront l'exploitation des fonds marins. Dans ce cadre, elle assure notamment « le partage équitable, sur une base non discriminatoire, des avantages financiers et *autres avantages économiques tirés des activités menées dans la Zone par un mécanisme approprié* »[43].

L'AIFM matérialise la gestion d'un bien commun : elle est « l'organisation par l'intermédiaire de laquelle les Etats Parties organisent et contrôlent les activités menées dans la Zone, notamment aux fins de l'administration des ressources de celle-ci »[44] et elle « est fondée sur le principe de l'égalité souveraine de tous ses membres »[45].

Ses organes principaux sont l'Assemblée, le Conseil et le Secrétariat. L'Assemblée, seul organe composé de tous les membres de l'Autorité, est considérée comme l'organe suprême de celle-ci devant lequel les autres organes principaux sont responsables »[46]. Elle examine et approuve, « sur recommandation du Conseil, les règles, règlements et procédures relatifs au partage équitable des avantages financiers et autres avantages économiques tirés des activités menées dans la Zone [...] en tenant particulièrement compte des intérêts et besoins des Etats en développement et des peuples qui n'ont pas accédé à la pleine indépendance ou à un autre régime d'autonomie »[47]. Pour les questions de fond, les décisions se prennent à la majorité qualifiée des deux tiers[48]

Au sens de la CNUDM, le Conseil constitue « l'organe exécutif de l'Autorité. Il a le pouvoir d'arrêter, en conformité avec la Convention et avec la politique générale définie par l'Assemblée, les politiques spécifiques à suivre par l'Autorité sur toute question ou tout sujet relevant de sa compétence »[49]. Son mode de fonctionnement est beaucoup plus complexe. Il est composé de 36 Etats, regroupés en quatre groupes ayant des caractéristiques communes, et 18 Etats élus suivant le principe d'une répartition géographique équitable de l'ensemble des sièges du Conseil[50]. Le Conseil est composé de la commission juridique et technique et de la commission de planification économique. Cette dernière a notamment pour rôle d'étudier l'impact de l'exploitation des ressources minérales sous-marines sur les Etats miniers terrestres, avec une attention particulière aux pays en développement[51].

L'Accord de 1994 modifie à ce titre plusieurs éléments importants pour la gestion du PCH. D'une part, il renforce considérablement le rôle du Conseil[52] et modifie les règles de prise de décision au sein de l'Autorité. Ainsi, les organes de l'autorité prennent leurs décisions sur les questions de fond, par consensus[53]. Si ce dernier ne peut être atteint, le Conseil décide alors à la majorité des deux tiers, « à condition que ces décisions ne suscitent pas l'opposition de la majorité au sein de l'une quelconque des chambres »[54]. L'Accord de 1994 donne ainsi un réel droit de véto aux chambres, dont la majorité est constituée de pays développés. De ce fait, ces derniers, dont le pouvoir était limité au sein de l'Assemblée en raison de leur infériorité numérique, retrouvent un droit de véto réel sur le fonctionnement de l'Autorité et l'adoption des règles, règlements et procédures.

De surcroit, l'Accord de 1994 reporte*, sine die*, la création de la commission de planification économique[55] et ajoute à cet ensemble institutionnel une com-

[42] Art. 137 CNUDM.
[43] Art. 140 CNUDM.
[44] Art. 157 § 1 CNUDM.
[45] Art. 157 § 3 CNUDM.
[46] Art. 160 § 1 CNUDM.
[47] Art. 160 § 2-f-i CNUDM.
[48] Art. 159 § 8 CNUDM.
[49] Art. 162 CNUDM.
[50] Art. 161 § 1 CNUDM.
[51] Art. 164 CNUDM.
[52] Section 3, art. 1, Annexe, Accord de 1994.
[53] Section 3, art. 2, Annexe, Accord de 1994.
[54] Section 3, art. 5, Annexe, Accord de 1994.
[55] Section 1, art. 4, Annexe, Accord de 1994.

mission des finances chargée d'élaborer des recommandations à l'intention du Conseil et de l'Assemblée sur les questions budgétaires et financières et notamment sur « les règles, règlements et procédures applicables au partage équitable des avantages financiers et autres avantages économiques tirés des activités menées dans 1a Zone ainsi que les décisions à prendre à ce sujet »[56]. La Commission des finances comprend 15 membres : au moins un représentant de chaque chambre au Conseil et, « jusqu'à ce que l'Autorité dispose de ressources suffisantes de sources autres que les contributions pour faire face à ses dépenses d'administration, [...] un représentant de chacun des cinq membres versant les contributions les plus importantes au budget d'administration de l'Autorité »[57], donnant de fait un pouvoir de décision considérable aux pays développés dans l'attente d'une exploitation effectives des grands fonds.

2) L'Entreprise, organe clé de l'exploitation du PCH, toujours non opérationnelle

La CNUDM charge l'Entreprise de l'exploitation du bien commun. Si l'idée d'une structure chargée d'exploiter les ressources minérales au fond des océans ne trouve pas directement son origine dans la notion de PCH[58], elle est pourtant devenue un symbole de cette gestion internationalisée d'un patrimoine commun[59]. On peut considérer que l'Entreprise est l'organe commercial de l'Autorité[60]. Dotée d'une structure indépendante, elle constitue un élément essentiel de l'exploration et de l'exploitation des fonds marins pour le compte de l'humanité tout entière et constitue ainsi une pièce maitresse du régime de PCH, réclamée par les pays en développement[61].

Or, l'Accord de New York réduit à peu de chose le rôle de l'Entreprise. Il l'intègre au Secrétariat de l'AIFM[62] et retarde son opérationnalisation jusqu'à ce qu'un plan de travail pour l'exploitation soit présenté par une entité autre que l'Entreprise ou jusqu'à une demande d'entreprise conjointe avec l'Entreprise[63]. L'Accord impose également à l'Entreprise de réaliser ses premières opérations d'exploitation des ressources dans le cadre d'entreprises conjointes[64]. Enfin, il revient sur l'obligation pour les Etats parties de financer un site minier au profit de l'entreprise[65].

Ces dispositions conduisent à rendre illusoires les possibilités pour l'Entreprise d'avoir un rôle à jouer dans l'exploitation éventuelle des fonds marins. Son absence d'opérationnalisation l'empêche de contribuer à l'élaboration des règles, règlements et procédures gouvernant l'exploitation[66]. Elle l'empêche également de pouvoir exploiter les zones réservées[67], qui le sont donc par le biais d'entreprises conjointes entre des entreprises basées dans des pays développés et des pays en développement[68]. Enfin, outre son rôle en termes d'exploration et d'exploitation, l'Entreprise constitue un organe chargé d'une expertise technique qui devrait permettre une analyse indépendante des conditions d'exploitation des ressources[69]. Or, l'Entreprise n'étant pas opérationnelle, les décisions liées à l'exploitation ré-

56 Section 9, art. 7f), Annexe, Accord de 1994.

57 Section 9, art. 3, Annexe, Accord de 1994.

58 La première proposition a été faite par un groupe de pays en développement: *Document de travail sur le régime du fond des mers et des océans, et de leur sous-sol, au-delà des limites de la juridiction nationale* (A/Ac.138/49) présenté par la Trinité-et-Tobago à la 18ème séance du Sous-Comité, le 10 août 1971 (annexe I, 8), *in* AGNU (n. 29)

59 CHARLES, Eden. The Enterprise under the 1982 United Nations Convention on the Law of the Sea and the Common Heritage of Mankind. *In:* ASCENCIO-HERRERA, Alfonso; NORDQUIST, Myron H. *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority*: A Twenty-Five Year Journey. Leiden: Brill | Nijhoff, 2022. p. 108: "*The linkage between the "common heritage of mankind" and the operationalization of the Enterprise is inescapable*"

60 *Idem,* p. 102.

61 MERCURE, Pierre-François. L'échec des modèles de gestion des ressources naturelles selon les caractéristiques du concept de patrimoine commun de l'humanité. *Ottawa Law Review*, v. 28, n. 1, p. 86, 1996.

62 Section 2, art. 1, Annexe, Accord de 1994.

63 Section 2, art. 2, Annexe, Accord de 1994.

64 *Idem.*

65 Section 2, art. 3, Annexe, Accord de 1994.

66 CHARLES, Eden. The Enterprise under the 1982 United Nations Convention on the Law of the Sea and the Common Heritage of Mankind. *In:* ASCENCIO-HERRERA, Alfonso; NORDQUIST, Myron H. *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority*: A Twenty-Five Year Journey. Leiden: Brill | Nijhoff, 2022.

67 JAECKEL, Aline. Benefitting from the Common Heritage of Humankind: From Expectation to Reality. *The International Journal of Marine and Coastal Law*, v. 35, p. 660–681, 2020. p. 671.

68 SHEN, Hao. Critical assessment of the international seabed authority's implementation of the common heritage of mankind principle from the perspective of benefit-sharing regime. *International Environmental Agreements*: Politics, Law and Economics, v. 23, n. 3, p. 363-365, 2023; WILLAERT, Klaas. The Interests of Developing States in the Area: Promoted or Neglected?. *The International Journal of Marine and Coastal Law*, v. 39, p. 758-763, 2024.

69 CHARLES, Eden. The Enterprise under the 1982 United Nations Convention on the Law of the Sea and the Common Heritage of Mankind. *In:* ASCENCIO-HERRERA, Alfonso; NORDQUIST, Myron H. *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority*: A Twenty-Five Year Journey. Leiden: Brill | Nijhoff, 2022.

sident uniquement dans l'expertise des entreprises souhaitant exploiter ou bénéficiant de permis d'exploration, les Etats ayant leurs propres objectifs politiques, et la Commission juridique et technique, qui ne dispose pas de la capacité nécessaire pour réaliser une étude approfondie des conditions permettant une exploitation durable des fonds marins.

Les incidences de l'Accord de 1994 ont souvent été décrites comme des concessions inévitables des pays en développement, afin de permettre l'entrée en vigueur de la Convention[70]. Nous acquiesçons mais pensons également que l'Accord de 1994 va plus loin en ce qu'il éloigne un peu plus la notion de PCH de l'Humanité en tant qu'ensemble d'individus passés, actuels et futurs. En suspendant l'opérationnalisation de l'entreprise, en limitant les pouvoirs de l'Assemblée et en renforçant le fonctionnement par groupes d'Etats partageant certaines caractéristiques, il accentue la vision que le patrimoine se résume à un ensemble de ressources à exploiter pour pallier aux difficultés économiques rencontrées par différents groupes d'Etats.

Cette discussion, encore théorique en 1994, devient aujourd'hui une réalité dans la perspective de l'exploitation des ressources de la Zone. Il revient alors à l'AIFM de déterminer les règles, règlements et procédures encadrant cette exploitation et permettant le partage des avantages. Les discussions actuelles nous semblent pouvoir contribuer à la redéfinition de la notion de PCH, la rapprochant peut-être des intentions d'Arvid Pardo, tout en l'écartant aussi sensiblement des termes de la Convention de 1982 et de l'Accord de 1994.

II – Les évolutions récentes du système de partage des avantages financiers, révélateurs d'une vision transnationale et intergénérationnelle du PCH

La perspective d'avantages financiers issus de l'exploitation des ressources minérales de la Zone a relancé les réflexions sur le partage des avantages, qui s'étaient jusqu'à présent limités aux autres avantages économiques issus de l'exploration des grands fonds.

Dans ces discussions, l'opposition entre pays en développement et pays développés ne doit pas être surestimée : d'autres clivages sont sont apparus dans les négociations[71] et les pays en développement ne forment pas un bloc aussi soudé qu'en 1982. La perspective d'exploitation directe par les pays en développement, grâce aux zones réservées et aux transferts de technologies, semble avoir fait long feu[72], tout comme les estimations de revenus importants résultant de l'exploitation[73].

Les discussions relatives à l'exploitation se sont pour le moment focalisées sur la décision d'accorder ou non des plans de travail et sur les conditions de ces derniers, notamment en ce qui concerne les exigences sur la protection de l'environnement et les termes financiers des contrats. Les discussions liées au partage juste et équitable des avantages n'ont pour le moment pas été aussi approfondies au sein de l'AIFM[74]. Avant d'étudier les modalités du partage (B), il est nécessaire de revenir sur ce qui sera partagé (A).

A) **Les avantages financiers :** un partage de la valeur peu équitable

Les avantages qui devront être partagés proviennent des résultats de l'exploitation des ressources minérales, et seront définis dans les termes du contrat entre l'exploitant et l'AIFM. Ce système de paiement fait actuellement l'objet d'âpres discussions au sein de l'AIFM, en raison des incertitudes et de la multitude d'intérêts en présence (1). A ce titre, le rôle de l'Entreprise en tant qu'exploitant suscite une attention particulière (2).

1) Des avantages incertains

Les incertitudes liées aux avantages financiers sont importantes. Il existe une multitude d'inconnues concernant l'exploitation (quantité de minéraux pouvant être extraites et coût de cette extraction) mais aussi la commercialisation[75]. En effet, il n'y a actuellement pas

[70] NOYES, John E. The common heritage of mankind: past, present, and future. *Denver Journal of International Law and Policy*, v. 40, n. 1-3, p. 447-471, 2011.

[71] HACHE, Emmanuel *et al*. Seabed mining: a new geopolitical divide? *Polytechnique insights*, July, 2024; FEICHTNER, Isabel; GINZKY, Harald. The struggle at the International Seabed Authority over deep sea mineral resources. *NPJ Ocean Sustainability*, v. 3, n. 1, p. 63, 2024.

[72] Cf. sources citées en n. 11.

[73] WILDE, Daniel *et al*. Equitable sharing of deep-sea mining benefits: More questions than answers. *Marine Policy*, p. 151, 2023.

[74] WILLAERT Klaas. Sharing is Caring: Prominent Issues and Considerations Regarding the Equitable Distribution of Deep-sea Mining Proceeds. *Ocean Yearbook*, v. 37, p. 194–206, 2023.

[75] DINGWALL, Joanna. The common heritage quandary. Devising a global payment regime for exploitation activities in the deep seabed Area. *In:* TASSIN CAMPANELLA, Virginie. *Routledge Handbook*

de marché pour les ressources minérales brutes (notamment les nodules polymétalliques) et les coûts de transformation de la matière brute vers les métaux recherchés sont encore difficiles à estimer[76]. Enfin, les coûts des métaux varient considérablement en fonction des prix du marché.

De plus, il est évident que la totalité des avantages financiers ne seront pas partagés. Les premiers bénéficiaires d'avantages financiers seront les entités intervenant dans le processus d'exploitation et de commercialisation des ressources minérales prélevées, qu'elles soient publiques ou privées. L'objet du partage sera donc réduit par rapport au chiffre d'affaires ou au bénéfice dégagé par cette exploitation. Avant même d'aborder l'enjeu des modalités du partage des avantages financiers, il est donc essentiel de comprendre ce qui sera partagé.

Les fruits de l'exploitation minière des fonds marins serviront en premier lieu à rémunérer l'exploitant. Le profit réalisé fera ensuite l'objet d'un partage qu'il reste à définir, en tentant de répondre à différents intérêts contradictoires[77]. D'une part, le partage doit permettre de garantir que l'exploitation soit rentable. L'exploitation des grands fonds marins implique des investissements colossaux, dont certains ont déjà été réalisés dans le cadre de l'exploration. D'autre part, les termes financiers des contrats doivent également permettre à l'AIFM de recevoir assez de fonds pour faire face aux dépenses générées par l'administration des contrats et le contrôle du respect des obligations juridiques qui s'imposent à l'exploitant. Enfin, le système de paiement ne doit pas créer de distorsion sur le marché des métaux et notamment désavantager les pays producteurs de métaux terrestres.

L'Accord de 1994 rend inapplicable le système de paiement prévu par l'Annexe III de la CNUDM[78]. Le pouvoir de définir le système de paiement est donc laissé à l'AIFM. Les discussions sont encore en cours au sein d'un groupe de négociation spécifique, à composition non-limitée[79]. Ce groupe examine les propositions faites par des consultants extérieurs en 2018[80], distinguant quatre types de paiement pouvant être combinés (fixe ou progressif, système de redevance ou de redevance associée à un partage des bénéfices). Ces propositions ont été à plusieurs reprises amendées suite aux commentaires des participants au groupe de travail[81]. Le Groupe des Etats africains à l'AIFM a notamment fait de nombreux commentaires critiques sur ce système[82]. Une de ces préoccupations est notamment que le système proposé ne constitue pas une juste compensation pour la perte des ressources du patrimoine commun. Selon eux, le système de paiement proposé ne permet pas de garantir une gestion rationnelle des ressources. De plus, il rend illusoire un partage juste et équitable des avantages : l'exploitant recevant la grande majorité des fruits de ce travail et l'humanité n'en recevant qu'une infime partie.

En effet, une fois le montant de prélèvement défini, il faudra encore retrancher différentes sommes avant de partager les avantages financiers de l'exploitation des grands fonds marins. Les paiements devront en premier lieu servir à couvrir les dépenses d'administration de

of Seabed Mining and the Law of the Sea. London: Routledge, 2023. p. 178-193

76 KIRCHAIN, Randolph *et al. Report to the International Seabed Authority on the Development of an Economic Model and System of Payments for the Exploitation of Polymetallic Nodules in the Area.* Cambridge: MIT Materials Systems Laboratory, 2023.

77 Art. 13 § 1, Annexe III à la CNUDM ; DINGWALL, Joanna. The common heritage quandary. Devising a global payment regime for exploitation activities in the deep seabed Area. *In:* TASSIN CAMPANELLA, Virginie. Routledge Handbook of Seabed Mining and the Law of the Sea. London: Routledge, 2023. c. 1.2; FEICHTNER, Isabel; GINZKY, Harald. The struggle at the International Seabed Authority over deep sea mineral resources. *NPJ Ocean Sustainability*, v. 3, n. 1, p. 63, 2024.

78 Section 8, art. 2 de l'Accord de 1994.

79 CONSEIL DE L'AIFM. Déclaration du Président du Conseil de l'Autorité internationale des fonds marins sur les travaux du Conseil à la vingt-quatrième session, 25 juillet 2018, ISBA/24/C/8/Add.1, § 12 et annexe 2.

80 ROTH, Richard; MUNOZ ROYO, Carlos. Update on Financial Payment Systems: Seabed Mining for Polymetallic Nodules, Présentation au Conseil de l'AIFM, 16 juillet 2018, Kingston, Jamaïque.

81 La dernière version a été présentée en juillet 2023 au groupe de travail. ROTH, Richard. Financial Payment System for Deep Sea Mining of Polymetallic Nodules, Présentation au groupe de travail à composition non-limitée sur le modèle financier, 10 juillet 2023, Kingston, Jamaïque, ce qui a donné lieu à une proposition de rédaction de la Partie VII du règlement sur l'exploitation des ressources, consacré au système de paiement. GROUPE DE TRAVAIL A COMPOSITION NON-LIMITEE. Draft regulations on exploitation of mineral resources in the Area. 9 oct. 2023, ISBA/28/C/OEWG/CRP.6.

82 GROUPE D'ETATS AFRICAINS A L'AIFM. "African Group Submission on the ISA Payment Regime for Deep-Sea Mining in the Area" 5 juil. 2019; *Idem.*, "African Group Submission on the Payment Regime for Deep-sea Mining in the Area", juin 2022, 24 p. Les critiques liées à l'insuffisante prise en compte du PCH était déjà présentes dans les commentaires aux propositions de règlements de 2018: GROUPE D'ETATS AFRICAINS A L'AIFM. Request for Consideration by the Council of the African Group's Proposal on the Economic Model/Payment Regime and Other Financial Matters in the Draft Exploitation Regulations under Review. 9 juil. 2018.

l'AIFM. L'article 173 considère ensuite plusieurs options pour l'utilisation de ces fonds:

a) Le partage juste et équitable des bénéfices

b) Le financement de l'Entreprise

c) Le dédommagement des Etats en développement producteurs de minerais et dont l'économie souffrirait de l'exploitation de mines sous-marines, par le biais du fonds d'assistance économique créé par l'Accord de 1994[83]

2) Le rôle de l'entreprise dans la création et la distribution des revenus tirés de l'exploitation des ressources

Le rôle de l'entreprise mérite à ce titre une attention particulière. Son opérationnalisation pourrait permettre de dégager davantage de ressources financières. L'article 10 de son statut énonce en effet que tout revenu net généré par l'exploitation sera reversé à l'Autorité après une période initiale requise pour que l'Entreprise puisse s'autofinancer, d'une période maximale de 10 ans[84]. L'AIFM bénéficierait ainsi de revenus bien plus importants qu'en cas d'exploitation par une autre entité, publique ou privée. Une partie de ces fonds seraient utilisées pour financer l'autorité mais on peut également imaginer un système de partage des avantages. En revanche, du fait de l'article 173 de la CNUDM, l'opérationnalisation de l'Entreprise pourrait conduire à réduire les fonds consacrés au partage des avantages vis-à-vis des pays en développement[85].

Il est donc essentiel que celle-ci, si elle est financée par les revenus tirés de l'exploitation des fonds marins, exploite effectivement les fonds afin que le manque à gagner du fait de son financement soit compensé par les revenus directs qu'elle pourrait générer et les opportunités qu'elle pourrait créer pour la participation des pays en développement[86]. En effet, l'Entreprise constitue encore aujourd'hui la pièce maitresse du système de partage des avantages : il parait peu réaliste que des pays en développement puissent se lancer dans l'exploitation des fonds marins autrement que par le patronage d'entités privées basées dans les Etats du Nord[87] ou par le biais d'entreprises conjointes avec l'Entreprise[88]. L'opérationnalisation rapide de l'Entreprise est d'ailleurs une demande de plusieurs pays en développement parties à la CNUDM[89].

Lors de la 28ème session de l'AFIM en 2023, le Conseil a demandé l'adoption d'un budget supplémentaire pour l'Entreprise et décidé de la nomination d'Eden Charles au poste de directeur par intérim de l'Entreprise[90]. Cependant, on peut d'ores et déjà douter de la capacité de l'Entreprise d'exploiter elle-même les ressources de la zone dans un avenir proche. En effet, d'un point de vue technique, l'exploitation est difficilement envisageable sans exploration préalable. Cela est confirmé par la rédaction de la CNUDM et de l'Accord de 1994, qui lient l'exploration et l'exploitation[91]. L'Entreprise a ainsi pris un retard considérable par rapport aux entités bénéficiant de permis d'exploration.

Il semble donc évident que le partage des avantages financiers ne pourra porter que sur une part limitée des bénéfices dégagés par l'exploitation des ressources minérales de la Zone. Dans ce système, plusieurs options sont envisagées, qui impliquent chacune une vision différente du PCH.

B) Les modalités de partage des avantages financiers, révélatrices de deux visions du PCH

Les discussions au sujet du partage des avantages sont moins développées que celles concernant les ter-

[83] Section 7, Annexe à l'Accord de 1994.

[84] Annexe IV de la CNUDM, art. 10.

[85] Pour une discussion au sujet de l'incidence de l'Accord de 1994 sur l'interprétation de l'article 173 CNUDM: COMMISSION DES FINANCES DE L'AIFM, « Equitable sharing of financial and other economic benefits from deep-seabed mining. *Note technique n° 31*, 2021.

[86] WILLAERT, Klaas. The Interests of Developing States in the Area: Promoted or Neglected?. *The International Journal of Marine and Coastal Law*, v. 39, p. 742-767, 2024.

[87] *Idem*, p. 764.

[88] CHARLES, Eden. The Enterprise under the 1982 United Nations Convention on the Law of the Sea and the Common Heritage of Mankind. *In:* ASCENCIO-HERRERA, Alfonso; NORDQUIST, Myron H. *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority*: A Twenty-Five Year Journey. Leiden: Brill | Nijhoff, 2022.

[89] GROUPE D'ETATS AFRICAINS A L'AIFM. "Request for Consideration by the Council of the African Group's Proposal for the Operationalization of the 'Enterprise'", 6 juil. 2018. § 11 à 14

[90] CONSEIL DE L'AIFM. Décision du Conseil de l'Autorité internationale des fonds marins relative à la création d'un poste de directeur(trice) général(e) par intérim de l'Entreprise, ISBA/28/C/10, 31 mars 2023

[91] V. not. section 1, art. 9, de l'Annexe à l'Accord de 1994, qui impose la soumission d'un plan de travail pour l'exploitation après 15 années d'exploration.

mes financiers des contrats et se déroulent exclusivement au sein de la Commission des Finances. Deux options sont possibles pour la répartition des revenus tirés de l'exploitation des ressources minérales des grands fonds et sont révélatrices de la conception du PCH adoptée par l'AIFM et les Etats parties à la CNUDM à l'heure actuelle. Une première option consiste à partager les avantages financiers issus de cette exploitation, selon une formule prenant en compte différents paramètres et accordant un traitement préférentiel aux pays en développement. Cette option nous semble être la plus conforme à la lettre de la CNUDM (1). Une autre option, davantage conforme à une vision humaniste et cosmopolitique du PCH, consiste à utiliser les avantages financiers dans un objectif de préservation de la ressource pour les générations futures, par le biais d'un fonds dédié à la préservation de l'environnement marin (2).

1) *La redistribution aux pays en développement : conforme à la lettre de la CNUDM*

Comme développé en première partie, l'humanité entendue au sens de la CNUDM en 1982, puis de l'Accord de New York en 1994, s'envisageait avant tout du point de vue des Etats. Il s'agit bien de partager les avantages au sein de la société des Etats, afin de pallier aux inégalités de développement et d'accès aux ressources.

La commission des finances de l'AIFM a suivi ce principe en présentant dès 2018 plusieurs propositions de clé de répartition permettant d'effectuer un partage équitable des avantages[92]. Basée sur une étude menée par des consultants extérieurs, ces propositions ont été discutées et ont donné lieu en 2021 à la publication d'une étude technique[93]. La Commission des finances propose ainsi différentes formules ainsi qu'une application sur un site internet permettant de simuler ce que chaque Etat pourrait recevoir en fonction des retombées économiques estimées de l'exploitation et de la formule choisie[94]. Cette formule intègre différents paramètres tels que le PIB par habitant, le nombre d'habitants, ainsi que des caractéristiques particulières méritant une plus grande attention (par exemple : petit Etat insulaire, pays les moins avancés, pays sans littoral, etc.)[95].

Si ces formules n'ont pas encore été examinées par le Conseil, certaines estimations, très préliminaires étant donné le niveau d'incertitude, conduisent à considérer que ce système de redistribution ne permet d'attribuer aux différents Etats qu'une infime partie de leur propre PIB[96]. Cela a conduit les consultants auteurs de cette note, ainsi que la Commission des Finances à envisager un autre mécanisme permettant d'aborder la notion d'humanité de manière transnationale[97].

Cependant, on peut également lier ce faible montant distribué, non pas au fait que la distribution entre Etats n'est pas efficace, mais bien au fait que le montant dédié au partage des avantages est lui-même trop faible (*supra*). De surcroit, on peut être étonnés de l'absence d'exclusion de pays, notamment patronnant, de la formule du partage des avantages. En effet, les termes financiers du contrat entre l'exploitant et l'Etat patronnant ont fait l'objet de longues discussions au sein du groupe de travail ouvert travaillant sur le système de paiement et sont estimées à des niveaux bien plus importants que les fonds qui pourront être dédiés au partage des avantages[98]. Cela ne peut qu'inciter les pays en développement à patronner des entreprises, ce qui soulève de nombreuses questions sur le « patronage de complaisance » et la capacité de ces Etats à remplir leurs obligations au titre de la CNUDM[99]. Cela peut en outre conduire à des conflit d'intérêts au sein des pays en développement entre les opportunités financières que représentent les contrats de patronage avec des entre-

[92] COMMISSION DES FINANCES DE L'AIFM. Règles, règlements et procédures applicables au partage équitable des avantages financiers et autres avantages économiques tirés des activités menées dans la Zone. *Rapport du Secrétaire général*, ISBA/24/FC/4, 18 mai 2018; *Equitable sharing of financial and other economic benefits from deep-seabed mining*, avril 2019 ; *Supplementary Report Prepared for the Finance Committee of the International Seabed Authority*, mai 2020; AIFM. *Rapport de la Commission des finances*. Règles, règlements et procédures applicables au partage équitable des avantages financiers et autres avantages économiques tirés des activités menées dans la Zone. [ISBA/26/A/24–ISBA/26/C/39, 6 juillet 2021].

[93] COMMISSION DES FINANCES DE L'AIFM (n. 85).

[94] https://equitablesharing.isa.org.jm/ (consulté le 21 fév. 2025).

[95] Pour une critique de ces critères : WILDE, Daniel *et al.* Equitable sharing of deep-sea mining benefits: More questions than answers. *Marine Policy*, p. 151, 2023.

[96] COMMISSION DES FINANCES DE L'AIFM (n. 85). WILDE, Daniel *et al.* Equitable sharing of deep-sea mining benefits: More questions than answers. *Marine Policy*, p. 151, 2023.

[97] COMMISSION DES FINANCES DE L'AIFM (n. 85), AIFM, ISBA/26/A/24–ISBA/26/C/39 (n. 92)

[98] GROUPE DE TRAVAIL A COMPOSITION NON-LIMITEE. Draft regulations on exploitation of mineral resources in the Area. 9 oct. 2023, ISBA/28/C/OEWG/CRP.6.

[99] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Responsabilités et obligations des Etats qui patronnent des personnes et des entités dans le cadre d'activités menées dans la zone. *Avis consultative*, n. 17, 1er février 2011.

prises privées et les perspectives limitées que représentent le partage des bénéfices au nom du PCH, dont les modalités ne seront justes et équitables qu'au prix d'un travail de négociation intense au sein de l'AIFM[100].

De fait, en l'absence de redistribution directe, les pays en développement pourraient finalement être les grands perdants de l'exploitation du PCH, contrairement à ce qui était envisagé en 1982. D'un point de vue financier, les sommes qu'ils pourraient percevoir pourraient être bien moindre que les pertes occasionnées par l'arrivée de nouvelles sources de métaux pour les pays en développement disposant de mines terrestres[101]. A cela s'ajoute la possibilité de ne plus envisager la distribution directe aux Etats comme la seule possibilité de partage des avantages financiers.

2) La création d'un fonds pour le patrimoine mondial : vers une vision transgénérationnelle du PCH

L'étude technique de la commission des finances de l'AIFM envisage une autre option que le simple partage interétatique et estime qu'une distribution qualitative pourrait remplacer ou se combiner avec ce système. Elle énonce : « les avantages financiers seraient utilisés pour investir dans les individus et dans la préservation et le développement de la zone de manière durable, de sorte qu'elle devienne véritablement un patrimoine précieux qui conserve sa valeur inhérente pour les générations à venir plutôt qu'une simple source exploitable, voire épuisable, de gains financiers immédiats. »[102]

La note propose ainsi de créer un Fonds pour la Soutenabilité des Fonds Marins (SSF), qui pourrait promouvoir des recherches en matière de méthodes d'exploitation permettant de réduire les dommages causés à l'environnement, mettre en œuvre des programmes d'éducation et de formation concernant la protection du milieu marin, financer des recherches sur les meilleures techniques et pratiques environnementales pour la restauration et la réhabilitation de la Zone, restaurer et réhabiliter la Zone et les zones maritimes des Etats côtiers, et financer la recherche sur la valeur environnementale de la Zone et les espèces migratoires présentes dans la Zone afin d'obtenir des informations de bonne qualité pour l'examen des plans régionaux de gestion de l'environnement et les études d'impact environnemental[103].

Si certains de ces objectifs peuvent permettre une meilleure protection de l'environnement, plusieurs pays ont fait remarquer que ces obligations figurent déjà dans la CNUDM, à la charge du contractant ou de l'Etat qui le patronne, et que les fonds visant à être partagés de manière juste et équitable ne pouvaient pas servir à financer des activités qui devraient l'être par les exploitants[104]. De surcroît, à part la mention de « communautés vulnérables. aucune référence n'est faite à une attention particulière accordée aux besoins des pays en développement dans le cadre des activités qui peuvent être financées.

Face à ces critiques, la Commission des finances a finalement proposé en 2023 la mise en place d'un Fonds du Patrimoine Commun qui garde l'objectif d'investir dans les personnes et dans la préservation de la Zone. La proposition était moins détaillée mais faisait davantage référence aux pays en développement et ne concernait plus les actions de réhabilitation de la Zone liée à l'exploitation[105]. L'AIFM a présenté une version plus détaillée en 2024[106].

Cette possibilité de créer un fonds dédié à la préservation de la Zone s'intègre dans une interprétation dy-

[100] FEICHTNER, Isabel; GINZKY, Harald. The struggle at the International Seabed Authority over deep sea mineral resources. *NPJ Ocean Sustainability*, v. 3, n. 1, p. 63, 2024.

[101] SUMAILA, U. R. *et al.* To engage in deep-sea mining or not to engage: what do full net cost analyses tell us ? *NPJ Ocean Sustainability*, p. 2-19, 2023; DINGWALL, Joanna. The common heritage quandary. Devising a global payment regime for exploitation activities in the deep seabed Area. *In:* TASSIN CAMPANELLA, Virginie. Routledge Handbook of Seabed Mining and the Law of the Sea. London: Routledge, 2023. p. 189.

[102] COMMISSION DES FINANCES DE L'AIFM (n. 85), p. 63.

[103] COMMISSION DES FINANCES DE L'AIFM. Résumé des solutions envisageables concernant la création d'un fonds pour la viabilité des fonds marins. *Rapport du Secrétaire général*, ISBA/26/FC/8*, 25 mars 2021

[104] GROUPE D'ETATS AFRICAINS A L'AIFM. *Statement delivered on behalf of the African group of the ISA during the Assembly's consideration of the report of the Finance Committee concerning equitable sharing of financial and other economic benefits*. 26ème session de l'Assemblée de l'AIFM, 14 déc. 2021; WILDE, Daniel *et al.* Equitable sharing of deep-sea mining benefits: More questions than answers. *Marine Policy*, p. 151, 2023.

[105] AIFM. *Rapport de la Commission des finances*. 28ème session de l'Assemblée de l'AIFM, 7 juillet 2023, ISBA/28/A/4–ISBA/28/C/13.

[106] COMMISSION DES FINANCES DE L'AIFM. Formulation des règles, règlements et procédures applicables au partage équitable des avantages financiers et autres avantages économiques tirés des activités menées dans la Zone conformément au paragraphe 7 f) de la section 9 de l'annexe de l'Accord de 1994. 19 avril 2024, ISBA/29/FC/2.

namique de la CNUDM. C'est une possibilité qui n'était envisagée, ni en 1982[107],ni en 1994 (*supra*). Cette innovation peut être replacée dans un contexte plus large. D'une part, la création de fonds liés aux conventions internationales permettant la préservation et la promotion d'un bien commun ou d'une cause commune, a débuté dans les années 1990 afin de garantir l'effectivité de ces conventions et la possibilité pour les PED de se conformer aux engagements pris[108]. D'autre part, la prise de conscience de la richesse de la biodiversité des grands fonds, ainsi que le rôle joué par l'Océan dans la régulation du climat, a rendu d'autant plus urgente la préservation de l'environnement marin, dans toute sa globalité[109]. Ainsi, on peut considérer, aux côtés du Professeur Dupuy, que « l'humanité est faite non seulement des hommes épars dans le temps présent mais aussi de ceux qui viendront [...] Dès lors la conservation de son patrimoine a autant de prix que sa gestion »[110].

Cette proposition aboutit cependant à un résultat qui soulève de nombreuses questions. D'une part, du point de vue de la compatibilité avec les dispositions de la CNUDM, les missions assignées à ce fonds semblent introduire une confusion entre les avantages financiers et les autres avantages économiques. Si les premiers sont utilisés pour financer les seconds, il existe un réel allègement du partage des avantages pour les opérateurs et une perte pour l'humanité[111]. Par exemple, le financement de la recherche scientifique constitue un avantage non financier majeur pour les pays en développement, notamment après que l'Accord de 1994 ait considérablement réduit les obligations en termes de transferts de technologie. Or, le financement de ce type de recherche par ce fonds conduit à transférer la charge du financement de la recherche scientifique des opérateurs bénéficiant de permis d'exploration ou d'exploitation vers un fonds chargé de la gestion des avantages financiers, et ainsi à limiter la portée de la distinction entre des avantages pourtant inscrite dans la CNUDM[112].

D'autre part, d'un point de vue pratique, les modalités de gestion et de gouvernance du fonds conduisent à s'interroger sur sa capacité à atteindre son objectif de partage des avantages. La Commission des finances et la Commission légale et technique de l'AIFM assumeront la gestion financière et scientifique de ce nouveau fonds[113] et on voit mal, dans la situation financière actuelle[114] et étant donné la surcharge de travail que constituera l'approbation des plans de travail et les missions de surveillance et de contrôle, quelles ressources humaines pourraient être allouées aux missions du fonds. Les conditions d'allocation des fonds, les modalités de financement, la prise en compte des caractéristiques spécifiques des pays en développement et les modes de gouvernance détermineront la contribution de ce fonds au partage juste et équitable des avantages et ainsi la conception que se font les Etats du PCH aujourd'hui.

2 Conclusion

Cette contribution avait pour objectif de démontrer que les réflexions sur le partage des avantages financiers résultant de l'exploitation des ressources de la Zone ont conduit à modifier considérablement la notion de Patrimoine Commun de l'Humanité en droit de la Mer. En 1982, cette notion s'attachait avant tout à rééquilibrer des rapports de force politiques et économiques liés à la décolonisation et visait ainsi principalement les pays en développement. L'Accord de 1994 a, tout en limitant la portée du partage des avantages, renforcé cette réfle-

[107] Un fonds pour le patrimoine commun avait néanmoins été proposée par le Népal en 1978. Si les objectifs de ce dernier étaient assez similaires aux missions assignées au fonds pour le patrimoine commun proposé par la Commission des Finances, ses ressources étaient bien différentes puisqu'elles provenaient des ressources dégagées de la ZEE et du plateau continental étendu. Troisième Conférence Des Nations Unies Sur Le Droit De La Mer, Comptes Rendus Analytiques Des Séances, Volume IX, Septième session, Séance plénière, 106ème séance, *19 mai 1978*, A/CONF.62/Vol.IX, p. 95

[108] On peut ainsi dater le début de cette pratique à la consécration du Fonds pour l'environnement mondial comme mécanisme de financement pour la CCNUCC et la CDB en 1994.

[109] LA BIANCA, Giulia *et al.* A standardised ecosystem services framework for the deep sea. *Frontiers in Marine Science*, May, 2023.

[110] DUPUY, René-Jean. Droit de la mer et communauté internationale. *In:* LE DROIT international: unité et diversité. Mélanges offerts à Paul Reuter. Paris: Pedone, 1981. p. 221.

[111] FRIEDMAN, Shani. Justice, Equity, and Approaches for Sharing Benefits from Deep Sea Mining Operations in the Area. *The International Journal of Marine and Coastal Law*, p. 1–19, 2024.

[112] Art. 140 CNUDM.

[113] COMMISSION DES FINANCES DE L'AIFM (n. 106), Annexe - Projet de règlement financier du Fonds du patrimoine commun, Article 10 - Approche évolutive : « Conformément au principe d'évolutivité appelé à régir, en vertu de l'Accord de 1994, la création et le fonctionnement des organes et organes subsidiaires de l'Autorité les fonctions du Conseil d'administration et du Conseil scientifique consultatif sont exercées respectivement par la Commission des finances et la Commission juridique et technique de l'Autorité, jusqu'à ce que l'Assemblée en décide autrement »

[114] AIFM. Rapport et recommandations de la Commission des finances, 12 juillet 2024, ISBA/29/A/9–ISBA/29/C/20.

xion centrée sur les Etats en traduisant cette différenciation dans le fonctionnement institutionnel de l'AIFM et en limitant le rôle central joué par l'Entreprise,entité au service de l'humanité dans son ensemble.

Aujourd'hui, l'AIFM est soumise à la pression de certains Etats, notamment en développement, de permettre l'exploitation des ressources minérales de la Zone. Dans ce cadre, la définition de ce qui doit être partagé et de la manière dont ce partage doit s'effectuer, contribue à la redéfinition de la notion de PCH. D'une part, les discussions actuelles viennent encore limiter les perspectives de retombées économiques pour les Etats, à la fois dans la définition des termes financiers des contrats et dans l'opérationnalisation très limitée de l'Entreprise. Les discussions concernant la mise en place d'un fonds du PCH, comme complément ou comme alternative à la redistribution aux Etats en développement, conduit à redéfinir la notion et à y réintroduire une dimension intergénérationnelle chère à Arvid Pardo. Les modalités de fonctionnement de ce fonds sont encore à définir et l'avenir nous dira si celui-ci peut réellement contribuer au bien-être des générations actuelles et futures.

On peut cependant se demander si le système ainsi esquissé ne finit pas par marcher sur la tête. En autorisant l'exploitation des ressources minières dans la Zone, l'AIFM permettrait à une minorité d'Etats de patronner des entreprises, souvent privées et basées dans des pays développés, afin d'exploiter des ressources dans un but lucratif. Ces activités portent une atteinte, dont l'ampleur et la gravité reste encore incertaine, à l'environnement sous-marin. Une petite partie des profits de cette activité est ensuite prélevée pour financer le fonctionnement de l'AIFM, y compris ses missions de contrôle du respect des règles, règlements et procédures, celui de l'Entreprise, l'indemnisation des pays producteurs de minerais terrestre, et, enfin, des missions visant à connaitre, préserver ou restaurer l'environnement sous-marin. Les pays en développement sont alors les grands perdants d'un partage des avantages qui ne leur bénéficient plus.

L'adoption d'une vision intergénérationnelle du PCH pourrait conduire à un tout autre résultat que la création d'un fonds dédié. En l'état des connaissances actuelles, adopter une approche de précaution conduisant à différer voire suspendre les possibilités d'exploitation des fonds marins semble la seule voie permettant que la Zone, selon les mots de l'AIFM, « devienne véritablement un patrimoine précieux qui conserve sa valeur inhérente pour les générations à venir plutôt qu'une simple source exploitable, voire épuisable, de gains financiers immédiats. »[115]

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115 *Ibid.*, n. 102.

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Le "patronage de complaisance " dans le cadre des activités de la Zone: une épée de Damoclès sur la protection uniforme du patrimoine commun de l'humanité

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Le "patronage de complaisance " dans le cadre des activités de la Zone: une épée de Damoclès sur la protection uniforme du patrimoine commun de l'humanité*

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Résumé

Alors que le concept de 'patronage souple' prévu implicitement par la CNUDM visait initialement à garantir un accès équitable aux ressources de la Zone – en particulier pour les États en développement – dans la pratique, sa mise en œuvre démontre des failles préoccupantes. En effet, en se reposant sur une approche que nous appellerons ici "souple ", le régime de patronage permet à tout État partie, indépendamment de ses capacités techniques ou économiques, de patronner une entité contractante, pourvu qu'il lui délivre un certificat de parrainage attestant d'un lien de nationalité, de résidence ou de contrôle 'effectif'. Cette flexibilité juridique a favorisé l'émergence d'une pratique que nous qualifions ici de 'patronage de complaisance'. A travers cette pratique, les États à capacités de contrôle limitées servent de paravent juridique à des opérateurs économiques transnationaux et puissants. Dans cette logique, cet article examine les risques juridiques et institutionnels associés à la pratique du patronage de complaisance, dans le cadre des activités menées dans la Zone, telle que régie par la CNUDM. À travers une analyse critique des dispositions conventionnelles, de la jurisprudence internationale ainsi que de pratiques contractuelles récentes, l'article soutient que le 'patronage de complaisance' compromet la protection uniforme du patrimoine commun de l'humanité, accentue les asymétries dans l'accès aux ressources et fragilise les garanties environnementales. Des propositions normatives seront formulées en conclusion afin de renforcer la responsabilité des entreprises contractantes et d'assurer l'intégrité du régime de gouvernance de la Zone

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Mots-clés: CNUDM; patrimoine commun de l'humanité; patronage de complaisance; responsabilité internationale; traitement différencié; Autorité internationale des fonds marins; protection de l'environnement marin; États en développement.

Abstract

While the concept of "flexible sponsorship" implicitly contemplated under the United Nations Convention on the Law of the Sea (UNCLOS) was originally designed to ensure equitable access to the resources of the Area—particularly for developing States—in practice, its implementation reveals significant and concerning deficiencies. By relying on what we shall refer to here as a "flexible" approach, the sponsorship regime permits any State Party, irrespective of its technical or economic capacity, to sponsor a contracting entity, provided that it issues a certificate of sponsorship attesting to a link of nationality, residence, or "effective" control. This legal flexibility has facilitated the emergence of what we designate as "convenience sponsorship." Through this practice, States with limited oversight capabilities function as legal façades for powerful transnational economic operators. Within this framework, the present article examines the legal and institutional risks inherent in the practice of convenience sponsorship in the context of activities carried out in the Area, as governed by UNCLOS. Through a critical assessment of the Convention's provisions, relevant international jurisprudence, and recent contractual practices, the article contends that convenience sponsorship undermines the uniform protection of the common heritage of humankind, exacerbates asymmetries in access to resources, and weakens environmental safeguards. The conclusion formulates normative proposals aimed at strengthening the accountability of contracting enterprises and safeguarding the integrity of the governance regime of the Area.

Keywords: UNCLOS; common heritage of humankind; convenience sponsorship; international responsibility; differential treatment; International Seabed Authority; marine environmental protection; developing States.

Resumo

Embora o conceito de "patrocínio flexível", previsto implicitamente na CNUDM, tivesse como objetivo inicial garantir um acesso equitativo aos recursos da Área – em especial para os Estados em desenvolvimento –, na prática, sua implementação revela falhas preocupantes. Com efeito, ao apoiar-se em uma abordagem que chamaremos aqui de "flexível", o regime de patrocínio permite que qualquer Estado Parte, independentemente de suas capacidades técnicas ou econômicas, patrocine uma entidade contratante, desde que lhe conceda um certificado de patrocínio atestando um vínculo de nacionalidade, de residência ou de controle "efetivo". Essa flexibilidade jurídica favoreceu o surgimento de uma prática que qualificamos aqui como "patrocínio de conveniência". Por meio dessa prática, Estados com capacidades de controle limitadas servem de fachada jurídica para operadores econômicos transnacionais e poderosos. Nessa lógica, este artigo examina os riscos jurídicos e institucionais associados à prática do patrocínio de conveniência no âmbito das atividades conduzidas na Área, tal como regida pela CNUDM. Através de uma análise crítica das disposições convencionais, da jurisprudência internacional e das práticas contratuais recentes, o artigo sustenta que o "patrocínio de conveniência" compromete a proteção uniforme do patrimônio comum da humanidade, acentua as assimetrias no acesso aos recursos e fragiliza as garantias ambientais. Propostas normativas serão apresentadas na conclusão a fim de reforçar a responsabilidade das empresas contratantes e assegurar a integridade do regime de governança da Área.

Palavras-chave: CNUDM; patrimônio comum da humanidade; patrocínio de conveniência; responsabilidade internacional; tratamento diferenciado; autoridade internacional dos fundos marinhos; proteção do meio marinho; Estados em desenvolvimento.

1 Introduction

En dépit des avantages proposés par l'approche souple de patronage des entreprises exécutant les activités d'exploration (ou d'exploitation future) dans la Zone, la dérive telle que le *patronage de complaisance* peut non seulement compromettre la protection uniforme du patri-

moine commun de l'humanité (PCH), mais aussi porter atteinte à la répartition équitable des ressources situées dans la Zone. Dans le cadre de cette analyse, le *patronage de complaisance* désigne une situation dans laquelle un État octroie son patronage à une entité privée sans exercer un contrôle effectif requis en droit international, permettant ainsi à cette entité de jouir d'un cadre réglementaire moins contraignant.[1] L'article 136 de la CNUDM indique que : *"La Zone et ses ressources sont le patrimoine commun de l'humanité "*.[2] L'une des conditions pour qu'une entreprise ait accès aux ressources de la Zone est qu'elle soit patronnée par un État partie à la CNUDM.[3] Afin d'encourager la participation des pays en développement et des moins avancés aux activités d'exploration et [dans le futur] d'exploitation des ressources marines situées dans la Zone, la CNUDM prévoit de manière implicite une approche que nous considérons comme *souple* en matière de patronage. Toutefois, cette *approche souple de patronage*, conçue à l'origine pour favoriser les pays en développement à capacité réduite est aujourd'hui, dans certains cas, détournée par certaines pratiques des États et des opérateurs privés, notamment le *patronage de complaisance*. En plus d'apporter quelques définitions importantes, cette partie introductive vise à contextualiser la question de *patronage de complaisance*, en conceptualisant l'approche du *patronage souple* à travers le concept de traitement différencié en droit de la mer, tout en posant le problème principal de cette analyse.

En partant de la philosophie incarnée par Arvid Pardo durant les négociations de la troisième conférence des nations unies sur le droit de la mer[4], deux des principes apparaissant en filigrane de la CNUDM – en particulier de la partie XI : *l'équité* et *l'inégalité compensatoire*.[5] En effet, à travers le principe du PCH, la CNUDM souligne l'importance de prendre en compte les situations nationales des pays en développement et d'inclure un traitement différencié dans l'application des obligations et des mécanismes contenus dans la partie XI de la CNUDM.[6] Ceci peut être identifié, par exemple, dans le préambule, paragraphe 5, qui stipule que :

> la réalisation des objectifs de la CNUDM contribuera à l'établissement d'un ordre économique international juste et équitable, tenant compte des intérêts et des besoins de l'humanité tout entière et, en particulier, des intérêts et des besoins spécifiques des pays en développement, qu'ils soient enclavés ou côtiers.[7]

Cette même approche est reprise dans la partie XI, articles 82, 150(e) et (f), 144, article 9(4) de l'annexe III, 148, etc. Toujours dans la même logique, le TIDM indique qu'il ne faut pas exclure *"la possibilité que les règles établissant les obligations directes des Etats qui patronnent prévoient un traitement différent selon qu'il s'agit de pays développés ou de pays en développement"*.[8] A travers ces dispositions et opinions, deux principes peuvent être extraits : la mise en place d'un système juste et équitable ainsi que la prise en compte des intérêts et des besoins spécifiques des pays en développement. Cette approche incarnant le traitement différencié «*Repose sur l'argument selon lequel le traitement égal ne peut garantir l'égalité qu'entre des parties identiques et que seul un traitement inégal peut corriger les inégalités entre des parties différentes [...]»* .[9] Ici, il est question de rechercher un équilibre entre les activités économiques et la protection du milieu marin, en utilisant une approche inclusive qui permet à tous les États parties de la CNUDM de participer aux activités menées dans la Zone. Cette approche inclusive est aussi identifiée dans l'approche *souple de patronage*.

Dans le cadre de notre analyse, le «patronage [dit] souple» désigne l'approche procédurale implicite retenue par la partie XI de la CNUDM et selon laquelle un État partie (incluant les pays en développement – y compris les petits États insulaires) peut patronner une entreprise contractante sans avoir à démontrer préala-

[1] SÉMINAIRE D'INFORMATION ORGANISÉ PAR L'AUTORITÉ INTERNATIONALE DES FONDS MARINS EN PARTENARIAT AVEC LE GOUVERNMENT DE CÔTE D'IVOIRE, Abidjan, Côte d'Ivoire, 22–25 octobre 2018. *Projet de programme*, Côte D'ivoire, 2018. p. 22.

[2] ONU. *Convention des Nations Unies sur le droit de la mer*. Montego Bay, 10 déc. 1982. Art. 136.

[3] ONU. *Convention des Nations Unies sur le droit de la mer*. Montego Bay, 10 déc. 1982. annexe 3, art. 4-3

[4] CASTANEDA, Jorge. Negotiations on the Third United Nations Conference on the Law of the Sea. *American Journal of International Law*, v. 69, n. 4, p. 762-787, 1975. PARDO, Avid. An International Regime for the Deep Seabed: Developing Law or Developing Anarchy?. *San Diego Law Review*, v. 5, p. 490-507, 1968.

[5] LACHARRIÈRE, Guy Ladreit de. L'influence de l'inégalité de développement des États sur le droit international. *Recueil des cours de l'Académie de droit international de La Haye*, v. 139, p. 1-84, 1973.

[6] ONU. *Convention des Nations Unies sur le droit de la mer*. Arts. 136;139;148-150.

[7] ONU. *Convention des Nations Unies sur le droit de la mer*. Préambule.

[8] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. *Opinion consultative, affaire n° 17*. Responsabilités et obligations des États qui patronnent des personnes et des entités dans le cadre d'activités menées dans la Zone. 1er févr. 2011. par. 160.

[9] TEMPONE, Eduardo. Special and Differential Treatment. *In*: MAX PLANCK Encyclopedia of Public International Law. Oxford: Oxford Public International Law, 2014.

blement sa capacité technique ou réglementaire à exercer un contrôle effectif sur ses activités. En d'autres termes, la CNUDM n'établit aucune condition *ex ante* quant à la capacité (économique et technologique) des États à contrôler effectivement les activités des entreprises privées relevant de leur juridiction.[10] Ainsi, cette flexibilité réglementaire – non explicitement nommée par la CNUDM, résulte de la lecture combinée de dispositions favorables à l'inclusion des pays à faibles capacités, telles que les articles 136, 139, 148 et 150 de la CNUDM. Deux principes peuvent être dégagés de cette lecture : le souci de promouvoir la participation de tous les États parties de la CNUDM aux activités de la Zone, nonobstant leurs réalités nationales et la question de la souveraineté des États – tous les États sont égaux en droit international.[11] Tous ces éléments traduisent une volonté politique d'ouverture et de justice interétatique, en cohérence avec les principes du PCH et de traitement différencié reconnus dans plusieurs instruments de droit international.[12] Ainsi, la CNUDM prévoit une procédure *souple de patronage* selon laquelle un ensemble d'obligations à respecter par les États Parties avant la conclusion du contrat est posé *en aval* du contrat de patronage. A ce niveau, la question qui se pose est de savoir si l'approche *souple de patronage* en faveur des pays en développement permet de garantir une redistribution équitable des ressources non vivantes situées dans la Zone, tout en protégeant uniformément l'environnement marin du PCH ?

En dépit des avantages identifiables dans le mécanisme du patronage souple, il est important de reconnaître que la pratique du *patronage de complaisance* constitue une menace persistante pour la protection de l'environnement marin dans la Zone et risque également de compromettre la répartition équitable de ses ressources. L'analyse du rapport juridique existant entre les États les moins avancés qui patronnent les activités menées dans la Zone et les entreprises contractantes nous permettra de mettre en lumière un véritable problème qui gagnera en ampleur lorsque l'exploitation commerciale commencera. Il s'agit de démontrer que, malgré ses avantages pour les pays en développement, l'approche souple du patronage accuse des limites qui pourraient mettre en péril la protection uniforme du milieu marin en exposant l'État en développement qui patronne à engager sa responsabilité internationale. Pour s'y faire, il sera analysé progressivement les fondements juridiques et tensions d'application du mécanisme de patronage (2), ensuite, seront mises en lumière les conséquences du patronage de complaisance (3) et enfin, sera discutée la nécessité du renforcement des obligations des entreprises patronnées. (4)

2 Le mécanisme de patronage dans la Zone : fondements juridiques et défis pratiques de sa mise en œuvre

Le régime d'exploration et d'exploitation des ressources de la Zone, tel qu'établi par la partie XI de la CNUDM, repose sur une architecture juridique particulière. Parmi ses mécanismes les plus originaux figure celui du patronage, qui permet à un État partie de se porter garant d'une entité juridique souhaitant mener des activités dans la Zone. Ce mécanisme joue un rôle essentiel dans la matérialisation du principe du PCH, en garantissant que les contractants, qui par ailleurs sont juridiquement des sujets de droit international soient liés par les obligations internationales qui régissent la Zone. Toutefois, sa mise en œuvre révèle des distorsions entre l'inclusivité recherchée par la CNUDM et la réalité de certaines pratiques à caractère opportuniste, notamment par le biais de *patronages de complaisance*. Cette section commence par une analyse de la procédure juridique relative au patronage (2.1), avant d'examiner les détournements réglementaires et opérationnels que cette procédure peut générer (2.2).

[10] Cela apparait dans la lecture combinée des articles : 139, 153(2)(b) et l'annexe III, art. 4. Etablissent les conditions relatives au patronage.

[11] ONU. *Charte des Nations Unies*. San Francisco, 26 juin 1945. Art. 2, par. 1.

[12] Cf. ONU. *Convention des Nations Unies sur le droit de la mer*. Montego Bay, 10 déc. 1982. Notamment: art. 140(1), 144, 148, 150(e)-(f), annexe III, art. 9(4). ONU. *Convention-cadre des Nations Unies sur les changements climatiques*. New York, 9 mai 1992. Voir: préambule; arts. 3(1), 3(2), 4(3), 4(7). ONU. *Protocole de Kyoto à la Convention-cadre des Nations Unies sur les changements climatiques*. Kyoto, 11 déc. 1997. Notamment: arts. 10 et 12. ONU. *Convention sur la diversité biologique*. Rio de Janeiro, 5 juin 1992. Pertinent: préambule, arts. 15(7), 20(4), 21(2). OMC. *Accord général sur les tarifs douaniers et le commerce (GATT 1947)*. Genève, 30 oct. 1947. Voir: Partie IV (arts. XXXVI à XXXVIII). OMC. *Accord sur le traitement spécial et différencié en faveur des pays en développement*. Marrakech, 15 avr. 1994. Basé sur l'art. XXIV du GATT et des dispositions sectorielles spécifiques. ONU. *Déclaration de Rio sur l'environnement et le développement*. Rio de Janeiro, 14 juin 1992. Voir: principes 6 et 7.

2.1 Procédure relative au patronage d'une entreprise d'exploitation dans la Zone par un État

La CNUDM et ses textes connexes contiennent des dispositions juridiques qui non seulement identifient les entités juridiques ayant la qualité d'exploiter la Zone, mais aussi détaillent la procédure permettant aux États de patronner les entreprises. Cette partie analysera l'application pratique de la procédure *souple*.

Les activités d'exploitation menées dans la Zone sont organisées et contrôlées par l'Autorité Internationale des fonds marins (Autorité) pour le compte de l'humanité tout entière. Elles peuvent être menées ou exécutées non seulement par l'Entreprise, mais aussi :

> […] en association avec l'Autorité, par des États Parties ou des entreprises d'État ou par des personnes physiques ou morales possédant la nationalité d'États Parties ou effectivement contrôlées par eux ou leurs ressortissants, lorsqu'elles sont patronnées par ces États ou par tout groupe des catégories précitées qui satisfait aux conditions stipulées dans la présente partie et à l'annexe III. [13]

En d'autres termes : pour qu'une entreprise privée puisse amorcer les activités dans la Zone, il est obligatoire qu'elle soit patronnée par un État partie à la CNUDM. Ainsi, le mécanisme de *"patronage"* est un élément très important du système d'exploration et d'exploitation des ressources de la Zone établi dans la CNUDM.[14] En effet, le patronage des demandeurs de contrats d'exploration et d'exploitation des ressources de la Zone par des États Parties a pour objet de garantir le respect des obligations énoncées dans la CNUDM et d'autres textes du droit international par les États et les contractants.[15] Du fait que les contractants sont sujets de droit interne et que les traités du droit international ne lient que les États qui y sont Parties, il est important de disposer d'un mécanisme qui permettra d'imposer les obligations aux contractants, d'où l'importance du patronage.[16] Ainsi, l'État qui patronne a pour rôle de contribuer «*à la réalisation de l'intérêt commun de tous les États par l'application correcte du principe du patrimoine commun de l'humanité, ce qui nécessite d'honorer fidèlement les obligations*».[17] À ce niveau, la préoccupation est de savoir s'il est indispensable de vérifier les capacités techniques, scientifiques, financières ou encore juridiques des États Parties avant de leur accorder le droit de patronner une entreprise contractante.

La CNUDM ne fait pas de différence entre les États *"techniquement et économiquement capables"* de patronner ou non un contractant. Il suffit pour l'État Partie d'avoir le statut d'un État souverain selon les règles du droit international. En effet, la CNUDM ne conditionne pas expressément "le droit des États à patronner" aux "capacités" dont ils disposent à contrôler les activités exécutées par les entités possédant leur nationalité. Cependant, plusieurs des dispositions de la CNUDM font apparaître en filigrane l'obligation de disposer des capacités garantissant le contrôle effectif du déroulement des activités d'exploration et d'exploitation. Nous pouvons par exemple citer l'article 4, para. 4 de l'annexe III de la CNUDM qui indique que :

> Il incombe à l'État Partie ou aux États Parties qui patronnent une demande de veiller, en application de l'art. 139 et au regard de leurs systèmes juridiques, à ce que les activités menées dans la zone par un contractant que cet État ou ces États patronnent le soient conformément aux obligations qui lui incombent en vertu du contrat et à la Convention.

L'article 139 de la CNUDM, mentionné précédemment, indique dans son para. 1 qu':

> Il incombe aux États Parties de veiller à ce que les activités menées dans la Zone, que ce soit par eux-mêmes, par leurs entreprises d'État ou par des personnes physiques ou morales possédant leur nationalité ou effectivement contrôlées par eux ou leurs ressortissants, le soient conformément à la présente partie. [18]

[13] Cf. ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. Montego bay, art. 539, point 2 a et b.

[14] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, para 74.

[15] XU, Xiangxin; XUE, Guifang (Julia). Potential contribution of sponsoring state and its national legislation to the deep seabed mining regime. *Sustainability*, v. 13, n. 19, p. 1-12, 2021. DOI: https://doi.org/10.3390/su131910784.

[16] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011. para. 75.

[17] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011. para. 76.

[18] Cf. ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. Montego bay, art. 584 para. 1

Cette condition, qui aurait pu être posée en amont, a été posée en aval du patronage d'un contractant. Cela peut se justifier à la lumière des principes fondamentaux guidant la CNUDM. En effet, considérant que la Zone est considérée comme "*le patrimoine commun de l'humanité et que [son] exploration et /ou [son] exploitation se feront dans l'intérêt de l'humanité tout entière, indépendamment de la situation géographique des États*"[19] et que plusieurs États récemment indépendants – majoritairement en développement – exprimaient leur intérêt à exploiter les fonds marins[20], il était important que les États Parties à la troisième Conférence des Nations unies sur le droit de la mer puissent réfléchir à l'utilisation d'une approche inclusive dans la CNUDM. En effet, dans le souci d'inclure tous les États dans la gestion de la Zone et d'éviter la discrimination en consacrant l'égalité des États selon l'approche de la Charte des Nations Unies, la CNUDM accorde aux États aux capacités nationales (financière, technologique, etc.) réduites la possibilité de patronner les entreprises d'exploitation des fonds marins, sans démontrer "au préalable" leur capacité à contrôler les activités menées par leurs entreprises. Cette approche souple apparaît davantage comme fonctionnelle quand nous l'opposons au concept des "États pionniers " qui accordait un accès privilégié à l'exploitation des fonds marins aux États maîtrisant la technologie marine et disposant de capacités financières importantes : les États développés essentiellement.[21] Ainsi, cette organisation inédite de la procédure du patronage apparaît comme une dérogation implicite accordée à une catégorie d'États, celle des pays disposant des capacités réduites, afin qu'ils ne soient pas obligés de prouver leur capacité à contrôler les activités exécutées par les entités qu'ils patronnent.

Toutefois, le fait qu'un État qui patronne ne dispose pas des capacités économiques, techniques, scientifiques ou encore juridiques adéquates pour exercer un contrôle effectif sur les contractants patronnés fait craindre qu'un problème sérieux de gouvernance puisse se poser. En effet, ce déséquilibre opérationnel, résultant directement de l'approche *souple de patronage*, a contribué à l'émergence de pratiques préoccupantes, révélatrices d'un usage détourné du régime juridique que propose la partie XI de la CNUDM. Il convient désormais d'analyser plus en profondeur cette dérive juridique que constitue le patronage de complaisance, en mettant en lumière les facteurs qui la favorisent et ses implications sur le régime normatif applicable à la Zone.

2.2 Le 'patronage de complaisance' : une dérive juridique née de l'approche souple de patronage

La pratique du patronage de complaisance constitue une épée de Damoclès qui pèse sur quelques-uns des principes inhérents au PCH, comme la protection de l'environnement marin et la répartition équitable des ressources de la Zone. Bien que le concept ne soit pas expressément mentionné par la CNUDM, Chambre pour le règlement des différends relatifs aux fonds marins (la Chambre), par le biais de son avis consultatif 17, a pu identifier la pratique, la considérant comme un phénomène qui met en péril les réalisations du PCH, en particulier la protection uniforme de l'environnement marin de la Zone. Pour utiliser ses propres mots, la Chambre estime qu'il était important :

> [d'] éviter que des entreprises commerciales ayant leur siège dans des États développés créent des sociétés dans des États en développement, obtenant ainsi leur nationalité et leur patronage, dans le but de bénéficier d'une réglementation et de contrôles moins stricts. La multiplication d'États qui patronnent "de complaisance" compromettrait l'application uniforme des normes les plus élevées de protection du milieu marin, la sécurité du développement des activités menées dans la Zone et la protection du patrimoine commun de l'humanité.[22]

Les activités de la Zone n'étant pas encore associées à l'exploitation des ressources, mais plutôt à leur exploration, il est encore difficile d'obtenir des informations juridiques et des exemples pratiques permettant une meilleure appréhension du phénomène. Cependant, en faisant une analogie entre la pratique du patronage de complaisance et le concept de pavillon de complaisance, il est plus facile de comprendre le phénomène. D'ailleurs, dans son avis 21, le TIDM a démontré la

[19] ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. Montego bay, préambule, para. 6

[20] ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. Montego bay, préambule, para. 2

[21] Cf. MPOTO BOMBAKA, Harvey. *Le traitement différencié en droit international de la mer*. 2022. Thèse (doctorat en droit public) - Université de Aix-Marseille / Universidade de Brasília (cotutelle), Brasília, 24 juin 2022. Première partie.

[22] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, para. 159.

possibilité d'envisager une analogie entre les deux domaines du droit de la mer en ces termes :

> Bien que la relation entre les États qui patronnent et les contractants ne soit pas entièrement comparable à celle qui existe entre l'État du pavillon et les navires battant son pavillon […] le Tribunal est d'avis que les précisions apportées par la Chambre pour le règlement des différends relatifs aux fonds marins en ce qui concerne l'expression 'obligation de veiller à' et le lien entre les notions d'obligation de 'diligence due' et d'obligation 'de comportement', mentionnées au paragraphe 129, sont pleinement applicables en l'espèce'[23].

Ainsi, le concept de pavillon de complaisance et le domaine de la navigation maritime serviront de laboratoire pour une analyse déductive de la pratique du patronage de complaisance. Selon l'article 91 de la CNUDM :

> Chaque Etat fixe les conditions auxquelles il soumet l'attribution de sa nationalité aux navires, les conditions d'immatriculation des navires sur son territoire et les conditions requises pour qu'ils aient le droit de battre son pavillon. Les navires possèdent la nationalité de l'Etat dont ils sont autorisés à battre le pavillon. Il doit exister un lien substantiel entre l'Etat et le navire.[24]

Cette affirmation est relayée par le TIDM en ces termes :

> Conformément à l'article 91, paragraphe 2, Saint--Vincent-et-les-Grenadines est tenue de délivrer à cet effet des documents aux navires auxquels elle a accordé le droit de battre son pavillon. La délivrance de tels documents est réglementée par le droit interne ". [25] "La détermination des critères et des formalités concernant l'attribution et le retrait de la nationalité aux navires constitue des matières qui relèvent de la compétence exclusive de l'Etat du pavillon .[26]

Ces passages soulignent le pouvoir discrétionnaire des États parties à la CNUDM d'accorder la nationalité à un navire conformément aux règles nationales, tout en garantissant un contrôle efficace grâce au lien substantiel entre l'État du pavillon et le navire. Toutefois, dans la pratique, l'exigence d'un lien substantiel, telle que décrite à l'article 91 *in fine*, est souvent contournée. En effet, certains États réduisent la procédure d'enregistrement à une simple transaction financière contre un document, tout en offrant un contrôle laxiste. À ce sujet, un exemple intéressant nous vient en tête : il s'agit du cas du Liberia. En effet, le Liberia possède le deuxième plus grand registre maritime du monde, après celui du Panama. [27] Le point intéressant ici est que celui-ci est géré depuis 1948 par une société privée américaine sous le nom suivant: la *Liberian International Ship and Corporate Registry* (LISCR) basée en Virginie (États-Unis). [28] S'agissant de la procédure d'obtention de l'autorisation de navigation sous pavillon libérien, tout se fait en ligne, en quelques heures, sans qu'il soit requis un lien matériel entre le navire et le territoire du Liberia. En contrepartie, la LISCR reverse 35 à 40 % de ses bénéfices au gouvernement libérien, ce qui constitue par ailleurs une source importante de revenus pour son budget national (près de 20% à certains moments).[29] Le principal problème réside dans le fait que le Liberia n'exerce pas un contrôle effectif sur les activités, sur les équipages ou sur les mesures de sécurité des navires battant son pavillon. Cette pratique transforme l'enregistrement en une transaction mercantile s'éloignant des exigences conventionnelles telles que le contrôle effectif du navire par l'État pavillon, créant ainsi un déficit en matière de responsabilité et de mise en œuvre des normes internationales.[30] Cette pratique débouche à ce que nous appelons le *pavillon de complaisance*. Un navire battant *pavillon de complaisance "est un navire qui arbore le pavillon d'un pays qui n'est pas le pays de propriété effective.* "[31]. Cette logique coïncide avec celle du patronage de complaisance, qui permet à certaines entreprises privées d'exercer des activités dans la Zone,

[23] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Demande d'avis consultatif soumise par la Commission Sous-Régionale des Pêches (CSRP). *Avis consultatif, 2 avril 2015*. TIDM Recueil 2015, para 125.

[24] ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. art. 91, para. 1

[25] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. *Navire SAIGA No. 2*. (Saint-Vincent-et-les-Grenadines c. Guinée), 1999. p. 36-37, par. 63.

[26] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. *Navire SAIGA No. 2*. (Saint-Vincent-et-les-Grenadines c. Guinée), 1999, par. 65.

[27] GLOBALSECURITY. *Liberian Ship Registry*. Disponible en: https://www.globalsecurity.org/military/world/liberia/ship-registry.htm. Consulté le: 16 juin 2025.

[28] GLOBALSECURITY. *Liberian Ship Registry*. Disponible en: https://www.globalsecurity.org/military/world/liberia/ship-registry.htm. Consulté le: 16 juin 2025.

[29] GLOBALSECURITY. *Liberian Ship Registry*. Disponible en: https://www.globalsecurity.org/military/world/liberia/ship-registry.htm. Consulté le: 16 juin 2025. p. 6

[30] U.N. CONFERENCE ON TRADE AND DEVELOPMENT. *Review of Maritime Transport 2023*. Geneva: UNCTAD, 2023. Disponible en: https://unctad.org/publication/review-maritime-transport-2023. Consulté le: 9 juin 2025. Voir notamment p. 40-42, sur le rôle du Liberia comme deuxième registre mondial et l'externalisation de la gestion du pavillon à une entité privée (LISCR).

[31] INTERNATIONAL TRANSPORT WORKERS' FEDERATION. *Flags of Convenience*. Disponible en: https://www.itfseafarers.org/fr/issues/flags-of-convenience. Consulté le: 9 juin 2025.

en échappant aux obligations strictes que d'autres États plus développés auraient imposées.

La CNUDM s'est efforcée de créer un équilibre – bien que fragile – en tenant compte des différences de capacité entre les pays développés et les pays en développement. L'approche souple de patronage (incarnant une forme de traitement différencié) des entreprises qui opèrent dans la Zone s'inscrit précisément dans cette logique d'établissement d'un équilibre. Pour mieux comprendre nous pouvons revenir sur l'avis consultatif 17 de la Chambre. A travers cet avis, la Chambre, bien qu'avec des nuances, suit la logique du traitement différencié en soulignant dans un premier temps qu' "*aucune des dispositions générales de la Convention visant les obligations et la responsabilité qui incombent à l'État qui patronne ne 'prévoit expressément' qu'un traitement préférentiel doive être accordé à ces États lorsqu'ils sont des États en développement […]*".[32] Elle complète ensuite son raisonnement en indiquant que : "*De telles observations n'excluent pas que des règles établissant les obligations directes des États qui patronnent puissent prévoir un traitement différencié, selon qu'ils sont développés ou en développement.*"[33]

Ce flou concernant les obligations différenciées des États parties à la CNUDM est une aubaine pour les entreprises transnationales qui choisissent d'être patronnées par des pays en développement, en particulier des petits États insulaires en développement, qui n'ont généralement pas la capacité économique, technique et administrative de contrôler strictement les activités exécutées dans la Zone. Cette situation compromet l'application uniforme des obligations environnementales et ouvre la porte à la monopolisation des ressources de la Zone par un groupe de multinationales opérant dans le secteur minier : nous assistons à un musellement du concept de PCH. [34]

En effet, l'inadéquation entre la capacité des pays en développement à patronner des entreprises privées et leurs responsabilités environnementales est l'un des aspects les plus problématiques du patronage de complaisance. La distorsion est aggravée par le fait que, d'une part, nous avons des entreprises multinationales qui sont des 'monstres financiers', disposant des technologies les plus avancées et capables d'appliquer les règles les plus strictes et, d'autre part, un État qui patronne, ne disposant ni des infrastructures de contrôle, ni des outils coercitifs nécessaires pour garantir la protection uniforme de l'environnement marin et l'exécution transparente des opérations d'exploration et d'extraction dans la Zone.[35] Une situation favorisant des stratégies d'évitement des règles strictes par les entreprises contractantes. L'exemple de Nauru Ocean Resources Inc (NORI) illustre parfaitement cette anomalie. Nauru est un petit État insulaire en développement du Pacifique qui dispose, comme tout autre État, du droit comme tout autre État de mener des activités d'exploration dans la Zone.[36] Cependant, Nauru n'a pas la capacité technologique ou financière de mener des activités par ses propres moyens ou de contrôler les activités d'une entreprise sous sa juridiction.[37] Actuellement, Nauru patronne une société appelée Nauru Ocean Resources Inc (NORI), qui mène déjà des activités d'exploration dans la Zone.[38] Cependant, une enquête plus approfondie révèle que les principaux actionnaires de NORI comprennent deux des plus grandes sociétés minières du monde : Teck Cominco Limited (aujourd'hui Teck Resources – cotée à la Bourse de Toronto et au New York Stock Exchange) et Anglo American plc (cotée à la Bourse de Londres (LSE) et à la Bourse de Johannesburg).[39] Il

[32] Une posture que nous jugeons assez hésitant et défensive de la part du tribunal, car une analyse approfondie de la CNUDM dégage quand même certaines dispositions qui mentionnent clairement un traitement préférentiel (para. 153). Nous y reviendrons.

[33] Para. 160 TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Demande d'avis consultatif soumise par la Commission Sous-Régionale des Pêches (CSRP) (Demande d'avis consultatif soumise au Tribunal), avis consultatif, 2 avril 2015, TIDM Recueil 2015, para. 160.

[34] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone.* 1er février 2011. TIDM Recueil 2011, para 160.

[35] MPOTO BOMBAKA, Harvey. *Le traitement différencié en droit international de la mer*. 2022. Thèse (doctorat en droit public) - Université de Aix-Marseille / Universidade de Brasília (cotutelle), Brasília, 24 juin 2022. p. 202.

[36] SILVA-SEND, Nilmini. Small Island Developing States as Deep Seabed Mining Sponsors – Another Source of Investor-State Liability. *San Diego Legal Studies Research Paper,* n. 25-29, 2025. p. 2.

[37] SILVA-SEND, Nilmini. Small Island Developing States as Deep Seabed Mining Sponsors – Another Source of Investor-State Liability. *San Diego Legal Studies Research Paper,* n. 25-29, 2025. p. 6

[38] INTERNATIONAL SEABED AUTHORITY. *Exploration Contracts*. Kingston: ISA, 2025. Disponible en: https://www.isa.org.jm/exploration-contracts/. Consulté le: 24 oct. 2025. INTERNATIONAL SEABED AUTHORITY. *Minerals:* Polymetallic Nodules. Kingston: ISA, 2025. Disponible en: https://www.isa.org.jm/exploration-contracts/polymetallic-nodules/. Consulté le: 24 oct. 2025.

[39] TECK RESOURCES LIMITED. *Teck Reports Unaudited Second Quarter Results for 2025*. Vancouver: Teck Resources Limited, 23 juil. 2025. Disponible en: https://www.teck.com/news/news-releas-

s'agit d'entreprises dont les sociétés mères sont basées dans des pays développés, mais qui ont établi des filiales dans des petits États insulaires en développement. Cela s'explique par l'intention de profiter des flexibilités et du traitement différencié dont bénéficient les petits États insulaires en développement.[40]

Cet exemple démontre les limites du contrôle effectif des entreprises contractantes par l'État qui patronne. Ainsi, comme l'a souligné la Chambre, de tels manquements compromettent gravement l'application uniforme des règles environnementales dans la Zone.[41] Dans cette logique, l'absence d'une approche claire et rigoureuse quant aux obligations de diligence raisonnable imposées à chaque acteur de la chaîne de production fait peser une menace sérieuse non seulement sur l'environnement marin, mais aussi sur la protection du PCH comme ressource appartenant à toute l'humanité. Au cas où ces carences structurelles et juridiques persistaient au moment du début de l'exploitation industrielle des fonds marins, cela exposerait la Zone à des effets environnementaux, juridiques et économiques néfastes, que nous analyserons dans les lignes qui suivent.

3 Conséquences de la pratique du 'patronage de complaisance': entre responsabilité juridique et captation des bénéfices

Alors que les ressources naturelles situées dans la Zone devraient appartenir à toute l'humanité, leur exploration et leur exploitation future semblent être largement dominées par des entreprises multinationales dont les maisons mères ont comme sièges les pays développés. Cette section discutera des possibles effets d'une pratique prolongée ou non contrôlée du patronage de complaisance. Il s'agit notamment du risque d'affaiblissement de la protection uniforme du milieu marin (3.1) le risque de voir des entreprises privées opérer sans contrôle effectif (3.2); le risque de monopoliser l'exploitation de ressources censées être le PCH (3.3); le risque de gestion opaque et d'appropriation du milieu marin de la Zone par des entreprises privées (3.4); mais aussi le risque selon lequel les bénéfices soient perçus par les États développés, propriétaires des entreprises, tandis que les États en développement assument la responsabilité environnementale (3.5).

3.1 Affaiblissement de la protection uniforme du milieu marin

Bien que la CNUDM impose des obligations contraignantes visant à assurer une protection uniforme du milieu marin, la mise en œuvre du système de patronage souple tend à en affaiblir l'effectivité. Ce constat est d'autant plus préoccupant que le projet de règlement sur l'exploitation minière de la Zone, toujours en cours de négociation à l'issue de la 30e session de l'Autorité[42], présente encore des lacunes concernant la protection uniforme du milieu marin.[43] A travers les textes applicables, cette partie va démontrer comment le patronage souple pourrait affaiblir la protection uniforme du milieu marin.

Dans un premier temps, la CNUDM impose plusieurs obligations aux États et insiste sur le strict respect de ces obligations pour garantir une protection uniforme de la Zone. Elle indique par exemple dans son article 139 qu':

> il incombe aux États Parties de veiller à ce que les activités menées dans la Zone, que ce soit par eux--mêmes, par leurs entreprises d'État ou par des personnes physiques ou morales possédant leur nationalité ou effectivement contrôlées par eux ou leurs ressortissants, le soient conformément à la présente partie.[44]

es/2025/teck-reports-unaudited-second-quarter-results-for-2025. Consulté le: 24 oct. 2025. ANGLO AMERICAN PLC. *Registered office (notice SENS, 30 avril 2025)*. [*S.l.: s.n.*], 2025, mentionne que la société est cotée principalement sur le Main Market de la London Stock Exchange et secondairement sur la Johannesburg Stock Exchange.

[40] MPOTO BOMBAKA, Harvey. *Les défis de la mise en œuvre de l'obligation de la due diligence dans le contexte de l'exploration de la mer*. Brasília: Université de Brasília, 2017. p. 45.

[41] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, para. 159

[42] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *30e session de l'Autorité internationale des fonds marins*. Kingston, Jamaïque, 2025.

[43] Malgré des avancées dans la première lecture du texte (articles 1 à 55), aucun consensus n'a été trouvé à ce jour pour une adoption avant fin 2025, ce qui continue de fragiliser le cadre juridique applicable à la protection du milieu marin.

[44] ONU. *Convention des Nations Unies sur le droit de la mer*. Art. 139 CNUDM. Cf. aussi l'art. 153, paragraphe 4, l'article 4, paragraphe 4, de l'annexe III à la Convention

L'article 145 de la CNUDM complète ce raisonnement en indiquant que : "En ce qui concerne les activités menées dans la Zone, les mesures nécessaires doivent être prises conformément à la Convention pour protéger efficacement le milieu marin des effets nocifs que pourraient avoir ces activités ".[45] La Chambre dans son avis 17 apporte plus d'éléments de compréhension concernant l'obligation 'de veiller à' ou 'de prendre des mesures nécessaires' en ces termes:

> L'obligation de l'État qui patronne "de veiller à " n'est pas une obligation d'obtenir dans chaque cas le résultat que le contractant patronné respecte les obligations précitées. Il s'agit plutôt d'une obligation de mettre en place les moyens appropriés, de s'efforcer dans la mesure du possible et de faire le maximum pour obtenir ce résultat. Pour utiliser la terminologie actuelle du droit international, cette obligation peut être caractérisée comme une obligation "de comportement " et non "de résultat ", et comme une obligation de "diligence requise.[46]

Ce passage apporte un peu plus de lumière sur les obligations et les responsabilités des États – du pavillon et ceux qui patronnent les entre entreprises – en matière de protection de l'environnement marin. Par ailleurs, ces dispositions conventionnelles ont été interprétées par la Chambre dans l'Avis consultatif n°17, qui précise la nature et la portée de l'obligation de diligence requise. le TIDM souligne que :

> [...] beaucoup de pays en développement, [non seulement] ne possèdent pas encore les moyens techniques et financiers nécessaires pour mener des opérations d'extraction minière sous-marine dans les eaux internationales [mais aussi] n'ont pas les moyens de faire face aux risques juridiques que peut comporter un tel projet […] Pour participer effectivement aux activités menées dans la Zone, ces Etats doivent faire appel à des contractants du secteur privé mondial.[47]

Cette possibilité de participer à travers les entreprises privées met en évidence certains risques liés à la pratique du patronage de complaisance. Ainsi, à travers le concept de traitement différencié prévu dans la CNUDM au bénéfice des pays en développement, nous nous retrouvons face à un scénario selon lequel deux opérateurs économiques disposant des mêmes capacités économiques peuvent se voir assujettis à des standards de contrôle différents selon l'État de patronage: le premier patronné par un pays développé doit observer des obligations plus strictes, comparé à celui patronné par un pays en développement qui bénéficie des flexibilités juridiques. Cela crée un système à plusieurs vitesses affaiblissant la protection uniforme du milieu marin.

Cette approche différenciée est également reprise par le projet (en négociation) relatif au règlement d'exploitation de la Zone en négociation, notamment au sujet des obligations de due diligence imposées aux entreprises contractantes. Une des mécaniques pouvant permettre de limiter les effets négatifs du patronage de complaisance serait en effet de renforcer les responsabilités des contractants. Toutefois, le projet accorde encore une flexibilité importante aux entreprises opérant sous le patronage d'États à capacité réduite.[48] Cette approche se manifeste notamment à travers les règlements 44 et 46 qui autorisent en effet une modulation substantielle des exigences environnementales, en fonction des capacités déclarées du contractant, de l'état des connaissances scientifiques disponibles ou de la localisation des activités minières : c'est en fait la logique intrinsèque des obligations de diligence raisonnable.[49] En effet, cette approche pragmatique, bien que défendable du point de vue opérationnel, génère une asymétrie normative incompatible avec la nature interconnectée des écosystèmes marins. Elle traduit une logique opérationnelle flexible, mais qui, en l'absence de garde-fous clairs, peut favoriser un nivellement par le bas des exigences de protection du milieu marin, notamment lorsque ces flexibilités sont invoquées par des entreprises disposant pourtant de moyens technologiques avancés. La Deep Sea Conservation Coalition, dans sa soumission à l'Autorité intitulée "Effective Control[50] a alerté sur le fait que cette approche pourrait affaiblir l'exigence de contrôle effectif et permet à des contractants puissants de bénéficier de normes environnementales plus sou-

[45] ONU. *Convention des Nations Unies sur le droit de la mer*. Art Art. 145 CNUD

[46] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, para. 110

[47] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, para 4

[48] Lire entre autres les articles 46 et 48

[49] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *Draft regulations on exploitation of mineral resources in the Area: revised consolidated text – ISBA/30/C/CRP.1*. Kingston: ISA, 2024. Art. 44 and 46. A

[50] DEEP SEA CONSERVATION COALITION. *Submission on Effective Control*. Kingston: International Seabed Authority, 2023.

ples, compromettant ainsi l'uniformité de la protection du milieu marin.[51]

Par ailleurs, la Chambre du TIDM, notamment dans l'Avis consultatif n°17 s'est efforcée anticipativement à désamorcer cette situation en indiquant une application rigoureuse de la due diligence dans la mesure où elle est variable dans le temps ou en fonction des risques encourus par le type d'activité exécutée (prospection, exploration, exploitation) ou encore du type de ressource explorée ou exploitée.[52] Bien que mentionnant la question de la capacité, l'idée confortée par la Chambre est que la due diligence doit être exercée de manière rigoureuse et proportionnée aux risques, sans que les limitations de capacité puissent justifier une négligence dans la prévention des dommages graves à l'environnement marin.[53] Cette approche a été récemment renforcée dans l'Avis consultatif n°31 (2023) du TIDM, relatif aux obligations des États en matière de changement climatique. Le Tribunal y rappelle que les États ont l'obligation coutumière de prendre toutes les mesures nécessaires pour prévenir, réduire et contrôler les risques graves au milieu marin, y compris ceux qui découlent d'activités sous leur juridiction, même lorsqu'elles sont réalisées par des entités privées.[54] Il précise que cette protection suppose – selon une interprétation synthétique de ses propos – l'existence de standards harmonisés, scientifiquement fondés et juridiquement contraignants, applicables sans discrimination à l'ensemble des contractants opérant dans la Zone.[55]

En fin de compte, cette dynamique, bien que justifiée par la volonté d'offrir aux États à faible capacité les moyens de participer effectivement aux activités des fonds marins, et par le fait que la prise en compte de capacité reste l'essence même des obligations de diligence requise, dans les faits, c'est précisément là que réside le problème : l'application différenciée des obligations ouvre la voie à des pratiques qui profitent principalement aux multinationales, affaiblissant ainsi la vocation universelle du régime de la Zone. Un problème qui va sans doute au-delà du droit de la mer. Ce désalignement entre ambitions proclamées et mécanismes opérationnels favorise une gouvernance environnementale à plusieurs vitesses, où la protection du milieu marin devient fonctionnelle, négociable et donc instable. Ce problème juridique est d'autant plus préoccupant qu'elle s'accompagne d'un défaut structurel de contrôle des acteurs économiques engagés dans l'exploitation minière: les entreprises privées peuvent opérer dans la Zone sans faire l'objet d'un contrôle effectif réel par les États qui les patronnent. C'est ce déficit institutionnel que nous abordons à présent.

3.2 Les entreprises privées opèrent en absence d'un 'contrôle effectif'

La mise en œuvre des obligations environnementales dans la Zone repose en partie sur la capacité des États à exercer un contrôle effectif sur les entreprises qu'ils patronnent. Dans le cadre du patronage, le contrôle effectif s'entend ici comme l'ensemble des capacités institutionnelles, juridiques et techniques permettant à l'État qui patronne de surveiller, réglementer et, le cas échéant, sanctionner les activités du contractant opérant dans la Zone.[56] Or, comme nous l'avons indiqué plus tôt, les réalités nationales (institutionnelles et économiques) de nombreux États en développement mettent en évidence des limites structurelles persistantes dans la surveillance des activités opérées dans des contextes technologiques et géoenvironnementaux complexes. Cette situation compromet l'application effective des obligations de due diligence telles que prévues par la CNUDM, ses instruments connexes ainsi que la juris-

[51] DEEP SEA CONSERVATION COALITION. *Submission on Effective Control.* Kingston: International Seabed Authority, 2023. p. 2-4

[52] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone.* 1er février 2011. TIDM Recueil 2011, para 117

[53] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone.* 1er février 2011. TIDM Recueil 2011, para. 117–120.

[54] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Advisory Opinion of 21 May 2024, Request submitted to the Tribunal for an advisory opinion by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Case No. 31. Hamburg: ITLOS, 2024. para.123–129.

[55] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Advisory Opinion of 21 May 2024, Request submitted to the Tribunal for an advisory opinion by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Case No. 31. Hamburg: ITLOS, 2024. para.para. 179.

[56] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone.* 1er février 2011. TIDM Recueil 2011, para. 122, 77 et 78.

prudence internationale. Pour mieux cerner ces limites, il convient de réutiliser l'exemple du concept classique du pavillon de navire, dont la portée du lien substantiel est davantage encadrée par les textes et la jurisprudence internationale. Selon le TIDM :

> le but des dispositions de la CNUDM relatives au lien substantiel entre un navire et son État du pavillon est de garantir un respect plus effectif des obligations des États du pavillon, et non d'établir des critères pouvant être invoqués par d'autres États pour contester la validité de l'enregistrement [57]

Elle interdit donc toute remise en cause externe du registre. Cette approche protège la souveraineté des États du pavillon, mais elle ne fonde aucun contrôle juridictionnel sur l'effectivité du lien. Dans le contexte de la Zone, le lien juridique entre l'État qui patronne et l'entreprise contractante revêt toutefois une portée beaucoup plus substantielle. Contrairement au régime du pavillon, l'État qui patronne assume des responsabilités directes et renforcées. L'article 4(4) de l'Annexe III de la CNUDM exige que l'État garantisse que les activités soient menées conformément aux règles internationales.[58] L'Avis consultatif de 2011 indiqué précédemment renforce cette obligation en précisant que l'État doit édicter des règles adéquates, assurer un encadrement technique et exercer une surveillance active.[59] Ici, la due diligence devient une norme opposable et évaluable dans un cadre multilatéral, car il s'agit de la gestion d'un bien commun. L'État ne peut donc se limiter à un simple rattachement administratif : il est tenu d'assurer un contrôle réel, continu et effectif. Pourtant, cette ambition juridique se heurte à des limites pratiques. Le cas de Nauru Ocean Resources Inc. (NORI) montre qu'un État sans capacités nécessaires de contrôle autonome peut patronner une entreprise minière contrôlée par des acteurs canadiens ou britanniques, tout en assumant seul la responsabilité juridique.

En somme, même si les règles applicables à l'exploitation dans la Zone sont juridiquement plus exigeantes que celles relatives aux pavillons, les déficiences institutionnelles persistantes dans de nombreux États en développement rendent souvent ce renforcement inopérant sur le terrain. Ce décalage structurel entre la norme internationale et les réalités nationales a d'ailleurs été réitéré durant la 30e session de l'Autorité en juillet 2025, sans pour autant donner lieu à l'adoption de mécanismes contraignants de soutien technique ou de renforcement des capacités.[60] Ce déficit opérationnel continue d'alimenter la logique du patronage de complaisance, au détriment de la protection du PCH.

Les défaillances systémiques liées à l'absence de contrôle effectif ouvrent également la voie à une concentration des avantages économiques entre les mains de quelques acteurs puissants, posant ainsi la question cruciale d'un risque de monopolisation de l'exploitation du patrimoine commun de l'humanité.

3.3 Risque de monopolisation de l'exploitation du PCH

L'un des conséquences majeures du patronage de complaisance réside dans la concentration des contrats d'exploration entre les mains de quelques multinationales, au mépris du principe de répartition équitable inscrit à l'article 137 de la CNUDM.[61] Cette tendance est exacerbée par l'usage stratégique de filiales par certaines entreprises, leur permettant de cumuler plusieurs permis sous différents États patrons. Pour mieux cerner ce problème juridique, cette partie apporte quelques exemples pratiques.

L'examen des contrats signés entre l'Autorité et les entreprises contractantes révèle que plusieurs d'entre eux sont attribués à des filiales rattachées à une même société mère. Symptomatiquement, le cas de The Metals

[57] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. *M/V Saiga n° 2*. Arrêt du 1er juillet 1999, para. 83 ; TIDM. Virginia G, arrêt du 14 avril 2014, para. 118.

[58] ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. Annexe III, art. 4, par. 4.

[59] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, par. 110–122.

[60] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *International Seabed Authority holds a landmark 30th session*: the Assembly adopts historic decisions as negotiations on the Mining Code progress. Kingston, 2025. Disponible en: https://www.isa.org.jm/news/international-seabed-authority-holds-a-landmark-30th-session-the-assembly-adopts-historic-decisions-as-negotiations-on-the-mining-code-progress/. Accès le: 26 out. 2025. AUTORITÉ INTERNATIONALE DES FONDS MARINS. *30th Session of the International Seabed Authority – 2025*. Kingston, 2025. Disponible en: https://www.isa.org.jm/sessions/30th-session-2025/. Accès le: 26 out. 2025. EARTH NEGOTIATIONS BULLETIN. *Summary of the Thirtieth Annual Session of the International Seabed Authority (Second Part):* 7–25 July 2025. Disponible en: https://enb.iisd.org/sites/default/files/2025-07/enb25259e.pdf. Consulté le: 28 oct. 2025.

[61] ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. Art. 137.

Company (TMC), qui détient trois contrats via ses entités NORI (Nauru), TOML (Tonga) et Marawa (Kiribati), représentant plus de 220 000 km² dans la zone Clarion-Clipperton, illustre cette dynamique de fragmentation juridique.[62] Dans le prolongement de cette stratégie, et pour mieux saisir l'ampleur de cette orientation productiviste, en mars 2025, TMC a même annoncé son intention de débuter l'exploitation commerciale dès 2026 sans attendre l'adoption du règlement d'exploitation par l'Autorité, en s'appuyant sur des autorisations nationales.[63] On peut clairement y voir une tentative de contournement des principes de gouvernance collective et du droit international applicable à la Zone.

Pourtant, les textes applicables ont toujours souligné l'importance et la nécessité d'un accès inclusif aux ressources. La CNUDM par exemple, prévoit plusieurs articles[64] qui visent à permettre aux pays en développement de participer pleinement aux activités dans la Zone grâce à un accès équitable au savoir-faire, aux équipements et aux connaissances techniques. En complétant ce raisonnement, l'Autorité a évoqué plus récemment la possibilité de limiter le nombre de permis par entité économique, bien que cela n'a toujours pas encore trouvé de soubassement juridique contraignants.[65] La Chambre des fonds marins du TIDM, dans son avis consultatif de 2011 insiste dans le même sens sur la nécessité d'assurer une participation équitable des États aux activités menées dans la Zone.[66] En insistant sur l'accès à la technologie, la limitation de permis octroyés par entité ou de façon large sur la participation équitable aux activités de la Zone, les institutions indiquées entendent (implicitement ou non) prévenir une concentration des droits et des bénéfices entre les mains de quelques acteurs, ce qui irait à l'encontre de l'essence même du principe de PCH.[67]

Toutefois, les difficultés pratiques de mise en œuvre des dispositions prévoyant l'approche inclusive de participation aux activités de la Zone renforcent la dépendance de ces pays vis-à-vis des entreprises contractantes en les exposant davantage aux risques économiques difficiles à affronter au niveau national.[68] En guise d'illustration, nous pouvons prendre le cas de la Papouasie-Nouvelle-Guinée dans le projet Solwara 1.[69] En 2011, la Papouasie-Nouvelle-Guinée avait investi environ 120 millions de dollars américains dans ce projet d'exploitation minière en eaux profondes situées dans sa ZEE, en partenariat avec la société canadienne Nautilus Minerals.[70] Cependant, au niveau national, le pays

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[62] THE METALS COMPANY INC. *Form 10-K*: Annual Report for the fiscal year ended December 31, 2022. Washington, D.C.: U.S. Securities and Exchange Commission, 27 mar. 2023 p. 16, 31 e 119. Disponible en: https://www.annualreports.com/HostedData/AnnualReportArchive/t/NASDAQ_TMC_2022.pdf. Accès le: 27 out. 2025

[63] En mars 2025, TMC a annoncé qu'elle engageait une procédure auprès de la NOAA (National Oceanic and Atmospheric Administration) pour demander des licences d'exploration et un permis de récupération commerciale au titre du Deep Seabed Hard Mineral Resources Act (DSHMRA) des États-Unis — c'est-à-dire sans attendre l'adoption du règlement d'exploitation de l'ISA. Dans la même logique l'Autorité internationale des fonds marins (AIFM/ISA) a réagi en rappelant que toute exploitation dans "la Zone" sans autorisation de l'ISA violerait le droit international. Un peu plutôt, (fin 2023–mi 2024), TMC communiquait encore sur un démarrage fin 2025 / début 2026 (traitement Q1 2026 chez PAMCO ; article de presse indiquant "production expected to start at the end of Q1 2026"). Cela explique que, au moment de l'annonce de mars 2025, l'entreprise laissait entendre un lancement aussi tôt que 2026, tout en changeant de filière d'autorisation. Mise à jour importante : depuis août 2025, TMC vise désormais un début de production en T4 2027 selon ses documents investisseurs/PFS.

[64] Nous avons par exemples les artlces : Article 144 – Transfert de technologie, Article 266 – Promotion du développement de la science et du transfert de la technologie marine, Article 267 – Objectifs du transfert de technologie, Article 268 – Moyens de transfert, Article 269 – Mesures pour promouvoir le transfert, Article 270 – Coopération avec les organisations internationales, Article 271 – Protection des intérêts légitimes, Article 272 – Protection de la nature et de l'environnement, Article 273 – Droits et obligations des États, Article 274 – Relations bilatérales et multilatérales, Article 275 – Centre de transfert de technologie marine

[65] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *Developing a regulatory framework for mineral exploitation in the Area: Work-plan for 2015*. Kingston: ISA, 2015. p. 7

[66] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, para. 154, 156, 163

[67] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, para. 154, 156, 163

[68] Cf. L'article 144 par exemple. Cf. aussi le débat sur la tension existant entre l'Accord de 1994 et la partie XI de la CNUDM.

[69] COLLAPSE of PNG deep-sea mining venture sparks calls for moratorium. *The Guardian*, 16 sep. 2019. Disponible en: https://www.theguardian.com/world/2019/sep/16/collapse-of-png-deep-sea-mining-venture-sparks-calls-for-moratorium. Consulté le : 28 out. 2025. (para. 4-6). CHIN, Andrew; HARI, Katelyn. *Predicting the impacts of mining deep sea polymetallic nodules in the Pacific Ocean:* a review of scientific literature. Canada : Mining Watch, 2020. Disponible en: https://miningwatch.ca/sites/default/files/nodule_mining_in_the_pacific_ocean.pdf. Consulté le: 28 oct. 2025.

[70] BUSINESS ADVANTAGE PNG. Nautilus looks across the Pacific after securing Papua New Guinea undersea mining deal. *Business Advantage PNG*, 30 avr. 2014. Disponible en: https://www.businessadvantagepng.com/nautilus-looks-across-pacific-securing-

ne disposait pas de capacités technologiques pour patronner les activités. Dans la même logique, il n'existait pas de mécanismes de transfert de technologie effectifs et clairs, cela a conduit à l'échec du projet.[71] Le pays s'est retrouvé avec une dette considérable et aucun gain technologique ou infrastructurel durable.[72] En d'autres termes : sans garanties institutionnelles solides et sans mécanismes contraignants de transfert de technologie, les États en développement risquent de ne jouer qu'un rôle marginal dans la gouvernance et les bénéfices issus de l'exploitation du PCH.

Ainsi, d'une certaine manière, le cadre juridique actuel facilite la captation des ressources situées dans la Zone au profit d'une élite industrielle globalisée.[73] Cette dynamique de concentration est aggravée par l'absence de critères juridiques clairs permettant d'identifier l'unité économique réelle derrière plusieurs entités contractantes. Aucune disposition contraignante n'impose aujourd'hui de transparence sur les liens de propriété ou de contrôle entre ces entités, facilitant ainsi des stratégies de fragmentation juridique où une même entreprise mère opère via différentes filiales sous divers États qui patronnent. Cette opacité affaiblit le rôle de régulation de l'Autorité, qui valide des plans de travail sans disposer d'outils normatifs pour évaluer la consolidation économique des droits d'exploration.[74] Elle engendre aussi un verrouillage technologique, car les entreprises dominantes imposent leur propre cadence aux normes environnementales en invoquant par exemple la propriété intellectuelle, ce qui freine l'élaboration de standards contraignants, notamment sur les impacts cumulatifs. Cette situation marginalise les acteurs moins dotés en capacités technologique et économique et détourne progressivement la Zone de sa vocation universelle, transformant le patrimoine commun en champ de rente privatisé au bénéfice d'un oligopole transnational. Dans la même logique, les lignes suivantes vont approfondir le risque d'une gestion opaque de la Zone.

3.4 Risque de gestion opaque et d'appropriation du milieu marin de la Zone par des entreprises privées

Un autre effet questionnable pouvant être provoqué par patronage de complaisance est l'absence de transparence qui entoure les activités d'exploration (exploitation) dans la Zone. En théorie, la CNUDM prévoit un cadre juridique encadrant cette question. L'article 144 par exemple impose aux États et à l'Autorité de promouvoir la recherche scientifique marine et le transfert de technologies, afin de garantir une participation équitable aux bénéfices du patrimoine commun.[75] L'article 140, al. 2 impose également la diffusion publique des connaissances acquises dans le cadre des activités de la Zone. Pourtant, dans la pratique, ces dispositions restent peu observées.[76] En effet, il existe un déficit chronique de transparence et d'accès à l'information. Cette opacité découle une fois de plus de l'asymétrie en termes de capacité entre les États qui patronnent et les entreprises Ce qui semble logique, dans la mesure où l'article 12 des Clauses types de contrat pour l'exploration des nodules polymétalliques indique que : "Les données et informations qui sont communiquées à l'Autorité en vertu du présent contrat sont considérées comme confidentielles

papua-new-guinea-undersea-mining-deal/. Consulté le: 28 oct. 2025. (para. 3-4 MONGABAY. Deep-sea mining project in PNG resurfaces despite community opposition. *Mongabay*, 18 out. 2023. Disponible en: https://news.mongabay.com/2023/08/deep-sea-mining-project-in-png-resurfaces-despite-community-opposition/. Consulté le: 28 oct. 2025. (para. 12-13, mention de la participation gouvernementale équivalente à 120 millions USD).

[71] COLLAPSE of PNG deep-sea mining venture sparks calls for moratorium. *The Guardian*, 16 sep. 2019. Disponible en: https://www.theguardian.com/world/2019/sep/16/collapse-of-png-deep-sea-mining-venture-sparks-calls-for-moratorium. Consulté le : 28 out. 2025.. (para. 4-6). CHIN, Andrew; HARI, Katelyn. *Predicting the impacts of mining deep sea polymetallic nodules in the Pacific Ocean:* a review of scientific literature. Canada : Mining Watch, 2020. Disponible en: https://miningwatch.ca/sites/default/files/nodule_mining_in_the_pacific_ocean.pdf. Consulté le: 28 oct. 2025.

[72] COLLAPSE of PNG deep-sea mining venture sparks calls for moratorium. *The Guardian*, 16 sep. 2019. Disponible en: https://www.theguardian.com/world/2019/sep/16/collapse-of-png-deep-sea-mining-venture-sparks-calls-for-moratorium. Consulté le : 28 out. 2025. (para. 4-6). CHIN, Andrew; HARI, Katelyn. *Predicting the impacts of mining deep sea polymetallic nodules in the Pacific Ocean:* a review of scientific literature. Canada : Mining Watch, 2020. Disponible en: https://miningwatch.ca/sites/default/files/nodule_mining_in_the_pacific_ocean.pdf. Consulté le: 28 oct. 2025.

[73] CHIN, Andrew; HARI, Katelyn. *Predicting the impacts of mining deep sea polymetallic nodules in the Pacific Ocean:* a review of scientific literature. Canada : Mining Watch, 2020. Disponible en: https://miningwatch.ca/sites/default/files/nodule_mining_in_the_pacific_ocean.pdf. Consulté le: 28 oct. 2025. p. 40-45.

[74] INTERNATIONAL SEABED AUTHORITY. *Article 154 Review:* Interim Report. Kingston, Jamaïque: ISA, 2016. Disponible en: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-22a-crp.3-1.pdf. Consulté le: 28 oct. 2025. p. 12-14.

[75] ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. art 144

[76] ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. art 140, al. 2

conformément aux dispositions du Règlement ".[77] En complément, le Règlement relatif à la prospection et à l'exploration des nodules polymétalliques dans la Zone, notamment son article 37, encadre strictement la confidentialité des données transmises à l'Autorité. [78] Il précise notamment que ces données ne peuvent être divulguées sans l'autorisation écrite préalable du contractant et établit des procédures strictes pour leur conservation et leur utilisation.[79]

Toutefois, ce régime de confidentialité fait désormais l'objet de critiques croissantes, tant de la part de certains États membres que des ONG, qui y voient un obstacle à la transparence scientifique et à la gouvernance environnementale. [80] Par exemple : le fait que les entreprises contractantes retiennent les informations relatives aux données primaires qu'ils collectent handicape l'évaluation indépendante des risques pour le milieu marin.[81] En guise d'illustration, il y a le cas de l'entreprise : The Metals Company (TMC) qui a longtemps refusé de publier intégralement ses rapports environnementaux sur la zone Clarion-Clipperton, malgré des demandes répétées de la société civile.[82] Alors que les images des essais d'exploitation minière dans cette zone par TMC ont montré que les eaux usées contenaient des débris rocheux et des sédiments, aspirés du fond marin ont été déversés directement à la surface de la mer.[83] TMC n'a pas rendu compte publiquement de l'incident. Il y a aussi le cas de l'effondrement du projet Solwara 1 en Papouasie-Nouvelle-Guinée qui va dans le même sens. Ce cas a révélé que l'État n'avait jamais eu accès à des données environnementales fiables durant la phase d'exploration menée par Nautilus Minerals, bien que ce soit une exigence en vertu des articles 145 et 162 de la CNUDM.[84] Le résultat : une perte économique de plus de 120 millions USD pour le pays, sans mécanisme de compensation ni d'audit environnemental.[85]

Par ailleurs, le recoupage des textes de la CNUDM démontre également que l'absence de transparence compromettrait le rôle de l'Autorité. Selon l'article 153(4) de la CNUDM, l'Autorité doit approuver les plans de travaux, en vérifiant leur conformité avec les objectifs de protection du milieu marin. Cette évaluation est fondée sur les informations fournies par l'entreprise contractante. Or, ces plans sont souvent validés sur la base de données incomplètes, sans examen indépendant préalable, ce qui réduit la portée du contrôle de l'Autorité à une simple formalité administrative.[86] La privatisation de la connaissance scientifique marine constitue une autre facette de cette gestion opaque. Les entreprises, notamment occidentales, financent elles-mêmes leurs campagnes d'échantillonnage, contrôlent la méthodologie, et déterminent les résultats publiables. Cela entraîne

[77] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *Clauses types de contrat pour l'exploration des nodules polymétalliques*. ISBA/19/C/WP.1. Kingston: Autorité internationale des fonds marins, 2015.

[78] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *Règlement relatif à la prospection et à l'exploration des nodules polymétalliques dans la Zone*. ISBA/19/C/WP.1. Kingston : Autorité internationale des fonds marins, 2013. Disponible en: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-19c-wp1_2.pdf. Consulté le : 18 juill. 2025. Art. 37 - 1

[79] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *Règlement relatif à la prospection et à l'exploration des nodules polymétalliques dans la Zone*. ISBA/19/C/WP.1. Kingston : Autorité internationale des fonds marins, 2013. Disponible en: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-19c-wp1_2.pdf. Consulté le : 18 juill. 2025. Art. 37 - 1

[80] JAECKEL, Aline; HARDEN-DAVIES, Harriet; AMON, Diva J.; VAN DER GRIENT, Jesse; HANICH, Quentin; VAN LEEUWEN, Judith; NINER, Holly J.; SETO, Katherine. Deep seabed mining lacks social legitimacy. *npj Ocean Sustainability*, v. 2, n. 1, 2023. Disponible en: https://doi.org/10.1038/s44183-023-00009-7. Consulté le: 28 oct. 2025. p. 2

[81] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *Deep Seabed Mining and Submarine Cables:* Developing Practical Options for the Implementation of the 'Due Regard' and 'Reasonable Regard' Obligations under UNCLOS. Rapport de l'atelier tenu à Bangkok, 29–30 oct. 2018. Kingston: AIFM, 2019. Disponible en: https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-24-amazon-jan-2020-eversion.pdf. Consulté le: 23 juil. 2025.

[82] DEEP SEA MINING CAMPAIGN; THE OCEAN FOUNDATION; BLUE CLIMATE INITIATIVE. *Letter of Complaint to the Securities and Exchange Commission regarding The Metals Company (TMC)*. Washington, D.C., 18 juil. 2024. Disponible en: https://dsm-campaign.org/wp-content/uploads/2024/07/2024_07_18_SEC_Complaint_Letter_re_-TMC.pdf. Consulté le: 28 oct. 2025. p. 3.

[83] GREENPEACE USA. *Revealed:* Undercover video shows deep sea mining tests tainted by pollution and flawed monitoring. 2023. Disponible en: https://www.greenpeace.org/usa/revealed-undercover-video-shows-deep-sea-mining-tests-tainted-by-pollution-and-flawed-monitoring/. Consulté le: 28 oct. 2025.

[84] STEINER, Robert. *Independent Review of the Environmental Impact Statement for the proposed Nautilus Minerals Solwara 1 Seabed Mining Project, Papua New Guinea.* Bismarck-Solomon Seas Indigenous Peoples Council, 2009. p. 8-12.

[85] MONGABAY. Deep-sea mining project in PNG resurfaces despite community opposition. *Mongabay*, 18 out. 2023. Disponible en: https://news.mongabay.com/2023/08/deep-sea-mining-project-in-png-resurfaces-despite-community-opposition/. Consulté le: 28 oct. 2025. para. 12-13

[86] MURPHY, Kevin. *Assuring Environmental Compliance in Deep-Sea Mining*: Lessons from Industry and Regulators. [S.l.]: The Pew Charitable Trusts, 2020. Disponible en: https://www.pew.org/-/media/assets/2020/06/seabed_mining_white_paper.pdf. Consulté le : 28 out. 2025. p. 2.

une appropriation indirecte du savoir — un bien pourtant collectif selon les principes de la CNUDM.[87] Cette asymétrie épistémique s'ajoute à l'asymétrie économique analysée précédemment, renforçant l'accaparement de la Zone par un petit nombre d'acteurs privés bénéficiant d'un accès privilégié aux données.

Lors de la session de juillet 2025, plusieurs délégations ont appelé à une réforme des textes applicables, en estimant que l'approche utilisée jusque maintenant compromet l'examen rigoureux et indépendant des plans de travail soumis pour approbation.[88] Bien que la création d'une base de données environnementale publique ait été proposée afin de garantir une meilleure transparence, aucune mesure contraignante – permettant d'établir des limites claires à la confidentialité dans les cas où l'intérêt général (comme la protection du milieu marin du PCH) serait en jeu – n'a encore été adoptée à ce sujet.[89] En somme, la gestion de la Zone dans le cadre actuel favorise une appropriation discrète, mais effective, des ressources et des connaissances marines par des opérateurs privés agissant sous couvert d'un patronage juridique formel. Cette situation est d'autant plus préoccupante qu'elle échappe au contrôle institutionnel conforme aux standards internationaux, compromettant le principe de gouvernance transparente et partagée inscrit dans la philosophie du PCH. Ce qui nous amène à la question de la répartition des bénéfices et de la responsabilité liée aux activités menées.

3.5 Les pays développés en tirent les bénéfices, tandis que les pays en développement assument la responsabilité de la pollution.

Alors que l'exploitation commerciale des ressources marines n'a pas encore débuté, plusieurs délégations, notamment du Pacifique, ont déjà alerté sur le risque d'un scénario déséquilibré dans lequel les pays en développement endosseraient le rôle juridique d'États qui patronnent, sans percevoir de bénéfices économiques substantiels.[90] Les groupes industriels, souvent domiciliés dans des pays développés, continueraient de capter l'essentiel des profits, tandis que la responsabilité juridique, notamment en cas de dommage environnemental, resterait à la charge des États à faibles capacités. À l'issue de la session de juillet 2025, aucun mécanisme clair de redistribution équitable ou de compensation obligatoire n'a été adopté.[91] Cette asymétrie est d'autant plus problématique que la responsabilité en cas de dommage environnemental repose sur l'État qui patronne.[92] En s'appuyant sur l'article 139 de la CNUDM, la Chambre pour le règlement des différends des fonds marins est explicite : *"un Etat Partie […] est responsable des dommages résultant d'un manquement de sa part aux obligations qui lui incombent "*[93], en d'autres termes en cas de manquement aux obligations de diligence requise. [94] *A contrario*, un Etat Partie n'est pas responsable des dommages résultant du manquement de la part d'un contractant patronné par lui à ses obligations sauf s'il a adopté les lois et règlements et pris les mesures administratives nécessaires et appropriées pour assurer le respect effectif de la partie XI.[95] Ainsi, ni les textes applicables ni la jurisprudence ne reconnaissent une exonération de responsabi-

[87] ONU. *Convention des Nations Unies sur le droit de la mer*. Montego Bay, 10 décembre 1982. Articles 136, 140 et 143(3).

[88] EARTH NEGOTIATIONS BULLETIN. *Summary of the Thirtieth Annual Session of the International Seabed Authority (Second Part):* 7–25 July 2025. Disponible en: https://enb.iisd.org/sites/default/files/2025-07/enb25259e.pdf. Consulté le: 28 oct. 2025. (section sur l'examen des réglementations, préoccupations exprimées sur l'absence d'examen rigoureux et indépendant des plans de travail).

[89] CHRISTIANSEN, Serenella *et al. Towards Transparent Governance of Deep Seabed Mining*. IASS Policy Brief 2/2016. Potsdam: IASS, 2016. Disponible en: https://www.rifs-potsdam.de/sites/default/files/files/policy_brief_transparency.pdf. Consulté le: 28 oct. 2025. p. 1-2

[90] TOMASSONI, Teresa. *Nations Denounce Deep Sea Mining Company's Bid to Exploit Metals in the Pacific Under US Law*. Inside Climate News, 29 juil. 2025. Disponible en: https://insideclimatenews.org/news/29072025/nations-denounce-deep-sea-mining-bid-pacific-us/. Consulté le : 28 out. 2025

[91] EARTH NEGOTIATIONS BULLETIN. *Summary of the Thirtieth Annual Session of the International Seabed Authority (Second Part):* 7–25 July 2025. Disponible en: https://enb.iisd.org/sites/default/files/2025-07/enb25259e.pdf. Consulté le: 28 oct. 2025.

[92] ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. Annexe III, art. 4, par. 4.

[93] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, par. 166.

[94] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, par. 166.

[95] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone*. 1er février 2011. TIDM Recueil 2011, par. 166 -167 ; ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. L'article 4, paragraphe 4, deuxième phrase, de l'annexe III

lité fondée sur la localisation effective de l'entreprise ou sur son centre réel de décision économique.

Dans ce sens, un État en développement peut juridiquement répondre des actes commis par la filiale d'une entreprise transnationale, patronnée par lui, dont les décisions sont prises à Toronto, Bruxelles ou à Londres, dès lors qu'un manquement de sa part aux obligations qui lui incombent en vertu de la partie XI de la CNUDM est établi. En matière de pollution, cette logique de transfert de responsabilité est aggravée par l'incapacité technique des États en développement qui patronnent les activités dans la Zone, à suivre et prévenir les impacts environnementaux. Nous sommes en quelque sorte en face de ce que nous appelons ' dumping environnemental'.[96] Les articles 145 et 194 de la CNUDM imposent des obligations de protection du milieu marin, y compris contre la pollution résultant d'activités humaines. Or, la mise en œuvre de ces obligations nécessite des infrastructures scientifiques et administratives que nombre de pays en développement ne possèdent pas. Cela est d'ailleurs souligné par le rapport de Pew Charitable Trusts, qui indique que plusieurs États qui patronnent ne disposent d'aucune agence de contrôle dédiée, ni de personnel qualifié pour analyser les rapports soumis par les entreprises.[97] En restant dans une approche hypothétique (car l'exploitation commerciale n'ayant pas encore commencé), il est constaté que le contraste est saisissant avec les bénéfices économiques qui seront captés par les maisons mères situées dans les pays développés.

Ces entreprises bénéficient des flexibilités juridiques dont jouissent certains États qui patronnent en droit international (de la mer), ce qui leur permet, d'une certaine manière, d'échapper aux contraintes normatives applicables dans leurs juridictions d'origine. Notre exemple de The Metals Company, domiciliée au Canada mais opérant via des filiales relevant des juridictions de Nauru, Tonga et Kiribati, en est particulièrement révélateur.[98] En effet, bien que la valeur potentielle des ressources qui seront extraites dépasserait plusieurs milliards de dollars, ces États ne percevront selon les estimations qu'une fraction minime des revenus — souvent sous forme de redevances contractuelles — tout en assumant la charge du risque environnemental.[99] Cet écart entre les responsabilités formelles et les bénéfices réels atteste d'un déséquilibre du système, qui transforme les pays en développement en vecteurs de légitimation d'activités industrielles polluantes, sans compensation équitable. Ainsi, souvent, en cas de litige, la charge de la preuve incomberait à ces mêmes États qui se retrouveraient dans un contexte juridique et financier défavorable. En guise de conclusion, l'approche de la responsabilité structurant le mécanisme de patronage tel qu'il est appliqué actuellement contribue d'une certaine manière à la consolidation d'un système inéquitable : les pays développés, *via* leurs entreprises, externalisent les coûts environnementaux vers des juridictions à faible capacité de contrôle, tout en internalisant les bénéfices économiques. Cette dynamique compromet l'objectif de solidarité interétatique et viole l'esprit de (l'équité et de la justice environnementale constituant la toile de fond du principe du PCH.

4 Réflexion sur le renforcement des obligations des entreprises patronnées

L'une des voies pouvant permettre de pallier aux lacunes précédemment identifiées serait le renforcement des obligations des entreprises patronnées, de telle sorte que même si l'État ne serait pas capable d'exécuter certaines obligations de façon uniforme, les entreprises pourraient le faire à leur niveau compte tenu de leur capacité avancée. Comme "*la portée des obligations des contractants patronnés est, de fait, analogue pour l'essentiel aux obligations de l'État qui patronne*"[100], les obligations des États

[96] RIEBER, Arsène; TRAN, Thi Anh-Dao. Dumping environnemental et délocalisation des activités industrielles: le Sud face à la mondialisation. *Revue d'économie du développement*, Paris, v. 16, n. 2, p. 5-34, 2008.

[97] MURPHY, Kevin. *Assuring Environmental Compliance in Deep-Sea Mining*: Lessons from Industry and Regulators. [*S.l.*]: The Pew Charitable Trusts, 2020. Disponible en: https://www.pew.org/-/media/assets/2020/06/seabed_mining_white_paper.pdf. Consulté le : 28 out. 2025. p. 5-6

[98] THE METALS COMPANY. *DeepGreen acquires third seabed contract area to explore for polymetallic nodules*. 2020. Disponible en: https://metals.co/deepgreen-acquires-third-seabed-contract-area-to-explore-for-polymetallic-nodules. Consulté le: 25 juil. 2025.

[99] AMADI, Emma; MOSNIER, François; GRASSI, Filippo; COZZOLINO, Giorgio. *Race to the Bottom:* Deep sea mining provides limited financial benefits for countries. 2024. Disponible en: https://planet-tracker.org/wp-content/uploads/2024/11/Race-to-the-Bottom.pdf. Consulté le: 25 juil. 2025.

[100] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui*

peuvent être pleinement applicables en l'espèce. Ainsi, il sera important que dans le développement normatif futur, les États Parties puissent réfléchir aux obligations plus robustes des entreprises contractantes afin de contenir *"la multiplication d'États qui patronnent de complaisance "*[101]. Selon la Chambre, ce type de patronage *"compromettrait l'application uniforme des normes les plus élevées de protection du milieu marin, la sécurité du développement des activités menées dans la Zone et la protection du patrimoine commun de l'humanité. "*[102] Dans ce sens, nous allons ici proposer quelques pistes de solution que nous estimons pertinentes pour contrer les effets négatifs du patronage de complaisance et redonner au concept de patronage souple, son sens juridique originel. Certains des éléments qui seront analysées sont déjà prévues par le projet de texte relatif à l'exploitation des fonds marins. Cependant, étant donné que le texte est encore dans sa phase de négociation, ces avancées seront utilisées comme des modèles à garder dans le texte définitif. Pour ce faire, nous allons analyser successivement : la question de l'élargissement des obligations environnementales aux entreprises contractantes (4.1), l'application stricte de la " due diligence " à tous les niveaux (4.2), l'encadrement du " contrôle effectif " et le recours au patronage conjoint pour limiter les dérives liées à l'autonomie de la personnalité juridique en droit de la mer (4.3)

4.1 La nécessité de l'élargissement des obligations environnementales aux entreprises contractantes

L'évolution observée dans le cadre des négociations du Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone[103], démontre que les États ont marqué (dans certains cas) une avancée considérable en ce qui concerne les obligations des entreprises contractantes – une avancée qui de fait, permet de compenser les lacunes relatives aux capacités de contrôle et de surveillance des États qui patronnent.

En effet, alors que la CNUDM évoque essentiellement les obligations applicables aux États et aux organisations internationales (en particulier l'Autorité), le projet relatif au code d'exploitation des fonds marins complète cette approche, en ajoutant l'entreprise contractante dans la liste des acteurs censés prendre des mesures nécessaires pour garantir la protection du milieu marin. En guise d'illustration, l'article 139, paragraphe 1 de la CNUDM indique que :

> Il incombe aux États Parties de veiller à ce que les activités menées dans la Zone, que ce soit par eux--mêmes, par leurs entreprises d'État ou par des personnes physiques ou morales possédant leur nationalité ou effectivement contrôlées par eux ou leurs ressortissants, le soient conformément à la présente partie. La même obligation incombe aux organisations internationales pour les activités menées dans la Zone par elles.

De son côté, le Projet, par exemple dans son article 46, indique que : "L'Autorité, les États patronnant et les contractants élaborent, mettent en œuvre et modifient, selon qu'il convient, les mesures nécessaires pour protéger efficacement le milieu marin des effets nocifs que pourraient avoir les activités menées dans la Zone". Cette nouvelle approche, qui consiste à ajouter l'entreprise contractante dans la liste des acteurs qui doivent prendre des mesures nécessaires pour protéger le milieu marin, irrigue l'ensemble du corps du texte du Projet, particulièrement en ce qui concerne les dispositions juridiques évoquant les obligations environnementales. Par ailleurs, il est aussi remarqué que le Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone prévoit plusieurs obligations applicables à l'entreprise contractante, à savoir entre autres : l'application de l'approche de précaution[104] ; veiller à l'application des meilleures techniques disponibles et des meilleures pratiques environnementales dans l'exécution de ces mesures[105] ; prendre en compte les meilleures données scientifiques disponibles dans la prise de décisions, s'agissant notamment de toutes les activités d'évaluation et de gestion des risques menées

patronnent des personnes et entités dans le cadre d'activités menées dans la zone. 1er février 2011. TIDM Recueil 2011, para 106.

[101] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone.* 1er février 2011. TIDM Recueil 2011, para. 159

[102] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone.* 1er février 2011. TIDM Recueil 2011, para. 159

[103] Cf. INTERNATIONAL SEABED AUTHORITY. Document n. ISBA/25/C/WP.1 relatif au *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone.* 22/03/2021.

[104] Cf. INTERNATIONAL SEABED AUTHORITY. Document n. ISBA/25/C/WP.1 relatif au *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone.* 22/03/2021, art, 46. a.

[105] INTERNATIONAL SEABED AUTHORITY. Document n. ISBA/25/C/WP.1 relatif au *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone.* 22/03/2021, art, 46. a. art 46. b.

dans le cadre d'évaluations écologiques, ainsi que des mesures de gestion et d'intervention prises conformément à la bonne pratique du secteur.[106] Ces éléments constituent une avancée importante permettant de traduire les exigences internationales en normes concrètes et directement exécutables au niveau opérationnel de l'entreprise. Concernant la lutte contre la pollution, le Projet indique que l'entreprise contractante a des obligations spécifiques, par exemple celle de prendre :

> toutes les mesures nécessaires pour prévenir, réduire et maîtriser la pollution et les autres risques que les activités menées dans la Zone font peser sur le milieu marin, conformément au plan de gestion de l'environnement et de suivi et aux normes et directives applicables .[107]

Ainsi, alors que la CNUDM dans son article 194 n'imposait ces obligations qu'aux États et à l'Autorité, grâce aux nouvelles avancées effectuées durant les négociations du projet, ces obligations sont dorénavant expressément imposées aux entreprises contractantes. Le contractant ne peut déverser, immerger ou rejeter dans le milieu marin de sédiments, des déchets ou d'autres effluents issus de l'extraction minière, sauf si ce déversement, cette immersion ou ce rejet est autorisé conformément aux textes applicables.[108] D'autres obligations directes systématisées par la Chambre pour le règlement des différends relatifs aux fonds marins telles que la mise en place d'un plan d'urgence et d'intervention ont été expressément transformées en obligations imposables aux entreprises contractantes.[109] Par ailleurs, considérant que ces évolutions ne figurent pour l'instant que dans un projet de texte non adopté, il serait souhaitable qu'elles soient maintenues et sauvegardées dans le texte final qui sera adopté. Cet élargissement d'obligations aux entreprises est aussi identifié dans l'application des obligations de due diligence. Les lignes suivantes nous en diront plus.

4.2 Application stricte et évolutive de la "due diligence " à tous les niveaux de la chaîne de valeur pour une responsabilisation systémique de tous les acteurs impliqués.

Une manière de rendre plus robuste le mécanisme de patronage dans la CNUDM serait d'appliquer l'obligation de due diligence stricte et évolutive, pas seulement au niveau des Etats qui patronnent, mais aussi au niveau des entreprises contractantes à chaque niveau de la chaîne de production. Un point important dans ce sens est que le projet de règlement sur l'exploitation de la Zone, actuellement en négociation, va dans ce sens. En effet, ce projet introduit une obligation de diligence explicite et élargie qui s'applique aussi et directement aux entreprises contractantes – en utilisant une approche globale transversale qui englobe les dimensions techniques, environnementales, commerciales et sociétales de l'exploitation minière dans la Zone.[110] Cette obligation se retrouve notamment dans la section 6 (relative à l'utilisation de sous-traitants et de tiers – clauses 6.1 à 6.3) de l'annexe X relative aux Clauses types du contrat d'exploitation, qui impose au contractant de démontrer qu'il met en œuvre des mesures appropriées dans le choix et le contrôle de ses fournisseurs,[111] ainsi que dans les règlements 31 et 31 bis, qui précisent l'obligation d'anticiper et de minimiser les effets des activités extractives sur des infrastructures critiques comme les câbles sous-marins.[112] Cette reconfiguration de la due diligence, telle qu'envisagée dans le projet de règlement (articles 31, 44, Annexe X), s'inscrit dans une logique de prévention active, fondée sur la mise en œuvre d'un système structuré de gestion des risques tout au long de la chaîne de valeur. Cette responsabilité ne se limite plus aux États qui patronnent, mais s'étend aux contractants, à leurs filiales et à leurs sous-traitants.

[106] INTERNATIONAL SEABED AUTHORITY. Document n. ISBA/25/C/WP.1 relatif au *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone*. 22/03/2021, art, 46. a. 44, art. 46. c.

[107] AUTORITÉ INTERNATIONALE DES FONDS MARINS. Document n. ISBA/25/C/WP.1 relatif au *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone*. 2019 , art. 47.

[108] AUTORITÉ INTERNATIONALE DES FONDS MARINS. Document n. ISBA/25/C/WP.1 relatif au *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone*. 2019 art. 48.

[109] AUTORITÉ INTERNATIONALE DES FONDS MARINS. Document n. ISBA/25/C/WP.1 relatif au *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone*. 2019 art. 53; annexe V.

[110] Cf. INTERNATIONAL SEABED AUTHORITY. *Draft regulations on exploitation of Mineral resources in the Area - Revised Consolidated Tex*t. ISBA/30/C/CRP.1. 29 November 2024, art . 31 et 31 bis.

[111] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone : Projet de règlement établi par le président du Conseil sur la base des travaux de la Commission juridique et technique*. ISBA/25/C/WP.1. Kingston : AIFM, 22 mars 2019. Annexe X – Clauses types du contrat d'exploitation, section 6 (Utilisation de sous-traitants et de tiers), clauses 6.1 à 6.3. Disponible en: https://www.isa.org.jm/wp-content/uploads/2022/06/isba_25_c_wp1-e_0.pdf. Accès le : 25 juill. 2025.

[112] INTERNATIONAL SEABED AUTHORITY. *Draft regulations on exploitation of Mineral resources in the Area - Revised Consolidated Tex*t. ISBA/30/C/CRP.1. 29 November 2024, art . 31 et 31 bis

BOMBAKA, Harvey Mpoto. Le "patronage de complaisance " dans le cadre des activités de la Zone : une épée de Damoclès sur la protection uniforme du patrimoine commun de l'humanité. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 93-120, 2025.

Lors de la 30e session de l'ISA en juillet 2025, plusieurs délégations ont appuyé cette approche ascendante et descendante, même si son caractère juridiquement obligatoire demeure en discussion dans le cadre des négociations finales[113]

L'obligation de diligence ne se limite pas à la promulgation de règles internes, mais implique la mise en œuvre de moyens appropriés selon la capacité réelle des États – visant indirectement également les contractant.[114] Cela implique une vigilance continue, non seulement avant, mais pendant toute la durée des activités, et justifie des ajustements dynamiques du contrat en fonction de l'évolution scientifique et technologique. L'interprétation stricte et évolutive (incluant également les contractants) de la due diligence a été réaffirmée par l'Avis consultatif n°31 du TIDM sur les obligations des États en matière de lutte contre le changement climatique. Le Tribunal y affirme que les États sont tenus d'adopter toutes les mesures concrètes, efficaces et scientifiquement fondées pour prévenir les atteintes graves ou irréversibles au milieu marin.[115] Il est donc indiqué une vigilance environnementale élargie et évolutive, intégrée à l'ensemble des activités sous juridiction ou contrôle d'un État. Dans ce contexte, en faisant une lecture croisée du projet de règlement sur l'exploitation de la Zone et les avis consultatifs du TIDM, l'approche dite de " due diligence ascendante et descendante " prend tout son sens : le contractant doit structurer ses propres processus internes selon des standards élevés, tout en s'assurant que ses fournisseurs, sous--traitants et partenaires commerciaux appliquent des exigences équivalentes. Cette responsabilité en cascade s'aligne avec la logique de chaîne de valeur responsable, aujourd'hui consacrée par plusieurs instruments normatifs, notamment les Principes directeurs de l'OCDE à l'intention des entreprises multinationales[116] et les lignes directrices du HCDH[117] sur les droits humains et l'environnement. Par ailleurs, la directive européenne sur le devoir de vigilance des entreprises (CSDDD) (bien que régionale, elle demeure pertinente de par son application extraterritoriale) offre un parallèle utile.[118] Il impose aux entreprises opérant dans des chaînes de valeur globalisées d'identifier, prévenir, atténuer et, le cas échéant, réparer les atteintes environnementales, y compris lorsqu'elles sont le fait de filiales ou partenaires étrangers.[119] Cette convergence normative renforce la crédibilité de la due diligence comme principe structurant de gouvernance transnationale, qui transcende les cloisonnements entre sphère publique et acteurs privés. Cependant, l'effectivité procédurale de ces obligations dans la Zone reste tributaire des mécanismes de contrôle de l'Autorité. Le projet de règlement prévoit à l'article 104 la possibilité pour l'Autorité d'imposer des plans correctifs contraignants, en cas de manquement, pouvant aller jusqu'à la suspension ou la résiliation du contrat.[120] Une proposition complémentaire consisterait à instaurer un mécanisme indépendant de plainte environnementale, ouvert à des ONG, communautés affectées ou tiers légitimes, inspiré du Panel d'inspection de la Banque mondiale[121] ou des points de contact nationaux de l'OCDE.[122]

En définitive, la due diligence imposée par le projet de règlement de l'Autorité ne constitue pas une simple condition administrative, mais bien une condition substantielle d'accès, de maintien et de renouvellement

113 EARTH NEGOTIATIONS BULLETIN. *Summary of the Thirtieth Annual Session of the International Seabed Authority (Second Part):* 7–25 July 2025. Disponible en: https://enb.iisd.org/sites/default/files/2025-07/enb25259e.pdf. Consulté le: 28 oct. 2025.

114 TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone.* 1er février 2011. TIDM Recueil 2011, para 117-122.

115 TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. *Demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international* (Affaire n° 31). Avis consultatif du 21 mai 2024. Hambourg: TIDM, 2024. par. 111-117, 123.

116 OCDE. *Principes directeurs à l'intention des entreprises multinationales.* Paris: Organisation de coopération et de développement économiques, 2018

117 HAUT-COMMISSARIAT DES NATIONS UNIES AUX DROITS DE L'HOMME (HCDH). *Lignes directrices relatives aux droits de l'homme et à l'environnement:* mise en œuvre des obligations en matière de droits de l'homme liées à l'environnement. A/HRC/49/53, 2021.

118 UNION EUROPÉENNE. Directive. 2024/1760 du Parlement européen et du Conseil du 13 juin 2024 relative au devoir de vigilance en matière de durabilité des entreprises. *Journal officiel de l'Union européenne*, L 2024/1760, 5 juil. 2024.

119 UNION EUROPÉENNE. Directive. 2024/1760 du Parlement européen et du Conseil du 13 juin 2024 relative au devoir de vigilance en matière de durabilité des entreprises. *Journal officiel de l'Union européenne*, L 2024/1760, 5 juil. 2024. Art. 1 Para. 1

120 Cf. UNION EUROPÉENNE. Directive. 2024/1760 du Parlement européen et du Conseil du 13 juin 2024 relative au devoir de vigilance en matière de durabilité des entreprises. *Journal officiel de l'Union européenne*, L 2024/1760, 5 juil. 2024. art. 103

121 BANQUE MONDIALE. *Panel d'inspection – Mécanisme de responsabilité.* Washington, D.C.: Banque mondiale, 2022.

122 OCDE. *Points de contact nationaux pour la conduite responsable des entreprises.* Paris: Organisation de coopération et de développement économiques, 2024.

des droits d'exploitation dans la Zone. Cette exigence contribue à faire évoluer le régime d'un système *autorisationnel* vers une gouvernance adaptative, fondée sur la transparence, la traçabilité, la responsabilité élargie et la prévention continue, dans le respect des articles 136, 139 et 145 de la CNUDM. Ceci nous ramène au point suivant relatif à l'autonomie de la personnalité juridique des entreprises contractants.

4.3 Encadrement du " contrôle effectif " et recours au patronage conjoint pour limiter les dérives liées à l'autonomie de la personnalité juridique en droit de la mer

L'un des principaux obstacles à une gouvernance effective et équitable des activités menées dans la Zone tient à l'usage stratégique de la personnalité juridique distincte par les entreprises transnationales. Cette autonomie juridique – pilier du droit des sociétés – leur permet de constituer des filiales dans des États en développement afin de bénéficier des avantages du patronage souple, tout en isolant juridiquement la maison-mère de toute forme de responsabilité directe. Cette dissociation entre le centre de décision réel et l'entité juridique opérante crée un écran normatif que l'on peut qualifier de blindage institutionnel asymétrique, entravant la mise en œuvre du principe de diligence requise tel que prévu à l'article 139 de la CNUDM.

Dans son Avis consultatif de 2011, la Chambre pour le règlement des différends relatifs aux fonds marins reconnaît indirectement cette problématique, en indiquant que l'État qui patronne ne peut se contenter d'un lien juridique formel avec le contractant, mais doit s'assurer d'un contrôle effectif sur ses activités.[123] Or, la dissociation de la personnalité morale empêche souvent l'identification du véritable centre de décision, en particulier lorsque les filiales bénéficient d'une autonomie de façade, mais sont entièrement contrôlées en pratique par leur société mère située dans un pays développé. Face à ce constat, plusieurs propositions normatives émergent, visant à repenser le régime de responsabilité dans la Zone en rompant avec l'approche purement formelle du lien juridique.

Parmi les solutions envisageables pour mieux encadrer les pratiques de contournement par filiales, plusieurs délégations ont proposé, au cours des discussions de 2025, de développer un test de contrôle économique et administratif fondé sur des critères objectifs tels que la détention majoritaire du capital, la nomination effective des dirigeants, la maîtrise des flux financiers ou encore le lieu de décision stratégique.[124] Ce double critère permettrait de lever le voile corporatif et d'imputer aux sociétés mères les responsabilités environnementales de leurs filiales si un lien de contrôle substantiel est établi. Bien que cette approche ait été saluée par plusieurs participants, aucun seuil normatif contraignant n'a encore été intégré dans le projet de règlement.[125] La mise en place d'un tel test reste donc une perspective en construction.

Dans cette même perspective, un autre problème clé reste sans doute la définition du lien substantiel ('effective control'). Le projet d'exploitation n'en offre toujours pas de définition précise.[126] Toutefois, un briefing paper de l'Autorité propose une double approche — juridico-administrative et économico-managériale —

[123] TRIBUNAL INTERNATIONAL DU DROIT DE LA MER. Chambre pour le règlement des différends relatifs aux fonds marins. *Avis consultatif 17, relatif aux responsabilités et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la zone.* 1er février 2011. TIDM Recueil 2011, par. 77-78.

[124] EARTH NEGOTIATIONS BULLETIN. *Summary of the Thirtieth Annual Session of the International Seabed Authority (Second Part):* 7–25 July 2025. Disponible en: https://enb.iisd.org/sites/default/files/2025-07/enb25259e.pdf. Consulté le: 28 oct. 2025; INTERNATIONAL SEABED AUTHORITY. *Draft regulations on exploitation of mineral resources in the Area: Revised Consolidated Text – ISBA/30/C/CRP.1.* Kingston: ISA, 10 janv. 2025, p. 132-133 (reg. 83 bis – Beneficial Ownership Registry), p. 249 (Glossaire : définition de « Effective Control », incluant lieu de gestion, bénéficiaires effectifs et maîtrise des ressources). Disponible en: https://www.isa.org.jm/wp-content/uploads/2025/01/10012025-Revised-Consolidated-Text-2.pdf. Consulté le : 28 out. 2025; INTERNATIONAL SEABED AUTHORITY. *Briefing paper on conceptual topics related to the Informal Working Group on Institutional Matters in the ISA's Exploitation Regulations* :Effective Control. Kingston: ISA, 25 mars 2024, § 11 (liste de critères : détention majoritaire des actions/droits de vote, droit de nommer le conseil, influence décisive, etc.). Disponible en: https://www.isa.org.jm/wp-content/uploads/2024/03/Briefing-paper-on-Effective-Control.pdf. Consulté le: 28 out. 2025.

[125] INTERNATIONAL SEABED AUTHORITY. *ISBA/30/C/19:* Decision of the Council of the International Seabed Authority relating to the reports of the Chair of the Legal and Technical Commission. Kingston: AIFM, 21 juil. 2025, § 13. Disponible en: https://www.isa.org.jm/wp-content/uploads/2025/07/EN_ISBA_30_C_19-Decision-of-the-Council-of-the-International-Seabed-Authority-relating-to-the-reports-of-the-Chair-of-the-Legal-and-Technical-Commission.pdf. Consulté le: 28 out. 2025.

[126] Cf. INTERNATIONAL SEABED AUTHORITY. *Draft regulations on exploitation of Mineral resources in the Area - Revised Consolidated Text*. Use of terms and scope. ISBA/30/C/CRP.1. 29 November 2024.

pour objectiver ce lien.[127] Cette clarification permettrait de distinguer un véritable co-patronage, fondé sur une influence réelle, des pratiques purement formelles ou transactionnelles. Par ailleurs, l'introduction d'un tel test dual permettrait d'établir des seuils cumulatifs (ex. : plus de 50 % du capital, nomination effective des dirigeants, flux financiers contrôlés), assurant qu'un État ne puisse plus utiliser une filiale écran pour contourner ses obligations.

La CNUDM propose déjà un encadrement préliminaire allant dans ce sens. À l'article 4(3) de l'annexe III de la CNUDM, il est prévu que si la nationalité de l'entreprise contractante et son contrôle effectif relèvent de deux États différents, le patronage conjoint devient obligatoire, imposant aux deux États d'assumer ensemble la responsabilité.[128] Cette approche est même réitérée par le Projet de règlement sur l'exploitation des ressources minérales dans la Zone, qui réaffirme cette possibilité dans un cadre opérationnel[129], tout en imposant des obligations conjointes aux États patronnant.[130] Toutefois, aussi bien la CNUDM que le projet restent insuffisant pour empêcher les abus liés au patronage de complaisance. En effet, ils n'encadrent ni les modalités concrètes ni les risques du patronage conjoint. En l'absence de critères stricts ou de responsabilités partagées clairement définies, ce dispositif laisse encore des marges de manœuvre permettant d'instrumentaliser la mécanique de patronage. A *contrario*, si les dispositions encadrant le patronage conjoint étaient renforcées, elles permettraient d'opérer une rupture significative avec l'approche formaliste actuellement tolérée dans la Zone. Une telle évolution consacrerait l'idée que le simple portage juridique d'une entité ne saurait suffire à éluder la responsabilité internationale d'un groupe transnational. Ce serait reconnaître que le contrôle économique et décisionnel réel engage des obligations substantielles, au-delà du simple lien de nationalité affichée.

De manière complémentaire, il conviendrait d'adopter, dans le droit positif de la gouvernance marine, une doctrine de levée du voile juridique adaptée aux spécificités du patrimoine commun de l'humanité.[131] Cette doctrine, bien connue en droit commercial interne (notamment en common law), permet d'ignorer la personnalité juridique de la filiale lorsque celle-ci est utilisée dans le but de frauder la loi ou d'éluder une réglementation.[132] Dans le contexte du droit de la mer, la transposition du principe de levée du voile juridique permettrait d'empêcher l'utilisation stratégique de sociétés écrans pour contourner les exigences en matière de transparence, de contrôle environnemental ou de partage équitable des bénéfices. Bien qu'en droit de la mer, cette approche ne soit pas encore codifiée, elle fait désormais l'objet de discussions au sein du Legal and Technical Commission (LTC). En 2025, le Secrétariat de l'ISA a reconnu la nécessité d'outils juridiques permettant d'identifier les bénéficiaires économiques réels. Toutefois, aucune disposition explicite relative à la levée du voile n'a encore été intégrée dans le projet de règlement.

Enfin, cette rupture avec l'autonomie juridique pure doit être inscrite dans une logique de justice intergénérationnelle et environnementale, en lien direct avec le principe de précaution[133] et le devoir de prévention inscrit à l'article 145 de la CNUDM. En retenant la responsabilité conjointe des sociétés mères et de leurs filiales agissant dans la Zone, on renforcerait l'effectivité du régime, tout en garantissant que la personnalité juridique ne soit plus un outil de désengagement stratégique, mais un vecteur de transparence et d'obligation. Ce repositionnement doctrinal et institutionnel suppose toute-

[127] INTERNATIONAL SEABED AUTHORITY. *Briefing paper on Effective Control*. Kingston, 2024, para. 13 (i)–(ii). Disponible en: https://isa.org.jm/files/files/documents/Briefing_Paper_Effective_Control_2024.pdf. Consulté le: 28 out. 2025; INTERNATIONAL SEABED AUTHORITY. *Discussion Paper: Effective Control*. Kingston, jan. 2023, para. 9. Disponible en: https://isa.org.jm/files/files/documents/Discussion_Paper_Effective_Control_2023.pdf Consulté le: 28 out. 2025;

[128] ONU. *Convention des Nations Unies sur le droit de la mer*. Jamaïque, 10 déc. 1982. anexe III. Art. 4 - 3

[129] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone : Projet de règlement établi par le président du Conseil sur la base des travaux de la Commission juridique et technique*. ISBA/25/C/WP.1. Art. 6 – 3 - b

[130] AUTORITÉ INTERNATIONALE DES FONDS MARINS. *Projet de règlement relatif à l'exploitation des ressources minérales dans la Zone : Projet de règlement établi par le président du Conseil sur la base des travaux de la Commission juridique et technique*. ISBA/25/C/WP.1. Art. 105

[131] FARNIER, Marion. *Le beneficial owner et la saisie d'un navire autre que celui auquel la créance se rapporte*. Marseille: Université d'Aix-Marseille, Centre de Droit Maritime et des Transports, 2017. Disponible en: https://pole-transports-facdedroit.univ-amu.fr/sites/pole-transports-facdedroit.univ-amu.fr/files/public/farnier_marion.pdf. Consulté le: 29 juil. 2025.

[132] FARNIER, Marion. *Le beneficial owner et la saisie d'un navire autre que celui auquel la créance se rapporte*. Marseille: Université d'Aix-Marseille, Centre de Droit Maritime et des Transports, 2017. Disponible en: https://pole-transports-facdedroit.univ-amu.fr/sites/pole-transports-facdedroit.univ-amu.fr/files/public/farnier_marion.pdf. Consulté le: 29 juil. 2025.

[133] NATIONS UNIES. *Déclaration de Rio sur l'environnement et le développement*. Rio de Janeiro: Nations Unies, 1992. Principe 15

fois une réforme du régime contractuel entre l'Autorité et les contractants. Il conviendrait d'intégrer dans les contrats une clause de responsabilité élargie, imposant au contractant de révéler sa structure de propriété, ses bénéficiaires effectifs et les engagements juridiques de sa maison mère. Le refus de coopérer à cette exigence pourrait constituer un motif de retrait ou de suspension du contrat d'exploitation, conformément à l'article 18 de l'annexe III de la CNUDM et de l'article 103 du Projet de règlement.

En conclusion, la rupture avec l'autonomie de la personnalité juridique dans le contexte de la gouvernance des fonds marins n'est pas une option idéologique, mais une exigence technique et juridique fondée sur l'intérêt supérieur du PCH. L'enjeu est clair : mettre fin à l'instrumentalisation des structures juridiques pour légitimer des pratiques extractivistes échappant au contrôle, et rétablir la pleine traçabilité juridique, environnementale et économique des activités menées dans la Zone.

5 Conclusion

D'une manière générale, l'objectif fondamental du principe de PCH repose avant tout sur l'idéal d'une gouvernance équitable, transparente et respectueuse de l'environnement. Cependant, comme l'a montré notre étude, la pratique émergente du patronage de complaisance menace cet édifice normatif en introduisant des logiques opportunistes qui vont à l'encontre de l'esprit et de la lettre de la CNUDM. L'usage stratégique du patronage par des entreprises transnationales, sous couvert de la personnalité juridique d'États à capacités limitées, fragilise l'universalité des standards environnementaux, compromet la répartition équitable des bénéfices et expose ces mêmes États à des responsabilités qu'ils ne sont matériellement pas en mesure d'assumer.

Compte tenu de ce problème systémique, plusieurs ajustements s'imposent. Nous pensons par exemple au renforcement des obligations directes des entreprises contractantes, à l'application rigoureuse et évolutive des obligations de due diligence à tous les niveaux de la chaîne de valeur, ou encore à l'amélioration du contour juridique de la notion du "contrôle effectif ", incluant un concept de co-patronage robuste. L'insertion de ces mécanismes apparaissent apparaît comme essentiels pour rétablir l'équilibre du régime applicable à la Zone. Il conviendrait également de repenser le rôle de la personnalité juridique en droit de la mer, en prévoyant, le cas échéant, une levée du voile corporatif afin de garantir une traçabilité et une imputabilité réelle.

Nous estimons que ces réformes, à la fois techniques, institutionnelles et philosophiques, pourraient préserver l'intégrité du régime de la Zone, assurer l'effectivité du principe du PCH et prévenir l'avènement d'une gouvernance à plusieurs vitesses, dans laquelle le droit environnemental international serait contourné au profit d'intérêts économiques privés. Dans un contexte de montée des périls climatiques et de pressions croissantes sur les écosystèmes marins, repenser les modalités du patronage constitue une urgence juridique et éthique. Le choix est clair : ou bien le patronage reste un vecteur de solidarité planétaire, ou bien il deviendra le cheval de Troie d'un nouvel extractivisme globalisé.

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Abstract

The overall governance and scope of the global commons under the new BBNJ Agreement (High Seas Biodiversity Agreement) concluded under the United Nations Convention on the Law of the Sea (UNCLOS 1982) include recognising the historical rights and the fair and equitable division, sharing, and allocating resources and the benefits deriving from it. Additionally, assessing the value of user rights, value as a property and as a resource, recognising the communal ownership or rights if any, and the cost of acquiring and enforcing property rights need immediate attention from the international community while enforcing the governance system for the global commons, that are considered the common heritage of mankind (CHM). The elements of the CHM principle have acceptance among the international community, especially among developing nations, least developed nations and Small Island Developing States, and the Caribbean Island communities for the regulation of activities in Areas Beyond National Jurisdiction. In this context, it is important to identify the nature of MGRs for the existing property concepts for the common resources. This study has majorly relied upon primary legal sources, comprising international treaties, legislations, and case laws, and secondary materials for a deep literature review in the areas of ABNJ, BBNJ, UNCLOS, MGRs, benefit sharing, TK, deep sea, high seas, biodiversity, actual value, potential value, sustainable use, etc. The paper focuses significance of international law in ocean governance by looking into governance of global commons. It is identified that global consensus among the international community is required on the applicability of customary principles and approaches in addressing the issues, including sustainability in exploration and exploitation, access regulation, and ensuring fair and equitable sharing of benefits.

Keywords: areas beyond national jurisdiction; BBNJ; common heritage of mankind; global commons; sustainable development goals.

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Resumo

A governança e o escopo dos bens comuns globais no âmbito do novo Acordo BBNJ (Acordo sobre a Biodiversidade em Áreas Além da Jurisdição Nacional), concluído sob a égide da Convenção das Nações Unidas sobre o Direito do Mar (CNUDM, 1982), compreendem o reconhecimento dos direitos históricos e a divisão, partilha e alocação justas e equitativas dos recursos e dos benefícios deles derivados. Ademais, a avaliação do valor dos direitos de uso, do valor enquanto propriedade e enquanto recurso, o reconhecimento da propriedade ou dos direitos comunitários, quando existentes, bem como o custo de aquisição e de execução dos direitos de propriedade, demandam atenção imediata da comunidade internacional na implementação de um sistema de governança dos bens comuns globais, considerados patrimônio comum da humanidade (PCH). Os elementos do princípio do PCH encontram ampla aceitação na comunidade internacional, em especial entre os países em desenvolvimento, os países menos desenvolvidos, os Pequenos Estados Insulares em Desenvolvimento e as comunidades insulares do Caribe, no que concerne à regulamentação das atividades nas Áreas Além da Jurisdição Nacional (ABNJ). Nesse contexto, torna-se relevante identificar a natureza dos recursos genéticos marinhos (MGRs) à luz dos conceitos vigentes de propriedade aplicáveis aos recursos comuns. O presente estudo fundamenta-se majoritariamente em fontes jurídicas primárias — compostas por tratados internacionais, legislações e jurisprudência —, complementadas por materiais secundários, para uma revisão aprofundada da literatura nas áreas de ABNJ, BBNJ, CNUDM, MGRs, partilha de benefícios, conhecimentos tradicionais (TK), mar profundo, alto-mar, biodiversidade, valor real, valor potencial, uso sustentável, entre outros. O artigo sublinha a relevância do direito internacional na governança dos oceanos, examinando a gestão dos bens comuns globais e identificando a necessidade de um consenso global sobre a aplicabilidade dos princípios e abordagens costumeiros para enfrentar questões relacionadas à sustentabilidade na exploração e no aproveitamento, à regulação do acesso e à garantia de uma partilha justa e equitativa dos benefícios.

Palavras-chave: áreas além da jurisdição nacional; BBNJ; patrimônio comum da humanidade; bens comuns globais; objetivos de desenvolvimento sustentável.

1 Introduction

The marine Areas Beyond National Jurisdiction (ABNJ) are outside the State's jurisdictional limits, and the resources derived from there, the Marine Genetic Resources (MGRs), due to their nature of existence, require specific regulatory mechanisms to ensure the sustainability of the ecosystem and the resources.[1] The surge in interdependence and correlated interactions, including scientific research and other Research and Development (R&D) activities over the marine resources from ABNJ, justify the initiatives for global governance of ocean resources. Additionally, the challenges in achieving the objectives proposed under the Sustainable Development Goals (SDGs)[2] and other biodiversity conservation initiatives, including the Aichi Targets, proposed under the United Nations Convention on Biological Diversity 1992 (CBD), prompted the international community to take initiatives to regulate the exploitation and ensure the sustainability of biological resources.[3] The accomplishment of these sustainability targets focused on addressing all elements affecting the marine realm while recognising the interrelation between anthropogenic activities.[4] It demands augmented consistency, synchronisation, and cooperative administrative practices at the global level, stranded on globally recognised rights of the international community.

The role of international law is significant in recognising the rights of all the stakeholders over global resources and in the regulation of activities implemented through state cooperation, other international or regional policies, international arrangements, and joint decision-making.[5] Ensuring fair and equitable benefit-sharing, regulation of access of MGRs from ABNJ, the assertion of historical rights, equitable sharing and

[1] HALL, Charles. Institutional Solutions for Governing the Global Commons: Design Factors and Effectiveness. *The Journal of Environment & Development,* v. 7, n. 2, p. 86-88, 1998.

[2] BABATUNDE, Abidoye *et al*. The origin and progress of the sustainable development goals. *In:* SHERYL, L. *et al*. (ed.) *Handbook on public policy and food security*. [*S. l.*]: Edward Elgar Publishing, 2024.

[3] SUSTAINABLE DEVELOPMENT GOALS KNOWLEDGE PLATFORM. *Oceans and Seas*. Available at: https://sustainabledevelopment.un.org/topics/oceanandseas.

[4] WCED. *Our Common Future, Managing the Commons in Report of the World Commission on Environment and Development:* Our Common Future. UN, 1987. Available at: http://www.un-documents.net/ocf-10.htm#I.

[5] HALL, Charles. Institutional Solutions for Governing the Global Commons: Design Factors and Effectiveness. *The Journal of Environment & Development,* v. 7, n. 2, p. 87-91, 1998.

allocation of resources, and proper monitoring and management of intellectual property rights (IPR) over MGRs including commercialisation for benefit-sharing, etc., are some key concerns to be addressed under the new governance framework for ABNJ and the resources.[6] Through the evolution of various legal and policy developments in ocean governance under international law, paper delves into the role and analyse the expanded scope of CHM Principle for marine biodiversity management from the ABNJ in the light of the BBNJ Agreement concluded under the UNCLOS.

2 Biodiversity as a natural resource and its significance

"Biological diversity or the biodiversity refers to the variety of life".[7] It is a collective expression to indicate the diversities at each stratum of biological associations, mainly categorised into genetic diversity, species diversity, and environmental diversity, including the diversity in the genetic makeup of individuals within and among the folks. The wide array of components of genetic coding, constituting the particular species, including the nucleotides, genes, or chromosomes, comes under genetic diversity.[8] The biological/ecological divergence among the populations in diverse niches and domains is referred to as ecological diversity.[9] Identifying the potential that elements of biodiversity can be traded as commodities, given a monetary value, has created a scope for the subject matter to qualify to the standard rules of private property, making it a discrete illustration of genetic resources getting the status as resourceful genes or genomes.

Considering that biological variability is perceived as an input for subsequent applications in R&D, that focused on evolving innovative combinations, novel genomes, genus, and ecological units in the course of instinctive progression or effected through technological applications.[10] It is again identified that the perception of biological variability and the multiplicity of hereditary attributes[11] as a reserve with undisclosed and unclassified extrinsic value,[12] additional discernments confer the merit to the diversity.[13] Applicability of biodiversity in innovative scientific studies and industrial application assigns it the status as a resource.[14] It can be concluded from the above observations that the concept of genetic resources is a unique category of information in specific genomes or assumed with biodiversity as a natural resource. It highlights the magnitude of information enclosed in the genetic resources, revealing that the merit and potential is not only specific to biodiversity, but also with the abundance of data it enfolds.

2.1 Genetic resources, MGRs, and its non-material nature

The uniqueness and relevance of genetic resources as a meticulous category of a natural resource begins with a comprehensive perception of natural resources as "anything derived from the environment and not made by humans that is instrumental to satisfying human wants and needs. Natural resources hold their potential both as a type of resource having some instrumental value, and as a natural resource that has not been produced or designed by humans (without any human intervention).[15] They are part of the natural wealth of the world".[16] The definition and the characteristics indicate the instrumental value of the resource and, at the same time, the inhuman origin of the resource. Thus, genetic resources, when employed as natural resources and scientific studies and other inventions are used to

[6] WIJKMAN, P. M. Managing the global commons. *International Organization,* v. 36, n. 3, 1982. Available at: https://www.jstor.org/stable/pdf/2706543.pdf. Access on: 31 Dec. 2024.

[7] RAO, M. B.; GURU, Manjula. *Biotechnology, IPRs and Biodiversity.* [*S. l.*]: Pearson Longman, 2007.

[8] GASTON, Kevin J.; SPICER, John I. *Biodiversity:* an introduction. [*S. l.*]: Blackwell Publishers, 2004. p. 5.

[9] SIMCOCK. *The First Global Integrated Marine Assessment*, *World Ocean Assessment* I, UM. Cambridge: Cambridge University Press, 2017. p. 499.

[10] REID, Colin T.; NSOH, Walters. *The Privatisation of Biodiversity?* New Approaches to Conservation Law. [*S. l.*]: Edward Elgar Publishing,Inc., 2016. p. 24.

[11] GILLES, Boeuf. Marine Biodiversity Characteristics. *Comptesrendusbiologies,* v. 334, n. 5-6, p. 435-436, 2011.

[12] PUSHPANGADAN, P.; GEORGE, V.; IJINU, T. P.; CHITHRA, M. A. Biodiversity, Bioprospecting, Traditional Knowledge. *Journal of Traditional Medicine & Clinical Naturopathy,* v. 7, n. 1, p. 2-3, 2018.

[13] DEPLAZES-ZEMP, Anna. Genetic resources, an analysis of a multifaceted concept. *Biological Conservation,* v. 222, p. 86-94, 2018. p. 92-93.

[14] SIGWART, Julia D. *et al.* Unlocking the potential of marine biodiscovery. *Natural Product Reports,* v. 38, n. 7, p. 1235-1242, 2021. p. 1235-1238.

[15] DEPLAZES-ZEMP, Anna. Genetic resources, an analysis of a multifaceted concept. *Biological Conservation,* v. 222, p. 86-94, 2018. p. 92-93.

[16] MOORE, M. *A Political Theory of Territory.* Oxford: Oxford University Press, 2015. p. 163.

get potential outcomes, have instrumental value assigned to generate more profits. Additionally, it is applicable in scientific studies and knowledge enhancement of the marine areas from which resources are collected, the peculiarity of the inhabitant species, their potential, and the design of conservation or protection measures whenever necessary.

However, regarding the use and value of genetic resources, genetic information is the key characteristic. The genome carries the genetic pattern of the species in its DNA or RNA. Critics argue that genetic resources were in use much ahead of the precise understanding of nucleic acids are the bearers of the genetic information and gene sequencing of species.[17] Accordingly, genetic resources are informational because the sample utilisation and its value are derived from the intangible data it holds, in place of the material or the samples that are gathered from nature, exported or exchanged as in the case of other forms of resources including digital sequence information (DSI), or the samples utilised in biopiracy.

MGRs are defined as "any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value".[18] They consist of long sequences of nucleic acid that provide the information needed to generate commercially viable products and other potential output and use value.[19] Nucleic acid sequences hold immense potential for discovering new species,[20] understanding the ocean's role in Earth's past, present, and future, and finding innovative ways to benefit humankind and biodiversity.[21] Thus, MGRs include the genetic information in organisms such as marine plants, animals, and microorganisms. These resources can be found in various forms, such as genes, proteins, enzymes, and other bioactive compounds, that form a crucial part of the marine biodiversity ecosystems, with a pivotal function in scientific research, conservation, and sustainable use. It also has to be noted that genetic resources and the samples are adequate to replace the conventional sampling or collection methods like type collections and biodiversity samples collected or accessed *in-situ* or *ex-situ* for any taxonomic studies, scientific studies, further R&D, and any other scientific and/or commercial development activities.

3 Marine genetic resources and the concept of commons

The notion of commons reflects the idea and conceptualization of traditional global commons, recognised within the multiple realms other than the ABNJ with its resources recognised as commons with different legal regimes for different sets of commons.[22] However, ambiguities still prevail over the concept as well as the legal categorisation of commons as it varies from *res nullius* to *res communis* to *res publicae*, etc.[23] Protecting the commons requires a creative and imaginative effort from jurists although commons do not embody a reality external to or unfamiliar to law. However, the notion of commons holds an array of semantic nuances in public international law, where the theoretical relationship and legal expressions differ with the framework it is chosen for.

Accordingly, it could be understood that the traditional global commons demand unique practices and governance regimes to address specific issues under the prevailing legal systems. In places where any regional/area-specific authority does not exist, the subjects of all states meet upon a footing of entire equality and independence, where no one state or any of its subjects will have a right to assume or exercise authority over the subjects of another, recognizing the equality and independence of sovereign nations.[24] This principle is

[17] DEPLAZES-ZEMP, Anna. Genetic resources, an analysis of a multifaceted concept. *Biological Conservation,* v. 222, p. 86-94, 2018. p. 92-93.

[18] Agreement under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Para 8, A/CONF.232/2023/4,2023. https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/177/28/PDF/N2317728.pdf?OpenElement.

[19] BLEUENN, Guilloux. *Marine genetic resources, R&D and the objects of use*. Nova Jersey: John Wiley & Sons, 2018.

[20] VIERROS, M. *et al.* 'Who Owns the Ocean? Policy Issues Surrounding Marine Genetic Resources'. *Limnology and Oceanography Bulletin*, v. 25, n. 2, p. 29, 2016. Available at: https://doi.org/10.1002/lob.10108

[21] ROGERS, Alex D. *et al.* Marine Genetic Resources in Areas Beyond National Jurisdiction: Promoting Marine Scientific Research and Enabling Equitable Benefit Sharing. *Frontiers in Marine Science,* v. 8, p. 600, 2021. Available at: https://www.frontiersin.org/articles/10.3389/fmars.2021.667274/full

[22] MILUN, Kathryn. *The Political Uncommons:* The Cross-cultural Logic of the Global Commons. Farnham: Ashgate 2011. p. 58-60.

[23] DE LUCIA, Vito. The Concept of Commons and Marine Genetic Resources in Areas Beyond National Jurisdiction'. *MarSafeLaw Journal,* v. 19, n. 5, 2018.

[24] RUTH, Lapidoth. Equity in international law, *Israel Law Review,* v.

upheld in environmental treaties throughout the 20th century referring to shared global problems by means of various expressions that presage the common concern of humankind. By the end of the century, the UNCBD (1992) and the United Nations Framework Convention on Climate Change (UNFCC) (1992) formally expressed the conservation of biological diversity and "change in the Earth's climate and its adverse effects" as common concerns of humankind. The Paris Agreement (2015) also acknowledged climate change as a common concern. All these prevailing legal institutions recognise and call for an international law based on natural law to regulate and govern such areas for the benefit of humanity by addressing the common concern and thus regulating access, sustainable exploitation, and assured sharing benefits.

3.1 Genetic resources as a subject matter of IPR claims and benefit-sharing regulations

Genetic resources, as such, are not a subject matter of IPR claims because they are not the outcome of any intellectual creation or creative and productive human intervention.[25] GRs are eligible only for further inventions from their utilisation.[26] Everyone has the right to access the resources, and key limiting factors include the absence of technological and scientific expertise to work on it and the financial capacity to access,[27] and identification of right repository.[28] However, the above illustrations highlight that claims for property rights are based on the genetic resources and the information carried with them. The intangible nature of information and the scope of utilising the sequence to produce tangible output and associated intangible right claims as IPR are possible without further accessing the resources. Thus, the resource starts accepting and exhibiting its non-rivalrous nature of the public good. However, implementing property rights over the GRs, especially MGRs of ABNJ is an impracticable task, even if it be through regulation of material supply. By assigning property rights or control rights over MGRs, the focus will shift to rights over natural information. The fact here is that repositories where the resources are preserved and serve as the donor of genetic resources also hold the right to forbid others from utilising their natural information or to sell licenses for MGRs held with them.

An additional issue in deciding the nature of property in GR research is the intent of research- whether it is basic research for taxonomic studies, basic biochemistry, conservation biology, etc., or advanced commercial-oriented research with industrial relevance.[29] Even though the distinction between commercial and non-commercial research[30] and bioprospecting with biological samples is difficult,[31] the driving factor is the commercial incentives that motivate to continue with basic research.[32] It also has to be noted that basic research is imperative in compartmentalising the research outcome for its correlation with commercial research; it may set hurdles in deciding the property associated with research, bringing ambiguities in sharing benefits and the negotiations for the use of genetic resources.[33]

The correlation between natural and scientific information is based on the benefits derived and the potential value, where IPR is consigned to the inventors as a reimbursement for their shared non-tangible input. Even though counterarguments are raised on the IPR claims over MGRs, patents and other IPRs are reasoned as an incentive for the new, beneficial, and non-obvious inventions, the paradigm is non-attributable to natural resources/information. Since IPRs, including patents, are the major property rights attributed over the GRs/

22, n. 2, p. 169-171, 1987.

[25] RAUSSER, Gordon C.; SMALL, Arthur A. 'Valuing Research Ideas: Bioprospecting and the Conservation of Genetic Resources'. *Journal of Political Economy*, v. 108, n. 1, p. 173-206, 2000.

[26] PADMA. Protection of Traditional Knowledge Associated with Genetic Resources, in An Introduction to Ethical, Safety and Intellectual Property Rights Issues in Biotechnology, Academic Press, 2017.

[27] BLASIAK, Robert *et al.* Corporate control and global governance of marine genetic resources. *Science advances,* v. 4, n. 6, 2018.

[28] LATHE, W. J. *et al.* Genomic Data Resources: Challenges and Promises, *Nature Education,* v. 1, n. 3, 2008.

[29] DEPLAZES-ZEMP, Anna. Genetic resources, an analysis of a multifaceted concept. *Biological Conservation,* v. 222, p. 86-94, 2018. p. 86-93.

[30] HUGHES, Kevin A.; PAUL D. Bridge. Potential impacts of Antarctic bioprospecting and associated commercial activities upon Antarctic science and scientists. *Ethics in Science and Environmental Politics*, v. 10, n. 1, p. 13-18, 2010.

[31] GHANASHYAM, Sharma; PRADHAN, Bharat Kumar. Exploring traditional knowledge: bio-prospecting and biopiracy in India and Southeast Asian mega-diversity nations. *In*: PANICKER, L. K.; NELLIYAT, P.; OOMMEN, O. V. (ed.). *Biodiversity and business*. Cham: Springer, 2024. p. 447-483

[32] YPSITA, Demunshi; CHUGH, Archana., 'Role of traditional knowledge in marine bioprospecting'. *Biodiversity and Conservation,* n. 19, p. 3015-3033, 2010.

[33] DEPLAZES-ZEMP, Anna. Genetic resources, an analysis of a multifaceted concept. *Biological Conservation,* v. 222, p. 86-94, 2018. p. 86-93.

MGRs/or the associated information, the question on control rights over natural information requires justifications on the grounds on which IPRs are granted, similar to conventional property rights above the material, natural resources can be justified considering the human intervention including the scientific, technological and intellectual inputs.

3.2 Appropriation of natural resources from ABNJ and governance challenges

The natural resources, particularly the varying oceanic species and the biochemical components derived from the marine realm, are outside the holder's control, whether a public entity or any individual possessor. The ABNJ and the resources of potential interest to the scientific/ industrial communities in the technologically and economically advanced developed nations makes it a fundamental subject of legal debates on international platforms.[34] Contribution of the key concepts in environmental governance for the global commons-[35] mainly common concern, common heritage, common areas, common goods, common interest, shared responsibility, or even community interest, etc. over the multilateral aspects of international environmental law or the bilateral or regional commitments is important in regulating and monitoring the activities over them.[36] The expansion of international environmental law brought a distinction to the origin of resources/ matters related to internal to/ within jurisdictional limits of states, transboundary resources, or those belong to ABNJ.[37] The transboundary obligations in customary environmental law significantly transform the rules from specific to global.

The inverse relation between biological resource diversity and the technological capacity to exploit and work on them to develop commercially viable and potential products has always been a subject of controversy between the developed and developing/under-developed nations. UN General Assembly adopted Resolution 1803 on 14 December 1962 to recognize permanent sovereignty over natural resources (PSNR), emphasizing sovereignty over natural resources[38] and several economic aspects,[39] the major reason for the existing conflicts on the appropriation and use of natural resources.[40] The doctrine of PSNR deals with the right of the State to freely use, exploit, and regulate its natural resources within its territory,[41] confined to terrestrial resources and limited distance from shore to marine areas.[42] It created a balance by laying a certain duty on the state to manage and use its resources appropriately and carefully. The PSNR principle thus became associated with a right to self-determination and economic development for developing states and a key influencing factor for foreign investment regulations, environment law, resource management, sustainable development, and economic developments.[43]

The developing, least developed and small island developing nations argued strongly for PSNR over the natural resources to declare an inalienable right of all peoples and states to use and freely dispose of their natural resources. The high seas are all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a State, or the archipelagic waters of an archipelagic State, as per UNCLOS article 86. The Area is the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction UNCLOS, (Article 1). In the UNCLOS, mari-

[34] ROGER D., Congleton. Governing the global environmental commons: the political economy of international environmental treaties and institutions, p. 241-263, 2001.

[35] RAYNER, S. *Governance and the global commons*. London: Pinter, 1995. p. 60-93.

[36] OHCHR, OHRLLS, UNDESA, UNEP, UNFPA. Global Governance and Governance of the Global Commons in the Global Partnership for Development Beyond 2015', *UN System Task Team on the Post 2015 UN Development Agenda*, 2013.

[37] DUNCAN, French. *Common concern, in Michael Handbook in biodiversity law*. [*S. l.*]: Edward Elgar, 2016. p. 335.

[38] BALORO, J. Some international legal problems arising from the definition and application of the concept of "permanent sovereignty over wealth and natural resources' of states. *The Comparative and International Law Journal of Southern Africa*, v. 20, n. 3, p. 335-352, 1987.

[39] SCHWEBEL, Stephen M. The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources. *ABAJ,* v. 49, 1963. p. 463.

[40] WAART, P. J. I. M. de. Permanent sovereignty over natural resources as a corner-stone for international economic rights and duties. *Netherlands International Law Review*, v. 24, n. 1-2, p. 304-322, 1977.

[41] The General Assembly resolution 1803 (XVII) of 14 December 1962.

[42] Maritime jurisdiction limits or boundaries as recognized and adopted through Article 57 of UNCLOS is up to 200 nautical miles from coast line of states. The maritime boundaries and areas are calculated from the baselines. In the Maritime Boundaries dataset, the baselines used were a combination of a coastline as a proxy for the low-water line (the normal baseline described in UNCLOS) and straight or archipelagic baselines.

[43] TOLENTINO JUNIOR, Amado S. Sovereignty over natural resources-change of concept or change of perception?. *Environmental Policy and Law,* v. 44, p. 300-306, 2014. p. 300.

time limits are specified to be until 200 nautical miles from the coast, and, beyond that, it is the High Seas and the Area, where sovereign rights are not applicable, and the resources[44] governed under the CHM principle,[45] and activities on marine biological resources from the high seas remained unregulated.[46] These limitations in existing legal regimes have featured the importance of international interventions for ocean governance.[47] The status of elements, recognised as critical components of the concept of commons,[48] has a notable significance under international law on the ecological and economic implications of ABNJ and its resources.[49] However, the reformations in international law are distinguished by overlapping concepts addressed under common-interest normative patterns over traditional global commons in inter-state normative models.[50]

The dichotomous structuring of international legal order around units of statehood sovereignty under the PSNR principle[51] and the ABNJ had highly influenced the development and the success of international environmental law.[52] *Res nullius* refers to corporeal things that have not or have never had a possessor, over which rights of possession are asserted through natural law.[53] The high seas and the resources from there were under a *res nullius* regime for a long time. This resulted in the resources remaining ungoverned, while the individual animal remained; it is *res communes,* or a thing common to all, i.e., in the public domain.[54] The Roman concept of *res communes* or *things common to all,* applies to *ferae naturae* or wild animals in the natural world and the competent right to utilise them.[55] An area is designated as commons either by decision to choose by the community as common to all; or through joint decision and perseverance or long-standing everyday use. It is a general situation of common ownership, administered by public law (*jus publicum* or *de communi jure*).[56] In the present concept of law, the *res communis* proceeded or has evolved into humankind's public domain and common heritage.

The interlinkage between genetic resources and biodiversity divulges their vulnerability, which demands internationally monitored region-specific regulatory measures to ensure sustainability practices in resource utilisation.[57] The continuing damages to biodiversity have been condemned both from the loss of active genetic resources, the impending inherent significance of biodiversity, and also for the ecological reverberations for humans and nature.[58] The additional importance of the demands for protection is to meet the opportunity costs when biodiversity safeguards go together with a decline in yield for dependents who sustainably use land or abstain from using it altogether.[59] MGRs, when employed as natural resources and the subsequent applications in scientific studies and other inventions reveal their potential outcome; instrumental value is assigned to generate profits. It requires the designing of specific conservation measures. Additionally, the fishery resources from ABNJ are exploited at an alarming rate, and

[44] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, UNCLOS Article 133 defines resources as mineral resources deriving from the area at or beneath in the seabed and article 136 emphasised the applicable principle as CHM.

[45] UNCLOS, Part VII and Part XI.

[46] Articles 86, 87(1)(f), 87(2) UNCLOS.

[47] LEE A. Kimball. *International Ocean Governance:* Using International Law and Organizations to Manage Marine Resources Sustainably. [*S. l.*]: IUCN, 2003. p. 45-47.

[48] FENNEL, Lee Anne. Commons, anticommons, semicommons. *In*: KENNETH, Ayotte; SMITH, Henry E. (ed.) *Research handbook on the economics of property law.* [*S. l.*]: Edward Elgar, 2011. p. 35.

[49] DE LUCIA, Vito. The Concept of Commons and Marine Genetic Resources in Areas Beyond National Jurisdiction'. *MarSafeLaw Journal,* v. 19, n. 5, 2018.

[50] MARELLA, Maria Rosaria. The commons as a legal concept. *Law and Critique,* v. 28, p. 62-64, 2017. Available at: https://link.springer.com/article/10.1007/s10978-016-9193-0.

[51] UN Res 1803 (XVII) (1962), affirmed that all the legal measures must be based upon the 'inalienable rights of all States freely to dispose of their natural wealth and resources in accordance with their national interest, and on respect for the economic independence of States'.

[52] Preamble of the 1972 Stockholm Declaration on the Human Environment recognise the concept. See, UN Doc. A/CONF.48/14/Rev.1, 1972 Stockholm Declaration on the Human Environment, 1972.

[53] MILUN, Kathryn. *The Political Uncommons:* The Cross-cultural Logic of the Global Commons. Farnham: Ashgate 2011.

[54] HEY, Ellen. 'International Institutions'. *In*: BODANSKY, Daniel *et al.* (ed.). *The Oxford Handbook of International Environmental Law.* Oxford: Oxford University Press, 2008.

[55] ESPOSITO, Roberto. *Bíos:* Biopolitics and Philosophy. Minnesota: University of Minnesota Press, 2008.

[56] FRENCH, Duncan. Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge? *In*: BOWMAN, Michael; DAVIES, Peter; GOODWIN, Edward. (ed.). *Research Handbook in Biodiversity Law.* [*S. l.*]: Edward Elgar, 2016. p. 334.

[57] JOELI, Veitayaki. Traditional Marine Resource Management Practices used in the Pacific Islands: An Agenda for Change. *Ocean & Coastal Management,* v. 37, n. 1, p. 133-135, 1997.

[58] OLDFIELD, Margery L. *The value of conserving genetic resources.* [*S. l.*]: US Department of the Interior National Park Service, 1984. p. 2-7.

[59] DEPLAZES-ZEMP, Anna. Genetic resources, an analysis of a multifaceted concept. *Biological Conservation,* v. 222, p. 86-94, 2018. p. 86-93.

CHALAKKAL, Kavitha; K, Simi K. Marine biodiversity management from the global commons: analysing the expanded scope of common heritage of mankind principle. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 121-141, 2025.

even though they are regulated under the regional fisheries management organisations (RFMOs) for catch quota, fishes are widely exploited for scientific research and applications for their genetic properties.[60] For example, the efforts to commercially produce omega-three fortified canola oil and the method of producing the same are applied for patents, and some patents are granted in the US.[61] These reveal the relevance and recognise the applications of DSI from biological resources in scientific and other commercial production activities. It emphasise the need for protection and monitoring of the activities over the marine biological diversity of ABNJ.

4 Approaches for ABNJ and the resources- antecedents to the CHM concept

The concepts of *res* and their applicability to traditional principles changed with the resources, technology, and scope of exploitation. The approach has changed widely from the freedom of the high seas, and in the context of SDGs, it demands more clarity. The applicability of the terminologies proposed by the global state delegates and the stakeholders for MGRs from ABNJ is important concerning the ownership over resources deriving from international spaces.

- *Res Communes* and MGRs from ABNJ

According to the Institutes of Justinian, *res communes* is a Latin term derived from Roman law having significance in international law and common law.[62] *Res communes* are explicitly open to and recognise rightful access by anyone, even if the use must not prejudice an equivalent use by others, which is an antecedent to the concept of CHM.[63] It includes air, running water, the sea, and the shores of the sea,[64] to refer to things that belong to everyone but cannot be owned or controlled by any one person. The term emphasises that the state acts as a trustee for these shared resources and ensures preservation and equitable use.[65] International jurists and other legal experts proposed different terminologies with a similar idea for ownership over international spaces and resources.

Although, regulation is permitted, but it is generally accepted that such a classification does not accede to any legitimate entitlement over the area or the spatial regime.[66] It is the resources that are appropriated and not the areas. The nature and characteristics of MGRs from ABNJ are that they are resources of actual and potential value of commercial and scientific interest, appropriation through IPR claims, and other forms of appropriation will happen. Even though *res communes* were considered property of all under the Roman law system, the same could not be the thing recognised for private property rights.[67] Thus, the concept of *res communes* applies to the spatial areas and not over the resources procured from there, and the resources- the MGRs from ABNJ do not fall under the *res communes* regime. In modern law, the concept of *res communes* plays a significant role in the evolution of maritime law, space law, and policy and practices for Antarctica. The acceptance of the principle of global commons describes all international, supranational, and global resources from which the resources belong to the common pool, over which rights of the whole of humanity prevail. It calls for an internationally accepted and regulated management mechanism to help ensure sustainable use, exploitation, and maintenance of resources and the area.

- *Res Communes omnium* and MGRs from ABNJ

Res communes omnium, a Latin term used to indicate the things held in common by all, is a concept derived from Roman law that recognises specific resources as belonging to all humanity.[68] The relevance of sharing the

[60] SORESSA M., Kitessa, and others. DHA-containing Oilseed: A Timely Solution for the Sustainability Issues Surrounding Fish Oil Sources of the Health-Benefitting Long-Chain Omega-3 Oils,v.6 *Nutrients* n. 5, p. 2040, 2014.

[61] CHENG, B. *et al.* Towards the production of high levels of eicosapentaenoic acid in transgenic plants: the effects of different host species, genes and promoters. *Transgenic Research*, v. 19, p. 221-229, 2010.

[62] An area of territory that is not subject to legal title of any state. Examples would be the high seas (see Article 2 of the Geneva Convention on the High Seas and Article 89 UNCLOS) and outer space; see UNGA Resolutions 1962 (XVII), 1721 (XVI), and 1884 (XVIII)

[63] BASLAR, Kemal. *The concept of the common heritage of mankind in international law*. [*S. l.*]: Martinus Nijhoff Publishers, 1998. p. 40.

[64] SANDARS, T. C. *The institutes of Justinian*. New York: Longmans, Green & Co, 1900. xlvii, xlviii.

[65] PERRUSO, Richard. 'The Development of the Doctrine of *Res Communes* in Medieval and Early Modern Europe'. *TijdschriftvoorRechtsgeschiedenis*, v. 70, p. 69-71, 2002.

[66] BASLAR, Kemal. *The concept of the common heritage of mankind in international law*. [*S. l.*]: Martinus Nijhoff Publishers, 1998. p. 40.

[67] BASLAR, Kemal. *The concept of the common heritage of mankind in international law*. [*S. l.*]: Martinus Nijhoff Publishers, 1998. p. 40.

[68] BLACK'S law dictionary: definitions of the terms and phrases of american and english jurisprudence, ancient and modern. 6th. St.

resources in common to satisfy common interests was recognised by the Romans, disregarding the concept of *res nullius*, where everything in common is the subject of acquisition.[69] The European conquests over the non-European civilisations and their socio-cultural and natural assets, including their natural resources and ecosystems, emerged with time to a trilateral correlation and embraced a transformation of a Westphalian system in interactions.[70] European exploration and the subsequent scientific developments using the marine resources and their appropriation subjugated the world and echoed shifted suppositions regarding the importance of international law and the craving to apply the principle of *res communes omnium* to the global ecosystem.[71]

Overcoming the challenges created by enhanced private ownership over the natural resources in limiting the scope of communal interests was the key reason behind taking the position of *res communes omnium* for the natural resources.[72] A conception of international spaces recognises global commons as "areas that were free and open to all, res communis omnium, fulfilled two criteria: the absence of territorial sovereignty and its prohibition".[73] Even though deliberations regarding equitable sharing of resources were established among the states for long,[74] limitations in the concept of freedom of the commons failed to abolish or reduce state inconsistencies over its interpretation and execution.[75] The challenges arising from the unregulated and unrestricted freedom of commons and its impact were elucidated in Garret Hardin's Tragedy of Commons that uncontrolled freedom will result in the devastation of the entire commons.[76] The concept of *res communes omnium* is rooted in the idea that specific resources are essential for the well-being and survival of all individuals and, therefore, should be accessible and available to everyone. It emphasises the importance of sustainable and equitable resource management, ensuring that essential resources are preserved and utilised in a manner that benefits the entire community.[77]

Consequently, the concept of *res communes omnium* includes both the human and non-human world in its normative scope. It is an essential platform for novel reflections on and articulations of the existing duties associated with the regime of freedom on the high seas. The traditional understanding of the concept focused on individualism rather than community interests, promoting the self-interest of the community members.[78] While seeking the scope of the concept in the broader context of global commons, the ABNJ, the individualistic unit among the international community, will be the sovereign states and thus protect and promote the interest of each group in the changed global preferences on economic, scientific, technical, technological, and environmental issues. The reasons and challenges arising from the scientific and technological advancements over the ecological systems and the resultant ecological crisis highlighted the practical situations in which interventions are necessary to address the aftermath of such developments. The category that has been more persistently associated with the global commons is *res communes omnium*. The category indicates a set of things- goods common to all – *communes omnium hominibus*[79]- that do not fall under the ownership of any individual, nor of any particular political community).[80] *Res extra*

Paul: West Publ., 1990. p. 1304.

69 CHRISTOL, C. Q.; PARDO. A. The common interest: the tension between the whole and the parts. *In*: CHRISTOL C. Q. (ed.) *Space law:* past present and future. [*S. l.*]: Kluwer Law and Taxation Publication, 1991. p. 380.

70 CHARLOTTE, Ku. The concept of res communis in international law. *History of European Ideas*, v. 12, n. 4, p. 459-477, 1990. p. 469.

71 CHARLOTTE, Ku. The concept of res communis in international law. *History of European Ideas*, v. 12, n. 4, p. 459-477, 1990. p. 469.

72 CHRISTOL, C. Q.; PARDO. A. The common interest: the tension between the whole and the parts. *In*: CHRISTOL C. Q. (ed.) *Space law:* past present and future. [*S. l.*]: Kluwer Law and Taxation Publication, 1991. p. 444.

73 JOHN, Kish. *The Law of International Spaces*. Leiden: A. W. Sijthoff, 1973. p. 60.

74 CASSESE, A. *International law in a divided world*. Oxford: Clarendon, 1986. p. 376-377.

75 CHARLOTTE, Ku. The Concept of Res Communis. *History of European Ideas*, v. 12, n. 4, p. 459-477, 469, 1990.

76 HARDIN, Garrett. The tragedy of the commons. *In*: CAHN, Matthew Alan; O'BRIEN, Rory. *Thinking about the environment:* readings on politics, property and the physical world. [*S. l.*]: Routledge, 2015. p. 173-178.

77 WHITE, Lynn. The historical roots in our ecologic crisis. In: BELL, Garrett de (ed.) *Environmental Handbook*. [*S. l.*]: Ballentine Books Inc., 1970. p. 14.

78 JOHNSON, P. M. The global commons, collective and individual concerns, state interests and survival, innocent bystanders and future generations. *In*: BORDEAU, P. M.; FASELLAA, T. (ed.) *Environmental ethics:* man's relationship with nature interactions with science. [*S. l.*]: Office for Official Publications for the European Community, 1990. p. 175.

79 CAPURSO, Andrea. The end of res communes omnium. *In*: FALCON, Marco; MILANI, Mattia. (ed.). *A new role for roman taxonomies in the future of goods?* Napoli: Jovene Editore, 2022. p. 59-90. p. 59.

80 JAMES, Anaya, S. *Indigenous peoples in international law*. 2th. [*S. l.*]: OUP, 2004.

commercium[81] and *res communes humanitatis/hominibus*[82] are considered essential concepts over the *res* (thing) in international law and specifically deal with the ownership over the international spaces, that fall under the category of global commons.

- *Res Extra Commercium*

The term *res extra commercium* originated with Roman law, and the doctrine embraces subjects that do not qualify as an object of private privileges, making them insusceptible to getting traded, thus representing and proposing a different approach.[83] A similar approach is accepted and followed for deep seabed and outer space. The doctrine highlights that the regions are the subject matter of common freedom of exploitation, and the sovereignty of states does not reign over the areas.[84] The expression indicates that the areas beyond the territorial limits of sovereign states fall under *res extra commercium*, which is dissociated from the rights claimed by holders of any property, including possession, exclusion, and alienation.[85] The absence of distinct legal characteristics of the doctrine challenges the applicability of the same principle over the MGRs from ABNJ, where the increased potential (economic, commercial, and scientific value and significance) required the regulation of activities over the resources from ABNJ.

- *Res Communis Humanitatis*

The Latin phrase *res communis humanitatis* does not credit its origin to Roman law,[86] deemed by its proponents to be an expansion of the *res communis* principle to fill the legal lacunae that emerged after the introduction of the CHM concept.[87] Scholars expressed diverse views, and for an immediate understanding, it could be said that *omnium* refers to private and thus does not apply to the entire humankind, and the claims cannot be theoretically applied or equated to the doctrine of the CHM.[88] There are varying dimensions and arguments on the concept, and one proposition was that: “international areas belonging to the common heritage of mankind are conceptually *res communis*”.[89] Even though the principles of CHM is incorporated into the *res communis humanitatis* concept,[90] a clear distinction between *res communis omnium* and *res communis humanitatis* depends on the legal characteristics of the inherent resources of the area (*in situ*).[91] Thus, the core difference between the two concepts is that the latter assigns and recognises humankind as the owner of natural resources. The uniqueness of the concept derives from the directives to share the benefits unlike its predecessors. The ABNJ being the vast ocean area with an abundant reserve of potential marine resources, any appropriation with economic benefits should share the proportion with the rest of the international community. Considering the special interests and needs of incapacitated states, the principle is advocated in the preamble and under the general principles and approaches of the BBNJ Agreement.

5 International law on global commons and ocean governance

The principles such as sovereign equality, self-determination, cooperation, non-intervention, and good faith also have a crucial role in ensuring international cooperation in implementing strategic action plans for conserving marine areas and resources.[92] Howe-

[81] CASSESE, A. *International law in a divided world*. Oxford: Clarendon, 1986. p. 376-377.

[82] GOLDIE, L. F. E. A note on some diverse meanings of the common heritage of mankind. *Syracuse Journal of International Law and Commerce*, v. 10, n. 1, p. 69-112, 1983. p. 81.

[83] CHRISTOL, C. The legal common heritage of mankind: capturing an illusive concept and applying it to the world needs. *In:* CHRISTOL, C. *Space law:* past, present, and future. [*S. l.*]: Kluwer Law and Taxation, 1991. p. 395.

[84] BASLAR, Kemal. *The concept of the common heritage of mankind in international law*. [*S. l.*]: Martinus Nijhoff Publishers, 1998. p. 40.

[85] STEINBERG, Philip E. *The Social Construction of the Ocean*. Cambridge: Cambridge University Press, 2001. p. 91.

[86] CHRISTOL, C. *The legal kluwer law and taxation*. Boston: [*s. n.*], 1991. p. 444.

[87] WOLFRUM, R. (ed.) ‘Celestial Bodies’ in *Encyclopaedia of Public International Law: Law of the Sea and Air Space* Max Plank Institute, 2013. p. 53.

[88] COCCA, A. A. *Mankind as a new legal subject*: a new judicial dimension recognized by the United Nations 1972 Proc. 13th Coll. on the Law of Outer Space. 1972. p. 212.

[89] LEFEBER, R. ‘The Exercise of Jurisdiction in the Antarctic Region and the Changing Structure of International Law: The International Community and Common Interest’. *NYIL,* v. 21, n. 81, p. 113, 1990.

[90] CHRISTOL, C. *The legal kluwer law and taxation*. Boston: [*s. n.*], 1991. p. 435.

[91] LEFEBER, R. ‘The Exercise of Jurisdiction in the Antarctic Region and the Changing Structure of International Law: The International Community and Common Interest’. *NYIL,* v. 21, n. 81, p. 113, 1990.

[92] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) preamble, recital 1, and Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 De-

ver, interconnectivity between biological resources and ecological systems is seen as a common interest of humankind. It is identified to have a key role in the modification of the elements of international law and its emerging interests for public international law.[93] Sovereignty principles and their limitation on the applicability of national laws are hurdle in addressing the core ocean governance issues like information sharing and assessment to support decision-making, resource and environmental monitoring, and deriving applicable solutions, etc.

The commons as a collective institution depart equally from the individualistic proposition envisaged under private law and the doctrine of state sovereignty proposed under public international law. Here, state sovereignty becomes a relative concept, where the state is given a personality that is distinct from the constituted government order[94] and at the same time a determinative concept for sovereignty is the one between state and the people, and between sovereign and the subject.[95] The concept of commons is pertinent for the governance of areas that were once considered common to all, where the threat of appropriation of resources has become common and needs governance.[96] Commons in general means, "the resources belong to the international community in its entirety or are shared jointly by all".[97] Even though the concept of commons is not new to the legal systems around the world, the changing dimensions of the notion reflect and tackle the international order and other neoliberal political and economic strategies both at a global and local level. The complicated governance issues associated with commons reflect the manifestation of intricacy between public/private dichotomy in property statutes by challenging the critical ideological frameworks against public/private and state sovereignty/market division under the new legal regime.

Additionally, the law of the sea, became a burgeoning division of international law[98] with a key role to play in regulating anthropogenic activities, including fishing, marine scientific research, accessing marine biological resources, mining, and other unregulated activities in the waters within and beyond the jurisdictional limits of states. It is in this context that the UNGA recognised the need for an overarching regulatory mechanism to bring uniformity among the nations regarding the rights and obligations for the activities carried out in the marine areas. In 1953, the UNGA Resolution 798 (VIII) recognised the physical and judicial interconnectivity of the ocean areas, including high seas, territorial waters, contiguous zones, the continental shelf, the superjacent waters, and other prevailing problems.[99] Thus, the concept of commons discussed under the international law regime is entwined with developments in international law, not only as a concept of public property but also in terms of ownership and sovereignty. Still, it represents the foundation for significant transformation initiatives and discussions of a dissident place in the international legal order. The concept of commons raises challenges to the supremacy and scope of private property with regard to its appropriation, specifically those related to the prevailing IPR system, which fostered reinforcing private property rights over the global commons or the resources belonging to CHM in a new world economic order.

5.1 ABNJ biodiversity governance and the BBNJ agreement

Ocean governance has always been a complicated issue from ancient times, where the states not only argued for more freedom in marine areas but also demanded extended sovereign rights.[100] By the 1600s, when the Grotian philosophy got prominence and acceptance among the maritime nations, oceans started being considered the property of no one,[101] i.e., under common

cember 1993) 1760 UNTS 79 (CBD) preamble, recital 3.

[93] SIMMA, Bruno. Universality of international law from the perspective of a practitioner. *EJIL*, v. 20, n. 2, p. 265-297, 2009.

[94] BROWNLIE, Ian. *Principles of public international law*. 5th. Oxford: Clarendon Press, 1998. p. 86-89.

[95] LOUGHLIN, Martin. *The Idea of Public Law*. Oxford: Oxford University Press, 2003. p. 65, 68, 81-87.

[96] MARELLA, Maria Rosaria. The commons as a legal concept. *Law and Critique*, v. 28, n. 12, p. 61-64, 2017. *Supra* n.12.

[97] FLEISCHER, Carl August. The International Concern for the Environment: The Concept of the Common Heritage'. *In*: BOTHE, M. (ed.). *Trends in Environmental Policy and Law*. Glande: IUCN, 1980. p. 330.

[98] CRAIG, Allen H. *The International Law of the Sea*. Oxford: Oxford University Press, 1982. p. 3-4.

[99] UNITED NATIONS. *Regime of the High Seas 1953 UNGA resolution 798 (VIII)*. 468th Plenary Meeting. 7 Dec. 1953. Available at: https://undocs.org/A/RES/798.

[100] SCHRIJVER, Nico. Managing the Global Commons: Common Good or Common Sink? *Third World Quarterly*, v. 37, n. 7, p. 1252-1254, 2016.

[101] FEENSTRA, Robert. *Hugo Grotius Mare Liberum 1609-2009*: Original Latin Text and English Translation. [*S. l.*]: Brill, 2009. p. 43.

possession.[102] Before the conclusion and adoption of the UNCLOS framework, the 1970 Declaration was the only international initiative that proposed the terminology of ABNJ, which emphasised the legal status of ABNJ to be the CHM, characterised by non-appropriation of the area without any sovereign rights attuned with the principles of international law.[103] The concept of sustainable development featured in the Brundtland Report- Our Common Future emphasised that UNCLOS was the most ambitious attempt ever to provide an internationally agreed regime for the management of the oceans and the resources,[104] identified the marine areas as global commons and emphasised in the report as:

> Traditional forms of national sovereignty raise particular problems in managing the global commons and their shared ecosystems - the oceans, outer space, and Antarctica. Some progress has been made in all three areas; much remains to be done.[105]

The number of marine species used by humans is growing at unprecedented rates, including domestication for aquaculture, the discovery of natural products, and research and development over marine genes of medical and biotechnological interest.[106] The CBD is the international instrument that recognises fair and equitable sharing of benefits established with other objectives of sustainable use and conservation;[107] however, its jurisdictional scope is limited to areas within national jurisdiction.[108] Initially, the scope of existing international legal instruments was looked into to understand the feasibility of the instruments for ABNJ governance to formulate a regulatory mechanism to govern activities affecting the ABNJ and the entire marine ecological systems, in particular the MGRs. The international community identified the prevailing legal lacunae for the governance of MGRs in ABNJ, and the new initiative for the BBNJ was a brave step towards filling the legal gap. In such an effort, one of the objectives under the BBNJ Agreement is the sharing of benefits fairly and equitably among the parties for the advantages accrued from the utilisation of MGRs of ABNJ,[109] with special emphasis on the needs and interests of the developing, least developed Pacific Small Island Developing States (PSIDS), Geographically Disadvantaged Landlocked Developing States to address the scientific and regulatory convergence challenges.

The efforts to develop an international legally binding instrument under the UNCLOS, where CHM, being the core of arguments in the new legal regime, had the challenge of whether it should be the same as in the UNCLOS or to consider and include other principles and approaches should be adopted to effectively regulate activities. The developed nations[110] had always supported and argued for freedom of high seas for not setting any development barriers and to bag maximum profits from the common areas. The outcome of such an inequitable system will be competition and other unavoidable complexities, including maritime supremacy and uneven opportunities in ocean governance. Ultimately, this will result in tragedy of commons and inter-generational discretion, unfairness, and inequality. To assure fairness in maritime interaction on MGRS from ABNJ, adopting and establishing a new legal regime under the law of the sea was essential.

Thus, the term ocean commons stand for a spatial domain, and for the BBNJ Agreement, it is the ABNJ. Importantly, this notion is applied to recognise knowledge holders over the commons, including the conservers of the resources, the Indigenous People and Local Communities (IPLCs) and their rights over resources. Thus, the international community and the respective states are vested with the responsibility of giving due recognition to the rights of IPLCs for the TK they have over the MGRs from ABNJ, including the straddling resources. Assets derived from the commons both tangible and intangible can result from social cooperation,

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[102] GROTIUS, Hugo. *Commentary on the Law of Prize and Booty.* [*S. l.*]: Liberty Fund 2012. Available at: https://oll.libertyfund.org/titles/ittersum-commentary-on-the-law-of-prize-and-booty.

[103] Resolution 2749 (XXV), Resolutions adopted on the reports of the First Committee, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction, 1933rd plenary meeting, 17 December 1970. Available at: https://legal.un.org/diplomaticconferences/1973_los/docs/english/res/a_res_2749_xxv.pdf.

[104] WCED. Report of the World Commission on Environment and Development: Our common future, 1987. p. 42,427. Para 83.

[105] WCED. Report of the World Commission on Environment and Development: Our common future , 1987. p. 42,427. Para 83.

[106] ARRIETA, J. M.; DUARTE, C. M. What lies underneath: conserving the 'oceans' genetic resources'. *Proceedings of the National Academy of Sciences*, v. 107, n. 43, 2010. Available at: https://www.pnas.org/doi/full/10.1073/pnas.0911897107.

[107] UNCLOS 1982, Article 1.

[108] UNCLOS 1982, Article 4.

[109] UNGA, A/RES/72/249, United Nations. Resolution Adopted by the UN General Assembly on 24 December 2017.

[110] SANTO, Elizabeth M. *et al.* Stuck in the middle with you (and not much time left): the third intergovernmental conference on biodiversity beyond national jurisdiction. *Marine Policy,* v. 117, n. 4, 2020.

especially in the case of cultural common, resulting in the mobilisation of resources and the communities, resulting in political, social, and economic transformations.[111] It is particularly true for the ABNJ and the resources, where the economic (based on the actual or potential value of the resource), political, ecological, and communal significance made it a core issue in legal debates. The international legal instruments negotiated on the global commons also include The UN Framework Convention on Climate Change- The Paris Agreement, the Basel Convention, CITES, the Arhus Convention, the CBD, the recently concluded BBNJ Agreement, etc.[112] Thus, many international and regional initiatives have identified the significance of the conservation of ABNJ and the biodiversity thereof, along with the understanding that the problems of ocean space are interconnected and need to be addressed as a whole to tackle the ecological imbalances prevailing for the regime- the global commons.

6 Governing the global commons and the common heritage of mankind principle

Maritime delimitation and the distinction recognised under the UNCLOS regime are the high seas and the area for the regulation of specific activities. Whereas the key concern was the deep-sea mining and the associated benefit sharing was addressed under the CHM principle.[113] The CHM principle was first referred to for the protection of cultural property in the preamble to the 1954 Hague Convention when any armed conflict occurs,[114] and later in the Antarctic Treaty in 1959.[115]The application of CHM to the marine realm was proposed in the First UN Conference on the Law of the Sea, through a statement by Prince Wan Waithayakon of Thailand that read: "The sea was the common heritage of mankind and that the law of the sea should ensure the preservation of that heritage for the benefit of all",[116] but could not gather support.[117] The legal right vested over nations as proposed in the 1958 Geneva Convention was emphasised in 1967 when Alexander Pardo of Malta proposed the UNGA to declare: "the sea-bed and the ocean-floor, beyond the limits of national jurisdiction, to be under the Common Heritage of Mankind".[118]

The proposal was an appeal for introducing a new principle in international law that could recognise the rights of all nations through establishing an organisation that will function for the entire humanity. The Moratorium Resolution adopted in 1969 recommended that: "States and corporations should be bound to refrain from sea-bed mining until an international regime could be established to govern this activity".[119] The 1970 Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction proclaimed that ABNJ areas and the resources are to be managed under the CHM principle,[120] and will apply to managing deep

111 MARELLA, Maria Rosaria. The commons as a legal concept. *Law and Critique*, v. 28, n. 12, 2017.

112 UNGA Res 'Development of an ILBI under the UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ (19 June 2015) UN Doc A/RES/69/292 [1(a)]; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) preamble, recital 1; and Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD) preamble, recital 3.

113 GLASBY, G. P. Deep seabed mining: past failures and future prospects. *Marine Georesources and Geotechnology,* v. 20, n. 2, p. 161-176, 2002.

114 Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 *portal.unesco.org*.

115 The Antarctic Treaty, 23 June 1962, 5778 *UNTS* 402., In the Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 *UNTS* 71, preamble, there is no explicit mention of 'common heritage', but there is equivalent language, as Antarctica is characterized as the province of all mankind, like outer space. For a review of the different positions as regards Antarctica, and the differences between areas under frozen claims, and unclaimed areas, See, CHRISTOPHER, Joyner. *Antarctica and the law of the sea*. [*S. l.*]: Martinus Nijhoff, 1992. See also, GUNTRIP, Edward. The common heritage of mankind: an adequate regime for managing the deep seabed?. *Melbourne Journal of International Law*, v. 4, n. 2, p. 376-405, 2003. However, outer space is subject to a regime of freedom (with the limitation of peaceful utilization), while Antarctica is subject to a strict regime that prohibits most activities, and carefully regulates the few uses that are allowed (eg., scientific research and more recently tourism). It is also worthy of note that some commentators consider that the Antarctic Treaty system is rather based on the principle of common concern, see, Dina Shelton, 'Common Concern of Humanity' 2009.

116 Official Records, UNCLOS, first plenary meeting, UN Doc A/CONF.13/SR.1, p. 3, 1958.

117 UN Conference on the law of the sea, Plenary meetings, Official records, Volume II, 1958.

118 GA Official Records, 22nd session (1967), First Committee Meeting, 1 November, 1967, UN Doc. A/C.1/PV.1515.

119 Moratorium resolution, GA Res. 2574D (XXIV), 15 December 1969.

120 Declaration of Principles Governing the Seabed and the Ocean

sea mining and associated exploration and exploitation activities in ABNJ; that was later adopted by the 1933rd UNGA plenary meeting of 1970 for areas beyond territorial limits elaborated proposals laid down by Pardo and agreed to the CHM principle[121] as an acceptable norm of international law and the elements of CHM incorporated under Part XI of the UNCLOS 1982 framework. Thus, the core elements proposed under the CHM principle were to prevent appropriation of CHM areas, the rights and responsibilities of all the parties in managing the common areas, share the benefits for the use of CHM resources fairly and equitably among the state parties and reserve the CHM areas exclusively for peaceful purpose. The principle of CHM from its introduction in any of the international legal and policy frameworks, the subject matter remained the same, i.e., to address the issues associated with the resources or the areas that are assigned/considered as commons, and its significance will continue until the global commons that are the common concern of humankind are in existence.

6.1 Implementing the CHM principle under the UNCLOS: an analysis with the ISA

The ISA has elaborated the seabed regime under the UNCLOS and the 1994 Implementation Agreement,[122] which orbits around the CHM principle.[123] The CHM principle is multifaceted and embodied in many provisions- part XI in particular,[124] under which ISA was established to function for the benefit of humankind as a whole,[125] and the activities were supposed to be regulated for humankind.[126] Benefit-sharing was thus recognised as an imperative factor of the CHM principle and an internationally accepted obligation under the ISA.[127] The benefit-sharing mechanism envisaged under the CHM consists of modalities for sharing both monetary and other benefits associated with deep-sea mining,[128] consistent with what Pardo had emphasised under their proposal that "implied an active sharing of benefits, not only financial but also benefits derived from shared management and transfer of technology".[129] Thus, the elements of the CHM principle apply to the exploitation of resources from the seabed and to assure that benefits are shared equitably with the entire humanity irrespective of their geographical distribution. The clause "shall not be a party to any agreement in derogation thereof" under UNCLOS Article 311(6) is significant in the context of the BBNJ Agreement, where multiple principles and approaches are accepted. Still, as per the provision, the basic principle of the BBNJ Agreement should also be the CHM.

6.2 CHM and freedom of high seas conflicts on governance of MGRs

The resources once considered the common heritage of humanity are getting appropriated at an alarming rate, but only countries with technical and scientific potential benefit from the resources. The concept of property over resources from the high seas and the area must be redefined to reconcile the issue.[130] The CHM principle envisaged under the UNCLOS shifted the legal regime to the sovereignty concept over resources procured from within national territories, but beyond

Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, UN Doc A/RES/2749(XXV) (17 December 1970). 2749(XXV) (17 December 1970).

[121] GOROVE, S. Concept of common heritage of mankind: a political moral or legal innovation. *San Diego Law Review,* v. 9, n. 3, p. 390-403, 1971. p. 390.

[122] Articles137(2), 153(1), 156–185 UNCLOS.

[123] Article 136, and Part XI (Article 331(6) UNCLOS; The CHM principle was officially codified in Article 136 and presented directives for the interpretation and application of Part XI of UNCLOS, as emphasised under Article 311(6) that agreed to retain the CHM as the basic principle without any scope for further amendments to what has been adopted under Art.136.

[124] SHEN, Hao. A critical assessment of the ISA's implementation of the CHM principle from the perspective of benefit-sharing regime. *International Environmental Agreements,* v. 23, n. 3, p. 355-371, 2023. p. 356.

[125] SHEN, Hao. A critical assessment of the ISA's implementation of the CHM principle from the perspective of benefit-sharing regime. *International Environmental Agreements,* v. 23, n. 3, p. 355-371, 2023. p. 357-359.

[126] JAECKEL, A.; ARDRON, J. A.; GJERDE, K. M. 'Sharing Benefits of the Common Heritage of Mankind - Is the Deep seabed Mining Regime Ready?'. *Marine Policy,* v. 70, p. 198–204, 2016.

[127] WILLAERT, K. 'Effective Protection of the Marine Environment and Equitable Benefit Sharing in the Area: Empty Promises or Feasible Goals?' *Ocean Development & International Law*, v. 51, n. 2, p. 175–192, 2020.

[128] Articles 143(3)(b)(ii),144,148,Annex III Article 15 of the Convention; 1994 Implementation Agreement, Annex Sect. 5(1)(b). Article 144 (Transfer of technology) and Article 148; See also, Report of the Chair of the Legal and Technical Commission on the work of the Commission at the first part of its twenty-sixth session (9 March 2020), ISA Doc. ISBA/26/C/12 (2020), paragraphs 4–7.

[129] DINGWALL, J. *International law and corporate actors in deep seabed mining*. Oxford: Oxford University Press, 2021. p. 90.

[130] JOYNER, Christopher C. The Concept of the Common Heritage of Mankind in International Law'. *Emory Int'l L. Review*, v. 615, n. 13, p. 429-432, 1999.

that, remained ungoverned, but demanding regulatory framework for the increased bioprospecting, misappropriation of resources, and claiming property rights over them.[131] The "Freedom of High Seas"[132] regime facilitated freedom of navigation, fishing, and conducting scientific research activities, raised questions on the applicable legal regime over the marine biological diversity, especially to deep-sea GRs and MGRs from ABNJ, highly migratory and straddling resources, and the traditional knowledge associated with MGRs of ABNJ, which were left unaddressed in any of the international legal and policy frameworks.[133]

The same concern has been reflected in ocean space governance, and international law has started recognising the common interest of mankind in protecting the ocean system and its resources. Both *res communis omnium* and the High Seas recognise the shared nature of specific resources and emphasise the importance of responsible management and protection for the benefit of humanity as a whole.[134] The concepts have found application in various areas, including environmental law, regulating natural resources, and the development of international treaties and agreements. The concept of the CHM is thus more encompassing than the *res communis omnium*, where the idea underlying idea was that, special legal regimes should safeguard the specific interests of all humankind.[135]

The fundamental principles of public international law implemented through an internationally agreed ABNJ activity notification and monitoring system,[136] following the principles of equality of states and equity for unhindered access to the global commons including for navigation etc, could partially address the concerns.[137] The same principle was upheld in the *North Sea Continental Shelf* Case by the ICJ[138] declaring that the principles recognised are relevant and applicable to the global commons.[139] However, the applicability of the principle and subject of justice should be subjected to the nature and content of equity,[140] along with the "allotment of something rationally regarded as advantageous or disadvantageous and interested in only one instance of its application".[141] Thus, concepts of equity and justice complement each other. To ensure equity for the developing and other disadvantaged states in decision-making and governing the global commons under international platforms requires effective participation following the principles of justice.

Thus, the CHM principle refers to the ethical and legal status of the subject area and resource (absence of private property rights being one aspect),[142] and the freedom of high seas is applicable to ABNJ and should not be confused with non-existent freedom to lay claim through property rights to the fruits of exercising that freedom including through IPRs.[143] Although the activity seems regulated, based on precedents, the CHM is an unpersuasive practical solution for precluding IPRs; but, as a principle, CHM proposes to deliver distributi-

[131] BLASIAK, Robert *et al.* Corporate control and global governance of marine genetic resources. *Science advances,* v. 4, n. 6, 2018.

[132] Articles 87-90, UNCLOS.

[133] MCGRAW, Désirée M. The CBD - key characteristics and implications for implementation. *Review of European Community & International Environmental Law,* v. 11, p. 17-28, 2002.

[134] KISS, Alexandrer. The common heritage of mankind: utopia or reality?. *International Journal,* v. 40, n. 3, p. 423-441, 1985.

[135] KISS, Alexandrer. The common heritage of mankind: utopia or reality?. *International Journal,* v. 40, n. 3, p. 423-441, 1985.

[136] HUMPHRIES, F. *et al.* 'A Tiered Approach to the Marine Genetic Resource Governance Framework under the Proposed UNCLOS Agreement for Biodiversity Beyond National jurisdiction (BBNJ). *Marine Policy*, v. 122, 2020.

[137] CHATTOPADHYAY, Subir K. Equity in international law: its growth and development. *Journal of International and Comparative Law,* v. 5, n. 2, p. 381-406, 1975. p. 384.

[138] North Sea Continental Shelf Cases, [1969] I.C.J. 3; other than this case, the principle of equity was upheld in more cases and the decisions illustrative of the meaning and applicability of equity are: Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116; Chorzow Factory Case, [1927] P.C.I.J., ser. A, No. 9; Serbian and Brazilian Loans Cases, [1929] P.C.I.J., ser. A, Nos. 20, 21; Diversion of Water from the Meuse Case, [1937] P.C.I.J., ser. A/B, No. 70; Venezuelan Preferential Case (Germany v. Venezuela), Hague Court Reports (Scott) 55 (Perm. Ct. Arb. 1904); Orinoco Steamship Company Case (United States v. Venezuela), Hague Court Reports (Scott) 226 (Perm. Ct. Arb. 1910); North Atlantic Coast Fisheries Case (Great Britain v. United States), 11 U.N.R.I.A.A. 167 (Perm. Ct. Arb. 1910); Island of Palmas Case (Netherlands v. United States), 2 U.N.R.I.A.A. 829 (Perm. Ct. Arb. 1928); Cayuga Indians Case

[139] SOHN, Louis B. 'Equity in International law' In *Proceedings of the Annual Meeting (American Society of International Law). American Society of International Law,* v. 82, p. 277-291, 280, 1988.

[140] JANIS, Mark W. The ambiguity of equity in international law. *Brooklyn Journal of International Law*, v. 9, n. 7, 1983.

[141] RAWLS, John. *A Theory of Justice.* [*S. l.*]: Universal Law Publishing Company, 2013. p. 8.

[142] DE LUCIA, Vito. Ocean commons and the 'ethological' nomos of the sea'. *In*: DE LUCIA, Vito; ELFERINK, Alex Oude; NGUYEN, Lan Ngoc (ed.) *International law and marine areas beyond national jurisdiction:* reflections on justice, space, knowledge and power. [*S. l.*]: Brill, 2022. v. 95, p. 16-20.

[143] THAMBISETTY, Siva. 'Biodiversity Beyond National Jurisdiction (Intellectual) Property Heuristics in Marine Biodiversity of Areas beyond National Jurisdiction'. *Center for Oceans Law and Policy,* v. 24, p. 31–146, 2021. Available at: https://doi.org/10.1163/9789004422438008.

ve justice to shield the rights of developing and other incapacitated member states by facilitating benefit-sharing. If accepted that the freedom of high seas applies to MSR, then regarding the possession of MGRs resulting from MSR is concerned, two possibilities follow – that biodiversity beyond national jurisdiction is regarded as being under common ownership or that no ownership rights exist.

Even though the CHM principle could only be seen as an agreement on constituent elements, the freedom of high seas and uninhibited access works best within the assumption that BBNJ is owner-less. The conflict here is that it appears to go against the language of UNGA Resolutions 72/249 and 69/292, which set out the need for a comprehensive global regime to address better conservation and sustainable use of the marine biological diversity of ABNJ. The language is redolent of managed common ownership rather than a *laissez-faire*, no-ownership scenario. For the freedom of high seas to be compatible with the wording of the relevant UNGA resolutions in a way that ties that principle to access and utilisation of MGRs, the status of these resources in law, and IPRs need persuasive amendments.

7 Conclusion

International initiatives for regulating activities in the global commons emphasised the need for global governance for the ABNJ areas. The legal status of marine genetic resources from ABNJ was a burning issue before the international community. To address the conflicting interests between developed nations and developing and other disadvantaged states, the scope of applicable principles and approaches that span from freedom of high seas to CHM was found noteworthy. From the Hague Conference to the recently concluded BBNJ Agreement, the need for a global governance regime with fair, informed, and benefit-sharing policies with a multilateral approach to assure consistency has been recognised. The issues associated with the resources from the global commons that span from access, utilisation, the role of human interventions and labour, possession, ownership, and appropriations of results of scientific inventions through IPRs are recognised by the international community. The initiatives for the regulation of increasing commodification of global commons remain unaddressed for their unique political, economic, and legal issues. The other side of the argument was the consent of the international community for the above activities where a consent mechanism under which benefit sharing has to be implemented for the global commons, for which the apt principle will be the *res communes* and thus Common Concern of humankind for the global governance mechanism. Retaining the CHM as the general principle and approach under the international legally binding instruments, along with the concepts of commons and regulated responsibilities, is crucial to creating an effective regulatory regime for MGRs and MGRTK from ABNJ. It will be affected better through the principle adopted under the Paris Convention 2015 under the UN Framework Convention on Climate Change - the common but differentiated responsibility, which will effectively address the challenges in governing the global commons with more obligations over the technologically advanced biodiversity utilising state parties. Even though other additional principles and approaches are proposed and accepted for the ABNJ, they do not have a direct bearing on access regulation and fair and equitable benefit sharing.

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Le Projet international Ice Memory: les carottes de glace sont-elles patrimoine commun de l'humanité?

The International Ice Memory Project: Are Ice Cores the Common Heritage of Humankind?

O Projeto Internacional Ice Memory: os Núcleos de Gelo são Patrimônio Comum da Humanidade?

Pierre-François Mercure

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Le Projet international Ice Memory: les carottes de glace sont-elles patrimoine commun de l'humanité?*

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Pierre-François Mercure**

Résumé

Des carottes de glace sont prélevées sur des glaciers sélectionnés par des chercheurs de plusieurs pays dans le cadre du Projet international Ice Memory. L'objectif est de documenter l'évolution du climat pour le bénéfice de chercheurs des générations futures. La Chaire de recherche Ice Memory Droit et Gouvernance vise plus spécifiquement à aborder les questions juridiques soulevées par le projet, notamment le statut à conférer aux carottes de glace qui revêtent un intérêt scientifique de premier ordre. Différents concepts juridiques élaborés en droit international public sont susceptibles de recevoir une application, au premier chef les concepts de patrimoine mondial et de patrimoine commun de l'humanité, mais aussi ceux d'apanage de l'humanité, de préoccupation commune de l'humanité et d'intérêt de l'humanité. Une revue de ces concepts amène à considérer avec une attention toute particulière celui de patrimoine commun de l'humanité.

Mots clés: Patrimoine commun de l'humanité, carottes de glace, mémoire climatique, changements climatiques, conservation scientifique.

Abstract

Ice cores are taken from selected glaciers by researchers from several countries as part of the International Ice Memory Project. The aim is to document climate change for the benefit of future generations of researchers. The Ice Memory Law and Governance Research Chair aims more specifically to address the legal issues raised by the project, in particular the status to be conferred on the ice cores, which are of prime scientific interest. Various legal concepts developed in international public law are likely to be applied, first and foremost the concepts of world heritage and the common heritage of mankind, but also those of the province of mankind, the common concern of mankind and the interest of mankind. A review of these concepts leads

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us to consider with particular attention the concept of the common heritage of mankind.

Keywords: Common heritage of humankind, ice cores, climate memory, climate change, scientific conservation.

Resumo

Núcleos de gelo são retirados de geleiras selecionadas por pesquisadores de vários países como parte do Projeto Internacional de Memória do Gelo. O objetivo é documentar as mudanças climáticas para o benefício das futuras gerações de pesquisadores. A Cátedra de Pesquisa em Direito e Governança da Memória do Gelo visa mais especificamente abordar as questões jurídicas levantadas pelo projeto, em particular o status a ser conferido aos núcleos de gelo, que são de interesse científico primordial. É provável que vários conceitos jurídicos desenvolvidos no direito público internacional sejam aplicados, principalmente os conceitos de patrimônio mundial e patrimônio comum da humanidade, mas também os de prerrogativa da humanidade, preocupação comum da humanidade e interesse da humanidade. Uma análise desses conceitos nos leva a considerar com atenção especial o conceito de patrimônio comum da humanidade.

Palavras-chave: Patrimônio comum da humanidade, núcleos de gelo, memória climática, mudanças climáticas, conservação científica.

1 Introduction

Le *Projet international Ice Memory*[1] est une initiative soutenue depuis 2015 par la France, l'Italie et la Suisse. Il vise à collecter et à préserver des carottes de glace provenant de différents glaciers du monde menacés de disparition en raison du réchauffement climatique. En sauvegardant ces échantillons de glaciers, les informations qu'ils contiennent sur l'histoire de la Terre et de son atmosphère seront conservées pour les générations futures de scientifiques.

Les carottes de glace, qui ont déjà été collectées dans une dizaine de pays, notamment en France, en Suisse, en Italie, en Bolivie et en Norvège, sont actuellement stockées dans les réfrigérateurs de l'Institut des Géosciences de l'Environnement de l'Université Grenoble-Alpes.

La *Fondation Ice Memory*, qui gère le projet, espère que ces carottes de glace seront à terme stockées en Antarctique dans le cadre d'un accord international garantissant leur non-appropriation et le libre accès aux données issues des recherches menées sur ces échantillons.

La *Chaire de recherche Ice Memory Droit et Gouvernance*[2], vise plus spécifiquement à aborder les questions juridiques soulevées par l'initiative *Ice Memory*, notamment en menant des recherches sur le statut des glaciers en tant que patrimoine naturel et culturel, le statut des carottes de glace en tant que patrimoine scientifique, et en faisant des propositions sur la future gouvernance internationale du projet *Ice Memory*.

L'une des problématiques à laquelle la Chaire est confrontée est celle de la détermination du statut juridique des carottes de glace actuellement localisées en France. Deux concepts semblent, à première vue, présenter un intérêt particulier sur cette question: Le concept de patrimoine mondial de l'UNESCO[3] et celui de patrimoine commun de l'humanité (PCH). Il est donc important, dans un premier temps, de préciser le contenu, la portée juridique et les enjeux de ces deux notions. Dans un deuxième temps, il est nécessaire de se demander laquelle des notions est la plus appropriée pour conférer un statut juridique aux carottes de glace.

Afin de traiter de ces deux aspects, le texte sera divisé en trois parties: Le concept de patrimoine commun de l'humanité (I); Le concept de patrimoine mondial de l'UNESCO (II) et, le concept retenu afin de caractériser les carottes de glace (III). En conclusion, nous proposerons les principaux éléments d'un projet de convention.

L'analyse qui sera faite nécessite de contextualiser le *Projet international Ice Memory* dans la perspective du droit international public. Puisqu'il s'agit d'une initiative

[1] ICE MEMORY FOUNDATION. Preserve the ice memory for future generations. Saint-Martin-d'Hères, France. [2025]. Disponible sur: https://www.ice-memory.org/ice-memory-foundation-/home-939753.kjsp. Accessible à: 20 janv. 2025.

[2] La titulaire est la professeure Sabine Lavorel, de l'Université Grenoble-Alpes. ICE MEMORY FOUNDATION. The Ice Memory Law and Governance Chair. *Ice Memory.org*, 11 oct. 2023. Disponible sur: https://www.ice-memory.org/international-mobilization/the-ice-memory-law-and-governance-chair/. Accessible à: 20 janv. 2025.

[3] United Nations Educational, Scientific and Cultural Organization (UNESCO). En français: Organisation des Nations Unies pour l'éducation, la science et la culture.

d'agences gouvernementales et d'universités de différents États, on peut considérer qu'il s'agit d'une initiative d'États[4]. L'objectif du projet est de conserver des carottes de glace pour les chercheurs contemporains et futurs, afin qu'ils puissent réaliser des études, notamment celles relatives à la qualité de l'air à différentes époques. On vise à documenter l'évolution de la composition chimique de l'atmosphère, notamment celle des polluants atmosphériques dans le temps. Ces carottes sont actuellement localisées en France et on envisage de les déplacer en Antarctique. Elles sont localisées sur un territoire étatique et seront déplacées sur un territoire non-étatique. Les carottes de glace sont des biens qui sont susceptibles d'être déplacés. Ce sont, en droit civil, des biens meubles corporels[5]. Elles ont une valeur scientifique indéniable; mais aussi, indirectement, une valeur économique qui est associée à leur étude et aux résultats que l'on peut en tirer. Ce sont des biens qu'il faut avant tout protéger et conserver pour des recherches futures. Les carottes de glace révéleront leur potentiel à mesure que les avancées scientifiques se feront, notamment dans l'analyse physico-chimique des éléments de l'atmosphère. Leur étude pourra guider les décideurs, mais de manière plus large, l'humain en général, dans les choix qu'il devra faire dans le domaine de l'environnement, mais aussi du développement économique et social.

Il existe une relation étroite entre ces carottes de glace, la protection de l'environnement, la recherche fondamentale et appliquée et le développement économique et social. Elles peuvent donc être qualifiées de bien meuble qui présente un intérêt indéniable pour l'humanité.

2 Le concept de patrimoine commun de l'humanité

Cette première partie se divise comme suit: l'origine du concept (*2.1*); le contenu du concept (*2.2*); les enjeux soulevés (*2.3*) et les notions qui y sont associées (*2.4*).

[4] PROJET d'articles sur la responsabilité de l'État pour fait internationalement illicite, Commission du droit international, Rapport de la Commission du droit international à sa cinquante-troisième session, Doc off AG NU, 56e sess, supp no 10, Doc NU A/56/10 (2001) 44. Tel est le sens des articles 4 et 5.

[5] Voir, par exemple, l'article 905 du Code civil du Québec: "Sont meubles, les biens qui peuvent se transporter". BAUDOIN, Jean-Louis; RENAUD, Yvon. *Code civil du Québec annoté*. Montréal: Wilson et Lafleur, 2024. p. 262.

2.1 L'origine du concept

L'introduction du concept de PCH en droit international est attribuable à M. Arvid Pardo qui en amena la proposition formelle à l'Assemblée générale des Nations Unies (AGNU) en 1967 pour qualifier les fonds marins[6]. Les membres discutaient, durant cette période, du statut juridique à conférer aux grands fonds marins[7]. Cette question était primordiale, car les représentants d'États travaillaient à l'élaboration de la *Convention des Nations unies sur le droit de la mer,* qui sera adoptée en 1982[8].

Les États débattaient, à peu près au même moment, du statut juridique de la Lune et des corps célestes, car depuis 1969, année où les États-Unis avaient foulé le sol lunaire, le statut juridique de la Lune était indéterminé. Ces deux questions opposaient les pays développés et les pays en développement. Ces derniers considéraient que ces ressources devaient être internationalisées, c'est-à-dire soumises à la juridiction d'une autorité supranationale, tandis que les premiers étaient attachés au principe de la souveraineté.

Après d'âpres débats, la notion de PCH fut reconnue dans deux conventions: l'*Accord régissant les activités des États sur la Lune et les autres corps céleste*s de 1979[9] et la *Convention des Nations Unies sur le droit de la mer* de 1982[10].

[6] DÉCLARATION et traité relatif à l'utilisation exclusive à des fins pacifiques des fonds marins et océaniques au-delà des limites de juridictions nationales actuelles et à l'exploitation de leurs ressources dans l'intérêt de l'humanité (dite résolution Pardo) Doc. N.U. A/6695, 18 août. 1967.

[7] C'est-à-dire les fonds marins situés au-delà des plateaux continentaux des États.

[8] CONVENTION des Nations Unies sur le droit de la mer, 10 décembre 1982, 1834 R. T. N. U. 3.

[9] ACCORD régissant les activités des États sur la Lune et les autres corps celestes. V A. D. A. S. 705. 1980.

[10] CONVENTION des Nations Unies sur le droit de la mer, 10 décembre 1982, 1834 R. T. N. U. 3. La traduction anglaise de «patrimoine commun de l'humanité» dans ces deux conventions est «common heritage of mankind». Dans le préambule de la Convention sur la protection et la promotion de la diversité des expressions culturelles de 2005 on traduit «patrimoine commun de l'humanité» en anglais par «common heritage of humanity». À l'article 1 de la Déclaration universelle sur le génome humain de 1997 on traduit «patrimoine de l'humanité» en anglais par «heritage of humanity». Ces deux conventions présentent des concepts qui ne sont pas caractérisés par les six éléments propres au concept de PCH tels qu'ils sont enchâssés dans la CNUDM et l'Accord sur la Lune et qui lui donnent une portée juridique précise (cf. 1.2, 3). L'expression «common heritage of mankind» est donc celle qui est appropriée aux fins de notre étude. CONVENTION sur la protection et la promotion de la diversité des expressions culturelles, 20 octobre 2005.

Sa reconnaissance répondait aux trois préoccupations du moment: Premièrement. Il était question de la mise en valeur de ressources présentant une valeur économique et non pas de leur protection comme telle. Les États abordaient, en effet, la question du statut juridique à conférer à ces ressources d'un point de vue économique avant tout. Ils les considéraient comme des ressources naturelles économiques et non pas comme des ressources qui peuvent être qualifiées de "vitales", comme l'air, l'eau, le sol, la nourriture, etc., et dont l'une des caractéristiques intrinsèques réside dans le fait qu'elles requièrent une protection afin d'assurer leur disponibilité dans le futur. L'objectif premier de ces deux conventions était donc l'exploitation des ressources et non pas leur conservation dans le temps. Deuxièmement., l'exploitation des ressources devait être réalisée dans la perspective du partage équitable des bénéfices qui en résulteraient. Les pays en développement considéraient d'ailleurs que la reconnaissance de concept de PCH constituait un élément de la réalisation du nouvel ordre économique international qu'il revendiquaient, dont l'essence même était la répartition équitable des ressources naturelles et financières de la planète[11]. Troisièmement. Les États désiraient conférer un statut juridique à des ressources naturelles situées au-delà de leurs frontières, c'est-à-dire à des biens ou espaces non soumis à leur compétence territoriale.

2.2 Le contenu du concept

Le concept de PCH comporte des éléments consubstantiels: La notion d'humanité (2.2.1) et celle de patrimoine commun (2.2.2). Ces notions confèrent des caractéristiques au concept qui lui donnent une portée juridique précise (2.2.3).

2.2.1 La notion d'humanité

L'idée d'humanité est fort ancienne et elle a devancé celle d'État. Elle est présente dans le droit romain. Le préambule de la *Charte des Nations Unies*[12] réfère à l'humanité. Les deux Pactes de 1966 sur les droits humains[13], font référence à la famille humaine. La notion est, en plus, formellement reconnue dans des textes contraignants conclus au cours des cinquante dernières années dans différents contextes. Mentionnons non exhaustivement les textes suivants:

- Reconnaissance des "lois de l'humanité" (Conventions de La Haye de 1899 et de 1907 concernant les lois et les coutumes de la guerre sur terre[14] et les quatre Conventions de Genève du 12 août 1949[15])
- Reconnaissance des crimes contre l'humanité (Statut du Tribunal militaire international de Nuremberg de 1945[16])
- Reconnaissance de la notion d'intérêt de l'humanité (Traité sur l'Antarctique de 1959[17])

Conférence générale de l'UNESCO, 33e session, Paris. Disponible sur: https://unesdoc.unesco.org/ark:/48223/pf0000142919_fre. Accessible à: 22 janv. 2025.; DÉCLARATION universelle sur le génome humain et les droits de l'homme de 1997, 11 novembre 1997. Conférence générale de l'UNESCO, 29e session, Paris. Disponible sur: https://www.ohchr.org/fr/instruments-mechanisms/instruments/universal-declaration-human-genome-and-human-rights. Accessible à: 22 janv. 2025.

[11] Voir la: DÉCLARATION concernant l'instauration d'un nouvel ordre économique international, rés. AG 3201 (S-VI), Doc. off. AG NU, 6e sess., 1974. Le concept de PCH est un instrument du NOEI, afin de mettre fin aux règles traditionnelles de liberté, d'appropriation nationale, au profit des principes d'équité et de partage équitable des bénéfices. BELAÏD, Sadok. *Communautarisme et individualisme dans le nouveau droit de la mer*: la gestion des ressources pour l'humanité. La Haye: Martinus Nijhoff Publishers, 1982. p. 138.

[12] "Nous, peuples des nations Unies, Résolus: À préserver les générations futures du fléau de la guerre qui deux fois en l'espace d'une vie humaine a infligé à l'humanité d'indicibles souffrances". CHARTE des Nations Unies et Statut de la Cour Internationale de Justice. San Francisco, 26 juin 1945. R. T. C. n. 7. Disponible sur: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&clang=_fr. Accessible à: 20 janv. 2025.

[13] PACTE international relatif aux droits civils et politiques, 16 décembre 1966, 999 R. T. N. U. 187.; PACTE international relatif aux droits économiques, sociaux et culturels, 16 décembre 1966, 993 R. T. N. U. 13.

[14] CONVENTION concernant les lois et coutumes de la guerre sur terre et son annexe: règlement concernant les lois et coutumes de la guerre sur terre. *La Haye*, 18 oct. 1907. Disponible sur: https://ihl-databases.icrc.org/assets/treaties/195-DIH-19-FR.pdf. Accessible à: 20 janv. 2025.

[15] CONVENTION de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne (Convention I), 75 R. T. N. U. 31. 1949.; CONVENTION de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer (Convention II), 75 R. T. N. U. 85. 1949.; CONVENTION de Genève relative au traitement des prisonniers de guerre (Convention III), 75 R. T. N. U. 135. 1949.; CONVENTION de Genève relative à la protection des personnes civiles en temps de guerre (Convention IV), 75 R. T. N. U. 287. 1949.

[16] ACCORD concernant la poursuite et le châtiment des grands criminels de guerre des Puissances européennes de l'Axe et statut du tribunal international militaire. Londres, 8 août 1945. Disponible sur: https://archive.wikiwix.com/cache/index2.php?url=http%3A%2F%2Fwww.icrc.org%2Fdih.nsf%2FFULL%2F350%3FOpenDocument#federation=archive.wikiwix.com&tab=url. Accessible à: 20 janv. 2025.

[17] TRAITÉ sur l'Antarctique 402 R. T. N. U. 71. 1959.

- Reconnaissance de la notion d'apanage de l'humanité (Traité sur les principes régissant les activités des États en matière d'exploration et d'utilisation de l'espace extra-atmosphérique, y compris la Lune et les autres corps célestes de 1967[18] et Accord sur la Lune de 1979[19])
- Reconnaissance de la notion de patrimoine commun de l'humanité (Accord sur la Lune de 1979[20] et CNUDM de 1982[21])
- Reconnaissance de la notion de patrimoine mondial de l'humanité (Convention pour la protection du patrimoine mondial, culturel et naturel de 1972[22] et Convention pour la sauvegarde du patrimoine culturel immatériel de 2003[23])
- Reconnaissance de la notion de préoccupation pour l'humanité/préoccupation commune à l'humanité (Convention sur les changements climatiques de 1992[24], Convention sur la diversité biologique de 1992[25])

Il est unanimement reconnu en droit international que la notion d'humanité comprend les générations présentes et futures[26].

2.2.2 La notion de patrimoine commun

Dans la notion de patrimoine commun, deux idées sont sous-jacentes: celle de la communauté, comprise dans le sens de biens communs (2.2.2.1) et celle de la patrimonialité, comprise dans le sens de biens patrimoniaux (2.2.2.2).

2.2.2.1 La Communauté comprise dans le sens de biens communs

L'idée des biens ou choses communes est ancienne. Elle remonte au droit romain. Le concept de biens communs concerne ceux qui, du fait de leur valeur indispensable à la vie, appartiennent à tout le genre humain et sa mise en œuvre a comme objectif de soustraire ces biens du régime de propriété qui leur est propre. Il s'agit de biens que la nature a produit pour l'usage de tous. Les biens communs ne sont pas la propriété commune des États. Ces derniers les gèrent pour le compte de l'humanité.

Le concept de PCH tente de moderniser les contours d'une conception fort ancienne de la nature où les êtres humains, compris dans leur globalité d'humanité, partagent en commun les ressources qu'elle leur procure.

2.2.2.2 La patrimonialité

Le concept de PCH comprend en son sein l'idée de générations futures dans les mots humanité, tel que vu. Il comprend aussi cette idée dans le mot "patrimoine". Le choix de ce mot, dont la traduction est *heritage* en anglais, n'est pas anodin. La notion de patrimoine doit inévitablement être envisagée dans une perspective qui tient compte des générations futures. Le patrimoine est différent du capital: "On ne gère pas un patrimoine de la même manière que l'on gère un capital. On gère un capital pour l'accroître, on gère un patrimoine pour le transmettre"[27]. La notion de patrimoine suppose une

[18] TRAITÉ sur les principes régissant les activités des États en matière d'exploration et d'utilisation de l'espace a extra-atmosphérique, y compris la Lune et les autres corps celestes 610 R. T. N. U. 220. 1967.

[19] ACCORD régissant les activités des États sur la Lune et les autres corps celestes. V A. D. A. S. 705. 1980.

[20] ACCORD régissant les activités des États sur la Lune et les autres corps celestes. V A. D. A. S. 705. 1980.

[21] CONVENTION des Nations Unies sur le droit de la mer, 10 décembre 1982, 1834 R. T. N. U. 3.

[22] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025.

[23] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025.

[24] CONVENTION sur les changements climatiques. XXXI I. L. M. 851. 1992. R. T. C. 1994, n. 7.

[25] CONVENTION sur la diversité biologique. 1760 R. T. N. U. 79; R.T.C. 1993, no 24. 1993.

[26] L'humanité désigne selon Jean Charpentier: "L'ensemble des peuples de la terre, abstraction faite de leur répartition entre États, et non seulement les peuples d'aujourd'hui mais aussi les peuples de demain, les générations futures; l'humanité, c'est le genre humain dans sa perpétuation". CHARPENTIER, Jean. L'humanité: un patrimoine, mais pas de personnalité juridique. *In*: PRIEUR, Michel; LAMBRECHTS, Claude (dir.). *Les hommes et l'environnement*: quels droits pour le vingt-et-unième siècle? Études en hommage à Alexandre Kiss. Paris: Frison-Roche, 1998. p. 17-20.; Selon Kemal Baslar, la Cour internationale de justice a reconnu indirectement la notion d'humanité comme sujet de droit potentiel dans l'Affaire Barcelona Traction (1970 CIJ). BASLAR, Kemal. *The concept of the common heritage of mankind in international law*. The Hague: Boston: M. Nijhoff Pub., 1998. (Developments in International Law, v. 30). p. 74.

[27] BAREL, 1984, p. 115 *apud* GODARD, Olivier. Environnement, modes de coordination et systèmes de légitimité: analyse de la caté-

obligation de transmission et donc une responsabilité de fiduciaire.

La notion de patrimoine est donc indissociable de celle de génération future, introduite dans le préambule de la *Charte des Nations Unies*. On y parle de protéger les générations futures du fléau de la guerre[28]. La notion de génération future a été mentionnée par la suite pour la première fois, dans un document contraignant, dans la *Convention internationale pour la réglementation de la pêche à la baleine* de 1946[29].

Depuis, la notion de génération future a été mentionnée dans plusieurs textes à caractère non-contraignant dans lesquels il est fait référence aux *devoirs de la communauté internationale à l'égard des générations présentes et futures*, notamment la *Déclaration sur la protection de l'atmosphère* de 1989[30], la *Déclaration sur le droit des peuples à la paix* de 1984[31] et la *Déclaration sur les responsabilités des générations présentes envers les générations futures* de 1997[32].

2.2.3 Les caractéristiques fondamentales du concept qui lui donnent une portée juridique précise

Les caractéristiques du PCH consacré par la CNUDM et le traité sur la Lune sont au nombre de six[33]. Ce sont les suivantes:

1)Une ressource libre de toute appropriation privée ou étatique;

2)Une ressource accessible à tous pour y effectuer de la recherche scientifique et dont les résultats sont publics;

3) La gestion du bien commun se fait sous l'égide d'une organisation internationale et non par des États individuellement;

4) Tout bénéfice économique doit être partagé équitablement (en portant une attention particulière aux pays en développement);

5) L'utilisation de la ressource n'est permise qu'à des fins pacifiques, et

6) L'intégrité de la ressource doit être protégée pour les générations futures.

Des commentaires seront apportés à la partie III sur l'applicabilité de chacun de ceux-ci aux carottes de glace.

2.3 Les enjeux

Malgré sa consécration dans deux conventions, une partie de la doctrine considère que le concept de PCH n'a pas de véritable statut juridique, car il manquerait de clarté; il serait imprécis et fluctuant[34]. Une autre partie, au contraire, considère que les deux conventions détaillent suffisamment le concept, que les caractéristiques y sont présentées clairement et que ce dernier ferait partie du droit positif[35]. À l'appui de cette position, il ne peut être contesté que le concept fait partie du droit positif pour les Grands fonds marins, la Lune et les corps célestes.

Certains auteurs qui ont étudié le concept dans la perspective de la conservation de ressources vitales, considèrent qu'il prend tout son sens sur le fondement des "droit humains"[36]. En consacrant la notion dans

gorie de patrimoine naturel. *Revue Économique*, v. 41, n. 2, p. 215-241, mars. 1990.

[28] CHARTE des Nations Unies et Statut de la Cour Internationale de Justice. San Francisco, 26 juin 1945. R. T. C. n. 7. Disponible sur: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&clang=_fr. Accessible à: 20 janv. 2025.

[29] CONVENTION internationale pour la réglementation de la pêche à la baleine 161 R. T. N. U. 75. 1946.

[30] DÉCLARATION sur la protection de l'atmosphère. La Haye, 11 mars: Doc. A/44/340 (22 juin 1989): version française reproduite dans R. G. D. I. P. T. 93 et dans R. J. E., 1990. 1989. p. 429.

[31] DÉCLARATION sur le droit des peuples à la paix. 57e séance plénière AGNU (1984) 39/11. 1984.

[32] DÉCLARATION sur les responsabilités des générations présentes envers les générations futures (1997) Adoptée par la conférence générale de l'UNESCO à sa 29e session, Paris, 12 novembre 1997.

[33] MERCURE, Pierre-François. Le choix du concept de développement durable plutôt que celui de patrimoine commun de l'humanité afin d'assurer la protection de l'atmosphère. *McGill Law Journal*: Revue de droit de McGill, v. 41, p. 595-628, 1996. p. 605.

[34] Selon Catherine Le Bris, qui ajoute, toutefois: "Analysées à l'aune du concept d'humanité, cependant, les règles applicables au patrimoine commun se révèlent dans toute leur originalité. L'humanité, en effet, est 'maître du domaine' et le patrimoine commun matérialise les intérêts du genre humain". LE BRIS, Catherine. *L'humanité saisie par le droit international*. Paris: LGDJ, 2012. p. 366.

[35] Après avoir fait référence, notamment, à la proposition d'Arvid Pardo de 1967 à l'AGNU, Sylvie Paquerot ajoute: "Or, le concept de patrimoine commun de l'humanité a une histoire beaucoup plus longue et semble faire plus ou moins partie de la philosophie du droit international sinon du droit international positif lui-même, depuis déjà longtemps." PAQUEROT, Sylvie. *Le statut des ressources vitales en droit international*: essai sur le concept de patrimoine commun de l'humanité. Bruxelles: Bruylant, 2002. p. 17.

[36] LE BRIS, Catherine. *L'humanité saisie par le droit international*. Paris:

deux conventions, on aurait créé un droit du PCH et même un droit au PCH. Ce dernier serait un droit de l'humanité[37]. Il aurait une double dimension. Un droit dont le respect s'exerce dans une perspective trans--temporelle, c'est-à-dire un patrimoine protégé pour être transmis aux générations futures afin qu'elles en bénéficient et qu'elles en assument aussi les coûts de préservation pour les générations qui lui succéderont. Il s'agirait aussi d'un droit qui assurerait la jouissance du patrimoine dans une perspective trans-spatiale; ce qui signifie que les coûts et les bénéfices associés à sa gestion devraient être répartis équitablement entre les membres des générations présentes; soit l'humanité contemporaine.

L'objet du droit au patrimoine commun est la protection des biens, au sens large, essentiels au genre humain. Il favorise la mise en œuvre des autres droits humains; au premier plan le droit à un environnement sain et le droit au développement.

Aucune ressource vitale n'a été caractérisée de PCH en se fondant sur les caractéristiques mentionnées dans l'*Accord sur la Lune* et la CNUDM. Comme mentionné précédemment, la Lune, les corps célestes et les grands fonds marins ont été consacrés PCH en tant que ressources économiques exploitables et non pas en tant que ressources vitales.

La distinction entre les ressources économiques et les ressources vitales est sujette à débats. Néanmoins, il est difficilement contestable que les ressources économiques sont aussi des ressources vitales puisque leur surexploitation représente une menace pour la vie. De plus, une ressources naturelle commune est, à la fois vitale, en ce sens qu'elle requiert une protection car elle est indispensable à la vie et, à la fois économique, car elle peut être exploitée. Par exemple, l'air est une ressource vitale, car il faut la protéger pour la survie de l'humanité, mais elle est aussi une ressource économique, car elle est exploitée. C'est d'ailleurs son exploitation qui est à l'origine de la pollution. Le concept de PCH est, par conséquent, susceptible de s'appliquer à toutes les ressources naturelles communes, économiques et vitales, car ses deux composantes sont déjà reconnues en droit international positif: l'humanité et le patrimoine.

Il peut être affirmé qu'il existe un consensus sur le fait que la consécration du concept de PCH implique une responsabilité commune dans la gestion et la protection de la ressource et aussi un partage équitable des avantages et des coûts associés à cette gestion et protection. La responsabilité dans la gestion et la protection de la ressource doit néanmoins être commune et différenciée, c'est-à-dire qu'elle doit tenir compte du niveau de développement des États[38]. Le partage, pour être équitable, doit aussi se fonder sur le niveau de développement des États. C'est l'essence même du concept de PCH.

Certaines notions sont associées au concept de PCH. Elles sont présentées ci-dessous.

2.4 Les notions associées

Les trois notions associées au concept de PCH, sont celles d'apanage de l'humanité (2.4.1); de préoccupation commune de l'humanité (2.4.2) et d'intérêt de l'humanité (2.4.3).

2.4.1 La notion d'apanage de l'humanité

La notion d'apanage de l'humanité[39] apparaît pour la première fois en 1967 dans le *Traité relatif à l'espace extra--atmosphérique*[40]. Son article 1 mentionne:

> l'exploration et l'exploitation de l'espace extra-atmosphérique, y compris la lune et les corps célestes, doivent se faire pour le bien et dans l'intérêt de tous les pays, quel que soit le stade de leur développement économique ou scientifique; elles sont l'apanage de l'humanité tout entière.

LGDJ, 2012. p. 363.

[37] Dans ce sens, voir l'article 7 de la Déclaration universelle des droits de l'humanité: «L'humanité a droit à la protection du patrimoine commun et de son patrimoine naturel et culturel, matériel et immatériel.» DÉCLARATION universelle des droits de l'humanité: Rapport à l'attention de Monsieur le président de la République, Mme Corinne Lepage & Équipe de rédaction, Rapport final, 25 septembre 2015, 133 p. Disponible sur: https://www.vie-publique.fr/files/rapport/pdf/154000687.pdf. Accessible à: 18 janv. 2025. Le projet de Déclaration est reproduit à la page 17 du rapport.

[38] CÔTÉ, Charles-Emmanuel. De Genève à Doha: genèse et évolution du traitement spécial et différencié des pays en développement dans le droit de l'OMC. *McGill Law Journal*: Revue de droit de McGill, v. 56, n. 1, p. 115-176, set. 2010.

[39] La traduction anglaise est Province of mankind.

[40] TRAITÉ sur les principes régissant les activités des États en matière d'exploration et d'utilisation de l'espace a extra-atmosphérique, y compris la Lune et les autres corps celestes 610 R. T. N. U. 220. 1967. Cette expression n'apparaît qu'une seconde fois à l'article IV, § 1 de l'Accord sur la Lune.

Elle sera reprise en 1979, dans l'*Accord sur la Lune*[41]. Elle n'apparaît que dans ces deux conventions. Sa signification et sa portée étaient imprécises au moment de son intégration dans ces dernières. Beaucoup d'auteurs ont affirmé à ce moment que ce n'était pas une notion juridique. Plusieurs le soutiennent encore[42].

La majorité des auteurs considère, en se fondant sur la lettre des traités, que la notion ne viserait que les activités s'exerçant dans l'espace: l'exploration et l'exploitation, et non pas "l'espace" comme tel, c'est-à-dire l'environnement tridimensionnel. Selon eux, l'humanité serait titulaire d'un droit sur les activités se déroulant dans l'espace, mais pas sur celles concernant le lieu physique, c'est-à-dire le bien qu'est l'espace extra-atmosphérique[43]. La notion d'apanage de l'humanité serait, de surcroît, étrangère à l'idée d'une quelconque institutionnalisation dans la gestion des activités d'exploration et d'exploitation.

Ce concept semble donc inapproprié, à première vue, pour caractériser les carottes de glace, car le bien, en soi, ne serait pas visé, mais seulement les activités effectuées sur les carottes. De plus, aucune gestion supranationale n'est envisageable quant aux activités réalisées sur les carottes.

2.4.2 La notion de préoccupation commune de l'humanité

La notion de préoccupation commune de l'humanité[44] apparaît pour la première fois en 1988 dans une résolution de l'AGNU pour qualifier la ressource vitale qu'est l'atmosphère, à la suite d'une proposition du gouvernement de Malte intitulée: "*Conservation du climat en tant que partie du patrimoine commun de l'humanité*". Elle se voulait être une alternative au concept de PCH, puisque la proposition initiale utilisait ce dernier pour qualifier l'atmosphère[45]. Une telle avenue aurait été innovatrice, mais elle inquiétait certains États, ce qui amena le rejet de la proposition initiale.

Le contenu juridique de cette notion est imprécis et, conséquemment, les interprétations varient à son égard. On considère qu'il s'agit d'une notion à travers laquelle s'exprime la volonté de la communauté internationale d'adopter une action collective à l'égard d'une ressource ou d'un problème environnemental. Sa reconnaissance suppose que la communauté internationale devra déployer des efforts communs pour coopérer et résoudre une problématique.

Sans retrouver un libellé identique dans les textes internationaux, l'idée de la notion trouve son origine, à la Conférence de Stockholm en 1972, "où s'est exprimée pour la première fois de manière officielle au plan international, une préoccupation commune pour l'environnement et les ressources"[46]. Cette notion a le mérite de reconnaître l'existence de ressources ou de biens qui requièrent une action commune; ressources que l'on peut qualifier de ressources naturelles communes ou de biens communs. Il s'agirait de ce point de vue d'un concept qui ferait évoluer le droit international de l'exploitation et de la conservation des ressources communes et de l'environnement, d'un droit interétatique de réciprocité, à un droit exposant une conception globale des problèmes relatifs aux ressources communes et présentant les règles pour résoudre ces problèmes. La responsabilité et les coûts de protection de la ressource devraient être partagés.

Pour certains auteurs, cette notion serait essentiellement politique, sans contenu juridique propre à créer une norme susceptible de devenir contraignante[47].

Certains autres expliquent le passage du concept de PCH à celui de préoccupation commune de l'humanité par la nécessité de résoudre le problème posé par le principe de non-appropriation inhérent au concept de PCH. Une ressource pourrait être consacrée préoccupation commune de l'humanité même si elle était localisée sur le territoire d'un État. Il est d'ailleurs à noter que dans le cas de l'Antarctique, les revendications de souveraineté de certains États sur ce territoire ont souvent été leur argument principal pour refuser de lui appliquer le concept de PCH.

[41] ACCORD régissant les activités des États sur la Lune et les autres corps celestes. V A. D. A. S. 705. 1980. À l'art. IV, § 1.

[42] LE BRIS, Catherine. *L'humanité saisie par le droit international.* Paris: LGDJ, 2012. p. 337.

[43] LE BRIS, Catherine. *L'humanité saisie par le droit international.* Paris: LGDJ, 2012. p. 338.

[44] Qui est traduit par Common Concern of Mankind.

[45] PAQUEROT, Sylvie. *Le statut des ressources vitales en droit international*: essai sur le concept de patrimoine commun de l'humanité. Bruxelles: Bruylant, 2002. p. 113.

[46] PAQUEROT, Sylvie. *Le statut des ressources vitales en droit international*: essai sur le concept de patrimoine commun de l'humanité. Bruxelles: Bruylant, 2002. p. 114.

[47] BIRNIE, Patricia W.; BOYLE, Alan E. *International Law and the Environment.* New York: Clarendon Press, 1992.; SAND, Peter H. International environmental law after Rio. *European Journal of International Law*, v. 4, n. 3, p. 377-389, 1993. p. 382.

Dans la mesure où il s'agit de qualifier des ressources situées sur des territoires étatiques ou revendiqués par des États, la notion de préoccupation commune de l'humanité apparaît moins menaçante pour ces États.

Compte tenu de toutes ces interprétations, on peut déduire que ne remettant pas en question la souveraineté des États sur les ressources, ni le principe d'appropriation qui lui est inhérent, la notion de préoccupation commune ne permet pas de mettre en place les conditions d'une représentation de l'humanité et de ses intérêts, qui, inévitablement, constituerait une limite à cette souveraineté.

La notion de préoccupation commune maintient les caractéristiques inhérentes à la propriété, ces dernières autorisant que l'on puisse disposer du bien à sa guise. C'est aussi le sens du concept de "ressources partagées" qui ramène aux relations de "bon voisinage" concernant l'usage de ressources dont le statut, par ailleurs, ne remet pas en cause l'appropriation nationale.

Comme dans le cas du concept de préoccupation commune, le concept de "ressources partagées" maintient intégralement la place prépondérante de la souveraineté, ce que reconnait aussi le concept de "patrimoine mondial" mis de l'avant par l'UNESCO, comme on le verra.

La notion de préoccupation commune semble donc inappropriée, à première vue, pour caractériser le statut des carottes de glace.

2.4.3 La notion d'intérêt de l'humanité

Dans les préambules de la *Convention internationale pour la réglementation de la chasse à la baleine* de 1946 et du *Traité sur l'Antarctique* adopté en 1959, il est fait référence à la notion d'intérêt de l'humanité. Dans la première, il s'agit de protéger une ressource vivante et dans la deuxième il est question d'assurer l'utilisation pacifique d'un espace. Cette notion a été reprise par la suite dans de nombreuses conventions et déclarations. Elle aurait précédé celle de préoccupation commune de l'humanité. Une grande partie de la doctrine, les considèrent d'ailleurs équivalentes.

Certaines règles applicables à l'Antarctique rappellent les critères du PCH. Seules les activités pacifiques sont permises; la recherche scientifique est libre; l'environnement doit être protégé, mais la comparaison s'arrête là. L'Antarctique n'est pas un PCH, car l'ensemble des États ne participe pas à sa gestion et, d'autre part, il n'a y pas de système d'exploitation des ressources, car ces activités sont interdites jusqu'en 2046. De plus, la question des coûts de protection de l'environnement Antarctique n'était pas à l'ordre du jour au moment de l'adoption du traité.

On peut affirmer que la notion d'intérêt de l'humanité est assimilable à cette d'apanage de l'humanité utilisé en droit de l'espace et à celle de préoccupation de l'humanité utilisé en droit de l'environnement.

Ces trois notions s'attachent moins au statut de l'espace en cause, qu'à celui des activités qui s'y déroulent. Sous l'angle de la ressource, à proprement parler, on peut soutenir qu'elles concernent moins son statut, que celui des activités auxquelles elle peut être soumise. Dans ces trois hypothèses il n'est pas question d'un modèle institutionnalisé comme c'est le cas pour le PCH. Il n'est question que d'une simple limitation des activités des États.

Pour conclure, ces trois notions nous semblent donc inappropriées afin de caractériser les carottes de glace. Qu'en est-il du concept de patrimoine mondial de l'UNESCO?

3 Le concept de patrimoine mondial de l'UNESCO

La communauté internationale prenait conscience dans les années 1960 de la nécessité de de préserver le patrimoine culturel et naturel pour sa transmission aux générations futures. Elle manifestait plus particulièrement son intérêt dans la protection de biens façonnés par l'humain et de ressources naturelles menacés de destruction à l'intérieur des frontières étatiques. Il s'agissait d'instaurer un système juridique en vue de préserver le patrimoine culturel et naturel de l'humanité.

C'est dans ce contexte que la *Convention pour la protection du patrimoine mondial, culturel et naturel* fut élaborée et adoptée dans le cadre de l'UNESCO en 1972. Son objectif est de rendre la communauté internationale responsable dans la préservation de ces "biens patrimoniaux".

Elle se fonde sur deux principes: la reconnaissance de la souveraineté de l'État (*3.1*) et l'absence de respon-

MERCURE, Pierre-François. Le Projet international Ice Memory: les carottes de glace sont-elles patrimoine commun de l'humanité?. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 142-158, 2025.

sabilisation de la communauté internationale (*3.2*). Ces deux aspects seront abordés successivement avant de conclure que ce concept est inapproprié pour caractériser les carottes de glace (*3.3*).

3.1 La Reconnaissance de la souveraineté de l'État

La Convention de l'UNESCO est fondée sur la reconnaissance de la souveraineté des États et du droit qu'ils exercent sur le patrimoine culturel et naturel localisé sur leur territoire. Elle a essentiellement pour but d'inscrire un bien sur la liste du Patrimoine mondial, en échange d'un engagement de l'État concerné de mettre en œuvre un plan de préservation du bien visé. Si tel est le cas, elle prévoit des modalités pour que les États parties apportent un soutien financier à l'appui de cette préservation, si et seulement si, le bien en question a une valeur pour l'humanité, c'est-à-dire, représente un "intérêt exceptionnel" qui nécessite sa préservation "en tant qu'élément du patrimoine mondial de l'humanité tout entière"[48]. Tous les paragraphes de l'article 1 de cette Convention qui définit le contenu du patrimoine culturel et naturel se terminent par les mots "ont une valeur universelle exceptionnelle […]".

L'inscription d'un bien sur la liste du Patrimoine mondial, ne peut être demandée que par l'État sur le territoire duquel il est situé. En effet, comme le mentionne l'article 3: "Il appartient à chaque État partie à la Convention d'identifier et de délimiter les différents biens situés sur son territoire" qu'il entend protéger. Le principe de la souveraineté de l'État est au cœur de la Convention[49]. Ainsi, c'est l'État qui détermine les modalités d'usage et de préservation du bien. La Convention reconnaît expressément des droits souverains à l'État sur lequel le patrimoine culturel ou naturel est situé[50]. Il est spécifié, à cet effet, que les États Parties apporteront leur concours "si l'État sur le territoire duquel il est situé le demande"[51]. Aussi, "l'inscription d'un bien sur la liste du patrimoine mondial ne peut se faire qu'avec le consentement de l'État intéressé"[52].

3.2 L'absence de responsabilisation de la communauté internationale

La préservation de ce patrimoine mondial ne relève aucunement de la responsabilité directe de la communauté internationale et ne correspond pas, par ailleurs, à l'idée d'un partage équitable des responsabilités entre elle et l'État. En effet, la communauté internationale ne fournit qu'une assistance à l'action de l'État intéressé. Ce dernier demeure responsable du financement des mesures de protection.

Ainsi, chacun des États parties à la Convention reconnaît que l'obligation d'assurer "l'identification, la protection, la conservation, la mise en valeur et la transmission aux générations futures du patrimoine culturel et naturel "situé sur son territoire, "lui incombe au premier chef"[53]. À cet effet, il agit "tant par son propre effort au maximum de ses ressources disponibles que, le cas échéant, au moyen de l'assistance et de la coopération internationales dont il pourra bénéficier [...]"[54].

Les limites de la responsabilité internationale sont clairement définies:

> Aux fins de la présente convention, il faut entendre par protection internationale du patrimoine mondial culturel et naturel la mise en place d'un système

[48] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025. préambule, par. 6.

[49] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025. art. 6, par. 1.

[50] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025. art. 6, par. 1.

[51] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025. art. 6, par. 2.

[52] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025. art. 11.

[53] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025. art. 4.

[54] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025. art. 4.

de coopération et d'assistance internationales visant à seconder les États parties à la convention [...].[55]

Selon la Convention, ce sont les difficultés pour l'État sur le territoire duquel se trouve un bien du patrimoine mondial de subvenir à ses coûts de protection et de restauration et non pas la reconnaissance de "responsabilités communes" incombant à la communauté internationale, qui constitueront le fondement du support ou de l'assistance de cette dernière:

> Le Comité établit, met à jour et diffuse, chaque fois que les circonstances l'exigent, sous le nom de "liste du patrimoine mondial en péril", une liste des biens figurant sur la liste du patrimoine mondial pour la sauvegarde desquels de grands travaux sont nécessaires et *pour lesquels une assistance a été demandée* aux termes de la présente convention [...] Ne peuvent figurer sur cette liste *que des biens du patrimoine culturel et naturel qui sont menacés de dangers graves et précis* [...].[56]

De plus, selon l'article 25, la part de financement des travaux par la communauté internationale doit, en principe, être accessoire, puisque "la participation de l'État qui bénéficie de l'assistance internationale doit constituer une part substantielle des ressources apportées [...]".

3.3 Un concept inapproprié pour caractériser les carottes de glace

En vertu de la Convention pour la protection du patrimoine mondial, culturel et naturel de l'UNESCO, la responsabilité internationale

> relève moins de l'idée de responsabilités communes que d'un mécanisme d'aide internationale pour les États qui n'auraient pas les ressources financières pour assurer la préservation de l'héritage culturel et naturel dont ils ont la responsabilité première[57].

De plus, le concept de patrimoine mondial de l'UNESCO ne concerne que de biens situés sur le territoire des États et non pas dans des espaces internationaux. Cette caractéristique posera un problème lorsque le moment sera venu de déplacer les carottes de glace en Antarctique. Pour ces deux raisons, le concept de patrimoine mondial de l'UNESCO semble, à première vue, inadapté aux carottes de glace.

On peut ajouter à ces raisons, que le concept de patrimoine mondial tel qu'il a été conçu dans le cadre de l'UNESCO, ne répond pas aux critères recherchés pour assurer une gestion internationale des carottes de glace: le partage équitable des coûts et des bénéfices, la non-appropriation nationale et la gestion supranationale. De plus, la convention ne fait aucune obligation aux pays inscrivant un site sur la liste du patrimoine mondial et recevant une aide internationale, d'en assurer l'accès. L'usage non-exclusif du site n'est pas reconnu.

Ce concept fournit cependant des éléments qui alimentent la réflexion sur la détermination du système le plus apte à assurer une gestion rationnelle et équitable des carottes de glace; mentionnons à ce titre: l'usage pacifique du bien, la prise de conscience par la communauté internationale d'une certaine forme de responsabilité, et, surtout, l'importance de ce patrimoine pour les générations futures.

4 Le concept retenu afin de caractériser les carottes de glace

Le concept de PCH semble approprié, à première vue, sous réserve de quelques adaptations, afin de caractériser les carottes de glace. Bien qu'il n'y ait que dix-sept États parties à l'*Accord sur la Lune*, en revanche la CNUDM a presque atteint l'universalité, soit 169 États parties sur les 193 États membres des Nations Unies. Il peut donc être assumé que le concept de PCH fait partie du droit positif.

Nous reprendrons les six caractéristiques du concept de PCH énoncées dans les deux instruments contraignants qui le consacrent: la CNUDM et l'*Accord sur la Lune*, et nous formulerons des commentaires sur chacune de celles-ci relativement aux carottes de glace.

[55] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025. art. 7.

[56] CONVENTION pour la protection du patrimoine mondial, culturel et naturel. Conférence générale de l'UNESCO, Paris, 17e session, 23 novembre, R. T. C. 1976 no 45. 1972. Disponible sur: http://www.unesco.org/culture/ich/fr/convention/. Accessible à: 23 janv. 2025. art. 11, par. 4. L'italique est de nous.

[57] PAQUEROT, Sylvie. *Le statut des ressources vitales en droit international*: essai sur le concept de patrimoine commun de l'humanité. Bruxelles: Bruylant, 2002. p. 121.

4.1 La non-appropriation privée ou étatique[58]

Les éléments qui ont été consacrés PCH dans deux conventions, soit les grands fonds marins, la Lune et les corps célestes, sont des espaces internationalisés, c'est-à-dire qu'ils sont situés à l'extérieur de territoires étatiques. Ces espaces comprennent des ressources[59]. Les deux conventions ont donc consacré PCH l'espace, mais aussi les activités d'exploration, c'est-à-dire la recherche et, en dernier lieu, les activités d'exploitation réalisées sur les ressources situées dans ces espaces. Si la Zone et la Lune sont consacrées PCH, c'est en raison de la présence de ressources exploitables. La motivation première des États lorsqu'ils ont créé le concept de PCH était précisément l'exploitation des ressources de ces espaces au profit des pays en développement. Compte tenu qu'il était impossible, au moment de l'adoption des deux conventions, de cibler précisément les lieux où les ressources seraient exploitées, les États parties consacrèrent PCH tout l'espace dans lequel elles devaient nécessairement se trouver: la Zone dans le cas de la CNUDM et la Lune dans le cas de l'*Accord sur la Lune*. Les États parties manifestaient ainsi que la superficie totale de ces espaces était susceptible d'exploitation. C'est en ayant ces éléments à l'esprit que doit être comprise la condition de la non-appropriation.

La condition de la non-appropriation est une conséquence, plutôt qu'un prérequis, de la volonté des États que la Zone et la Lune soient déclarés PCH. Alors, quelle que soit la localisation des carottes de glace et quels qu'en soient les propriétaires, détenteurs ou usagers actuels, leur consécration PCH dans un traité respecterait la caractéristique de la non-appropriation. En effet, la consécration des carottes de glace PCH viserait des biens ou des objets qui constituent des ressources, sans égard à leur localisation. Leur entreposage sur le territoire d'un État, en l'occurrence la France en ce moment, ne constituerait donc pas un obstacle à leur statut juridique de PCH. Les biens, ainsi que l'espace occupé par ces biens, seraient ainsi déclarés PCH. De tout manière, le bien ou l'objet, et l'espace qu'il occupe se confondent, puisque la définition du mot "espace" réfère à un objet: "Propriété particulière d'un objet qui fait que celui-ci occupe une certaine étendue, un certain volume au sein d'une étendue, d'un volume nécessairement plus grand que lui et qui peuvent être mesurés"[60].

Ainsi, une carotte de glace peut être une ressource localisée dans un espace qui est libre de toute appropriation étatique ou privée, lorsque ce dernier est consacré PCH par une convention.

4.2 Une ressource accessible à tous pour y effectuer de la recherche scientifique, dont les résultats sont publics[61]

Les deux conventions encouragent la participation des différents pays à la recherche et plus particulièrement celle des pays en développement. Les pays qui réalisent de la recherche doivent assurer le transfert de connaissance et de technologie aux pays en développement.

Il est intéressant, sur cette question, de mentionner l'Article 10 de la résolution 2740 de l'Assemblée générale du 17 décembre 1970 mentionnée dans le préambule de la CNUDM, qui résume bien les dispositions de la CNUDM sur la question de la recherche, mais aussi ce qui est consacré dans l'Accord sur la Lune:

> Les États doivent favoriser la coopération internationale dans le domaine de la recherche scientifique:
>
> a) En participant à des programmes internationaux et en encourageant la coopération, en matière de recherche scientifique, des personnes originaires de pays différents;
>
> b) En publiant de façon effective les programmes de recherche et en diffusant les résultats de ces recherches par voies internationales, et
>
> c) En coopérant à des mesures destinées à renforcer la capacité des pays en voie de développement dans le domaine de la recherche, notamment par la participation de leurs ressortissants à des programmes de recherche.
>
> Aucune de ces activités ne pourra constituer la base juridique d'une revendication quelconque à l'égard de la Zone et de ses ressources.[62]

[58] CONVENTION des Nations Unies sur le droit de la mer, 10 décembre 1982, 1834 R. T. N. U. 3. art. 137.; ACCORD régissant les activités des États sur la Lune et les autres corps celestes. V A. D. A. S. 705. 1980. art. 11 (2), (3).

[59] Dans le cas des grands fonds marins, par exemple, l'article 136 de la CNUDM, supra note 9, consacre PCH la Zone, c'est-à-dire, l'espace, mais aussi ses ressources: «La Zone et ses ressources sont le patrimoine commun de l'humanité.» L'article 11 (1) de l'Accord sur la Lune, supra note 10, est au même effet: «La Lune et ses ressources naturelles constituent le patrimoine commun de l'humanité.»

[60] Le Petit Robert.

[61] CONVENTION des Nations Unies sur le droit de la mer, 10 décembre 1982, 1834 R. T. N. U. 3. art. 143 (3) (c) et 144.; ACCORD régissant les activités des États sur la Lune et les autres corps celestes. V A. D. A. S. 705. 1980. art. 5 (1) et 6 (1) (2).

[62] ACCORD régissant les activités des États sur la Lune et les autres

Les carottes de glace pourront ainsi être utilisées pour des analyses futures et les résultats devront être partagés au sein de la communauté scientifique dans un esprit de solidarité à l'égard de tous les États, et plus particulièrement avec les pays en développement.

4.3 La gestion de la ressource se fait sous l'égide d'une organisation internationale et non des États individuellement[63]

L'organisme de gestions des carottes de glace est déjà opérationnel; il s'agit de la *Fondation Ice Memory*.

4.4 Tout bénéfice économique doit être partagé équitablement, en portant une attention particulière aux pays en développement[64]

Les carottes de glace ne présentent aucun avantage commercial immédiat, bien au contraire, leur conservation implique des coûts. Il peut cependant aisément être soutenu que les recherches qui y sont associées sont susceptibles de conférer un avantage économique; surtout aux États qui les réalisent, et, dans une mesure beaucoup moindre, à ceux qui ont accès aux résultats d'analyse.

Il est clair que la recherche fondamentale et appliquée confère un avantage économique à plus ou moins long terme aux États qui consacrent une part importante de leur produit national brut à la recherche/développement. C'est un fait démontré.

Tout cela est conforme avec l'idée même du PCH consacré dans la CNUDM. Si l'on s'en tient aux principes de la CNUDM: l'exploitation des grands fonds marins implique, dans une première phase, des coûts que certains États assument, mais, dans la deuxième phase; celle de la récolte des revenus; les États qui ont investi dans l'exploitation sont remboursés pour leur investissement et ils ont droit à une part des profits qui correspond à un montant raisonnable selon les critères déterminés par les États parties. La balance des profits est versée aux États équitablement, en portant une attention particulière aux pays en développement. La répartition des profits doit obéir au principe d'inégalité compensatoire. C'est aussi ce principe qui sera retenu en ce qui a trait aux coûts de gestion des carottes de glace.

4.5 L'utilisation de la ressource n'est permise qu'à des fins pacifiques[65]

Cette condition ne pose aucun problème pour le statut des carottes de glace, puisque ces dernières répondent à des considérations scientifiques avant tout.

4.6 L'intégrité du bien doit être protégée pour les générations futures

Cet aspect soulève la question de la conservation ou de la protection de la ressource ou du bien et des bénéfices qui en découlent pour les générations futures. Les ressources ou biens visés dans la CNUDM et *l'Accord sur la Lune*, sont des ressources économiques. On vise la conservation du bien afin que les générations futures puissent elles aussi tirer profit de leur exploitation. C'est dans cet esprit qu'on envisageait les générations futures dans ces deux conventions.

Lorsque l'on applique la notion de PCH à des ressources vitales, cela demande des adaptations. Il est alors question de conservation, ce qui implique des coûts de gestion dans le temps. Il est aussi question de bénéfices à plus long terme au profit des générations futures.

Dans la CNUDM, il n'y a aucune disposition sur les générations futures, mais il est abondamment fait référence à l'humanité dont le sens vise sans contredit les générations futures, comme nous l'avons mentionné précédemment. On peut d'ailleurs référer à cet effet à la *Déclaration sur la responsabilité des générations présentes à l'égard des générations futures* adoptée le 12 novembre 1997 par la conférence générale de l'UNESCO.

Dans l'*Accord sur la Lune*, il est mentionné à l'article 4 (1) que l'exploration et l'utilisation de la Lune doit se faire pour le bien et dans l'intérêt des générations présentes et futures.

corps celestes. V A. D. A. S. 705. 1980.

[63] CONVENTION des Nations Unies sur le droit de la mer, 10 décembre 1982, 1834 R. T. N. U. 3. art. 156.; ACCORD régissant les activités des États sur la Lune et les autres corps celestes. V A. D. A. S. 705. 1980. art. 11 (5).

[64] CONVENTION des Nations Unies sur le droit de la mer, 10 décembre 1982, 1834 R. T. N. U. 3. art. 140.; ACCORD régissant les activités des États sur la Lune et les autres corps celestes. V A. D. A. S. 705. 1980. art. 11 (7) (d).

[65] CONVENTION des Nations Unies sur le droit de la mer, 10 décembre 1982, 1834 R. T. N. U. 3. art. 141.; ACCORD régissant les activités des États sur la Lune et les autres corps celestes. V A. D. A. S. 705. 1980. art. 3 (1).

MERCURE, Pierre-François. Le Projet international Ice Memory: les carottes de glace sont-elles patrimoine commun de l'humanité?. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 142-158, 2025.

5 Conclusion

Il semble donc, selon une analyse préliminaire, que les carottes de glace pourraient être consacrées PCH et gérées selon les caractéristiques propres à ce concept.

Un traité qui consacrerait ces biens PCH devrait comporter les cinq éléments qui suivent. Il devrait:

> 1) Présenter précisément et clairement les six caractéristiques propres à un bien consacré PCH;
>
> 2) Mentionner explicitement que les États agissent au nom de l'humanité qui est le titulaire du bien. Dans les faits, les États agiront par l'intermédiaire d'un organisme supranational, La *Fondation Ice Memory*, qui se verra confier un rôle dans la gestion des carottes;
>
> 3) Mentionner que tous les États de la planète sont titulaires d'un droit à ce que les carottes de glace soient PCH à leur égard.

Cette clause ferait en sorte que même en l'absence de ratification du traité par un État, ce dernier serait présumé consentir au droit qui lui est conféré. Selon un principe bien établi en droit international public:

> Un droit naît pour un État tiers d'une disposition d'un traité si les parties à ce traité entendent, par cette disposition, conférer ce droit soit à l'État tiers ou à un groupe d'États auquel il appartient, soit à tous les États, et si l'État tiers y consent. Le consentement est présumé tant qu'il n'y a pas d'indication contraire, à moins que le traité n'en dispose autrement[66].
>
> Un État tiers pourrait néanmoins déclarer qu'il est en désaccord avec la reconnaissance du principe et, conséquemment, qu'en ce qui le concerne les carottes de glace ne sont pas PCH.
>
> 4) Être ouvert à l'adhésion des États tiers. Le traité serait signé par un certain nombre d'États lors d'une conférence diplomatique *ad hoc* et il comprendrait une clause qui présenterait les modalités d'adhésion pour les États absents de la conférence diplomatique. Il serait ouvert à tous les États qui accepteraient les modalités du traité.
>
> 5) Comporter au minimum ces cinq parties: 1) Les principes qui seraient fondés sur les six caractéristiques propres à un bien consacré PCH; 2) Les droits de l'humanité sur le bien; des droits exercés pas les États en son nom; 3) Les obligations (ou les devoirs) de l'humanité à l'égard du bien; 4) Les mécanismes de gestion du bien (création d'un organisme de gestion, etc.) et 5) Les dispositions finales (entrée en vigueur, dépositaire, amendements, communications individuelles, interétatiques, etc.).

Le préambule devrait être rédigé avec soin, de manière à faire ressortir l'importance de la consécration des carottes de glace comme PCH pour la résolution de problématiques environnementales par les générations futures. Le préambule revêt une importance primordiale, car, en plus de son rôle juridique à proprement parler, soit qu'il sert à interpréter un traité, il exposerait que le concept s'applique à un bien qui présente un intérêt scientifique fondamental.

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La cultura del vino como patrimonio inmaterial*

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Resumen

La producción vinícola constituye un sector particularmente importante dentro del sector primario en buena parte del mundo. Su actividad ha generado la construcción de disciplinas dotadas de un corpus teórico que les ha abierto las puertas de la educación superior. Por su parte, el consumo de vino está presente en actividades de índole social y cultural de todo tipo. La conclusión inicial es la de que el vino ha desarrollado a su alrededor una cultura activa y en constante evolución. El presente artículo pretende hacer un repaso del tratamiento del vino y de su entorno cultural desde la perspectiva de la regulación en materia de patrimonio cultural, con especial atención al tratamiento que se hace dentro de la categoría inmaterial. Para ello establece una metodología analítico-descriptiva en la que se destaca la importancia histórica de la denominada cultura del vino y su encaje dentro del concepto de patrimonio cultural. La conclusión principal es que no es desacertado hablar de un patrimonio vinícola como categoría transversal dentro de los conceptos básicos de patrimonio cultural material e inmaterial, donde podemos encontrar ejemplos propios de los denominados «bienes-cosa» y de los denominados «bienes-actividad» hasta el punto de que bien puede integrarse en el concepto de patrimonio cultural mixto. La consideración del patrimonio enológico como una categoría transversal puede servir para la resolución ciertas controversias en el ámbito del específico tratamiento del patrimonio inmaterial o para abordar otras categorías patrimoniales protegidas que estén caracterizadas por su naturaleza interdisciplinar.

Palabras clave: vino; cultura del vino; patrimonio cultural; patrimonio inmaterial.

Abstract

Wine production is a particularly important sector in the primary sector almost all over the world. Its activity has generated the development of disciplines endowed with a theoretical corpus that has opened the gates of universities. Furthermore, wine consumption is present in social and cultural activities of all kinds. The initial conclusion is that the wine has developed around it an active and constantly evolving culture. This article aims to review the treatment of wine and its cultural environment from the perspective of the regulation of cultural heritage, with special attention to the treatment that is done within the intangible category. The main conclusion is that walk

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talk about wine heritage as a transversal category within the basic concepts of material and intangible cultural heritage, where we can find typical examples of so-called «goods-thing» and so-called «goods-activity» to the point that it can well be integrated into the concept of mixed cultural heritage.

Keywords: wine; wine culture; cultural heritage; intangible heritage.

1 Introducción: el vino y su cultura

El vino, al igual que el agua o la leche, es una de las bebidas más antiguas que se conocen. Esta bebida forma parte del proceso sociocultural en el ser humano aproximadamente desde hace 6.000 años, siendo principalmente característico de la cuenca mediterránea[1]. Los primeros vestigios de su consumo fueron encontrados en Georgia y se remontan al Neolítico[2]. Según la denominada *Hipótesis de Noé,* las montañas del Tauros en la región oriental de Turquía, situadas en los cursos altos de los ríos Tigris y Éufrates albergan los restos más antiguos de *Vitis vinífera* -nombre científico de la vid productora de vino- datados en torno al año 9000 a.C.[3]

El vino era elaborado y consumido en Egipto, siendo prueba de ello las bodegas encontradas junto a las tumbas faraónicas. La civilización griega era experta en la venta e intercambio de vino en el Mediterráneo y la romana mejoró las técnicas de producción de vino, promoviendo la viticultura dentro y fuera de su imperio. Todas estas civilizaciones tenían deidades relacionadas con el vino, como podían ser Osiris, Dioniso o Baco. De hecho, puede afirmarse que ha existido desde siempre una relación entre el vino y la religión que se ve reflejada en textos religiosos como la Biblia. Así, la hipótesis de Noé debe su nombre al relato del Antiguo Testamento en el que se considera al último de los patriarcas antediluvianos como el primer cultivador de la vid y productor del vino, en tanto que Jesús de Nazaret realiza su primer milagro convirtiendo el agua en vino según el pasaje del Nuevo Testamento que relata las bodas de Caná[4]. Por su parte, el vino ha tenido un importante rol en la religión católica en ritos de carácter social, cultural y litúrgico[5].

En la Península Ibérica se encuentran varios yacimientos arqueológicos que ilustran la cultura y el comercio del vino en época protohistoria. La fecha de la llegada del vino a la Península Ibérica es una cuestión actualmente en continua revisión a tenor de los datos que proporcionan las excavaciones. En este caso está también documentada la existencia de vid desde el Neolítico, pero siempre referida a *Vitis silvestre* y no a la *Vitis vinífera.* Así, pues, por el momento, no es posible hablar de una temprana elaboración de vino en esta parte del mundo. Ya en la época histórica -periodos tartésico e histórico- su consumo estará relacionado con la aristocracia y las élites, popularizándose a partir de la presencia romana en Hispania[6]. Desde allí, la vid y el vino partirían hacia América, pasando por los archipiélagos macaronésicos de Madera y Canarias. La vid ya existía en América en forma silvestre —*Vitis labrusca, Vitis rupestris, Vitis berlandieri*—, pero el resultado de sus uvas, una vez fermentadas, no era ciertamente vino, debien-

[1] FARIÑA MARTÍN, Patricia Candelaria. *Vino y salud.* 2015. Trabajo Fin de Grado (Grado en Enfermería) – Sección de Enfermería y Fisioterapia, Facultad de Ciencias de la Salud, Universidad de La Laguna, Laguna, 2015. p. 1.

[2] BELTRÁN, Natalia; AULET, Silvia. El vino como patrimonio inmaterial de los monasterios benedictinos en Europa. *In*: SIMPOSIO DE PATRIMONIO CULTURAL ICOMOS – ESPAÑA, 2., 2022, Cartagena. *Actas* […]. Valencia: Editorial Universitat Politècnica de València, 2023. p. 511-520. p. 512.

[3] CELESTINO PÉREZ, Sebastián; BLÁZQUEZ PÉREZ, Juan. Origen y desarrollo del cultivo del vino en el Mediterráneo: la Península Ibérica. *Universum,* v. 2, n. 1, p. 32-60, 2007. p. 152.

[4] BELTRÁN, Natalia; AULET, Silvia. El vino como patrimonio inmaterial de los monasterios benedictinos en Europa. *In*: SIMPOSIO DE PATRIMONIO CULTURAL ICOMOS – ESPAÑA, 2., 2022, Cartagena. *Actas* […]. Valencia: Editorial Universitat Politècnica de València, 2023. p. 511-520. p. 512.

[5] SANTOS, Flavio Andrew do Nascimento; VAVDINOS, Nikolaos. Progress and prospects for research of Wine Tourism in Portugal. *Pasos*, v. 18, n. 1, p. 159-170, 2020. p. 161. MARTÍ TALAVERA, Javier; GARCÍA MARÍN, Ramón; MORENO MUÑOZ, Daniel; RUÍZ ÁLVAREZ, Víctor. Los Caballos del Vino: tradición, patrimonio y turismo en Caravaca de la Cruz (Murcia, SE de España). *Cadernos de Geografía,* n. 36, p. 77-86, 2017. p. 77.

[6] CELESTINO PÉREZ, Sebastián; BLÁZQUEZ PÉREZ, Juan. Origen y desarrollo del cultivo del vino en el Mediterráneo: la Península Ibérica. *Universum,* v. 2, n. 1, p. 32-60, 2007. Los autores destacan en España los yacimientos L'Alt de Benimaquia (Alicante), Aldovesta (Tarragona, La Torre de Doña y El Cerro de San Cristóbal (Cádiz). Por su parte, el elemento religioso está presente en el santuario de Cancho Roano (Badajoz) y en el poblado íbero de La Quéjola (Albacete). Más aún, excavaciones realizadas en Segeda I (Zaragoza) acreditan la presencia de semillas de *Vitis vinífera* y del consumo de vino, tanto celtibérico como importado desde Italia. BURILLO MOTOZA, Francisco. Proyecto Segeda Vitivinícola: La Casa del Lagar. *In*: DOMÍNGUEZ ARRANZ, Almudena (ed.). *El patrimonio arqueológico a debate*: su valor cultural y económico. Zaragoza: Instituto de Estudios Altoaragoneses, 2009. p. 173-185. p. 174.

do estos caldos ser enviados desde Europa. En el año 1502 el vino de Villalba del Alcor (Huelva) salió para el Nuevo Mundo acompañando la expedición de Nicolás de Ocando. Pronto se haría evidente que era más fácil plantar y vinificar en los nuevos territorios que llevar el vino desde España[7]. Ya en el S. XVIII, será Portugal uno de los primeros lugares del mundo en acoger una demarcación vinícola, el *Alto Douro Vinateiro* o Región Vinatera del Alto Douro, fechada en el año 1756[8].

La condición de lugar de paso entre Europa y América de la Macaronesia determinó también que en archipiélagos como los ya mencionados de Canarias o Madera el vino hiciera acto de presencia[9]. Así, los primeros registros de la producción de vino en Canarias datan del siglo XV, cuando los europeos comenzaron a cultivar la vid en las islas. Durante los siglos siguientes, la producción de vino se convirtió en una parte importante de la economía de la región tras el duro golpe de las plagas de filoxera a la industria vinícola en el viejo continente, lo cual permitió entablar relaciones de comercio con ultramar. Ello ayudó a establecer el auge del comercio del vino hacia la primera mitad del siglo XVII y su posterior declive comercial hasta su situación actual. En la actualidad, las islas cuentan con una gran variedad de vinos de alta calidad, desde los tintos y blancos más clásicos hasta los vinos dulces y los espumosos más innovadores[10]. Además, en la cultura canaria el vino cuenta con una importante presencia en las tradiciones festeras, en el folclore y en la música popular[11] siendo la vid el cultivo más extenso del archipiélago[12], aunque los cambios sociales hayan determinado un progresivo abandono de la producción familiar en algunas de las comarcas.

Por su parte, las condiciones de Madera -archipiélago descubierto por João Gonçalves Zarco a principios del S. XV- han determinado la aparición de un vino generoso denominado *Madeira,* igualmente apreciado y vinculado a su propia denominación de origen protegida. En esta isla, la viticultura goza de cierta peculiaridad debida a diversos factores, como los pequeños bancales verticales, llamados *poios,* en los que crecen las vides, el ciclo vegetal de las cepas, la naturaleza basáltica del suelo, la altitud, la pluviometría y la larga estación veraniega[13].

Ya en el Nuevo Mundo, el cultivo de la vid y la producción del vino fueron objeto de una rápida difusión. Desde México se extendió hacia el norte por California gracias a la labor misionera de jesuitas y franciscanos, pero también hacia el sur, desarrollándose en Perú, Argentina y Chile. El vino en Argentina empezó con la llegada de los españoles, que desde Chile y Perú introdujeron las viñas al pie de la cordillera de los Andes. El primer viñedo se plantó en Santiago del Estero en 1557, Mendoza se fundó en 1561 y los viñedos de San Juan comenzaron a dar sus frutos entre 1569 y 1589[14]. Para el S. XVIII, Chile se había convertido en el principal productor de vinos de América[15].

Más allá del continente americano, la vid y el vino se expandieron a otras regiones de la mano de la expansión europea. Así, Sudáfrica, Australia o Nueva Zelanda son actualmente productores vinícolas y sus caldos, junto con los americanos, se engloban en algunas ocasiones dentro de la categoría general de vinos del Nuevo Mundo[16].

7 QUERO TORIBINIO, Serafín. Los vinos atlánticos. *TSN:* Revista de Estudios Internacionales, v. 7, n. 14, p. 151-172, 2022. p. 152.

8 LOREUÇO-GOMEZ, Lina; PINTO, Lígia M. C.; REBELO, João. Wine and cultural heritage: the experience of the Alto Douro Wine Region. *Wine Economics and Policy*, v. 4, n. 2, p. 78-87, 2015. p. 78.

9 SANTANA, Alberto Ramos. El vino, elemento clave de la dieta mediterránea y del patrimonio cultural. *In*: CONGRESO INTERNACIONAL "EL PATRIMONIO CULTURAL Y NATURAL COMO MOTOR DE DESARROLLO: INVESTIGACIÓN E INNOVACIÓN, 1., 2012, Sevilla. *Actas* […]. Sevilla: Universidad Internacional de Andalucía, 2012. p. 192-204. p. 194.

10 AROCHA ALONSO, Francisco Nauzet; PARGA-DANS, Eva; ALONSO GONZÁLEZ, Pablo; CUMPLIDO MANCERA, Luis Francisco. El vino de tea de La Palma: un patrimonio cultural alimentario. *Anuario de Estudios Atlánticos*, n. 70, p. 1-22, 2024. p. 1.

11 SOLÍS ROBAINA, Francisco Javier. *El lagar y la prensa de vino en la Historia de Gran Canaria*: tipos, funcionalidad y restos arqueológicos (patrimonio enológico). 2012. 288 p. Tesis (Doctorado) – Departamento de Arte, Ciudad y Territorio, Universidad de Las Palmas de Gran Canaria, Las Palmas de Gran Canaria, 2012. p. 14.

12 GONZÁLEZ MORALES, Alejandro; RAMÓN OJEDA, Antonio Ángel; HERNÁNDEZ TORRES, Santiago. El cultivo del viñedo como recurso turístico cultural: el caso de La Geria (Lanzarote, Islas Canarias, España). *Papeles de Geografía*, n. 61, p. 109-121, 2015. p. 114.

13 QUERO TORIBINIO, Serafín. Los vinos atlánticos. *TSN:* Revista de Estudios Internacionales, v. 7, n. 14, p. 151-172, 2022. p. 168.

14 QUERO TORIBINIO, Serafín. Los vinos atlánticos. *TSN:* Revista de Estudios Internacionales, v. 7, n. 14, p. 151-172, 2022. p. 152.

15 ROJAS AGUILERA, Gonzalo. Las tinajas y su lugar al interior del patrimonio vitivinícola de Chile. *In*: SEMINARIO DEL VINO, GASTRONOMÍA Y RURALIDAD: PATRIMONIO VITIVINÍCOLA, TERRITORIO, TRADICIONES Y PUESTA EN VALOR, 2., 2013, Santiago de Chile. *Actas* [...]. Santiago de Chile: Biblioteca Nacional de Chile, 2013. p. 1-28. p. 11.

16 CHELOTTI, Marcelo Cervo; MEDEIROS, Rosa Maria Vieira.

En conclusión, en este primer apartado ha quedado patente que el vino está presente y extendido por todo el mundo, como consecuencia de su acompañamiento de los movimientos migratorios humanos. Este fruto de la vid es partícipe y protagonista de muchas actividades de índole social, cultural y religiosa y, como consecuencia de los distintos papeles que asume en cada concreto caso, se ha convertido en un elemento determinante en la configuración de la identidad de los colectivos que participan en aquéllas. Además, el cultivo de la viña es también un factor decisivo a la hora de reconfigurar el entorno en el que cultiva. Es por todo ello que se haya llegado a hablar de patrimonio enológico, como expresión del patrimonio cultural y por lo que en el presente trabajo se pretende exponer que la denominada cultura del vino alberga expresiones de la actividad humana que tienen la consideración de bienes interés cultural y que pueden ser representativos de una nueva categoría que vaya más allá y complemente las ya existentes de patrimonio material y patrimonio inmaterial.

2 El tratamiento legal del patrimonio cultural

2.1 La protección de la cultura como fundamento de la regulación del patrimonio cultural

La protección de la cultura y el consiguiente establecimiento de un régimen especial para los bienes del patrimonio cultural se ha presentado como una forma de democratización de la cultura[17]. Sin una base cultural sólida no es posible cimentar los principios de libertad e igualdad o una democracia digna de ese nombre[18]. Es por tal razón que a nivel nacional e internacional ha habido una preocupación por el establecimiento de un régimen protector de los bienes dotados de la característica de ser de interés cultural[19].

Sin embargo, la empresa de proteger el patrimonio cultural encierra el primer obstáculo de su complejidad conceptual. En una primera aproximación básica, podemos encontrar definiciones como la que establece que el conjunto de elementos que nos han sido transmitidos por nuestros antepasados[20], pero esto lleva a la pregunta básica de cuestionar si todo aquello que se ha recibido de la generación precedente forma parte del patrimonio cultural. Toda actividad humana encierra en sí misma la consideración de cultura[21] pero esto no basta para que todas puedan ser consideradas como bienes culturales para lo que aquí se trata. En este sentido, la definición de este concepto puede tornarse imprecisa y generar dificultades a la hora de desarrollar la tarea de evaluación del valor cultural de un bien y aplicarle la regulación protectora que el ordenamiento jurídico correspondiente determine[22]. Es por tal razón que el concepto de patrimonio cultural ha ido variando a lo largo del tiempo y se han añadido nuevas categorías en el seno de aquél[23].

Dentro de la complejidad inherente a la definición que se ha descrito en el párrafo precedente, es posible establecer algunos parámetros para la identificación de un bien como de interés cultural. Específicamente, estos bienes están definidos por su valor desde un punto de vista espacial y temporal y su dimensión cultural. El patrimonio es un concepto al cual la mayor parte de las personas asocian una característica positiva y la preservación de sus componentes tangible e intangible es generalmente considerada como un bien común del que todos pueden beneficiarse. Estas características de

O patrimonio territorial vitivinícola do sul de Minas Gerais: expressões do cultivo da uva e do fabrico do vinho. *Revista GeoNordeste*, ano 30, n. 2, p. 187-203, 2019. Edição Especial. p. 152.

[17] CAPOTE PÉREZ, Luis Javier. Patrimonio histórico y registro de la propiedad. *Revista de Derecho Privado*, año 91, n. 5, p. 59-80, 2007. p. 62.

[18] ALONSO IBÁÑEZ, María del Rosario. *El patrimonio histórico, destino público y valor cultural*. Oviedo: Editorial Civitas, 1990. p. 52.

[19] FUENTES, Mercedes. *Urbanismo y publicidad registral*. Madrid: Marcial Pons., 2001. p. 253. BARRERO RODRÍGUEZ, Concepción. *La ordenación jurídica del patrimonio histórico*. Madrid: Instituto García Oviedo: Ed. Civitas, 1990. p. 120.

[20] FERNÁNDEZ MAROTO, Domingo; PÉREZ FERNÁNDEZ, Palmira; MEDINA MÁRQUEZ, María Eulalia. La vid y el vino como patrimonio de la humanidad: avatares de una propuesta inacabada. *In*: CONGRESO DE LA CULTURA DE LA VID, 3., 2019, [*S. l.*]. *Actas* [...]. Valdepeñas: Instituto de Estudios Manchegos (CECEL-CSIC), 2009. p. 1-32. p. 10.

[21] DÍAZ VILELA, Luis Fernando. *¿Qué es esa cosa llamada cultura?*: ciencia y pseudociencias 2006. San Cristóbal de La Laguna: Universidad de La Laguna, 2006.

[22] FONSECA, Susana; REBELO, João. Economic valuation of cultural heritage: application to a museum located in the Alto Douro Wine Region – World Heritage Site. *Pasos*, v. 8, n. 2, p. 339-350, 2010. p. 341-342.

[23] MARTÍ TALAVERA, Javier; GARCÍA MARÍN, Ramón; MORENO MUÑOZ, Daniel; RUÍZ ÁLVAREZ, Víctor. Los Caballos del Vino: tradición, patrimonio y turismo en Caravaca de la Cruz (Murcia, SE de España). *Cadernos de Geografía,* n. 36, p. 77-86, 2017. p. 79.

historicidad y culturalidad constituyen las bases sobre las cuales el Derecho del Patrimonio Cultural se constituye como una disciplina orientada al establecimiento y el estudio de las reglas que permitan la conservación, la divulgación y el enriquecimiento de la cultura. Más allá de los derechos subjetivos individuales que puedan recaer sobre un bien de interés cultural está el interés general inherente al valor que representa y sus vínculos con la identidad de una colectividad[24].

2.2 El patrimonio cultural material

La Convención UNESCO sobre la protección del patrimonio mundial, cultural y natural de 1972 define el patrimonio cultural desde un punto de vista material, al establecer en su art. 1 que se considera aquél como los monumentos, conjuntos y lugares que tengan un valor universal excepcional desde el punto de la historia, del arte o de la ciencia.

Sobre la base de la definición descrita en el párrafo precedente, puede deducirse que el patrimonio cultural tangible fue la primera categoría en ser tomada en consideración, de manera que las regulaciones legales nacionales que traen causa de la suscripción de la Convención tienen una normativa eminentemente orientada a la conservación de las cosas muebles e inmuebles caracterizadas por las cualidades mencionadas en el indicado precepto del tratado. Si tomamos como ejemplo el ordenamiento jurídico español, veremos que el art. 46 de la Constitución Española (CE) establece que

> Los poderes públicos garantizarán la conservación y promoverán el enriquecimiento del patrimonio histórico, cultural y artístico de los pueblos de España y de los bienes que lo integran, cualquiera que sea su régimen jurídico y su titularidad. La ley penal sancionará los atentados contra este patrimonio[25].

La referencia a la titularidad de los bienes deja patente la preeminencia de los bienes tangibles, los cuales pueden ser objeto de derechos de propiedad. A continuación, la primigenia regulación de la materia, contenida en la *Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español* (LPHE) establece una serie de reglas que establecen una línea protectora basada en la restricción del contenido de los derechos dominicales privados cuyo objeto son bienes de interés cultural, limitando facultades como las relativas a la libertad de disposición o a la libertad de destino. Esta regulación combina normas civiles, administrativas y penales y basa su contenido en el límite intrínseco de toda propiedad privada establecido en el art. 33 CE[26], que no es otro que el de la función social del dominio. En el caso de los bienes de patrimonio cultural, este interés general viene definido por los ya mencionados valores de historicidad y culturalidad, como concreta expresión de ese multifacético concepto contenido en el mentado precepto constitucional.

Este ejemplo regulador refleja la condición de los bienes del patrimonio cultural o tangible como «bienes-cosa» cuya protección y defensa se establece desde el punto de vista de su conservación, como parece corresponder a bienes que, por su naturaleza material, son de condición estática.

2.3 El patrimonio cultural inmaterial

Por su parte, la Convención para la Salvaguarda del Patrimonio Cultural Inmaterial de 2003 define a esta categoría en el primer inciso de su art. 2.1 como los usos, representaciones, expresiones, conocimientos y técnicas que las comunidades, los grupos y en algunos casos los individuos reconozcan como parte integrante de su patrimonio cultural. El concepto continúa haciendo referencia al hecho de que los bienes de esta categoría se transmiten de generación en generación y se recrean con cada una de ellas, lo cual redunda en la consideración de que, al contrario que en el caso de los bienes de patrimonio material, es más complejo hablar propiedad, siendo más apropiado hablar de custodia. Como habrá podido comprobarse por la fecha del tratado, esta noción es bastante más reciente[27].

[24] CAPOTE PÉREZ, Luis Javier. Cultural heritage and Spanish Private Law. *Santander Art and Culture Law Review*, n. 3, p. 237-254, 2017. p. 240.

[25] ESPAÑA. *Constitución Española*. 19 dic. 1978. Disponible en: https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229.

[26] Art. 33 CE: 1. Se reconoce el derecho a la propiedad privada y a la herencia. 2. La función social de estos derechos delimitará su contenido, de acuerdo con las leyes. 3. Nadie podrá ser privado de sus bienes y derechos sino por causa justificada de utilidad pública o interés social, mediante la correspondiente indemnización y de conformidad con lo dispuesto por las leyes.

[27] MOLINA, Marcela S. Las denominaciones de origen protegidas simultáneamente bajo un régimen de propiedad intelectual y de patrimonio cultural intangible: un análisis en el marco del Derecho argentino. *Revista Iberoamericana de Viticultura, Agroindustria y Ruralidad*, v. 5, n. 15, p. 136-156, 2018. p. 138. También, IRIGARAY SOTO, Susana. El concepto de patrimonio inmaterial. *Cuadernos de Etnología y Etnografía de Navarra*, año 14, n. 88, p. 121-126, 2013.

Tomando de nuevo como ejemplo el ordenamiento jurídico español, la *Ley 10/2015, de 26 de mayo, para la salvaguardia del Patrimonio Cultural Inmaterial* (LPCI) establece una regulación del patrimonio intangible que amplía la introducción del concepto de patrimonio etnográfico en la LPHE, primera referencia a esta categoría en el Derecho interno. En su momento, esa mención a un elemento intangible dentro de una clasificación donde la contrapartida material era hegemónica se consideró un hito por su naturaleza pionera, pero también fue criticada por dar una visión arcaica y folclorizante del patrimonio intangible, siendo en muchos una categoría que venía a englobar a aquellos bienes que, por diversas razones, no entraban en las restantes, mucho más acotadas y mejor definidas[28].

En su regulación, se refleja que el patrimonio inmaterial está conformado por los bienes-idea, que evolucionan y acompañan a la colectividad en la que se integran, de la que surgen y a la que retornan. Esta categoría es, consecuentemente, más dinámica y su protección no puede ni debe plantearse en los mismos términos que los planteados para su contrapartida tangible.

2.4 El patrimonio cultural mixto

Desde un punto de vista doctrinal, se ha sugerido la conveniencia de adoptar una tercera clase que incorpore aquellos bienes de interés cultural que tienen una naturaleza compartida con las dos ya existentes. Así, en la década de los noventa del siglo pasado comenzó esta nueva categoría para la protección del patrimonio, que vienen a combinar no solamente las categorías material e inmaterial del patrimonio cultural, sino también ciertos aspectos del patrimonio natural[29].

Esta categoría está aún en fase de consideración y desarrollo desde un punto de vista teórico, pero puede plantearse la posibilidad de que dentro de la misma tenga un mejor encaje la cultura del vino, de la cual alguna representación de la doctrina empieza a hablar y a referirse bajo la denominación de *patrimonio enológico*[30].

En todo caso, la formulación de esta nueva categoría permite exponer una vez más que el elemento determinante a la hora de hablar de patrimonio cultural en la más amplia extensión del concepto es el valor intrínseco de cada uno de los bienes que lo componen, definido por los caracteres de historicidad y culturalidad y de los que la generación presente en cada momento histórico es custodia, receptora -de la generación anterior- y emisora -hacia la generación venidera-. A continuación, veremos varios ejemplos de la variedad de bienes que se incluyen dentro de la categoría de patrimonio enológico y justificar a través de ésta la pertinencia de considerar a este heterogéneo conjunto de cosas e ideas como integrante del patrimonio cultural mixto.

3 La cultura del vino como patrimonio cultural

Como ha podido comprobarse en el apartado introductorio del presente trabajo, la cultura del vino es una base y pilar esencial de la cultura, la identidad y tradiciones de un pueblo[31]. Para una mejor y más completa valoración de la cultura de cualquier pueblo es imprescindible un conocimiento lo más exacto posible de las incidencias y la evolución del pasado histórico, lo cual es válido a la hora de llevar a cabo una aproximación a la cultura del vino. Mostrar preocupación por este aspecto de la cultura humana equivale a ahondar en los atributos definitorios de la civilización y conectar con toda una serie de herencias que han ido conformando a la colectividad que las recibe[32]. Existe una cultura de la

[28] MARTÍNEZ SANMARTÍN, Luis Pablo. La tutela legal del patrimonio cultural inmaterial en España: valoración y perspectivas. *Revista de la Facultad de Ciencias Sociales y Jurídicas de Elche*, v. 1, n. 7, p. 123-150, 2011. p. 126. CAPOTE PÉREZ, Luis Javier. Tangible and intangible heritage in Spanish Law. *In*: DOBOSZ, Piotr; GÓRNY, Witold; KOZIEŃ, Adam; MAZUR, Anna (ed.). *Protection of tangible and intangible cultural heritage*: contemporary development directions. Kraków: AT Wydawnictwo, 2020. p. 45-54. p. 50.

[29] FERNÁNDEZ MAROTO, Domingo; PÉREZ FERNÁNDEZ, Palmira; MEDINA MÁRQUEZ, María Eulalia. La vid y el vino como patrimonio de la humanidad: avatares de una propuesta inacabada. *In*: CONGRESO DE LA CULTURA DE LA VID, 3., 2019, [*S. l.*]. *Actas* [...]. Valdepeñas: Instituto de Estudios Manchegos (CECEL-CSIC), 2009. p. 1-32. p. 9-10.

[30] Véase, a título de ejemplo, el ya citado SOLÍS ROBAINA, Francisco Javier. *El lagar y la prensa de vino en la Historia de Gran Canaria*: tipos, funcionalidad y restos arqueológicos (patrimonio enológico). 2012. 288 p. Tesis (Doctorado) – Departamento de Arte, Ciudad y Territorio, Universidad de Las Palmas de Gran Canaria, Las Palmas de Gran Canaria, 2012.

[31] CARREÑO ARIAS, Constanza Andrea. *El vino como patrimonio cultural inmaterial de Chile*: estudio del nivel de conocimiento del consumidor chileno. 2018. Proyecto de investigación, Facultad de Ciencias Agronómicas y de los Alimentos, Pontificia Universidad Católica de Valparaíso. p. 1.

[32] SANTANA, Alberto Ramos. El vino, elemento clave de la dieta mediterránea y del patrimonio cultural. *In*: CONGRESO INTERNACIONAL "EL PATRIMONIO CULTURAL Y NATURAL

bebida, manifestación humana que se evidencia con el consumo de diferentes brebajes en todas las civilizaciones conocidas[33].

En el presente apartado se van a exponer algunos casos de la puesta en valor de la cultura del vino como parte del patrimonio cultural. La enumeración no será ni pretende ser en modo alguno exhaustiva, sino en todo caso, ejemplar, por lo que se agrupará en varias categorías.

3.1 Patrimonio paisajístico

Esta categoría se presenta como una en la que se combinan el patrimonio natural y el patrimonio cultural. En el primer apartado podemos encontrar los aspectos medioambientales y ecológicos de un territorio, en tanto que en el segundo podemos encontrar múltiples actividades humanas que, teniendo la consideración de bienes-idea, han contribuido a modelar los paisajes en los que se ha venido desarrollando la viticultura, dándoles sus características formas[34] y aportando también una arquitectura del vino[35]. A título de ejemplo se pueden citar:

3.1.1 La región del Alto Douro (Portugal)

Un territorio de 246 kilómetros cuadrados (24600 hectáreas) localizado al norte del país lusitano que ha sido incluido dentro del listado de lugares patrimonio de la humanidad por la UNESCO, sobre la consideración de que ha sido una comarca productora de vino durante casi dos mil años, de modo y manera que su paisaje se ha ido modelando conforme a a esta actividad humana. Así, el panorama de la región tiene como elementos representativos una serie de componentes que, como las *quintas* -complejos agrarios dedicados a la producción del vino- están asociados a la actividad vinícola[36]. Este paisaje acredita con su propia existencia la presencia de diferentes técnicas de plantación de la viña que van desde los viejos *socalcos* -cultivos en grada o pendiente sostenidos por muros- hasta los más modernos *patamares* -terrazas de viña moderna-[37].

3.1.2 El Marco de Jerez (España)

Una zona ubicada en la región de Baja Andalucía en la que se produce el vino homónimo. La relación de la comarca con la actividad vinícola se remonta a la Edad Antigua y a la colonización fenicia, según el geógrafo e historiador griego Estrabón. La relación entre la bebida y la región que la produce se ha convertido en sinónimo de tradición, historia y cultura, siendo a su vez un importante atractivo turístico[38].

3.1.3 La comarca de La Geria (España)

Esta región de la isla canaria de Lanzarote presenta una forma de cultivo en la que el viñedo de se planta en parcelas donde se excavan hoyos con forma de cono invertido en lapilli o se realizan zanjas con muros separándolas de tal manera que hacen la función de cortavientos. El viñedo se extiende desde los doscientos hasta los quinientos metros sobre el nivel del mar. Los suelos son en general de escasa fertilidad y algunos aparecen fosilizados al haber sido cubiertos por erupciones volcánicas más recientes o por depósitos coluviales. Presentan colores rojizos, textura franco-limo-arcillosa, con elevado contenido medio de materia orgánica, lo cual asegura un suministro de nitrógeno adecuado a las exigencias de la vid. En el caso de la isla conejera, ésta es una forma de la diversidad de técnicas y sistemas de cultivo de viñe-

COMO MOTOR DE DESARROLLO: INVESTIGACIÓN E INNOVACIÓN, 1., 2012, Sevilla. *Actas* […]. Sevilla: Universidad Internacional de Andalucía, 2012. p. 192-204. p. 192-193.

33 SANTANA, Alberto Ramos. El vino, elemento clave de la dieta mediterránea y del patrimonio cultural. *In*: CONGRESO INTERNACIONAL "EL PATRIMONIO CULTURAL Y NATURAL COMO MOTOR DE DESARROLLO: INVESTIGACIÓN E INNOVACIÓN, 1., 2012, Sevilla. *Actas* […]. Sevilla: Universidad Internacional de Andalucía, 2012. p. 192-204. p. 195.

34 CAPOTE PÉREZ, Luis Javier; CALZADILLA MEDINA, María Aránzazu. Cultural heritage and land uses of sustainable development under the Green Deal and sustainable development goals. *CEDR Journal of Rural Law*, v. 7, n. 1, p. 25-37, 2021. p. 34.

35 SOLÍS ROBAINA, Francisco Javier. *El lagar y la prensa de vino en la Historia de Gran Canaria*: tipos, funcionalidad y restos arqueológicos (patrimonio enológico). 2012. 288 p. Tesis (Doctorado) – Departamento de Arte, Ciudad y Territorio, Universidad de Las Palmas de Gran Canaria, Las Palmas de Gran Canaria, 2012. p. 10-11.

36 FONSECA, Susana; REBELO, João. Economic valuation of cultural heritage: application to a museum located in the Alto Douro Wine Region – World Heritage Site. *Pasos*, v. 8, n. 2, p. 339-350, 2010. p. 341.

37 LOREUÇO-GOMEZ, Lina; PINTO, Lígia M. C.; REBELO, João. Wine and cultural heritage: the experience of the Alto Douro Wine Region. *Wine Economics and Policy*, v. 4, n. 2, p. 78-87, 2015. p. 78.

38 OSUNA GÓMEZ, Pilar. *La cultura del vino como atractivo para los turistas que visitan Andalucía, con especial referencia a los vinos de Jerez*. 2013. 61 p. Trabajo Fin de Grado (Graduado em Turismo) – Facultad de Turismo, Universidad de Málaga, Málaga, 2013. p. 1.

dos, pero en todos los casos ha tenido como resultado que la acción humana la que aprovechando las ventajas que le daba la naturaleza y los recursos con los que contaba, la que explica el paisaje lanzaroteño[39].

Aparte, figuras como los itinerarios culturales[40] o las denominaciones de origen[41] son también figuras que permiten exponer el valor cultural de las actividades vinícolas en un territorio.

3.2 Patrimonio etnográfico e industrial

Aquí se engloban los conocimientos y actividades que son o han sido expresión relevante de la cultura de una colectividad. En el caso del vino se pueden citar las siguientes:

3.2.1 Los Caballos del Vino de Caravaca de la Cruz (España)

Esta tradición, radicada en una localidad de la región de Murcia, es el ejemplo de que muchos bienes del patrimonio inmaterial derivan de los distintos tipos de festejos patronales que celebran los municipios y localidades. Su génesis, más allá de la leyenda a la que se vincula, está unida al ritual de la Bendición del Vino, también conocido como Baño del Vino, cuyas primeras noticias sobre su realización se encuentran en las décadas iniciales del siglo XVIII Este rito fue evolucionando, siendo probablemente a finales del siglo XVIII y principios del siglo XIX cuando aparece la bandeja de purificadores, antecedente histórico de la bandeja de flores y ésta a su vez de la Bendición de las Flores, que hoy forma parte de la ceremonia del Baño del Vino, en la cual se bendicen con vino, las flores ofrendadas por el pueblo a la Santísima y Vera Cruz el día anterior. Los caballos eran el medio de transporte utilizado para llevar la carga de vino al castillo. Su evolución desde rito litúrgico a festejo de interés turístico es un ejemplo de la condición del patrimonio inmaterial como un patrimonio vivo[42].

3.2.2 El vino de tea de La Palma (España)

Este producto se elabora mayormente los municipios palmeros de Puntagorda, Garafía y Tijarafe, mediante la mezcla de uvas blancas y tintas, al mismo tiempo que su crianza se desarrolla en barricas, localmente denominadas como pipas, elaboradas a partir del duramen del *Pinus canariensis* (pino canario) generalmente conocida como madera de tea. Del mismo modo, este es un vino con una composición organoléptica única, gracias a la utilización de maderas resinosas de pino en su fermentación, una tendencia casi sin similitudes en todo el mundo, salvo por el caso del vino *retsina* griego. El origen de su elaboración está relacionado con la presencia histórica de vinos en la zona nororiental de la isla canaria, que se remonta al último tercio del S. XVI como sustitutivo de plantaciones como la del trigo. Su producción se vincula a un modelo tradicional que ha ido decayendo en el ámbito familiar y doméstico y muestra cómo el patrimonio inmaterial sigue los avatares de la colectividad a la que se vincula[43].

3.2.3 Los museos dedicados a la cultura del vino

Sirvan, a título de ejemplo, El Museo de la Cultura del Vino – Dinastía Vivanco en Logroño (España) referente en el campo de la divulgación de la cultura vinícola[44] y Pagos del Rey – Museo del Vino en Zamora

[39] GONZÁLEZ MORALES, Alejandro; RAMÓN OJEDA, Antonio Ángel; HERNÁNDEZ TORRES, Santiago. El cultivo del viñedo como recurso turístico cultural: el caso de La Geria (Lanzarote, Islas Canarias, España). *Papeles de Geografía*, n. 61, p. 109-121, 2015. p. 110-111.

[40] FERNÁNDEZ MAROTO, Domingo; PÉREZ FERNÁNDEZ, Palmira; MEDINA MÁRQUEZ, María Eulalia. La vid y el vino como patrimonio de la humanidad: avatares de una propuesta inacabada. *In*: CONGRESO DE LA CULTURA DE LA VID, 3., 2019, [*S. l.*]. *Actas* [...]. Valdepeñas: Instituto de Estudios Manchegos (CECEL-CSIC), 2009. p. 1-32. p. 19.

[41] MOLINA, Marcela S. Las denominaciones de origen protegidas simultáneamente bajo un régimen de propiedad intelectual y de patrimonio cultural intangible: un análisis en el marco del Derecho argentino. *Revista Iberoamericana de Viticultura, Agroindustria y Ruralidad*, v. 5, n. 15, p. 136-156, 2018.

[42] MARTÍ TALAVERA, Javier; GARCÍA MARÍN, Ramón; MORENO MUÑOZ, Daniel; RUÍZ ÁLVAREZ, Víctor. Los Caballos del Vino: tradición, patrimonio y turismo en Caravaca de la Cruz (Murcia, SE de España). *Cadernos de Geografía,* n. 36, p. 77-86, 2017. p. 81-86.

[43] AROCHA ALONSO, Francisco Nauzet; PARGA-DANS, Eva; ALONSO GONZÁLEZ, Pablo; CUMPLIDO MANCERA, Luis Francisco. El vino de tea de La Palma: un patrimonio cultural alimentario. *Anuario de Estudios Atlánticos*, n. 70, p. 1-22, 2024. p. 10-22.

[44] ESCUÍN GUINEA, María Jesús. El Museo de la Cultura del Vino – Dinastía Vivanco en relación con la arqueología industrial y etnoarqueología vinculadas al vino". En: DOMÍNGUEZ ARRANZ, Almudena (ed.), El patrimonio arqueológico a debate. Su valor cultural y económico. Zaragoza: Instituto de Estudios Altoaragoneses, Diputación de Huesca, Gobierno de Aragón. 2009. p. 195-210, p. 195.

(España) ejemplo de dinamización económica y social de la zona[45].

3.3 Patrimonio lingüístico y literário

Aquí se encuentran ejemplos de la influencia de la cultura vinícola en las lenguas -reconocidas éstas como elementos del patrimonio inmaterial que mantiene la vitalidad, la fuerza y el bienestar de sus comunidades de hablantes. Igualmente, se pueden encontrar referencias a celebradas variantes de esta bebida en obras clásicas de la literatura universal. Concretamente:

3.3.1 Las denominaciones de cada variedad de vino

La mención de palabras como *jerez, rioja, málaga jumilla, montilla, o valdepeñas,* evoca los vinos nombrados con las mismas, pero también la localización de su producción, así como la forma de su elaboración en no pocos casos[46].

3.3.2 Las referencias literarias

Las referencias literarias a ciertos caldos como las que se hacen del vino canario en la obra de William Shakespeare *Enrique IV* o en la de Sir Walter Scott, *Ivanhoe*. En el primer caso, el personaje de Sir John Falstaff se declara un admirador de la calidad del mismo[47]. En el segundo, el Caballero Negro pregunta a su reticente anfitrión, el ermitaño de Copmanhurst -más tarde identificado como el Fray Tuck de la banda de Robin Hood- si no tendrá a mano un *barrilejo de canario* para acompañar a las viandas con las que renuentemente le había agasajado[48]. En ambos casos se trata de curiosos anacronismos, si se tiene en cuenta la época en la que están ambientadas ambas obras y aquélla en la que los caldos insulares empiezan a ser producidos, exportados y apreciados.

3.4 Patrimonio material

Por último, hay algunos bienes-cosa que pueden encontrarse como integrantes del patrimonio enológico. Específicamente:

3.4.1 Las pipas de tea (España)

Se trata barricas elaboradas a partir de la madera de tea del pino canario que, por su naturaleza resinosa y como se ha mencionado previamente, dan al vino homónimo su aroma y sabor característicos[49].

3.4.2 Las tinajas del patrimonio vitivinícola (Chile)

Se trata de vasijas grandes de alfarería que combinan las tradiciones de los pueblos indígenas precolombinos del país con las que trajeron españoles y portugueses, pues uno y otro colectivo participaron en su fabricación. Se utilizaron durante el periodo anterior a la independencia para el transporte de mercancías y el almacenamiento de líquidos, aceites y grano, entrando su uso en decadencia en el campo de la viticultura cuando se introdujo la tonelería desde Europa durante el S. XIX, al ser consideradas recipientes toscos y groseros[50].

Todos estos ejemplos, tan variados como diversos, constituyen un ejemplo de que puede hablarse de un patrimonio enológico y que bien podría incardinarse en la novedosa categoría del patrimonio mixto.

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[45] CASASECA GARCÍA, Gerardo José. Pagos del rey museo del vino: raigambre de una cultura. En: GALÁN-PÉREZ, Ana María y PRADO SAN GIL, Diana (eds.). Las profesiones del patrimonio cultural: Competencias, formación y transferencia de conocimiento. Albacete: Grupo Español del International Institute for Conservation of Historic and Artistic Works, Asociación de Conservadores Restauradores de España. 2018. p. 27-33, p. 29.

[46] SANTANA, Alberto Ramos. El vino, elemento clave de la dieta mediterránea y del patrimonio cultural. *In*: CONGRESO INTERNACIONAL "EL PATRIMONIO CULTURAL Y NATURAL COMO MOTOR DE DESARROLLO: INVESTIGACIÓN E INNOVACIÓN, 1., 2012, Sevilla. *Actas* […]. Sevilla: Universidad Internacional de Andalucía, 2012. p. 192-204. p. 199. RION TETAS, Rosanna. El patrimonio lingüístico en la cultura vitivinícola. *Her&Mus*, v. 9, n. 1, p. 71-75, 2012. p. 71.

[47] SHAKESPEARE, William. *Enrique IV*. Traducción de Miguel Cané. Buenos Aires: [*s. n.*], 1918. p. 13.

[48] SCOTT, Sir Walter. *Ivanhoe*. Barcelona: RBA Editores, 1984. p. 116.

[49] AROCHA ALONSO, Francisco Nauzet; PARGA-DANS, Eva; ALONSO GONZÁLEZ, Pablo; CUMPLIDO MANCERA, Luis Francisco. El vino de tea de La Palma: un patrimonio cultural alimentario. *Anuario de Estudios Atlánticos*, n. 70, p. 1-22, 2024. p. 10.

[50] ROJAS AGUILERA, Gonzalo. Las tinajas y su lugar al interior del patrimonio vitivinícola de Chile. *In*: SEMINARIO DEL VINO, GASTRONOMÍA Y RURALIDAD: PATRIMONIO VITIVINÍCOLA, TERRITORIO, TRADICIONES Y PUESTA EN VALOR, 2., 2013, Santiago de Chile. *Actas* [...]. Santiago de Chile: Biblioteca Nacional de Chile, 2013. p. 1-28. p. 1, 11-16.

Si pasamos al ámbito legal comparado, podemos encontrar diversos ejemplos en ordenamientos jurídicos de Estados cuyos países tienen una tradición vitivinícola prolongada[51]. A título de ejemplo podemos encontrar referencias en los sistemas legales español, francés e italiano.

En el ámbito del Derecho español, la Ley 24/2003, de 10 de julio, de la Viña y del Vino establece en su exposición de motivos que "la viña y el vino son inseparables de nuestra cultura", para hacer a continuación un repaso histórico del origen de una y otro y su llegada al país y asumir el uso de un lenguaje castizo para hacer las correspondientes definiciones, lo que implica el reconocimiento intrínseco de los aspectos lingüísticos desarrollados en la cultura del vino y su toma en préstamo para el español jurídico. Esta referencia abre la puerta a la protección a través de las normas, tanto nacionales como regionales, del ordenamiento jurídico propio.

En el ámbito del Derecho francés, el *Code rural et de la pêche maritime* dispone en su Art. L665-6 que "Le vin, produit de la vigne, les terroirs viticoles ainsi que les cidres et poirés, les boissons spiritueuses et les bières issus des traditions locales font partie du patrimoine culturel, gastronomique et paysager protégé de la France"[52]. Aquí podemos ver cómo se sanciona la naturaleza mixta del patrimonio enológico, a través de un precepto de naturaleza ejemplarmente descriptiva.

En el ámbito del Derecho italiano, la *Legge 238 del 12 / 12 / 2016, Testo único della vite e del vino* establece en su Art. 1 que

> Il vino, prodotto della vite, la vite e i territori viticoli, quali frutto del lavoro, dell'insieme delle competenze, delle conoscenze, delle pratiche e delle tradizioni, costituiscono un patrimonio culturale nazionale da tutelare e valorizzare negli aspetti di sostenibilità sociale, economica, produttiva, ambientale e culturale[53].

Aquí podemos encontrar un tratamiento en términos parecidos a los de la legislación gala.

Sin perjuicio de la existencia de más ejemplos en el ámbito del Derecho comparado[54] podemos comprobar que en estos tres países se ha afirmado en sede legal la importancia de la cultura del vino y sus vínculos con el patrimonio cultural nacional, estableciendo la necesidad de cumplir con los mandatos generales de conservación, protección y transmisión a la siguiente generación[55].

4 Conclusión

A lo largo del presente trabajo se ha pretendido hacer una somera descripción de la importancia que, desde un punto de vista cultural, tienen el vino y todo lo que le rodea para múltiples colectividades humanas, hasta el punto de que no sería desacertado hablar de que el patrimonio enológico es, efectivamente, una universalidad universal, en el sentido de que su conservación y custodia corresponde a la humanidad en su conjunto. Desde tal punto de vista, hemos podido comprobar que diversos bienes materiales e inmateriales encajan dentro del concepto de patrimonio cultural. La naturaleza material o inmaterial de unos y otros determina, conforme a cada Derecho interno, un tratamiento distinto, pero transversal. Así, no se pueden separar la técnica empleada para la elaboración de un caldo de las denominaciones empleadas para el mismo y para las herramientas empleadas en el proceso, de ahí que se plantee la necesidad de un abordaje transversal, entrando en juego aquí el concepto de patrimonio cultural mixto. En este punto se pueden abordar los aspectos problemáticos que plantea la protección de los bienes-idea, para los cuales las medidas, más desarrolladas, de conservación de los bienes-cosa resultan inadecuadas. Quizá una aproximación global pueda dar respuesta al actual debate, en el que entran en juego conceptos tan controvertidos como el de apropiación cultural, y convertir el tratamiento del patrimonio enológico en un ejemplo extrapolable a otras figuras del patrimonio

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[51] FRANCA FILHO, Marcilio Toscano; CORREA, Gabriel de Cerqueira Paes. Blending wine, law and cultural heritage. *In*: TORRES, Claudio; Marques, Claudia Lima (ed.). *Wine Tourism Law*. [*S. l.*]: ESHTE, 2024. p. 355-372. p. 364.

[52] FRANCIA. *Code rural et de la pêche maritime*. Disponible em: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071367/LEGISCTA000022179032/#LEGISCTA000022196930.

[53] ITALIA. *Legge 12 dicembre 2016, n. 238*. Disponible em: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2016;238.

[54] FRANCA FILHO, Marcilio Toscano; CORREA, Gabriel de Cerqueira Paes. Blending wine, law and cultural heritage. *In*: TORRES, Claudio; Marques, Claudia Lima (ed.). *Wine Tourism Law*. [*S. l.*]: ESHTE, 2024. p. 355-372. p. 365.

[55] Igualmente y merced a la condición «viva» del aspecto inmaterial de los bienes de patrimonio cultural, hay que hacer mención a la incidencia de otras ramas del Derecho como las correspondientes al ámbito de la propiedad intelectual, de la alimentación y del agro, lo que redunda en la naturaleza jurídica multidisciplinar del patrimonio enológico.

cultural inmaterial. De igual forma, la experiencia de un estudio interdisciplinar del patrimonio enológico, como consecuencia de su naturaleza mixta, puede servir de gran ayuda para el tratamiento de otras categorías definidas por su condición transversal, como es el caso del patrimonio paleontológico, a caballo entre las categorías de patrimonio cultural y patrimonio natural. Más aún, la naturaleza del patrimonio enológico o, más bien, de los bienes que lo integran constituye un ejemplo de figura jurídica cuya regulación trasciende el campo de la regulación patrimonial, para extenderse a otras ramas de la jurisprudencia como los Derechos de la propiedad intelectual, agrario o alimentario, convirtiéndose en un ejemplo perfecto para el abordamiento sistemático de los elementos que lo componen.

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Towards the prosecution of maritime piracy before the International Criminal Court

Em direção à persecução penal da pirataria marítima no âmbito do Tribunal Penal Internacional

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Towards the prosecution of maritime piracy before the International Criminal Court*

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Amr Elhow**

Abstract

Piracy has been a serious threat to the international community throughout history. Considering freedom of navigation as a common human issue, piracy was denounced by customary international law prior to its official codification. Thus, it was acknowledged as an international maritime crime and an infringement upon the principles of international law, as stated in Article 101 of the 1982 United Nations Convention on the Law of the Sea. Indeed, the judicial complexities encountered by criminal justice in punishing the offenders of these crimes despite the establishment of universal jurisdiction make it difficult for international courts to make judicial decisions regarding their perpetrators. Given the absence of a dedicated international court for piracy, prosecutions often take place at the national level, which creates many legal and procedural issues, ultimately hindering the effective punishment of these offenders. Furthermore, the involvement of pirate leaders and the recruitment of young pirates and children present additional legal complexities that could be considered grave infringements of human rights as outlined in international humanitarian law that warrant the jurisdiction of the International Criminal Court (ICC). Since the enactment of the Rome Statute, piracy has increased notably, especially in recent years, which represents the «golden age of piracy». Logistical and judicial challenges have limited criminal accountability for piracy. This study has as its main aim to tackle contemporary issues associated with modern maritime piracy. by the hypothesis of the possibility of the prosecution of maritime pirates before the International Criminal Court prosecuting pirates before the International Criminal Court, given the inadequacy of global judicial jurisdiction and the limitations of national legal systems in addressing maritime piracy. while the sub-objectives focus on specific legal issues, including the absence of a standardised definition of maritime piracy in international agreements and the varied interpretations of legal texts. Additionally, the study aims to elucidate the justification for invoking the jurisdiction of the International Criminal Court, framing piracy as a crime against humanity. depending on the comparative method of the international agreements and the analysis of the private characteristics of these crimes and its commission methods.

Keywords: maritime piracy; criminal justice; challenges; interpretation; universal jurisdiction; crime against humanity.

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Resumo

A pirataria tem representado, ao longo da história, uma grave ameaça à comunidade internacional. Considerando a liberdade de navegação como uma questão comum à humanidade, a pirataria foi condenada pelo direito internacional consuetudinário antes mesmo de sua codificação oficial. Assim, foi reconhecida como crime marítimo internacional e como violação dos princípios do direito internacional, conforme disposto no Artigo 101 da Convenção das Nações Unidas sobre o Direito do Mar de 1982. De fato, as complexidades judiciais enfrentadas pela justiça penal na punição dos autores desses crimes, apesar do estabelecimento da jurisdição universal, dificultam que os tribunais internacionais adotem decisões judiciais contra seus perpetradores. Diante da ausência de um tribunal internacional específico para a pirataria, as persecuções ocorrem, em regra, no âmbito nacional, o que gera numerosos problemas jurídicos e processuais, prejudicando a punição efetiva dos infratores. Ademais, a participação de líderes piratas e o recrutamento de jovens e crianças apresentam complexidades jurídicas adicionais que podem ser consideradas graves violações de direitos humanos, à luz do direito internacional humanitário, e que justificariam a jurisdição do Tribunal Penal Internacional (TPI). Desde a entrada em vigor do Estatuto de Roma, a pirataria aumentou consideravelmente, sobretudo nos últimos anos, o que representa uma "era de ouro" da pirataria. Desafios logísticos e judiciais têm limitado a responsabilização penal por esse crime. Este estudo tem como objetivo principal abordar questões contemporâneas relacionadas à pirataria marítima moderna, partindo da hipótese da possibilidade de persecução de piratas marítimos perante o Tribunal Penal Internacional, considerando a insuficiência da jurisdição judicial global e as limitações dos sistemas jurídicos nacionais no enfrentamento desse fenômeno. Os objetivos secundários concentram-se em questões jurídicas específicas, como a ausência de uma definição padronizada de pirataria marítima nos acordos internacionais e as interpretações divergentes dos textos jurídicos. Além disso, o estudo busca justificar a invocação da jurisdição do Tribunal Penal Internacional, enquadrando a pirataria como crime contra a humanidade, com base no método comparativo dos acordos internacionais e na análise das características próprias desse crime e de seus métodos de execução.

Palavras-chave: pirataria marítima; justiça penal; desafios; interpretação; jurisdição universal; crime contra a humanidade.

1 Literature review

Maggie Gardner (2012) concluded that the aspects of universal jurisdiction prosecution are applied uniformly and appropriately across domestic jurisdictions, with the necessary legal authority to address piracy, the real difficulties appear in the implementation of this law within national legal systems, particularly in individual cases, compounded by a shortage of case law. The task involves ensuring that early case law within each jurisdiction is analyzed, and international law is applied correctly. **Aaron N. Hannibal (2015)** concluded that the concept of "private purposes" remains vague and ill-defined, particularly since it has not been clear whether this concept extends beyond the actions of rebels to include actions by independent individuals or organizations pursuing political objectives, since only political acts are prohibited from "private purposes.» As a result, subsequent case law have proven to be crucial in defining the parameters of the exception and determining what constitutes exclusively political activities. However, subsequent state practice shows a continuing ambiguity that has failed to clearly define the boundaries of "private purposes.» States have not taken much positive action in this regard, and their views have been divided. The practices of political activists have often been characterized by passivity, negligence, and inaction. This inaction may be driven by a variety of political factors, complicating the process of obtaining a legal opinion that results in positive action that achieves criminal justice. **Yvonne Dutton (2010)** has focused specifically on judicial solutions to contemporary piracy, suggesting that prosecuting pirates by the International Criminal Court (ICC) might help to close the gap in accountability. The international community's efforts to ensure pirates face justice and held accountable for their crimes could potentially deter at least some individuals from engaging in such activities. Even if not all piracy has stopped, **Elhaw (2024)** deduced that the ambiguity surrounding the notion of piracy in international treaties, coupled with the inadequacy of global judicial authority to prosecute offenders—often due to the incapacity of national courts in certain nations—has undermined

international criminal justice. This deterioration is particularly pronounced as such crimes increasingly contravene the tenets of international humanitarian law, highlighting the necessity of exploring legal grounds for establishing the authority of international criminal justice, epitomized by the ICC.

2 Introduction

Understanding and implementing international maritime law in all its aspects has been of great importance throughout the ages, especially in the modern era, where most of global trade takes place via sea routes. The lack of harmony in international maritime law[1] can lead to economic disruptions around the world. This reinforces the necessity for international maritime law governance to guarantee the security for all states all over the world.

Piracy accounts for a significant ancient phenomenon that has been recognized since the early maritime explorations of mankind, coinciding with the emergence of traditional international law theories in both closed and open seas[2]. Since that time, recurring cases have arisen in maritime areas, especially after the codification of international customs as a cornerstone of public international law, which promoted the emergence of crimes that endanger maritime freedom and the flow of international trade across seas and rivers, negatively affecting the global community interests. Accordingly, international jurisprudence has decided that these perpetrators are considered enemies of humanity and must be tried and punished. The prosecution of these criminals falls within the universal jurisdiction, which grant each state the right to try those it can capture in accordance with the stipulations of the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law[3] of the Sea (UNCLOS). The scale of piracy and its associated risks have led the International Maritime Organization's Safety Committee to propose several recommendations to states aimed at preventing and addressing maritime armed robbery. The main recommendation advises States to establish and enforce jurisdiction over acts of piracy, stressing the importance of universally applying criminal jurisdiction, thus promoting the adoption of universal criminal jurisdiction over piracy, ensuring that perpetrators do not escape punishment, and applying this principle globally. As outlined in Article 19 of the 1958 Geneva Convention on the High Seas, "the courts of a state that has seized a pirate ship or aircraft shall have jurisdiction to impose penalties and take appropriate measures in respect of the ships, aircraft, and other property."[4]

The definitions of piracy in the 1988 and 2005 Conventions for the Suppression of Unlawful Acts against the Safety of Maritime Navigation are broad and comprehensive and include all types of attacks carried out by a vessel's crew or passengers against the vessel itself. Unlike the 1958 Geneva Convention on the High Seas and the 1982 UNCLOS[5] and included more geographically broad, not restricted to the high seas only, in contrast to the definitions contained in the 1958 Geneva Convention[6] and the 1982 United Nations Convention.[7]

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[1] ATTARD, David Joseph; FITZMAURICE, Malgosia; MARTÍNEZ GUTIÉRREZ, Norman A. (ed.). *The IMLI Manual on International Maritime Law*: the law of the sea. Oxford: Oxford University Press, 2014. v. 1. p. 8.

[2] "Hugo Grotius, Dutch Huigh de Groot, (born April 10, 1583, Delft, Netherlands—died August 28, 1645, Rostock, Mecklenburg-Schwerin), Dutch jurist and scholar whose masterpiece De Jure Belli ac Pacis (1625; On the Law of War and Peace) is considered one of the greatest contributions to the development of international law. Also, a statesman and diplomat, Grotius has been called the 'father of international law.'", ONUMA, Yasuaki. Hugo Grotius: Dutch statesman and scholar. *Britannica*. Available at: https://www.britannica.com/biography/Hugo-Grotius. Access on: 13 Nov. 2024.

[3] For further details regarding the significance of establishing UNCLOS. LE BRIS, Catherine. The legal implications of the Draft Universal Declaration of the Rights of Mankind. *Revista de Direito Internacional*, v. 14, n. 1, 2017. p. 156.

[4] BLUM, Jeffrey M.; STEINHARDT, Ralph G. Federal Jurisdiction over International Human Rights Claims: the alien tort claims act after Filartiga v. Pena-Irala. *Harvard International Law Journal*, v. 22, n. 1, p. 53-60, Winter 1981. (specifying that piracy falls under universal jurisdiction due to its heinous nature); Randall, 66 U Tex L Rev at 793–94 (cited in note 23) (specifying that the justification for universal jurisdiction over piracy stems from its violent and destructive nature, targeting ships of all nations). Additionally, Rear Admiral Brian M. Salerno (cited in note 5) emphasizes that ("Maritime piracy is a universal crime under international law because it places the lives of seafarers in jeopardy and affects the shared economic interests of all nations.").

[5] TIRIBELLI, Carlo. Time to update the 1988 Rome Convention for the suppression of unlawful acts against the safety of maritime navigation. *Oregon Revue of International Law*, v. 8, 2006. p. 133, 136.

[6] "'Piracy' means unlawful acts as defined in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)." Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, 2.1 (2001).

[7] KONTOROVICH, Eugene. 'A Guantanamo on the Sea': the difficulties of prosecuting pirates and terrorists. *California Law Review*, v. 98, p. 243-276, 2010. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371122##. Access on: 11 Nov. 2024. (specifying that the SUA Convention has been applied only once.

Despite the differences in jurisprudence in defining piracy, as well as the differences in definitions of piracy in international conventions, there is a consensus that piracy accounts for a crime under international criminal law, while customary practices and judicial interpretations confirm its classification as a prohibited act that deserves punishment when it occurs.[8] However, some of these laws were issued without scrutiny, and others sparked widespread legal and judicial controversy because of various factors, including the ambiguity in the interpretation of piracy, especially considering the different definitions set by international agreements for the crime of piracy.[9] Hence, the absence of a precise interpretation of the concept of piracy, and reliance on national jurisdiction to prosecute perpetrators of these crimes, according to universal jurisdiction principle. Additionally, difficulties arise when attempting to involve the ICC, given its current lack of jurisdiction over such cases. In addition to many legal aspects, including the difficulty of proving the incapacity of domestic judicial systems to prosecute offenders of these crimes, and the absence of any responsibilities in international agreements on countries that are a scene of preparation for these crimes within their land and sea borders, raise many problems that will be addressed in the study by addressing the shortcomings of the 1982 United Nations Convention on the Prosecution of Pirates, and the international element that characterized these crimes in recent years, in addition to its material element represented in criminal acts and the moral element represented in making a profit, through which they constituted crimes against humanity due to their extensive commission, the recruitment of children, and their regular re-commission by armed individuals, especially since they contradict the international humanitarian law principles, even if they fall outside the jurisdiction of Rome Statute.[10] This study has as its main aim to discuss Challenges of prosecuting pirates by building a hypothesis the possibility of prosecuting the pirates before ICC, More specifically, the study aims to:

- Evaluates the reasons behind the failure of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to achieve effective piracy prosecutions.
- Evaluates differences between international agreements (Geneva Convention and UNCLOS and SUA Conventions) regarding piracy definitions.
- Explore the implementation challenges of applying universal jurisdiction to the piracy cases when used by the International Criminal Court.
- Clarify the most important justifications of requiring the resorting to the ICC jurisdiction to prosecute those severe pirates.

3 Methodology

This research follows a qualitative legal research methodology to analyse the procedural and legal system which handles maritime piracy prosecutions. The research undertakes a comprehensive comparison of three major international treaties, which include the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and both versions of the SUA Conventions in 1988 and 2005. The research analyses legal interpretations of the difference between the concepts of maritime piracy under the international agreements while investigating both customary international law together with state practices regarding applying universal jurisdiction. The research evaluates national legal legislation gaps which justify the necessity of resorting to the ICC, especially in light of the methods of its commission, including acts did not mentioned in the international agreements, such as children recruitment and the following the same

This instance involved a an action initiated by the United States in Hawaii's District Court, targeting a ship's cook who had seized control of a fishing trawler. For more details on the case, refer to United States v Shi, 525 F3d 709 (9th Cir 2008).

[8] BASSIOUNI, M. Cherif. Universal jurisdiction for international crimes: historical perspectives and contemporary practice. *Virginia Journal of International Law*, v. 42, p. 81-161, 2001-2002. p. 110, 111.

[9] Regarding their early twentieth-century efforts to aid in codifying international law regarding piracy, the Harvard Research Draft authors observed the absence of consensus on the precise definition of the crime of piracy. Harvard Research in International Law Draft Convention and Commentary on Piracy ("Harvard Research Draft"), 26 American Journal of International Law 739, 749, 769 (Supplement 1932).

[10] UNGOED-THOMAS, Jon; WOOLF, Marie. Navy releases pirates caught red-handed: a legal loophole hashelped scores of Somali gunmen escape justice. *The Times*, 29 Nov. 2009. Available at: http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece. Access on: 3 Sept. 2024.

methods of non-state actors, hence considered crime against humanity.

4 Study hypothesis

This study is led by the hypothesis of the possibility of the prosecution of maritime pirates before the international criminal court, as the national laws cannot effectively combat maritime piracy when applying universal judicial jurisdiction because of their inadequacy. In light of The absence of standardised definition in international agreements coupled with unclear procedures and challenges from involving the ICC creates major difficulties for global piracy response.

5 The golden age of maritime piracy (background)

The piracy golden age, which spanned the late 17th to 18th centuries, was centered in the Caribbean, where its waters and the Antilles emerged as a major arena for American piracy. The many islands and secluded bays served as a haven for adventurers and sea robbers for decades, amid European and American efforts to eradicate piracy within the area. Piracy emerged as a criminal activity in East Asia and South Asia during the 17th century, with European and merchant ships being targeted by various Asian pirates from different seas. Piracy has escalated in various regions, including the Philippines, Thailand, Indonesia, Nigeria,[11] Vietnam, Laos, Somalia, and the Gulf of Aden' eastern coast, to a great level of danger, threatening the lives of innocent people in local communities. Piracy is no longer limited to stealing valuables from crews and cargo but also includes looting ships, holding hostages for ransom, and hijacking ships, which endangers navigation security across the national, cross-border, and global levels, as well as undermining global stability, highlighting the importance of this issue. The Red Sea holds critical significance in the western zone, specifically around the Strait of Aden and the Somali coast, due to its pivotal role in regional strategy, necessitating an enhanced military presence. This is achieved through the intervention of these countries to protect their interests by deploying naval armed forces.[12]

The International Maritime Bureau recorded 60 vessel-targeted piracy and armed robberies in the first half of 2024. This is down from 65 last year. Although piracy has decreased, the IMB[13] study states that "the concerning rise in violent occurrences underscores the necessity for sustained vigilance by the international community to safeguard all seafarers—especially during this time." The 60 occurrences included 46 boardings, eight attempted boardings, four hijackings, and gunfire. Overall, attackers boarded 85% of ships. Despite fewer incidents, they have been more violent than pirates lately.

Table 1 - The table clarifies most successful instances occurred while vessels were anchored or in transit. (IMB Report on Piracy and Armed Robbery: January to March 2024)

Status when attacked	BOARDED	ATTEMPTED	HIJACKED	FIRED UPON	Grand Total
ANCHORED	15	5			
BERTHED	1				
STEAMING	8	1	2	1	12
Grand Total	24	6	2	1	33

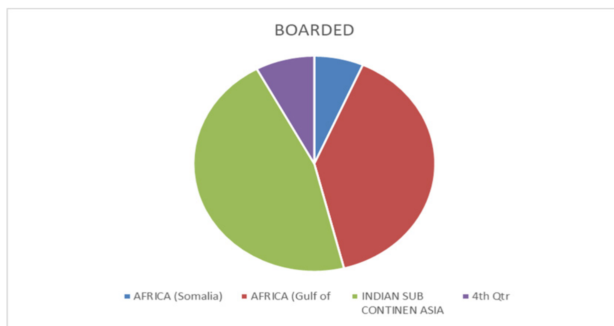
Source: IMB piracy and armed robbery report for January–June 2024. Available at: https://www.piclub.or.jp/en/news/40048.

[11] Piracy has increased off the Nigerian coast due to substantial maritime activity in the oil and gas sector, while land-based factors, such as unemployment, have been intensified by the Covid-19 preventive measures implemented in Nigeria. The increase in piracy in Nigeria is primarily motivated by demands for resource control, sabotage of oil and gas facilities, environmental degradation in Niger Delta communities, and political violence as local politicians vie for oil and gas revenue. The environmental contamination in oil-producing regions has adversely impacted fisheries, agriculture, and public health, hence exacerbating poverty and unemployment, which are precursors to piracy. Piracy along Nigeria's coast is thus associated with the petroleum sector – which is crucial to the nation's economy. ANELE, Kalu Kingsley. A critical analysis of the implications of Covid-19 on piracy off the Nigerian coast. *Revista de Direito Internacional*, Brasília, v. 18, n. 2, p. 108-133, 2021. Available at: https://www.publicacoesacademicas.uniceub.br/rdi/article/view/7332/pdf#. p. 109.

[12] WEIR, Gary E. Fish, family, and profit: piracy and the horn of Africa. *Naval War College Review*, v. 62, n. 3, p. 15-30, Summer 2009.

[13] INTERNATIONAL MARITIME ORGANIZATION. Committees. *IMO*. Available at: http://www.imo.org/About/Conventions/Pages/Home.aspx. Access on: 15 Sept. 2013.

Figure 1 - Clarifies the regions where incidents are reported



Source: REGIONS where incidents reported, IMB piracy and armed robbery report for January. Available at: https://www.piclub.or.jp/en/etc/news-contact?post_id=40048.

5.1 Legal framework of piracy

5.1.1 The Geneva Convention 1958

The Geneva Convention emerged during the Cold War era. The International Law Commission's work was significantly shaped by the developments of the mid-20th century, during which Taiwanese nationalists frequently targeted vessels on route to harbors in China. These actions constituted a significant challenge to navigational liberty within the Far East. By October 1954, the Soviet authorities presented a proposal aimed to foster global collaboration against piracy in Chinese waters by including the Violation of navigation rights in the Chinese waters on the discussions of the UN General Assembly during its 9th session. The Soviet Union argued, depending upon the terms outlined in the Nyon Convention, that the activities of the Taiwanese fleet ought to be classified as piracy. Under the Soviet Union leadership, communist states like the People's Republic of Poland argued that politically driven actions carried out by both warships and private vessels ought be classified as piracy.[14] According to Article 15 of the 1958 Convention, piracy encompasses any of the aforementioned acts performed beyond the territorial jurisdiction of any state:

- Any act of violence or plunder intended to rob, assault, injure, enslave, detain, or kill an individual, or to seize or destroy property for personal gain without a legitimate claim or right, is considered piracy if it involves an attack carried out from or directed toward the sea or air. If an attack originates from aboard a ship, the vessel initiating the attack or any other ship involved must either qualify as a pirate vessel or lack a recognized national affiliation.
- Any act of willingly participating in the management of a ship with the knowledge that it is identified as a pirate vessel.
- Any act of encouraging or deliberately aiding in the commission of the actions outlined in paragraph 1 or 2 of this Article.

5.1.2 The UNCLOS 1982

Article 101 of the UNCLOS specifies piracy as a violent or theft-related act intended to gain from the people aboard a privately owned vessel or aircraft in international waters or areas not under the control of any state. This includes targeting ships or aircraft, as well as the individuals and assets present aboard. Engaging in or supporting such activities is also considered a contributing act.[15]

The above definition of piracy has been criticized by many international legal jurisprudence for being limited to attacks for personal gain on the high seas (comprising exclusive economic zones or regions beyond the authority of any state) that involve two ships. Therefore, attacks by pirates or crew members within a coastal state's internal or territorial waters do not constitute piracy under the UNCLOS definition.[16] These include offences carried out aboard ships for national or political motives, as well as maritime hijackings. This contradicts

[14] FIEDUCIK, Bartosz. The definition of piracy under article 101 of the 1982 United Nations convention on the law of the sea: an attempted legal analysis. *Białostockie Studia Prawnicze*, n. 10, p. 67-79, 2011. DOI 10.15290/bsp.2011.10.02. Available at: https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/2009/1/BSP_10_2011_Fieducik.pdf. p. 68.

[15] GUILFOYLE, Douglas. Treaty jurisdiction over pirates: a compilation of legal texts with introductory notes. *UCL*. Available at: http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes. Access on: 17 Sept. 2013.

[16] KAO, M. Bob. Against a uniform definition of maritime piracy. *Maritime Safety and Security Law Journal*, n. 03, p. 1-20, 2016.

with the international law's principles and provisions, as 80% of pirate activities takes place within the authority and control of coastal states. Of interest, the concept of "special purposes" within the piracy UNCLOS definition has historical precedent, as many governments have traditionally used pirates as tools against their adversaries. Their governments have imposed sanctions on these pirates to seize foreign ships to increase their financial resources.[17]

Articles 100 to 107 and 110 of the 1982 UNCLOS form the foundation for addressing piracy within international law, reflecting principles of customary international law. The Security Council has repeatedly asserted that the Convention establishes the legal framework for addressing piracy, maritime armed robbery, and various other maritime offenses. UNCLOS's Article 100 specifies that "all States should collaborate to the maximum extent feasible in the elimination of piracy on the high seas or in any region beyond the jurisdiction of a State." The General Assembly has consistently urged States to collaborate in combating piracy and maritime armed robbery through its resolutions concerning maritime law and ocean policies.[18]

According to UNCLOS, the world's waterways comprise four distinct legal categories: high seas, contiguous zones, exclusive economic zones, and territorial waters.8. The Division for Ocean Affairs and the Law of the Sea acts as the administrative body for UNCLOS, offering support and guidance on the uniform and standardized implementation of UNCLOS regulations, particularly those related to the piracy suppression.

UNCLOS establishes a legal framework granting States considerable discretion to combat piracy, yet it is incumbent upon States to incorporate UNCLOS principles into their national legislation. States are required to empower their military and law enforcement personnel with the necessary authority, as outlined in national legislation, to facilitate arresting and prosecuting individuals suspected of piracy. Contextually, it is essential to recognize that under UNCLOS, universal jurisdiction is «permissive.» This implies that when states choose to apply this jurisdiction, it is a privilege rather than a requirement.[19]

5.1.3 (SUA Convention), 1988

This convention aims to establish jurisdiction over piracy acts within international waters. The importance of countering piracy stems from the fact that certain aspects of piracy may also violate several instruments and treaties; also, for some States, regional and bilateral agreements may be pertinent to addressing pirate issues. The primary objective of the convention is to guarantee that suitable measures are implemented against those who perpetrate illegal activities against vessels. These include:

Forcibly seizing ships.

Acts of violence against people aboard ships.

Installing devices on ships designed to cause destruction or damage.[20]

The convention requires contracting governments to extradite or take legal action against those charged with offenses. This approach ensures that individuals who engage in piracy and other violations are prosecuted. When a crime involves a vessel flying a contracting state's flag, or is within its jurisdiction, or by one of its nationals, the convention compels contracting states to either extradite the suspect or initiate prosecution (Article 7). This provides additional assurance that individuals who engage in such conduct will be held accountable. Deliberate and forcible seizure of ships, violent actions against passengers onboard, the installation of destructive equipment onboard a vessel, and any destruction to a ship or its cargo that jeopardizes navigation safety are unlawful under the Convention. Article III22, this convention facilitates the establishment of jurisdiction over piracy in international waterways. The key goal of the convention is to guarantee the enforcement of effective measures against those who engage in unlawful actions targeting vessels.

UNCLOS restricts the definition of piracy through the 'two-ships' criterion, thereby excluding 'internal hijackings'—the coercive seizure of a vessel by individuals

[17] TODD, P. *Maritime fraud and piracy*. 2. ed. London: Lloyd's List, 2010. p. 329.

[18] United Nations Security Council, Resolution 2077, 2012.

[19] GUILFOYLE, Douglas. Treaty jurisdiction over pirates: a compilation of legal texts with introductory notes. *UCL*. Available at: http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes. Access on: 17 Sept. 2013.

[20] WOLFRUM, Rüdiger. *Fighting terrorism at sea*: options and limitations under international law. Available at: http://www.virginia.edu/colp/pdf/Wolfrum-Doherty-Lecture-Terrorism-at-Sea.pdf. Access on: 17 Nov. 2024.

on board, whether crew members or passengers passengers—and cases where a group of passengers holds the crew and others hostage for ransom. Consequently, military interventions against a vessel by warship or other authorized government vessels are not encompassed within UNCLOS provisions.[21]

The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (SUA PROT) are not applicable to territorial waters. Nonetheless, they encompass the actions regardless of purpose and without the 'two-ships' stipulations.[22]

The 2005 Protocols expand the range of offenses against maritime navigation safety outlined in the SUA conventions to include the following acts: a) utilizing explosive, radioactive substances, or weapons categorized as biological, chemical, or nuclear (BCN), as well as releasing liquefied natural gas, oil, or other harmful and hazardous materials (HNS) from a vessel, or employing a vessel as a means to inflict fatal harm or injury, and b) transporting radioactive, explosives substances, BCN weapons, or source materials on board a vessel to coerce a population or pressure a state authority or an international body into taking or refraining from specific actions. (Art. 3)[23]

Protocols 2005 also describe a vessel as a destructive entity that inflicts destruction or harm against individuals or property and contain new stipulations allowing the boarding of a vessel registered under the flag of another member State when credible suspicion exists that the vessel or an individual onboard is implicated in an offence punished under the Convention (Art. 8 bis). The procedure for halting and confiscating vessels on the high seas is detailed extensively. Such Protocols constitute the legal foundation for actions pertaining to the interception and inspecting vessels in international waters.[24]

6 International legal characteristics of piracy offences as per Article 101 of UNCLOS and Article 15 of the 1958 Convention on the High Seas

6.1 An illegal act of violence

The notion of piracy encompasses four fundamental components that necessitate additional examination. An illegal act of aggression or coercion, or any form of larceny. It is significant because UNCLOS lacks definitions for «**violence**,» «**detention**,» and «**depredation**.» Researchers from the World Maritime University in Malmo, Sweden, assert that the primary issue involves the categorization of harm as either physical or the recognition of psychological injury as a kind of violence. A limited definition of violence encompasses solely physical harm. The broad notion of violence includes psychological harm, such as intimidation and threats. Including psychological injury in the definition of violence aligns with the World Health Organization's stance. UNCLOS lacks a definitive definition of illegal violence; hence, the responses of various governments to analogous acts of violence may differ, notwithstanding their status as signatories to the treaty. Detention, like assault, is illegal unless authorized by the governing authority. Furthermore, the phrase «detention» should be comprehended in its most expansive interpretation, as it may be executed not alone by governmental entities but also by non-governmental individuals," specifically, the personnel and passengers of private vessels, as clearly stated in Article 101 of UNCLOS.[25]

[21] ANYANOVA, Ekaterina. Piracy in Modern International Law. *In*: CHIVASA, Norman (ed.). *Global Peace and Security*. [*S. l.*]: IntechOpen, 2022. DOI 10.5772/intechopen.108111.

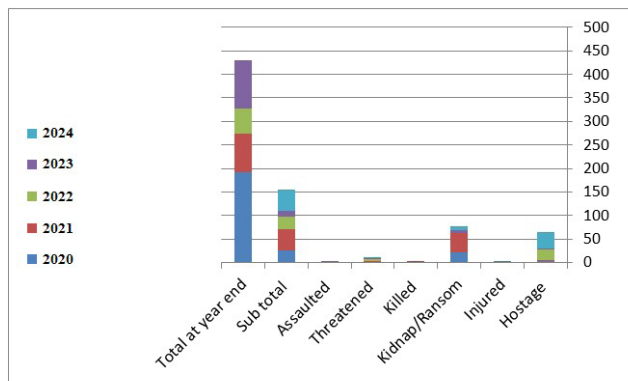
[22] The creation of the SUA documents was prompted by the 1985 incident involving the Italian ship Achille Lauro, where the assailants took hostages to secure the release of Palestinian detainees. These documents were formulated and adopted to ensure that individuals engaging in unlawful acts against ships are held accountable. GUILFOYLE, Douglas. Piracy prosecutions and international law. *BIMCO Bulletin*, v. 106, n. 2, p. 86-88, 2011.

[23] The 2005 Protocol of the SUA (SUA 2005) was established in 2005, came into effect in 2010, and has been endorsed by 52 states.

[24] BORDAHANDY, Pierre-Jean; FORREST, C. Maritime Security and Maritime Law in Austrália. *Journal of International Maritime Law*, v. 14, n. 2, p. 162-179, 2008.

[25] CAMPBELL, Penny. A modern history of the international legal definition of piracy. *In*: ELLERMAN, Bruce A.; FORBES, Andrew; ROSENBERG, David (ed.). *Piracy and maritime crime*: historical and modern case studies. Newport: Naval War College Press, 2010. p. 19-32.

Figure 2 - Types of violence to crew, January – March 2020-2024



Source: IMB piracy and armed robbery report for January–June 2024. Available at: https://www.piclub.or.jp/en/news/40048.

The diagram clarifies the types of crimes and violence. From 2020 to 2024, incidents involving hostage ship personnel rose by 17.5%. By March 2024, the cumulative tally of crimes, including kidnapping, murder, threats, and assaults on maritime crews, amounted to 90 instances, representing 80% of the total crimes documented by the conclusion of 2023. The other instances are expected to transpire over the course of the year if these violations continue.

6.2 Private ends

The second factor regards piracy as an action undertaken for personal profit. This viewpoint asserts that the understanding of personal goals will depend on the offender's subjective assessment. The principal objective of this strategy is to completely eradicate any instances of maritime terrorism as outlined by the UNCLOS framework. This strategy is deficient, as individuals within the same gang accountable for a pirate attack may assert divergent motivations for their actions. The alternative viewpoint is utilizing an objective standard to differentiate between private purposes and public objectives (activities acceptable for state execution). Article 101 characterizes this mentality as involving any violent actions undertaken for personal gain without governmental authority. This methodology was corroborated by the International Law Commission's observations. In examining the development of the international legal system, Polish historian Y. Moskovsky highlighted that the conference debated whether piracy is defined exclusively by activities motivated by commercial interests or also by political objectives. Significant differences over this matter have emerged during the ILC's hearings. The ILC articulated its position in documents concerning the law of the sea, which encompassed observations. Piracy may be committed out of anger or retribution for personal reasons. This position asserts that individual incentives are a crucial element of piracy, embracing various objectives beyond just financial profit. Utilizing an objective standard has been empirically substantiated.[26]

6.3 Nature and the scale of commission

A continuous journey that makes port calls at several locations. With «wide networks of investors, negotiators, and associates spanning multiple countries and continents, creating a trans-regional economy deeply intertwined with other privatized enterprises on both land and sea,» piracy has evolved into a conglomerate operation. Thus, maritime piracy constitutes a menace to the security and stability of the world.[27]

Modern piracy Modern piracy is of a considerable global influence. Recorded piracy incidents numbered 410 in 2009, increased to 445 in 2010, slightly decreased to 439 in 2011, and then dropped to 297 in 2012. The incidence of piracy assaults in Asian waterways, specifically in Bangladesh, India, the South China Sea, and Southeast Asia, has varied over the 20th century, peaking till 2005, decreasing from 2006 to 2010, and subsequently rising again. In 2012, Indonesian waters emerged as a significant epicenter for piracy, experiencing more incidents than any other region globally, attributed to weak borders, a multitude of islands, and insufficient national marine resources for surveillance.[28]

The human cost is also significant. Most assaults entail the utilization of weapons, which endanger the ves-

[26] In the 1986 Castle John v. NV Mabeco case, the court in Belgium determined that Greenpeace demonstrators who committed violent acts targeting a Dutch ship within international waters, "to advocate a personal viewpoint," engaged in piracy. The appellate court determined that the authority established in the pirate provisions was relevant because the criteria for a private goal was satisfied. Consequently, the Court directed the respondents to avoid engaging in any activities that impede free movement of passage or waste disposal.

[27] IMB October 2009 Report at 27 (cited in note 2) (demonstrating that an organization based in Denmark, Risk Intelligence, estimates around half of all pirate attacks on the oil industry are not reported).

[28] O'BRIEN, Melanie. Where security meets justice: prosecuting maritime piracy in the international criminal court. *Asian Journal of International Law*, v. 4, n. 01, p. 81-102, Jan. 2014. Available at: http://journals.cambridge.org/AJL. p. 81, 84.

sel, cargo, and environment, but primarily threaten the safety of seafarers. The International Maritime Bureau indicates that from 2007 to 2012, forty-eight individuals were fatalities in piracy attacks, while 243 sustained injuries. Although the death toll may appear modest, the number of individuals taken prisoner during the same timeframe is astonishing: 4,792. According to the IMB, hostages experience violence post-kidnapping, including beatings, deprivation of sustenance, being targeted with water jets, confinement within the ship's cold storage, shackling under intense heat, solitary confinement, forced nudity, simulated killings, and refusal of medical assistance. Certain seamen were compelled to work alongside the pirates, whereas others were utilized as human shields. Piracy has evolved into a structured criminal enterprise, encompassing a «global network of financial supporters» and impacting thousands across local, regional, and national spheres—referred to by some researchers as the «pirate value chain.» The escalation of criminal activity encompasses crimes like corruption and laundering of funds. The participants extend beyond the pirates to encompass government officials, aligning with the historical context of piracy, which has intermittently involved state-sponsored raids where pirates received funding from governmental or local authorities to execute assaults, particularly during periods of crisis.[29]

Annually, piracy requires the spending of approximately US$2 billion on naval operations in the waters near Somalia, straining naval resources further. The 2010 OBP report on the Economic Cost of Piracy identified two primary sources of naval costs. The expense is associated with each participating navy vessel. We compute these expenses by estimating the daily operational expenses for a vessel and multiplying this figure by the annual count of vessels in service. This figure encompasses the budgets for administration and personnel across three significant naval operations: Operation Atlanta, Operation Ocean Shield, and the Combined Task Force. Beyond economic expenditures, the global allocation of naval resources by states may diminish their military capabilities, resulting in insecurity and a deficiency in defense proficiency over their own territory. Between December 2010 and March 2022, the UN Security Council enacted seven resolutions addressing Somali piracy, permitting foreign naval and aerial forces to access and patrol Somali waters, and endorsing the Operation Atalanta, a European Union Naval Forces mission led by US, employing force and all requisite measures to counter piracy and maritime armed robbery. A 2013 World Bank report, frequently referenced, indicates that piracy incurs an annual cost of approximately $18 billion to the global economy.[30]

Although the UN Security Council Resolutions were appropriate, they appear to have inadequately addressed the issue. They articulated, in conventional diplomatic terminology, and appeared to be exhortative. The resolutions were emphasized to pertain exclusively to the circumstances in Somalia and were not intended to set a precedent in customary international law. The reality is that a scenario in which vessels are routinely ambushed at sea necessitates a substantial and resolute response. It affected world peace and security, and requests for cooperation with the Somali government, which appeared to lack effective control, were inadequate responses. Aggravating conditions that are present in many cases of piracy.

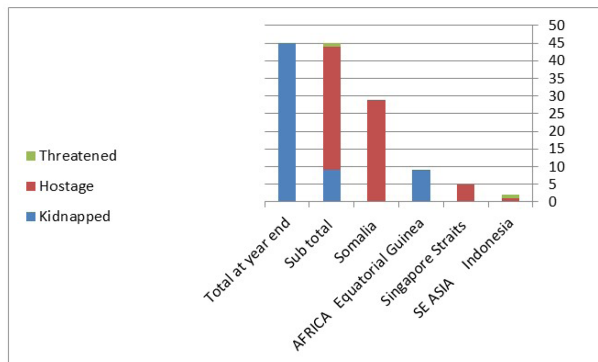
The impact on a global scale highlights how serious piracy is through scale, nature, method of execution, effects on victims, and the presence of aggravating factors (qualitative dimension). Regarding the scope of the crimes, thousands of people have been harmed by piracy, which is perpetrated throughout vast swaths of the world. The regional dispersion further illustrates how pervasive the crimes are. The victims have suffered severe physical and psychological harm because of the acts, including post-traumatic stress disorder. The use of violence and hostage-taking are two aggravating conditions that are present in many cases of piracy.[31]

[29] IMB 2012 Report, supra note 6 at 11; ICC International Maritime Bureau, supra note 17.

[30] NEW THREAT to global shipping as Somali pirates makes fierce comeback, Piracy costs the global economy $18 billion annually. *Alarabiya*. Available at: https://www.alarabiya.net/aswaq/special-stories.

[31] Referência.

Figure 3 - Clarifies the type of incidents, in different regions January–March 2020-2024



Source: KONTOROVICH, Eugene; ART, Steven. An Empirical Examination of Universal Jurisdiction for Piracy. *American Journal of International Law*, v. 104, issue 3, p. 436-453, July 2010. DOI 10.5305/amerjintelaw.104.3.0436.

The **aforementioned illustrates** the qualitative aspects of marine piracy offences concerning the locations and conditions of their perpetration throughout various continents and nations at both regional and global scales. The diverse consequences arising from the perpetration of these crimes are apparent, encompassing both fatalities and injuries, as well as substantial financial burdens.

7 Discussion of the study hypothesis

7.1 Justifications for resorting to the jurisdiction of the International Criminal Court

Despite being the first crime with international dimensions, piracy was ultimately omitted by the Rome Statute during the ICC's formation discussions, despite earlier suggestions advocating its inclusion as a crime under its authority. The justification for this is that non-state actors participate in piracy as a criminal enterprise for individual gain. This justification ignored the reality that state and non-state entities have the capacity for committing Rome Statute war crimes such as looting for personal gain.

Additionally, examples from Somalia and Southeast Asia highlight that government officials can participate in piracy without being the principal ones operating vessels. Furthermore, negotiations concentrated on «core crimes» instead of addressing offences like piracy that are already established in existing treaties. A greater number of suggestions were submitted for the incorporation of terrorism and drug trafficking offences as opposed to piracy; nonetheless, these were similarly dismissed in the ongoing tendency to exclude treaty crimes.

Considering the current increase in piracy, both practitioners and researchers have explored potential strategies for penalizing pirates who operate beyond state jurisdictions. Academics and United Nations organizations have suggested many ways include enhancing regional capacities to combat piracy, as shown by Africa nations through tackling Somali piracy and establishing a separate Somali court governed by a third-party nation. Establishing a specialized chamber within the Kenyan court, creating a regional court, and forming an international court, potentially under the framework of Chapter VII of the Security Council. The ICC is hardly considered a viable alternative, and when it is, it is labelled «not feasible» without comprehensive analysis or clarification of the reasoning behind that conclusion.[32]

Gardner critiques the judgements in his study, stating: «The initial wave of domestic piracy prosecutions indicates that domestic courts have not yet attained the requisite consistency and expertise in addressing pivotal questions of international law in these matters.» Alternatively, some studies highlight solutions for the Somali pirate dilemma, although they neglect to address prosecutorial possibilities for pirates operating in other regions or of different nationalities. Consequently, the ICC offers a prosecuting avenue for piracy offences perpetrated in any jurisdiction[33] because of the below justifications.

7.1.1 Piracy as a Crime Against Humanity: a systematic attack

An extensive or organized attack targeting civilians in a community is considered an aspect of a crime

[32] Analyzing Yvonne Dutton's theory titled 'Bringing Pirates to Account,' it stands as the exploration of the ICC's ability to pursue individuals involved in piracy to date. Dutton points out that during negotiations in Rome there was hesitation around incorporating treaty-based crimes like piracy due to a belief that handling offences at a level would be more appropriate and concerns about potentially overwhelming the Court with cases.

[33] GARDNER, Maggie. Piracy Prosecutions in National Courts. *Journal of International Criminal Justice*, v. 10, p. 797-821, 2012. p. 820.

against humanity when part of a coordinated assault against them. The terms «systematic» and «widespread» are mutually exclusive; thus, the action must qualify as either an attack against civilians or a widespread offensive.

«Widespread» refers to the quantity of victims rather than a specific geographic area. The word has been broadly applied via specialized tribunals to include «the extensive scale of the assault and the number of individuals targeted.» The geographical dispersion of the crimes is important in the case of piracy, although «widespread» does not always mean geographical dispersion. Pirates are becoming more widespread. sufficient to compare to comparable ICC cases and circumstances, which often involve thousands of victims.

A systematic attack refers to «patterns of crimes,» meaning the intentional and repeated occurrence of similar criminal activities, as well as the «organized nature of the acts of violence and the unlikelihood of these acts being random.»[34]

The phrase «reflects the organized nature of the attack, excludes random violence, and does not require a policy or plan,» according to rulings from other courts and tribunals, However, the assault must be «pursuant to or in furtherance of a state or organizational policy to commit such an attack,» as defined by the Rome Statute's Article 7(2)(a). This policy is interpreted to involve either actively endorsing or facilitating such an attack. According to the Court's interpretation, the attack «must be thoroughly organized and follow a regular pattern» and «also be conducted in furtherance of a common policy involving public or private resources,» even though the policy is not required to be specifically articulated. The overall trend of assaults will reveal how organized the crimes are. As an example, the SCSL in the RUF case assessed if peacekeeping troop murder was a crime against humanity. According to other claims, the Trial Chamber found that «the assaults on UNAMSIL personnel were separated in both location and time from the crimes against civilians.» It was discovered that the deaths of the peacekeeping forces were unrelated to offences or other crimes against civilians. The peacekeeping forces were classified differently from Sierra Leonean civilians; although they were civilian peacekeepers, they were not the people who were the focus of the systematic or widespread attack. Therefore, the Trial Chamber specified that the assaults were «distinct from and did not form part of the widespread or systematic attack on the civilian population of Sierra Leone,» even though the peacekeeping soldiers were found to be civilians. Regarding this matter, it is accurate to say that each attacked ship is situated geographically apart from the others, yet these are not distinct groups of citizens. Whether they are passengers or sailors working on ships, the civilian population on all of them is the target of the attack. Given their obvious ability to defend themselves, only military vessels may be seen as not being among the civilians the pirates are targeting. Given that private security has a structured organization and is armed, their status may likewise be in question. They should still be regarded as civilians, though, because they are not in the military. Multinational and multiethnic shipping crews can be included in the attack since the civilians targeted may belong to any ethnicity or nationality or have other distinctive characteristics.[35]

7.1.2 Recruitment of children

In September 2002, Thomas Lubanga, a co-founder and head of the Union des Patriots Congolais (UPC), was charged with three distinct offences by the ICC. The ICC Trial Chamber I determined that the offences of recruiting and registration occur when children younger than 15 years old is recruited or enlisted in an armed group or force, regardless of coercion. Additionally, the evidence conclusively demonstrated that the accused and his co-defendants conspired and engaged in a collective scheme to form an army aimed at securing and sustaining authority and control dominance over Ituri, a province of the Democratic Republic of Congo, which consequently resulted in the conscription of children younger than 15 years old to actively partake in armed conflict.[36]

[34] DEGUZMAN, Margaret McAuliffe. The road from rome: the developing law of crimes against humanity. *Human Rights Quarterly*, v. 22, n. 02, p. 335-403, May 2000. p. 335, 364. (noting that the ICTR was the first authoritative international legal framework to incorporate the phrase «widespread or systematic attack» into its definition).

[35] BUEGER, Christian; EDMUNDS, Timothy. Blue crime: conceptualising transnational organised crime at sea. *Marine Policy*, v. 119, n. 104067, Sept. 2020. Available at: https://doi.org/10.1016/j.marpol.2020.104067.

[36] See PROSECUTOR v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Summary Judgment under Article 74 of the Statute, 34-42 (14 March 2012). Available at: http://www.icccpi.intticcdocs/doc/doc1379843.pdf. parag. 37 further states:

The question In the Lubanga Case is, whether the enlisting and utilizing child soldiers exclusively pertain to armed conflict, rendering it an inadequate analogy for the enlistment and exploitation of child pirates?

Due to the lucrative nature of piracy, investors form groups of pirates, often recruiting young children, some under the age of fifteen, who are especially susceptible and accessible as a result of the disintegration of familial and governmental structures in Somalia, and who are perceived as fearless, to provide resources aimed at generating profit. The coast of Somalia is inhabited by pirate organizations that persistently and systematically assault innocent mariners.[37] **Consequently**, it is obvious that limiting the prosecution of individuals involved in child recruitment offences only to armed conflicts contravenes international humanitarian law and global treaties concerning children's rights, particularly the 1989 United Nations Convention, which prohibits the employment of children in warfare[38] and inappropriate labour during peacetime or their transfer outside their homeland or their exploitation to achieve economic profits.[39]

7.1.3 Organized crimes

Attacks are occasionally planned over several weeks, with pirate crews evaluating the security environment and formulating assault methods beforehand. For example, organizations increasingly utilize «mother ships,» which are large vessels stationed in a fixed location, serving as the «pirate base» from where smaller, swifter boats initiate assaults. This has enabled pirates to broaden their scope;[40] they can seek potential ships to target throughout extensive oceanic regions. Contemporary pirates own swifter vessels due to enhanced operations and increased successful heists. Negotiators, transportation firms, and victims have all commented on the progressively professional way ransom talks are executed. To avert one faction from encroaching upon another's «territory,» pirate organizations have established informal «codes» among themselves—a form of «honor among thieves.

Rackets are linked to territorial dominance both on land and at sea. Local fishermen and maritime vessels are extorted by pirates for «protection» against attacks when traversing their «territory.» Moreover, some contemporary groups exhibit a hierarchical, often militaristic organization led by formidable figures akin to warlords. These factors collectively provide a systematic framework of pirate offences, which clearly demonstrate an organizational strategy to initiate assaults. Although each pirate faction is obviously well organized, all pirate attacks, not just those by certain factions, should be assessed for their organized structure and pattern.[41]

In the same vein, the ICC has determined that assessing "the capacity of a group to commit acts that violate fundamental human values" is a means of determining an organization. Ultimately, there is a correlation between the inaction or cooperation of a national government in dealing with piracy crimes, as in Somalia. The breakdown of the Somali state has resulted in fragile governance, widespread corruption, and authorities accepting bribes from pirates. Ultimately, this situation reinforces the reluctance to address and eradicate piracy.

While The assault must be comprehensive or meticulously orchestrated. The defendant's unlawful conduct cannot be segregated, confined, or arbitrary; it may comprise a singular act or a restricted series of acts occurring during the assault on a civilian populace. Pirate attacks may be classified as intermittent in the context

[37] GASWAGA, Duncan. Does the International Criminal Court have jurisdiction over the recruitment and use of child pirates and the interference with the delivery of humanitarian aid by Somali Pirates? *ILSA Journal of International & Comparative Law*, v. 19, n. 2, p. 277-304, 2013. Available at: https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1792&context=ilsajournal. Access on: 15 Nov. 2024.

[38] The forced recruitment of children is one of the most serious violations of internationally recognized international humanitarian law FRISSO, Giovanna Maria. Crianças-soldados no conflito em Serra Leoa: direitos humanos, direito internacional humanitário e/ou direito internacional penal. *Revista de Direito Internacional*, Brasília, v. 9, n. 2, p. 83-91, 2012. Available at: https://www.publicacoes.uniceub.br/rdi/issue/view/148. p. 86.

[39] UN Convention child rights. AR 11<32.

[40] UNITED NATIONS. Office on Drugs and Crime. *United Nations Convention Against Transnational Organized Crime And The Protocols Thereto*. United Nations: New York, 2004. Available at: https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.

[41] Rome Statute, supra note 7, art. 7(2)(a) (outlining a pattern of behavior that involves the repeated commission of such acts. Conversely, Badar, cited in note 28, page 110, highlights a distinction between the Rome Statute and customary international law. While the former mandates the occurrence of multiple acts, the latter does not impose such a requirement. For instance, the Soviet authorities' execution of Imre Nagy, Hungarian leader, was classified as a crime against humanity, even though it involved just a single individual. Although the act was not carried out on a «vast scale,» targeting a political leader demonstrated an intent to harm an entire population).

of armed warfare, but this classification does not apply when addressing crimes against humanity. Despite the crimes geographically separation, each pirate persists in their attacks, indicating that they are not isolated incidents.

7.2 The broad definition of piracy[42]

The 1958 Geneva Convention on the High Seas established a criterion whereby an individual's guilt for piracy is contingent upon whether the conduct is executed for «private ends.» The private ends test lacks a definitive description; however, an act is typically considered to have a private end if it is executed without legal authority and is motivated by personal benefit or retribution. Violent actions perpetrated by governments or organizations for political purposes are typically not seen as private endeavors and, thus, do not fulfil the criteria for piracy.[43]

The Geneva Convention is the foremost declaration regarding the law of piracy. However, its provisions present numerous interpretational challenges and uncertainties. The Mayaguez case[44] exemplifies the intricacies of piracy and the overarching challenge of codifying a contentious subject. The Cambodian conduct is presumed to be an «unlawful act of violence.» The Mayaguez was not involved in unlawful surveillance of Cambodia or any other activities that could potentially justify or excuse the seizure on the principles of self-defense or necessity.[45] Article 15 mandates that the pirate vessel must be «private» and engaged in the pursuit of «pri.» The Cambodian naval warship was, objectively, a public vessel, not a private one. The United States, however, had not acknowledged the Khmer Rouge regime, under whose authority the seizure occurred. The Convention does not address the matter of recognition, or its absence, in formulating this definition. (Article 15, Geneva).

The drafters failed to distinguish between political factions opposing a singular government and those that directly impacted the interests of multiple States. There was no distinction between the actions of political organizations and those of the States. The «private ends» test was a blunt instrument applied to a highly intricate issue. It overlooked the variations in the extent of State engagement and the characteristics of political organizations and their actions. According to the preparatory documents of the 1958 Geneva Convention and the 1982 Jamaica Convention, Article 101 employs the concept of "private ends" to exclude from the piracy definition actions conducted by rebels who are not acknowledged as a combatant force by the opposing state, as long as their attacks are solely aimed at that state's assets. The architects of this definition aimed to prevent governments engaged in conflict with rebels from categorizing their insurgent activities as piracy.[46]

The «private ends» condition may serve as a loophole for nearly every action undertaken by a State or revolutionary political group. This exception is hardly deemed prudent. The fundamental justifications for

[42] UNCLOS, supra note 8, art. 105. For the comprehensive list of ratifications, see UNITED NATIONS. OCEANS & LAW OF THE SEA. Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements. *UN*, 23 July 2024. Available at: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea. 70. Id. art. 101(a). Although the United States has not officially approved the latest version of UNCLOS, it remains a member of an earlier edition that encompasses the same piracy-related clauses. See Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 516 U.N.T.S. 205.

[43] CROCKETT, Clyde H. Toward a Revision of the International Law of Piracy. *DePaul Law Review*, v. 26, n. 1, Fall 1976. Available at: https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2619&context=law-review. Access on: 15 Nov. 2024. p. 78-79.

[44] On May 1, 1975, Khmer Rouge forces launched an attack on on Phu Quoc, a territory under South Vietnamese administration but claimed by Cambodia. On May 10, the Khmer Rouge seized the Tho Chu Islands, where they forcibly removed and subsequently killed 500 Vietnamese residents. The Vietnamese People's Army initiated a counteroffensive to expel the Khmer Rouge out of Tho Chu and Phu Quoc, and assaulted Cambodia's Pulu Wai Island. During the conflicts over the islands, the Khmer Navy diligently patrolled Cambodian coastal waterways to prevent Vietnamese invasions and to mitigate concerns that the CIA may utilize merchant vessels to support adversaries of the emerging Khmer Rouge rule. The Khmer Navy subsequently apprehended 7 Thai fishing vessels. A South Korean cargo ship was pursued by individuals from Cambodia.

[45] The Mayaguez incident occurred in the Gulf of Thailand in May 1975. The incident commenced when Cambodian gunboats intercepted and boarded the American cargo vessel SS Mayaguez on 12 May, one month after the conclusion of the Vietnam War. The Cambodians captured the crew and directed the vessel towards Koh Tang Island, located off the Cambodian shores. The U.S. Government classified the incident as piracy, prompting the U.S. military to receive directives to locate the commandeered vessel. BEHUNIAK, Thomas E. The Seizure and Recovery of the S.S. Mayaguez: a Legal Analysis of United States Claims. *Military Law Review*, v. 82, p. 41-170, Fall 1978. Available at: https://maint.loc.gov/law/mlr/Military_Law_Review/27588F~1.pdf. Public Domain Content from a public domain source has been integrated into this article.

[46] BURGESS, D. R. *The world for ransom*: piracy is terrorism, terrorism is piracy. New York: Prometheus, 2010. p. 136.

state immunity are typically separate from those advocated for the exclusion of insurgent actions from the realm of piracy. The forthcoming part will address the justification and appeal of State immunity from piracy law. The discourse will next focus on the handling of insurgents and other politically affiliated organizations.

A thorough definition should incorporate elements from the definitions in both conventions, even if it does not cover all parts. The UNCLOS definition of piracy highlights theft, assault, and detention, while maritime piracy offences emphasize the risk posed to the safety of sea navigation and the harm or destruction inflicted on a vessel or its cargo. Deliberate damage to a ship can also occurs in situations that are not classified as piracy and do not satisfy the requirements for international crime. The crimes of maritime piracy are therefore broad in scope and may independently exceed the International Criminal Court's authority. Any reference to a ship's destruction must therefore be explicitly linked to the involvement of the key elements of piracy, which include acts of "violence, detention, or pillage.» The UNCLOS definitions for both "act of violence" and "any unlawful act of violence or detention" are overly broad and fail to adequately educate the court or the accused about the types of conduct prohibited. A more suitable approach would be to incorporate a clause such as Article 3(1)(g) of the UNCLOS [44], which states that it is unlawful to kill or seriously injure a person while engaging in or attempting to engage in piracy. Furthermore, crimes such as torture, and hostage-taking must be committed. To ensure that all violent actions carried out during their execution are encompassed, the term should remain sufficiently broad and not overly restrictive. Definitions may be informed by other offences outlined in the Rome Statute, including "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health,» to this end.[47]

After the UNCLOS, the alleged deficiencies were swiftly revealed, and the provisions of UNCLOS were subjected to scrutiny. In 1985, the Achille Lauro, an Italian-flagged[48] passenger liner traveling from Alexandria to Port Said, was commandeered by militants of the Palestine Liberation Front (PLF), a branch of the Palestine Liberation Organization. The assailants murdered one passenger. Some classified the hijacking as piracy, while others refrained from doing so due to the presumed political intentions of the hijackers and the absence of a secondary vessel involved.[49]

7.3 The inefficacy of universal jurisdiction[50]

The 1988 Rome Convention for the Suppression of Unlawful Acts against the Security of Maritime Navigation established the principle of universal jurisdiction to combat piracy. It states that

> the duty of the Contracting State in whose territory the offender or alleged offender is found is, if it does not extradite him, to submit the case without delay and without exception, whether or not the offence was committed in its territory.[51]

or regarding the procedures established by its relevant authorities for implementing the public prosecution according to the country's laws.

The seizure must be carried out by warships or public ships owned by the ate. This is a natural condition provided that the ships contain the necessary elements for the seizure and pursuit, including military equipment, trained personnel, weapons, and specialized qualifications necessary to carry out the pursuit. Government ships or any ship displaying distinctive marks and signals indicating their mandate to perform the functions

[47] UNITED NATIONS. [*United Nations Convention on the Law of the Sea of 10 December 1982*]. Part VII: high seas: Section 1. General Provisions. Available at: https://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm.

[48] The Achille Lauro departed from Genoa, Italy, on October 3 for a 12-day Mediterranean voyage. Onboard were 748 passengers and a considerable number of crew members. On October 7th, the ship arrived at Alexandria, Egypt, where 651 people disembarked to visit the pyramids, planning to reunite with the ship at Port Said that evening. Following the disembarkation of the tourists, four armed men wielding AK-47 assault rifles apprehended the crew and the remaining 97 passengers, compelling the captain to exit the port. The assailants allowed the crew to continue with their duties.

The individuals, masquerading as passengers, were affiliated with a PLF faction led by Mohammed Zaidan, also known by the alias Mohammed or Abu Abbas, and associated with the Palestine Liberation Organization (PLO). Upon seizing the vessel, they insisted that Israel liberate 50 Palestinian detainees. Israel remained unresponsive, and the ship proceeded to Tartus, Syria. Upon its arrival the next day, Syrian officials, acting on requests from the U.S. and Italy, refused to enable the warship to dock.

PALLARDY, Richard. *Achille Lauro hijacking hijacking, Mediterranean Sea* [1985].

[49] AZUBUIKE, Lawrence. International law regime against piracy. *Annual Survey of International & Comparative Law*, v. 15, n. 1, p. 43-59, 2009. p. 56.

[50] Referência.

[51] Referência.

of public authorities, including seizure, supervision of compliance with the law, and arrest of offenders. These specifications and marks are necessary to identify them and subject them to their orders. As a result, merchant ships cannot pursue and fight pirate ships because they do not have the appropriate equipment, their capabilities are not as good as those of armed pirate ships operating in fast craft, and there is a fear that pirates will seize these merchant ships. Therefore, they are prevented from performing these tasks.

Piracy is required to occur in maritime areas or regions that fall beyond the jurisdiction of any nation. The high seas are areas free from state sovereignty but belong to all humanity with common rights. All states have universal jurisdiction to deal with crimes committed within these waters, including slavery, piracy, terrorism, illicit drug trafficking, human trafficking, and unauthorized broadcasting.

Piracy does not acquire the character of an international crime unless it occurs in the high seas. However, when an occurs within a state's territorial waters, it is classified as an internal crime and thus establishes the authority of that sovereign state. Piracy violates international law because it affects the collective interests of the state. Hence, the emphasis on this has been clear in all conventions criminalizing this act and affirming the customary right of all governments to pursue and try the perpetrators of this crime based on the universal jurisdiction's principle.[52]

The state judiciary may occasionally be incapable of prosecuting perpetrators of crimes, as evidenced in Somalia during its civil wars. Despite international agreements, some countries' judiciaries may struggle to prosecute offenders, exemplified by Kenya's attempt to prosecute Somali pirates under its agreements with certain Western nations, resulting in the acquittal of twenty-six defendants due to challenges in managing legal cases stemming from a lack of evidence.[53]

One of the key reason states refrain from prosecuting piracy domestically, despite direct impacts on their population, is the substantial financial burden associated with prosecution. In many cases, affected countries are required to transport prisoners across large distances, hold them in pre-trial detention, fund legal representation and translation services, and cover the costs of transporting witnesses to the trial venue. On the other hand, numerous national courts with potential jurisdiction over piracy matters lack the necessary legal framework, judicial infrastructure, and expertise. Numerous other countries may lack national legislation against maritime piracy because they have not formally adopted the Law of the Sea Convention. Furthermore, many countries, including Somalia, located in piracy-prone areas lack the capacity to prosecute piracy incidents despite having adequate legal frameworks.

Numerous national courts with potential jurisdiction over piracy matters lack the requisite legal framework, judicial infrastructure, and expertise. And several nations may lack national legislation against maritime piracy because they have not formally adopted the Law of the Sea Convention. Moreover, numerous nations, including Somalia, situated in pirate-prone regions, lack the capacity to prosecute piracy incidents despite having appropriate legal frameworks. Conversely, others were prosecuted in the past decade by the United States judiciary, receiving harsh penalties of up to eighty years for monitoring an American commercial vessel and discharging firearms at it. It is evident that universal jurisdiction,[54] encompassing the authority of national judicial systems, although referenced in international accords, specifically in the 1982 Law of the Sea Convention (Article 105), may yield results at times and may not succeed at others.

A state may choose not to pursue prosecution for political reasons. This has been true for numerous Western states. They may be averse to the risks associated with piracy suspects asserting asylum upon entering the

[52] See e.g. Lotus, supra note 24, at 71; WOLFRUM, Rüdiger. *Fighting terrorism at sea*: options and limitations under international law. Available at: http://www.virginia.edu/colp/pdf/Wolfrum-Doherty-Lecture-Terrorism-at-Sea.pdf. Access on: 17 Nov. 2024.; in MOORE, John Norton; NORDQUIST, Myron H; WOLFRUM, Rudiger (ed.). *Legal challenges in maritime security*. Leiden: Brill, Martinus Nijhoff, 2008. p. 3-40. p. 27. In fact, Article 105 of the UNCLOS is mainly intended to restrict this authority to enforce regulations. The succeeding two articles further limit the types of vessels authorized to exercise this authority to only «warships or military aircraft» and establish liability when such authority is applied unjustifiably. Refer to UNCLOS, supra note 21, arts. 106-107.

[53] GATHII, James Thuo. Kenya's Piracy Prosecutions. *American Journal of International Law*, n. 104, p. 416-436, 2010. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698768#. Access on: 11 Nov. 2024.

[54] JOHNSON, D. H. N. Piracy in Modern International Law. *Transactions of the Grotius Society*, v. 43, p. 63-85, 1957. Available at: http://www.jstor.org/stable/743144. Access on: 15 Sept. 2013.

prosecuting state, as evidenced by attempts in the Netherlands in 2009 and Denmark in 2023. They may also wish to avoid a scenario in which they cannot repatriate suspects following the court case due to human rights commitments, as suspects frequently originate from unstable regions.[55]

An illustrative example is Denmark, where data on the ratio of apprehensions to prosecutions is accessible. Denmark has undertaken proactive counter-piracy initiatives, resulting in the Royal Danish Navy apprehending 300 pirate suspects from 2008 to 2021. Most detentions occurred off the Somalia's coastline, with one incident in the Gulf of Guinea. Of the 300 suspects, merely 51 faced prosecutions. This illustrates the worldwide context of the Indian Ocean during the initial Somali piracy phase: in 2011, the UN stated that 90% of all detained suspects were freed without trial, a practice referred to as 'catch and release'.

The problem is considerably more pronounced when examining the Gulf of Guinea. Since the escalation of pirate occurrences in the mid-2010s, just three cases have been adjudicated in court. One case was adjudicated in Togo; one in Nigeria; and one in Denmark (however this was not really a piracy-related accusation). It is noted that there were 115 documented piracy occurrences in 2020 alone.[56] The unfavorable ratio of occurrences to prosecutions reveals three primary problems to international counter-piracy initiatives, Capacity to apprehend suspects, find a courtroom, Proving the act of piracy.

For example, Denmark declared that it is difficult to penalize the pirates it apprehends. It was among the initial European nations to try Serbian officers for offences perpetrated targeting Bosnian Muslim communities during the Yugoslav civil war.[57] In a similar vein, the Spanish naval forces apprehended a contingent of alleged Somali pirates. However, a judge mandated their release, arguing that prosecuting an offence committed thousands of kilometers abroad would be «somewhat disproportionate. «Merely a week prior, another judge in Spain initiated an inquiry into an Israeli assault targeting a Hamas leader in Gaza in 2002.[58]

7.4 The extent to which pirates are regarded as non-state actors[59]

Humanitarian law at the international level applies to all states that have ratified the 1949 Geneva Conventions and their 1977 Additional Protocols, and it also imposes obligations on non-state actors, including ordinary individuals, armed factions, movements for national liberation, and global organizations. International humanitarian law grants specific rights and protections to civilians in conflict scenarios while simultaneously imposing certain responsibilities. This dual role is illustrated by historical cases such as the Nuremberg trials, rulings from international tribunals, and the recent sentencing of Congolese warlord Thomas Lubanga by the ICC to 14 years in prison for employing child soldiers and coercing them to perpetrate atrocities. (As mentioned before)[60], If international justice cannot effectively tackle «criminal activities perpetrated by lightly armed thugs dispatched from small boats and fishing vessels,» it will struggle to discourage more powerful offenders. If a limited handful of thieves cannot be held accountable by international law, then the war criminals globally have less cause for concern.[61]

[55] Referência.

[56] LARSEN, Jessica. What shall we do with the suspected pirates? why piracy prosecution doesn't always work. *DIIS Policy Brief*, 30 Mar. 2023. Available at: https://pure.diis.dk/ws/files/23488739/piracy-final.pdf.

[57] ISHERWOOD, Julian. Pirates released on beach. *Politiken*, 24 Sept. 2008. Available at: http://politiken.dk/newsinenglish/article572053.ece.

[58] WHITLOCK, Craig. Spain's judges cross borders in rights case: high-ranking U.S. Officials among targets of inquiries. *Wash. Post*, 24 May 2009. at A1.

[59] REYDAMS, Luc. *Universal jurisdiction*: international and municipal perspectives. Oxford: Oxford University Press, 2003. p. 128, 129. In European civil law systems, it is essential to have a specific statute to initiate prosecution. The Danish law on universal jurisdiction seems to allow prosecution solely when international law obligates it, rather than merely permitting it. However, such legislative gaps can be readily addressed when there is political will to pursue prosecutions.

[60] Various instruments impose obligations under international humanitarian law on non-state armed organizations or insurgents, including Article 3 common to the Geneva Conventions, Additional Protocol II of 1977, and Article 2, paragraph 8, of the Statute of the ICC.

[61] KONTOROVICH, Eugene. 'A Guantanamo on the Sea': the difficulties of prosecuting pirates and terrorists. *California Law Review*, v. 98, p. 243-276, 2010. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371122##. Access on: 11 Nov. 2024. (stating that the SUA Convention has only been used once—in a case the US See also, PINEAU, Elizabeth. France asks seychelles to help with pirate trials. *Reuters*, 18 Oct. 2009. Available at: http://www.reuters.com/article/africaCrisis/idUSLI622681.

Humanitarian law at the international level applies solely to non-international armed conflicts that fulfil specific organizational criteria and attain a requisite level of intensity and possibly duration, rather than to all instances of violence. Individuals engaged in maritime piracy might be classified as armed factions operating within the framework of a localized armed conflict.[62]

8 Conclusion

A reassessment of the interpretation of piracy outlined in Article 101 of the 1982 United Nations Convention on the Law of the Sea is necessary to expand the criteria and regulations necessary to commit this crime, to include armed robbery against vessels. Additionally, it is crucial to implement effective measures to address such crimes while adhering to international criminal law, particularly the principle of upholding the sovereignty and territorial wholeness of coastal States. To include «engaging in or facilitating illegal activities that endanger maritime navigation by a ship or aircraft within the territorial waters of States or on the high seas.

It is necessary to consider the results of the criminal acts that define piracy at sea, including its material and moral elements, as well as its international nature. Such acts can only be considered crimes against humanity because they breach international humanitarian law. These include extensive attacks and the involvement of children in armed conflicts, which compromise global harmony and endanger worldwide stability. This highlights the critical role and jurisdiction of the ICC.

The ICC's jurisdiction is confined to crimes stipulated exclusively in Article 5 of the Statute for the Punishment of International Crimes Violating International Humanitarian Law. As a permanent global judicial body, it has established mechanisms for referrals, which can be made by the Security Council or the States Parties, as per the provisions outlined in its Statute. We may often find that the Security Council recognizes in its resolutions that these crimes pose a significant risk to global peace and security. Notable examples include Thomas Lubanga in Nordombourg, Callixte Mbarushimana in Rwanda, and Pol Pot, the Khmer Rouge leader in Cambodia, who was subsequently referred to the ICC for his role in perpetrating crimes against humanity.

[62] CLAPHAM, A.; GAETA, P. (ed.). *The Oxford handbook of international law in armed conflict*. Oxford: Oxford University Press, 2014. p. 214.

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Abstract

Generative artificial intelligence (AI) has gained considerable interest due to its exceptional capacity to produce text, graphics, and several other types of material. This emerging technology is swiftly revolutionizing the worldwide terrain. Generative AI algorithms can augment creative expression and create novel creative opportunities. Although generative AI promises economic expansion and creativity, it poses intricate legal and ethical dilemmas. This article examines the legal and moral consequences of adopting generative AI technology, specifically focusing on the legal stances of Malaysia and Uzbekistan. This article employs a qualitative research methodology, specifically utilising a doctrinal and comparative legal approach and conducting a content analysis of the primary source, which consists of the laws and regulations in both countries. The authors contend that while generative AI can offer valuable insights into technology, it has also sparked numerous legal and ethical concerns and given rise to criminal liability. The absence of regulation in this field underscores the necessity of implementing rules to mitigate the negative consequences associated with the use of generative AI. Furthermore, the authors argue that generative AI technology carries inherent risks such as copyright, criminal liability, and the erosion of personal data and privacy, which are fundamental human rights principles, leading to public scepticism towards the government. The paper emphasises the need for legal control in this field. The study examines the existing regulatory structures in both countries, highlighting the difficulties and opportunities presented by the growing use of generative AI. This article offers valuable insights for policymakers, industry stakeholders, and researchers working in these dynamic environments by examining crucial legal and ethical factors.

Keywords: generative AI; Malaysia; Uzbekistan; privacy and data protection; ethical issues; European Union.

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Resumo

A inteligência artificial generativa (IA) tem despertado considerável interesse devido à sua capacidade excepcional de produzir textos, gráficos e diversos outros tipos de conteúdo. Essa tecnologia emergente está rapidamente transformando o cenário global. Os algoritmos de IA generativa podem ampliar a expressão criativa e gerar novas oportunidades de criação. Embora a IA generativa prometa expansão econômica e criatividade, ela também suscita dilemas jurídicos e éticos complexos. Este artigo examina as consequências jurídicas e morais da adoção da tecnologia de IA generativa, com foco específico nas posturas legais da Malásia e do Uzbequistão. O estudo adota uma metodologia de pesquisa qualitativa, valendo-se especificamente de uma abordagem jurídica doutrinária e comparativa, e realizando uma análise de conteúdo da fonte primária, constituída pelas leis e regulamentos de ambos os países. Os autores sustentam que, embora a IA generativa possa oferecer contribuições valiosas para a compreensão tecnológica, ela também tem suscitado inúmeras questões jurídicas e éticas e dado origem a responsabilidades penais. A ausência de regulamentação nesse campo evidencia a necessidade de implementação de normas para mitigar as consequências negativas associadas ao uso da IA generativa. Além disso, os autores argumentam que a tecnologia de IA generativa acarreta riscos inerentes, tais como questões de direitos autorais, responsabilidade penal e a erosão de dados pessoais e da privacidade — princípios fundamentais dos direitos humanos —, conduzindo a uma crescente desconfiança pública em relação ao governo. O artigo enfatiza a necessidade de controle jurídico nessa área. O estudo analisa as estruturas regulatórias vigentes em ambos os países, destacando as dificuldades e oportunidades apresentadas pelo uso crescente da IA generativa. Ao examinar fatores jurídicos e éticos cruciais, este trabalho oferece subsídios relevantes para formuladores de políticas públicas, atores do setor e pesquisadores que atuam nesses contextos dinâmicos.

Palavras-chave: inteligência artificial generativa; Malásia; Uzbequistão; privacidade e proteção de dados; questões éticas; União Europeia.

1 Introduction

Artificial Intelligence (AI) has transitioned from a specialized academic field into a transformative force, shaping industries and everyday practices. Among its many branches, Generative AI stands out for its ability to create content that mimics human creativity. This technology powers systems capable of generating text, images, music, and even complex scientific data, fundamentally altering how content is created and consumed. At the heart of this evolution are sophisticated machine learning models and algorithms, such as Generative Adversarial Networks (GANs), Variational Autoencoders (VAEs), and Transformer-based models like GPT-4. These models enable AI to produce realistic and creative outputs, finding applications across sectors like entertainment, healthcare, finance, and education.[1]

However, the widespread adoption of Generative AI also raises critical legal, ethical, and societal challenges. As AI-generated content becomes increasingly indistinguishable from human-made works, issues related to data privacy, intellectual property, misinformation, and ethical use demand urgent attention. This paper seeks to examine these issues by analyzing the current legal frameworks and ethical guidelines that govern the use of Generative AI, focusing on the examples of Malaysia and Uzbekistan. These countries were selected due to their contrasting yet complementary economies, which provide a valuable comparative perspective on how emerging economies can navigate AI adoption responsibly.[2]

This paper begins by explaining the development of generative AI and justifying the selection of Malaysia and Uzbekistan for this study. The second section outlines the evolution of AI-related laws in Malaysia, followed by an examination of Uzbekistan's legal stance on similar AI governance. The fourth section delves into the challenges associated with generative AI's use and development, concluding with recommendations

[1] BENGESI, S.; EL-SAYED, H.; SARKER, M. K; HOUKPATI, Y.; IRUNGU, J.; OLADUNNI, T. Advancements in Generative AI: A Comprehensive Review of GANs, GPT, Autoencoders, Diffusion Model, and Transformers. *ArXiv*, 17 Nov. 2023. Available at: https://doi.org/10.48550/arxiv.2311.10242. Access on: 6 fev. 2025.

[2] BENGESI, S.; EL-SAYED, H.; SARKER, M. K; HOUKPATI, Y.; IRUNGU, J.; OLADUNNI, T. Advancements in Generative AI: A Comprehensive Review of GANs, GPT, Autoencoders, Diffusion Model, and Transformers. *ArXiv*, 17 Nov. 2023. Available at: https://doi.org/10.48550/arxiv.2311.10242. Access on: 6 fev. 2025.

for governments to adopt policies to mitigate the risks posed by generative AI technologies.

2 Development of Generative AI

Generative AI's roots trace back to the 1960s with the development of early chatbots. However, it wasn't until 2014, with the introduction of Generative Adversarial Networks (GANs), that AI gained the ability to produce realistic images, videos, and audio that closely resemble human works. Over the years, advances in GANs and other machine learning algorithms have revolutionized generative AI, facilitating breakthroughs across industries such as healthcare, education, hospitality, and energy distribution. In the medical field, AI models like ChatGPT have shown potential to enhance diagnostic capabilities, research methodologies, and patient care strategies.[3]

Generative AI's applications are expanding rapidly. In hospitality and tourism, AI is transforming service delivery and creating opportunities for personalized experiences. In education, AI technologies are reshaping content generation and research, offering new ways to enhance learning and teaching. Despite these opportunities, the integration of generative AI into various sectors raises pressing concerns about privacy, security, and transparency. Academic integrity, especially regarding authorship and plagiarism, has become a key issue as generative AI plays a more prominent role in content creation.[4] Moreover, the use of AI technologies necessitates ethical considerations, such as ensuring that AI-generated outputs are free from bias and uphold privacy standards. As AI systems generate content based on vast amounts of data, maintaining transparency in the process is essential to prevent the misuse of AI and safeguard against discriminatory outcomes.[5]

[3] MEGAHED, F. M.; CHEN, Y. J.; FERRIS, J. A.; KNOTH, S.; JONES-FARMER, L. A. How generative AI models such as ChatGPT can be (mis) used in SPC practice, education, and research? An exploratory study. *Quality Engineering*, v. 36, n. 2, p. 287-315, 2024.

[4] WIRZAL, M. D. H.; NORDIN, N. A. H. M.; ABD, N. S.; HALIM, M. Generative AI in Science Education: A Learning Revolution or a Threat to Academic Integrity? A Bibliometric Analysis. *Journal of Educational Research and Studies: e-Saintika*, v. 8, n. 3, p. 319-351, 2024.

[5] GROOT, J. de; PALUCHOWSKA-MESSING, A.; MACIULEWICZ, J.; JARECKA, A. Keynote lectures. *Multiple Sclerosis Journal*, v. 18, S5-S10, 2012.

3 Justification for Countries Selection

The choice of Malaysia and Uzbekistan for this study stems from their emerging economies and contrasting socio-legal landscapes. Malaysia's robust digital infrastructure and established regulatory frameworks make it an ideal case for understanding how generative AI can be integrated into existing legal systems. Uzbekistan, with its post-Soviet market economy, provides a unique perspective on the challenges faced by countries still developing their AI governance frameworks. The comparison between these two countries offers valuable insights into how different cultural and economic contexts shape the adoption and regulation of generative AI. Furthermore, Malaysia's well-established AI policies and ethical guidelines provide a rich data source for research, while Uzbekistan offers an interesting case study in navigating the complexities of AI regulation in a rapidly evolving technological environment. The insights drawn from this comparison can guide other emerging nations as they seek to balance innovation with the need for ethical and legal safeguards.

4 Legal Position of Generative AI in Malaysia

Malaysia's AI ecosystem is fast changing as the government and business communities drive digital transformation. The National AI Framework, launched by the Malaysian government, integrated AI into the economy to improve public services and boost productivity. The Artificial Intelligence (AI) market is expected to grow until 2030 due to industry adoption of AI technologies, advances in AI algorithms and infrastructure, and increased investment in AI research and development.[6]

AI has revolutionised the daily lives of Malaysians by offering personalised experiences, efficiency, and simplicity of use in various domains. According to the Malaysian Multimedia Commission (2021), Siri and Google Assistant are utilised by more than 70% of Malaysian smartphone consumers daily. Furthermore, QR codes and other AI-driven solutions have expe-

[6] MANAP, N. A.; ABDULLAH, A. Regulating artificial intelligence in Malaysia: The two-tier approach. *UUM Journal of Legal Studies*, v. 11, n. 2, p. 183-201, 2020.

rienced substantial growth in the business sector. Bank Negara Malaysia reported that QR code transactions increased by more than 300% in 2020, suggesting that Malaysians prefer contactless payments. According to MIER research 2023, online sales have increased due to personalized product recommendations based on AI algorithms.[7]

The development and regulation of Generative AI in Malaysia present a complex landscape that intertwines technological advancements with legal and ethical considerations. As Malaysia embraces the opportunities and challenges posed by AI deployment, navigating the evolving legal frameworks becomes crucial to ensure responsible innovation and societal well-being. The ethical dimensions of AI in healthcare underscore the importance of leveraging AI to enhance care systems while mitigating potential harms. This dual advantage emphasises the need for policymakers and developers to prioritise ethical considerations when integrating AI technologies. 7

In the realm of election campaigns, the utilisation of AI, particularly Generative AI, has demonstrated cost--cutting benefits by aiding in drafting communication materials such as fundraising emails. It highlights the practical applications of AI in streamlining processes within specific sectors, shedding light on the potential efficiency gains that can be achieved through AI integration. Moreover, the impact of AI on social science in Malaysia emphasises the necessity of interdisciplinary collaborations and capacity-building efforts to ensure the ethical deployment of AI technologies. By prioritising these aspects, Malaysia can shape a future that aligns with the principles of social justice and collective well-being.7

Accountability in AI systems is a critical aspect that intersects with legal considerations, emphasising the need for explanations in AI decision-making processes.[8] This accountability underscores the importance of transparency and oversight in AI deployment to ensure adherence to legal standards and ethical principles. Furthermore, strategies for workforce readiness and inclusive growth in the AI landscape in Malaysia are essential for positioning the country as a leader in the global economy. By prioritising social equity and sustainable development, Malaysia can harness the potential of AI to create a resilient and prosperous society. Such efforts are also in tandem with the 2020 report by the World Bank on Malaysia, which highlights the capacity of artificial intelligence (AI) to strengthen economic resilience and prosperity through its ability to stimulate innovation, boost productivity, and foster inclusive growth.[9]

The principles of explainable artificial intelligence offer a multidisciplinary framework encompassing the diverse aspects of AI development, including legal and ethical dimensions.[10] These principles provide a roadmap for ensuring transparency and interpretability in AI systems, aligning with legal requirements and ethical standards. Understanding the mechanisms, impacts, and policy interventions for inclusive employment in the AI era is crucial for navigating the evolving landscape of AI technologies in Malaysia.[11] By comprehensively addressing these aspects, Malaysia can foster an inclusive environment that harnesses the benefits of AI while mitigating potential challenges. Navigating the legal and ethical conundrums of using AI-generated content in arbitration underscores the importance of upholding legal standards and ethical considerations in AI applications.[12]

The role of AI in improving access to justice highlights the potential of specialised AI systems to reduce barriers to the legal system.[13] It underscores the transformative impact of AI in enhancing legal services and

[7] TAJUDEEN, F. P.; MOGHAVVEMI, S.; THIRUMOORTHI, T.; PHOONG, S. W.; BAHRI, E. N. B. A. *Digital Transformation of Malaysian Small and Medium Enterprises*. [*S.l.*]: Emerald Group Publishing, 2025.

[8] MENIS-MASTROMICHALAKIS, O. R. F. E. A. S. *Explainable Artificial Intelligence*: An STS perspective. [*S. l.: s. n.*], 2024.

[9] COLLINA, L.; SAYYADI, M.; PROVITERA, M. *Critical issues about AI accountability answered*. 2023. Available at: https://cmr.berkeley.edu/assets/documents/pdf/2023-11-critical-issues-about-a-i-accountability-answered.pdf. Access on: 6 fev. 2025.

[10] OLORUNFEMI, O. L.; AMOO, O. O.; ATADOGA, A.; FAYAYOLA, O. A.; ABRAHAMS, T. O.; SHOETAN, P. O. *Towards a conceptual framework for ethical AI development in IT systems*. [*S. l.: s. n.*], 2024.

[11] EKONG, H. Navigating the AI Era: Understanding Mechanisms, Impacts, and Policy Interventions for Inclusive Employment in Malaysia. *Impacts, and Policy Interventions for Inclusive Employment in Malaysia,* Apr. 2024.

[12] LABANIEH, M. F., HUSSAIN, M. A., AYUB, Z. A., & Al-AZZAWI, H. A. (2024, January). Navigating Legal And Ethical Conundrums of Using AI-Generated Content (AI-GC) Systems In Arbitration. *In:* UUM INTERNATIONAL LEGAL CONFERENCE (UUMILC 2023), 12., 2023. *Proceedings* [...], Zhengdong: Atlantis Press, 2023. v. 15, p. 271.

[13] VARGAS-MURILLO, A. R.; TURRIATE-GUZMAN, A. M.; DELGADO-CHÁVEZ, C. A.; SANCHEZ-PAUCAR, F. Transforming justice: Implications of artificial intelligence in legal systems. *Academic Journal of Interdisciplinary Studies*, v. 13, n. 2, p. 433, 2024.

promoting inclusivity within the legal framework. AI is crucial in improving access to justice by automating repetitive tasks, enhancing legal research efficiency, and assisting in document analysis and case management. Through natural language processing and machine learning algorithms, AI systems can help identify relevant legal precedents, streamline document review processes, and provide legal guidance to individuals who may not have access to traditional legal services. Additionally, AI-powered tools can support legal aid organizations by enabling faster and more cost-effective delivery of legal assistance to underserved communities, thereby promoting fairness and equality in the justice system.

The Malaysian government is also implementing aggressive measures to regulate the advancement and use of artificial intelligence (AI), specifically generative AI (GAI), due to its capacity to generate novel content. The National Artificial Intelligence Roadmap 2021-2025 has been launched by the Ministry of Science, Technology, and Innovation (MOSTI) to lead this endeavour. In addition, Minister Chang Lih Kang has unveiled proposals for comprehensive Artificial Intelligence (AI) legislation. This legislation seeks to tackle AI-related concerns like data privacy, public knowledge, openness, and cyber defence. The AI Bill aims to achieve a harmonious equilibrium between minimising potential hazards and promoting creativity. The objective is to guarantee that AI functions as a beneficial influence on Malaysia's economic and social advancement.

Presently, the ownership of AI-generated technologies and creative works becomes ambiguous due to the existing legislations on Patents and Copyright Acts on intellectual property, which are insufficient to govern the inventions and any works generated by AI technology. Although humans are presently recognised as inventors, the new proposed bill could tackle the ownership issue through artificial intelligence.

5 AI Law and Copyright in Malaysia

In relation to copyright law, Section 7(3)(a) of Malaysia's Copyright Act 1987 requires literary, musical, and creative works to be original after due effort. The Federal Court recently ruled that copyright in works requires sufficient time, labour, and skill to render the same original. **YKL Engineering Sdn Bhd v. Sungei Kahang Palm Oil Sdn Bhd & Anor [2022] 8 CLJ 32.** Thus, it can be inferred that an AI-produced work is original if the AI creates it with enough effort. But what constitutes sufficient effort remains subjective.

The Patents Act 1983 and the Patents Regulations 1986 did not define the words «inventor.» Nevertheless, several court judgments by the Malaysian Court suggest that AI may not be an «inventor.» The judges opined that an «invention» is an inventor's idea that solves a technology challenge, according to Section 12 of the Patents Act 1983. It may be argued that only humans can have ideas. Regulation 6 of the Patents Regulations 1986 requires inventors to be named and addressed. The phrasing suggests that the Patents Act 1983 and its related statutes view the inventor as a human person who can conceptualise ideas, have a name, address, or sign a declaration.[14] The above concept of inventors under the Patents Act creates the same dilemma for the author or ownership of copyrighted materials under Section 7 of the Copyright Act 1987.

Conversely, the Personal Data Protection Act 2010 applies to artificial intelligence systems that gather and handle personal data. It guarantees adherence to data protection rules such as consent and data security. The first data protection law in Malaysia was passed by the Malaysian Parliament on June 2, 2010, and entered into force on November 15, 2013, called the Personal Data Protection Act 2010 (PDPA).[15] The advancement of technology has raised questions on whether the Personal Data Protection Act 2010 (PDPA) could adequately protect the personal data of Malaysians.[16]

The formulation of the Malaysia Personal Data Protection Act 2010 set a general guideline for all data practitioners. However, it is observed that Malaysia needs a tailormade framework that guides the collection and

[14] LEE, C. W.; FU, M. W. Conceptualizing Sustainable Business Models Aligning with Corporate Responsibility. *Sustainability*, v. 16, n. 12, p. 5015, 2024.

[15] KANOJIA, S.; ZAHRA, I. A. Economic Development and Privacy Regulations in Malaysia: The Case of PDPA 2010. *In:* AL-HUMAIRI, Safaa Najah Saud; HAJAMYDEEN, Asif Iqbal; MAHFOUDH, Asmaa. Sustainable Smart Cities and the Future of Urban Development. Pennsylvania: IGI Global Scientific Publishing, 2025. p. 443-462.

[16] KANOJIA, S.; ZAHRA, I. A. Economic Development and Privacy Regulations in Malaysia: The Case of PDPA 2010. *In:* AL-HUMAIRI, Safaa Najah Saud; HAJAMYDEEN, Asif Iqbal; MAHFOUDH, Asmaa. Sustainable Smart Cities and the Future of Urban Development. Pennsylvania: IGI Global Scientific Publishing, 2025. p. 443-462.

processing of digital information based on the country's perspectives.[17] The PDPA is concerned with issues such as personal data protection principles, types of personal data, management of personal data, mechanism of personal data protection and security, commission of personal data protection, transfers of personal data, resolution mechanism of personal data dispute and criminal sanctions and civil claims.[18] Shah & Khan contends that despite having PDPA laws in Malaysia, challenges exist with the fast-paced advancement in Data Analytics and Artificial Intelligence innovation and catering for such standards.[19]

In an increasingly interconnected world, legal systems around the globe are facing similar challenges and opportunities, particularly in emerging areas such as artificial intelligence (AI) regulation. As nations strive to navigate the complex technological innovation landscape while safeguarding fundamental rights and societal values, benchmarking against other jurisdictions has become imperative. The EU AI Act stands out for its comprehensive regulatory framework, addressing key aspects such as transparency, accountability, and ethical AI deployment.[20]

With reference to the European context, it can be observed that the European Parliament on March 13, 2024 approved the European Union's AI Act. Article 3(60) of the AI Act defines deepfake technology as synthetic or manipulated image, audio, or video content that essentially seems truthful or authentic, resembling existing individuals, places, objects, or other events or entities. Also, the AI deep fake technology was assessed based on their possible risk, and as the risk is higher, the rules will be more stringent for the product developers.[21]

The EU AI Act has tackled the uncertainty of AI--generated content in the context of its definition and transparency for AI providers and deployers. Many academics underline, especially the dearth of studies looking at their fit with the General Data Protection Regulation (EU) 2016/679 (GDPR) and the European Convention on Human Rights (ECHR). Building on the author's past work, Articles 8 and 10 of the ECHR and the GDPR propose two modifications to close a knowledge vacuum. Firstly, structured synthetic data for deepfake detection is required to fortify security and protect fundamental rights.[22] Secondly, it classifies artificial intelligence meant for deep fake election misinformation, extortion, and AI sexual abuse material as «high-risk,» given their substantial potential for damage and violation of rights.

The EU AI Act has set out horizontal rules for developing, commodifying, and using AI-driven products, services, and systems, including regulations on AI systems and data protection.[23] The Act introduces more robust legal requirements such as third-party conformity assessment, fundamental rights impact assessment, transparency obligations, and enhancements to existing EU data protection laws.[24] This legal framework is designed to promote trustworthy AI and is a significant step towards regulating artificial intelligence. The EU's goal with the proposed AI Act is to establish itself as a leader in AI regulation.[25]

[17] CHEN, L. F.; ISMAIL, R. Information Technology program students' awareness and perceptions towards personal data protection and privacy. *In*: INTERNATIONAL CONFERENCE ON RESEARCH AND INNOVATION IN INFORMATION SYSTEMS, 2013. *Proceeding [...],* Kuala Lumpur, p. 434-438, 2013. DOI 10.1109/ICRIIS.2013.6716749. Available at: https://ieeexplore.ieee.org/document/6716749. Access on: 6 fev. 2025.

[18] SUDARWANTO, A. S.; KHARISMA, D. B. B. Comparative study of personal data protection regulations in Indonesia, Hong Kong and Malaysia. *Journal of Financial Crime*, v. 29, n. 4, p. 1443-1457, 2022.

[19] MUHMAD Kamarulzaman, A. M.; WAN MOHD JAAFAR, W. S.; MOHD SAID, M. N.; SAAD, S. N. M.; MOHAN, M. UAV implementations in urban planning and related sectors of rapidly developing nations: A review and future perspectives for Malaysia. *Remote Sensing*, v. 15, n. 11, p. 2845, 2023.

[20] DÍAZ-RODRÍGUEZ, N.; DEL SER, J.; COECKELBERGH, M.; PRADO, M. L. de; HERRERA-VIEDMA, E.; HERRERA, F. Connecting the dots in trustworthy Artificial Intelligence: From AI principles, ethics, and key requirements to responsible AI systems and regulation. *Information Fusion*, v. 99, p. 101896, Nov. 2023. DOI 10.1016/j.inffus.2023.101896.

[21] ROMERO-MORENO, F. AI. *Papers SSRN*, 23 Nov. 2024. Available at: https://ssrn.com/abstract=5031627. Access on: 6 fev. 2025.

[22] ROMERO-MORENO, F. Generative AI and deepfakes: a human rights approach to tackling harmful content. *International Review of Law, Computers & Technology*, v. 38, n. 3, p. 297-326, 2024.

[23] DUNG, Tran Viet. Artificial Intelligence and Data Protection: How to Reconcile Both Areas from the European Law Perspective. *Vietnamese Journal of Legal Sciences*, [*S. l.*], v. 7, n. 2, p. 39–58, 2022. DOI: 10.2478/vjls-2022-0007. Available at: https://sciendo.com/pdf/10.2478/vjls-2022-0007. Access on: 6 fev. 2025.

[24] ČAS, J., HERT, P. de; PORCEDDA, M. G.; RAAB, C. D. Introduction to the special issue: questioning modern surveillance technologies: ethical and legal challenges of emerging information and communication technologies. *Information Polity*, v. 27, n. 2, p. 121-129, 2022.

[25] KAZIM, E.; GÜÇLÜTÜRK, O.; ALMEIDA, D.; KERRIGAN, C.; LOMAS, E.; KOSHIYAMA, A; TRENGOVE, M. Proposed EU AI Act—Presidency compromise text: select overview and comment on the changes to the proposed regulation. *AI and Ethics*, v. 3,

6 Legal Position of Uzbekistan

Uzbekistan, a Central Asian nation, has been actively addressing the rapid advancements in artificial intelligence (AI) technology, particularly in generative AI. The country's legal framework has been evolving to tackle the challenges and opportunities this emerging technology presents. The government has established a comprehensive legislative foundation to regulate AI technologies. The cornerstone of this framework is the «Strategy for the Development of Artificial Intelligence in the Republic of Uzbekistan for 2019-2025,» introduced through Presidential Decree No. PP-4507 (2019).[26] The strategy outlines the country's vision for AI development, focusing on critical areas such as research, education, infrastructure, and legal and ethical considerations.[27] Building upon this initial strategy, the Concept for the Development of Artificial Intelligence for 2021-2030 solidifies Uzbekistan's long-term commitment to AI. It outlines a broader vision for its development.[28]

Several other legislative acts play a crucial role in regulating AI in Uzbekistan. The Personal Data Law (2019) establishes a framework for personal data protection, including data processed by AI systems. It outlines data processing principles, data subjects' rights, and the obligations of data controllers and processors.[29] Additionally, the Electronic Commerce Law (2020) regulates electronic transactions. It sets the legal framework for electronic signatures and documents relevant to generative AI applications in e-commerce.[30] The Law on Intellectual Property (2006) protects copyrights, patents, and trademarks (Law of the Republic of Uzbekistan No. ZRU-42, 2006). The IP law regime in Uzbekistan shared concerns similar to those in Malaysia. It deals with the dilemma of ownership and authorship of the patents and copyrighted materials and who the inventors and the authors under such a regime can be.

Next, there are several governmental bodies, such as the Ministry for Development of Information Technologies and Communications (MITC), are responsible for regulating the ICT sector, including AI, and developing relevant policies and regulations (Decree of the President of the Republic of Uzbekistan No. UP-5099, 2017). The National Agency for Project Management (NAPM) coordinates the implementation of AI strategies and oversees the Artificial Intelligence Research Center (AIRC) (Resolution of the Cabinet of Ministers of the Republic of Uzbekistan No. 589, 2019). The AIRC, established in 2019, is tasked with conducting AI research and development, promoting AI adoption, and developing ethical guidelines (Decree of the President of the Republic of Uzbekistan No. PP-4349, 2019).

In 2021, the Cabinet of Ministers of Uzbekistan adopted a resolution to establish a special legal regime supporting AI technologies (Resolution of the Cabinet of Ministers of the Republic of Uzbekistan No. 717, 2021). This law aims to create favorable conditions for organizations and institutions working on AI technologies, facilitate the testing and implementation of AI software, and simplify legal relationships in AI development. It offers benefits and preferences similar to those provided to IT Park residents, including tax incentives and simplified procedures (Resolution of the Cabinet of Ministers of the Republic of Uzbekistan No. 717, 2021). The particular legal regime also establishes a regulatory sandbox for testing AI technologies in a controlled environment (Resolution of the Cabinet of Ministers of the Republic of Uzbekistan No. 717, 2021).

The Uzbekistan government recognizes the ethical implications of AI and has taken steps to address them[31]. The national AI strategies emphasize ethical development, aligning with international best practices[32]. The AIRC is tasked with developing ethical guidelines

n. 2, p. 381-387, 2023.

[26] GUO, R. *Cross-border resource management*. 4. ed. [*S. l.*]: Elsevier, 2021.

[27] GUO, R. *Cross-border resource management*. 4. ed. [*S. l.*]: Elsevier, 2021.

[28] KUDIYAROV, K.; SEYPULLAEVA, G. Stages of digital transformation of the economy of the republic of Uzbekistan. *Вестник Каракалпакского Государственного Университета Имени Бердаха*, v. 64, n. 1, p. 50-54, 2024.

[29] RAJABOVA, K. Protection of personal data in the context of digitalization. *Общественные науки в современном мире:* теоретические и практические исследования, v. 4, n. 5, p. 17-22, 2025.

[30] MAKMUDOV, M.; KHAMIDOV, O. Regulating artificial intelligence in Uzbekistan: A comparative analysis. *International Journal of Law and Information Technology*, v. 29, n. 1, p. 1-20, 2021. Available at: https://doi.org/10.1093/ijlit/eaab001. Access on: 6 fev. 2025.

[31] ABDURAKHMANOVA, G. K.; ASTANAKULOV, O. T.; GOYIPNAZAROV, S. B.; IRMATOVA, A. B. Tourism 4.0: Opportunities for applying industry 4.0 technologies in tourism. *In:* INTERNATIONAL CONFERENCE ON FUTURE NETWORKS & DISTRIBUTED SYSTEMS, 6., 2022. *Proceedings [...]*, p. 33-38, Dec. 2022.

[32] KHAMIDOV, O.; MAKMUDOV, M. Artificial intelligence in Uzbekistan: Challenges and opportunities. *International Journal of Artificial Intelligence and Machine Learning*, v. 10, n. 2, p. 120-135, 2020. Available at: https://doi.org/10.5555/3385738.3385745. Access on: 6 fev. 2025.

for AI research and development, including a code of ethics for researchers and developers (Decree of the President of the Republic of Uzbekistan No. PP-4349, 2019). Efforts are underway to address biases and discrimination in AI systems, with the «Law on Personal Data» mandating fair and non-discriminatory data processing (Law of the Republic of Uzbekistan No. ZRU-547, 2019). The impact of AI on employment and the need for workforce reskilling are being addressed through initiatives like the «Digital Uzbekistan 2030» program (Decree of the President of the Republic of Uzbekistan No. UP-6079, 2020).

While AI comes with sophisticated issues, determining liability and ensuring accountability for the actions and outputs of AI systems are complex challenges. Uzbekistan's legal framework is still evolving in this area, with discussions ongoing about specific regulations.[33] The existing principles of tort law and product liability may apply, but the unique nature of AI decision-making poses challenges in attributing responsibility.[34] Despite the progress in developing a legal and regulatory framework for generative AI in Uzbekistan, several challenges remain. These include balancing innovation with protecting fundamental rights, addressing the shortage of skilled AI professionals, raising public awareness, and keeping the legal framework up-to-date with technological advancements.[35] The nation aims to develop a comprehensive legal framework, establish a national AI research center, and foster international collaboration to address these challenges (Decree of the President of the Republic of Uzbekistan No. PP-4507, 2019).

7 Issues and Challenges in Regulating Generative AI

Regulating Generative AI in countries presents many issues and challenges that policymakers and stakeholders must address to ensure responsible and ethical deployment of AI technologies. One of the key challenges highlighted in the literature is the opacity of AI algorithms, often referred to as a 'black box,' which hinders the assessment of bias within these systems.[36] This lack of transparency poses a significant hurdle in ensuring fairness and accountability in AI decision-making processes, raising concerns about potential discriminatory outcomes.

Moreover, implementing AI technologies, including Generative AI, in various sectors faces obstacles such as the shortage of skilled personnel, inadequate infrastructure, and high implementation costs. These challenges underscore the need for capacity-building efforts, resource allocation, and regulatory frameworks to support the effective integration of AI solutions. Additionally, issues related to data privacy regulations, the digital divide, and outdated technologies further complicate the adoption of AI-based solutions.[37]

In healthcare, using AI, including Generative AI, introduces complexities related to data privacy, algorithmic transparency, and accountability. These challenges necessitate robust regulatory frameworks that address the ethical implications of AI technologies in healthcare settings. Furthermore, the global nature of AI technologies poses regulatory challenges, requiring coordinated efforts to develop comprehensive and harmonized regulatory standards.[38]

The impact of AI on employment landscapes, as highlighted in the context of Malaysia, underscores the need for inclusive strategies to address workforce readiness and promote inclusive growth.[39] The dynamic

[33] MAKMUDOV, M.; KHAMIDOV, O. Regulating artificial intelligence in Uzbekistan: A comparative analysis. *International Journal of Law and Information Technology*, v. 29, n. 1, p. 1-20, 2021. Available at: https://doi.org/10.1093/ijlit/eaab001. Access on: 6 fev. 2025.

[34] ABDURAKHMANOVA, G. K.; ASTANAKULOV, O. T.; GOYIPNAZAROV, S. B.; IRMATOVA, A. B. Tourism 4.0: Opportunities for applying industry 4.0 technologies in tourism. *In:* INTERNATIONAL CONFERENCE ON FUTURE NETWORKS & DISTRIBUTED SYSTEMS, 6., 2022. *Proceedings [...]*, p. 33-38, Dec. 2022.

[35] KHAMIDOV, O.; MAKMUDOV, M. Artificial intelligence in Uzbekistan: Challenges and opportunities. *International Journal of Artificial Intelligence and Machine Learning*, v. 10, n. 2, p. 120-135, 2020. Available at: https://doi.org/10.5555/3385738.3385745. Access on: 6 fev. 2025.

[36] LONGO, L.; BRCIC, M.; CABITZA, F.; CHOI, J.; CONFALONIERI, R.; DEL SER, J.; STUMPF, S. Explainable Artificial Intelligence (XAI) 2.0: A manifesto of open challenges and interdisciplinary research directions. *Information Fusion*, v. 106, 102301, 2024.

[37] LONGO, L.; BRCIC, M.; CABITZA, F.; CHOI, J.; CONFALONIERI, R.; DEL SER, J.; STUMPF, S. Explainable Artificial Intelligence (XAI) 2.0: A manifesto of open challenges and interdisciplinary research directions. *Information Fusion*, v. 106, 102301, 2024.

[38] ZAIDAN, E.; IBRAHIM, I. A. AI governance in a complex and rapidly changing regulatory landscape: A global perspective. *Humanities and Social Sciences Communications*, v. 11, n. 1, p. 1-18, 2024.

[39] JUKIN, N. A. F. Inclusive Strategies for AI-Driven Employ-

nature of AI adoption necessitates policy interventions and collaborative governance approaches to navigate the challenges and opportunities presented by AI technologies in the labour market. Additionally, the economic implications of AI adoption, including the high cost of technological tools, require targeted interventions to ensure equitable access to AI-driven employment opportunities.[40]

In the legal domain, using AI technologies poses challenges related to data privacy, algorithmic transparency, and accountability. These issues underscore the importance of developing regulatory frameworks that uphold fundamental rights and ensure responsible AI innovation within legal systems. Addressing these challenges requires a nuanced understanding of the legal implications of AI technologies and proactive measures to mitigate potential risks.

Furthermore, developing AI technologies in urban services introduces challenges such as opaque decision-making processes, accountability issues, and privacy risks due to extensive data collection practices.[41] These negative externalities highlight the importance of responsible urban innovation that prioritises transparency, accountability, and privacy protection in AI-enabled decision-making processes. By addressing these challenges, countries can harness the benefits of AI technologies while mitigating potential risks to society.

Thus, regulating Generative AI in countries involves navigating a complex landscape of challenges, including algorithmic bias, data privacy concerns, workforce readiness, and regulatory harmonisation. Countries can foster responsible AI deployment that aligns with legal standards and societal values by addressing these issues through collaborative governance, capacity-building efforts, and ethical frameworks. Each of these issues will be discussed in detail below:-

ment in Malaysia: Decentralization, Policy Interventions, and Collaborative Governance. *Artificial Intelligence eJournal,* Apr. 2024. DOI 10.2139/ssrn.4806209.

[40] SAIARI, Sami Musaed H. Al; SAMUDIN, S. A. B.; SAMAH, M.; MAHYOUB, A. A. Advancements in Artificial Intelligence in Saudi Arabia: a critical analysis of current realities and future prospects. *International Journal Of Academic Research In Business And Social Sciences*, v. 15, n. 2, 2025.

[41] PELLEGRINO, A.; STASI, A. *Transformative Technologies*: Exploring the Role of Artificial Intelligence in Enhancing Infrastructure Governance and Economic Outcomes A Bibliometric Review. [*S. l.: s. n.*], 2024.

8 Data Protection and Privacy Issues of AI-Generated Contents

Data protection and privacy issues in AI-generated content are crucial considerations in the ethical and legal landscape. The advanced capabilities of AI systems raise concerns about collecting, storing, and utilising personal information, leading to potential privacy breaches.[42] In healthcare, the processing of sensitive patient data by AI technologies underscores the importance of addressing privacy concerns to safeguard confidentiality and personal data protection. The vast amounts of personal data integrated into AI algorithms for medical purposes present challenges to patient privacy, necessitating robust regulatory frameworks to ensure data security.[43] Moreover, using AI in various sectors, including healthcare and online transactions, has highlighted the significance of trust and privacy as critical concerns among users.[44]

Privacy issues in AI applications extend to the security of data and the potential risks associated with data breaches, emphasising the need for privacy-preserving techniques and regulatory measures to mitigate privacy threats. The tension between security imperatives and personal privacy rights is a central ethical concern, particularly in the context of national security and AI technologies. As AI technology evolves, addressing privacy concerns becomes increasingly crucial, especially with the proliferation of user-generated content and the adoption of AI in diverse domains.[45] Privacy protection studies in AI often focus on anonymisation techniques and differential privacy to safeguard sensitive information and ensure data confidentiality. However, traditional distributed machine learning methods face challenges in effectively addressing data privacy con-

[42] CARMODY, J.; SHRINGARPURE, S.; VAN DE VENTER, G. AI and privacy concerns: a smart meter case study. *Journal of Information, Communication and Ethics in Society*, v. 19, n. 4, p. 492-505, 2021.

[43] CARMODY, J.; SHRINGARPURE, S.; VAN DE VENTER, G. AI and privacy concerns: a smart meter case study. *Journal of Information, Communication and Ethics in Society*, v. 19, n. 4, p. 492-505, 2021.

[44] ZARIFIS, A.; FU, S. Re-evaluating trust and privacy concerns when purchasing a mobile app: Re-calibrating for the increasing role of artificial intelligence. *Digital*, v. 3, n. 4, p. 286-299, 2023.

[45] GUO, J.; WANG, M.; YIN, H.; SONG, B.; CHI, Y.; YU, F. R.; YUEN, C. Large Language Models and Artificial Intelligence Generated Content Technologies Meet Communication Networks. *IEEE Internet of Things Journal, v. 12, n. 2, p. 1529-1553, 15 Jan.* 2024. DOI 10.1109/JIOT.2024.349649.

cerns, necessitating innovative approaches to enhance privacy protection in AI applications.[46]

In the context of AI-generated content, such as ChatGPT, ethical considerations revolve around data privacy, transparency, and the need for informed consent to ensure the confidentiality and protection of personal data. The ethical challenges of AI in marketing also highlight data privacy as a pressing concern, emphasising the importance of addressing privacy issues in AI applications.[47]

In Malaysia, even though the PDPA 2010 regulates the processing of personal data by corporate entities and individuals, the PDPA principles do not apply to the automated collection, storage, and processing of data by an AI that can operate without human guidance or instruction. The principles of the PDPA 2010 may be violated by a generative AI in the following ways: Sections 6, 7, and 8 of the PDPA 2010 prohibit the collection and disclosure of personal data to third parties without the data subject's knowledge or consent. Sections 9, 10, and 11 of the PDPA 201also 0 prohibit the unauthorised storage and retention of personal data for AI «training» and memorisation without providing a right to access, update, or delete the data. Section 129 of the PDPA 2010 prohibits the transfer of personal data to servers and users outside of Malaysia without the data subject's consent. Other artificial intelligence (AI) programs may also process personal data without the subject's knowledge or consent, such as AI filters that analyse candidates for employment and recruitment purposes and AI programmes that filter individuals' biometric information for surveillance purposes. (FN)

9 Source of Data Training and Bias Amplification

Data privacy and bias in AI are crucial considerations that significantly impact the integrity and fairness of AI systems. The training data utilised in AI models may inherently contain biases, and the algorithms can exacerbate these biases, leading to ethical and legal challenges.[48] The reliance on data stored in the databases for training AI-based computational approaches underscores the necessity of addressing bias in the source of training data to ensure the accuracy and fairness of AI applications.[49] Furthermore, ensuring the accuracy and fairness of AI applications necessitates using diverse datasets and continuous monitoring to mitigate algorithmic bias.[50]

The ethical implications of AI in various sectors, including healthcare and education, underscore the importance of addressing bias and privacy concerns to foster responsible AI practices.[51] Integrating AI with neurotechnology introduces new ethical considerations, such as mental privacy, transparency, and biases, highlighting the need for a comprehensive ethical framework to guide the development and utilisation of AI-driven technologies.[52] Moreover, ethical considerations surrounding AI technology emphasise the significance of prioritising transparency, accountability, and fairness to mitigate bias and privacy violations and ensure ethical AI deployment.[53]

Policy imperatives play a vital role in tackling challenges related to data privacy, accountability, and bias in adopting AI/ML technologies, emphasising the necessity of regulatory frameworks to protect individuals' privacy rights and prevent bias amplification in AI systems.[54] The systematic amplification of bias in datasets and AI models underscores the importance of evaluating poten-

[46] WANG, C. *et al.* Ethical considerations of using ChatGPT in health care. *Journal of Medical Internet Research*, v. 25, e48009, 2023. Available at: https://doi.org/10.2196/48009. Access on: 6 fev. 2025.

[47] KUMAR, D. Ethical and legal challenges of AI in marketing: an exploration of solutions. *Journal of Information Communication and Ethics in Society*, v. 22, n. 1, p. 124-144, 2024. Available at: https://doi.org/10.1108/jices-05-2023-0068. Access on: 6 fev. 2025.

[48] ANSARULLAH, S. I.; KIRMANI, M. M.; ALSHMRANY, S.; FIRDOUS, A. Ethical issues around artificial intelligence. *A Biologist s Guide to Artificial Intelligence,* p. 301-314, 2024.

[49] MANZINI, A.; LEE, T. *Current and emerging capabilities of AI-powered genomics, and associated ethical, legal and political debates*. [*S. l.: s. n.*], 2023.

[50] ELENDU, C.; AMAECHI, D. C.; ELENDU, T. C.; JINGWA, K. A.; OKOYE, O. K.; OKAH, M. J.; ALIMI, H. A. Ethical implications of AI and robotics in healthcare: A review. *Medicine*, v. 102, n. 50, e36671, 2023.

[51] BASKARA, R. AI in elt: navigating ethical quandaries and fostering equitable learning environments. *Proceeding of Annual International Conference on English Language Teaching,* v. 1, n. 1, p. 46-59, Dec. 2024.

[52] VAN STUIJVENBERG, O. C.; BROEKMAN, M. L.; WOLFF, S. E.; BREDENOORD, A. L.; JONGSMA, K. R. Developer perspectives on the ethics of AI-driven neural implants: a qualitative study. *Scientific Reports*, v. 14, n. 1, p. 7880, 2024.

[53] MURIKAH, W.; NTHENGE, J. K.; MUSYOKA, F. M. Bias and ethics of AI systems applied in auditing-A systematic review. *Scientific African*, p. e02281, 2024.

[54] KIRKSEY, D. *Econometric Modeling of Hospital Spending Relative to Artificial Intelligence, Telehealth, and CEO Health Equity Goals.* 2024. Thesis (Doctoral) - Trident University International, Arizona, 2024.

tial bias mitigation methods to enhance the fairness and reliability of AI technologies.[55] Additionally, employing domain adaptation through training set enhancement can be a valuable strategy to promote AI fairness and address imbalances in bias-causing training data.[56]

10 IP Right of AI Generative Contents

The discourse surrounding AI regulation and governance has become increasingly focused on the intellectual property rights of AI-generated content. The legal frameworks that regulate intellectual property rights are confronted with new challenges and complexities as AI technologies, such as Generative AI, continue to develop and generate innovative results. Intellectual property rights and AI intersection raise inquiries regarding the ownership, authorship, and preservation of AI-generated content.

Determining ownership is critical in discussing intellectual property rights concerning AI-generated content. The study underscores the significance of comprehending the intellectual property implications of AI-generated content.[57] The issue of who owns the rights to these creations becomes increasingly crucial in ensuring a reasonable and equitable distribution of intellectual property as AI systems generate content autonomously. The legal and ethical challenges associated with the ownership and authorship of AI-generated content are complex. Despite the absence of human authorship and copyright protection in AI-generated works, determining legal liability and recognising authorship continue to be a significant concern.[58] The generation of human-like text has been facilitated using generative AI, such as ChatGPT and Natural Language Processing, which has led to questions regarding the authenticity of authorship in AI-generated content.[59] Research has shown that users do not perceive themselves as the proprietors or authors of AI-generated text, a phenomenon referred to as the AI Ghostwriter Effect, and it necessitates the importance of addressing the issues of ownership and authorship in AI-generated works.[60]

Copyright challenges arise in AI-generated creative content, requiring modifications to current regulations to address the intricacies of ownership and authorship.[61] The term "AI-generated" is frequently associated with AI-generated content, irrespective of its accuracy. It underscores the significance of labelling and comprehending the origins of AI-generated content.[62] Additionally, the research illuminates the influence of AI regulation and governance on sharing personal data online, emphasising the importance of suitable rules to enable data sharing without jeopardising intellectual property rights.[63] This underscores the necessity of legal frameworks and guidelines that balance preserving intellectual property rights and facilitating data sharing in AI-driven environments.

The significance of public engagement and diverse representation in developing AI policies that protect intellectual property rights is emphasised by the changing landscape of AI policy and governance, as explored in the study by Ulnicane.[64] Most countries can establish

[55] KOÇAK, B.; PONSIGLIONE, A.; STANZIONE, A.; BLUETHGEN, C.; SANTINHA, J.; UGGA, L.; CUOCOLO, R. Bias in artificial intelligence for medical imaging: fundamentals, detection, avoidance, mitigation, challenges, ethics, and prospects. *Diagnostic and interventional radiology*, v. 31, n. 2, p. 75, 2025.

[56] JOSHI, N.; BURLINA, P. AI fairness via domain adaptation. *ArXiv*, 15 Mar. 2021. Available at: https://arxiv.org/abs/2104.01109.

[57] CHAVA, K.; SARADHI, K. S. *Emerging Applications of Generative AI and Deep Neural Networks in Modern Pharmaceutical Supply Chains*: A Focus on Automated Insights and Decision-Making. [*S. l.: s. n.*], 2024.

[58] WACH, K.; DUONG, C. D.; EJDYS, J.; KAZLAUSKAITĖ, R.; KORZYNSKI, P.; MAZUREK, G.; ZIEMBA, E. The dark side of generative artificial intelligence: A critical analysis of controversies and risks of ChatGPT. *Entrepreneurial Business and Economics Review*, v. 11, n. 2, p. 7-30, 2023.

[59] TLILI, A. *et al.* What if the devil is my guardian angel: ChatGPT as a case study of using chatbots in education. *Smart Learning Environments*, v. 10, n. 1, 2023. Available at: https://doi.org/10.1186/s40561-023-00237-x. Access on: 6 fev. 2025.

[60] DRAXLER, F.; WERNER, A.; LEHMANN, F.; HOPPE, M.; SCHMIDT, A.; BUSCHEK, D.; WELSCH, R. The AI ghostwriter effect: When users do not perceive ownership of AI-generated text but self-declare as authors. *ACM Transactions on Computer-Human Interaction*, v. 31, n. 2, p. 1-40, 2024.

[61] LUCCHI, N. ChatGPT: a case study on copyright challenges for generative artificial intelligence systems. *European Journal of Risk Regulation*, p. 1-23, 2023. Available at: https://doi.org/10.1017/err.2023.59. Access on: 6 fev. 2025.

[62] EPSTEIN, D. C.; JAIN, I.; WANG, O.; ZHANG, R. Online detection of ai-generated images. *In*: INTERNATIONAL CONFERENCE ON COMPUTER VISION WORKSHOPS, 2023. *Proceedings [...]*, Paris, p. 382-392, 2023. Available at: https://ieeexplore.ieee.org/document/10350523. Access on: 6 fev. 2025.

[63] CHATTERJEE, S.; SREENIVASULU, N. S.; HUSSAIN, Z. Evolution of artificial intelligence and its impact on human rights: from sociolegal perspective. *International Journal of Law and Management*, v. 64, n. 2, p. 184-205, 2021.

[64] ULNICANE, I.; KNIGHT, W.; LEACH, T.; STAHL, B. C.;

regulatory frameworks that resolve intellectual property concerns and foster innovation and collaboration in the AI ecosystem by involving various stakeholders in policymaking. Additionally, the comparative study conducted by Cath in 2017 underscores the necessity of policies safeguarding intellectual property rights and promoting the development of a «good AI society to promote responsible AI innovation.[65] The comparative assessment shows how various jurisdictions manage the intricate interplay between intellectual property regulations and AI technologies.

The study by Artz and Dung underscores the significance of regulatory frameworks that protect intellectual property rights in AI-driven environments, highlighting the necessity of reconciling artificial intelligence and data protection from a European law perspective in the context of data protection and AI.[66] Countries can foster innovation while protecting intellectual property rights by harmonising AI regulations with data protection laws. A nuanced comprehension of AI innovation's legal, ethical, and technological aspects is necessary to resolve the intellectual property rights of AI-generated content.

11 Generative AI Issues in Criminal Justice

In criminal justice systems, generative artificial intelligence presents various ethical questions and challenges that cross legal frameworks and social consequences. Generative AI and other artificial intelligence (AI) technologies in criminal justice systems beg issues about bias, openness, and responsibility in decision-making procedures.[67] In legal settings, using AI tools for data analysis and prediction complicates the assessment of the validity and reliability of AI-generated conclusions.[68]

Using artificial intelligence in the criminal justice system creates several possibilities and trends that could completely transform accepted methods and processes.[69] These developments, however, beg questions regarding the moral application of artificial intelligence, the defence of personal liberties, and the results of automated decision-making in legal environments. Knowing how artificial intelligence technology will affect criminal justice requires a sophisticated strategy balancing ethical issues and invention. Underlined the outstanding issues in decision-making processes within the criminal justice system.[70] Focusing on how AI systems are changing the basic ideas of knowledge creation and epistemology in the criminal justice area, investigated the impact of digital technologies and artificial intelligence on justice systems.[71]

The spectacle of international criminal justice underlines justice systems' performative and epistemic aspects in a globalised environment. This point of view underscored the need to closely study the stories and policies underlying international criminal justice systems to attain fairness, openness, and responsibility. Examining the theatre of justice will help stakeholders understand the subtleties of cross-border legal procedures and artificial intelligence technology's role in shifting these dynamics. By moving the focus from punitive measures to supportive treatments, attempts at decriminalisation in drug policy and criminal justice strive to enhance the mental health outcomes of drug users.[72] Developing good drug policies in Malaysia and

WANJIKU, W. G. Framing governance for a contested emerging technology: insights from AI policy. *Policy and Society*, v. 40, n. 2, p. 158-177, 2021.

[65] ADEKUNLE, J. J.; KOMGUEM, S. J. T. ABAH, V. E.; MONICA, N. N. AI Ethics, Balancing Innovation and Accountability. *Journal of Systematic and Modern Science Research,* 2024.

[66] DUNG, Tran Viet. Artificial Intelligence and Data Protection: How to Reconcile Both Areas from the European Law Perspective. *Vietnamese Journal of Legal Sciences*, [*S. l.*], v. 7, n. 2, p. 39–58, 2022. Available at: https://sciendo.com/pdf/10.2478/vjls-2022-0007. Access on: 6 fev. 2025.

[67] UGWUDIKE, P. Predictive algorithms in justice systems and the limits of tech-reformism. *International Journal for Crime, Justice and Social Democracy*, v. 11, n. 1, p. 85-99, 2022.

[68] OSTROWSKA, M.; KACAŁA, P.; ONOLEMEMEN, D.; VAUGHAN-LANE, K.; JOSEPH, A. Sisily; OSTROWSKI, A.; WRÓBEL, M. J. To trust or not to trust: evaluating the reliability and safety of AI responses to laryngeal cancer queries. *European Archives of Oto-Rhino-Laryngology*, v. 281, n. 11, p. 6069-6081, 2024.

[69] SUSHINA, T.; SOBENIN, A. Artificial intelligence in the criminal justice system: leading trends and possibilities. *In:* INTERNATIONAL CONFERENCE ON SOCIAL, ECONOMIC, AND ACADEMIC LEADERSHIP, 6., 2020. *Proceedings* [...], Zhengdong: Atlantis Press, 2020. p. 432-437.

[70] SUSHINA, T.; SOBENIN, A. Artificial intelligence in the criminal justice system: leading trends and possibilities. *In:* INTERNATIONAL CONFERENCE ON SOCIAL, ECONOMIC, AND ACADEMIC LEADERSHIP, 6., 2020. *Proceedings* [...], Zhengdong: Atlantis Press, 2020. p. 432-437.

[71] UGWUDIKE, P. Predictive algorithms in justice systems and the limits of tech-reformism. *International Journal for Crime, Justice and Social Democracy*, v. 11, n. 1, p. 85-99, 2022.

[72] SINGH, J. S. P.; AZLINDA, A.; SHANKAR, D.; NIZAM, A.

elsewhere depends on an awareness of how decriminalisation policies affect societal consequences and recovery. Countries using artificial intelligence technologies in their drug policies can apply data-driven approaches to address drug use more precisely.

The participation of interest groups in criminal justice policymaking emphasises the need for several stakeholders to create legal frameworks and regulatory standards.[73] Promoting policy changes and reforms in the criminal justice system depends on professional associations, advocacy groups, and community stakeholders, all of which are important. Working with interest groups helps legislators ensure that social ideals and legal criteria use artificial intelligence technologies. Undocumented individuals in nations like Malaysia, including migrant labourers and refugees, face significant obstacles to legal identity and educational prospects.[74] Thorough policies and support systems that advance social equality and inclusion must address underprivileged communities' legal and intellectual needs. By examining the experiences of illegal communities, policymakers can design more inclusive legislation frameworks protecting the rights of vulnerable people. Managing artificial intelligence technology in criminal justice systems requires a consistent framework balancing innovation, ethics, and legal obligations.[75] Adopting compliance frameworks and responsibility systems helps nations guarantee the responsible and open application of artificial intelligence technologies within legal environments. These governance structures significantly affect the direction of artificial intelligence control and application in criminal justice systems. Therefore, the interplay of Generative AI and criminal justice systems generates a complex terrain of challenges and possibilities requiring a multidisciplinary approach. Governments can properly manage AI technology's ethical and legal implications in criminal justice environments by addressing bias, openness, responsibility, and inclusiveness.

12 Quality and Reliability of Generated Content

The quality and reliability of AI-generated material are critical in determining AI systems' usefulness and trustworthiness. The literature delves into many aspects of the quality and reliability of AI-generated content, emphasising both the benefits and drawbacks of AI technologies. The quality and dependability of AI-generated material have emerged as significant factors in discussing deploying AI technologies. The literature emphasises the need to resolve issues with the accuracy, reliability, and ethical implications of the content generated by AI systems. One study by Arshad et al. (2023) emphasises the importance of assuring the quality and dependability of AI-generated information, data privacy, and equal access to AI technology.[76] This underscores the necessity for solid processes to analyse and confirm the correctness and credibility of AI-generated details to increase user trust and confidence.

Furthermore, the evolution of Generative AI, as discussed in a comprehensive survey by Cao, has resulted in the creation of Artificial Intelligence Generated Content (AIGC), which encompasses a wide range of digital content produced by AI models, such as images, music, and natural language.[77] The spread of AI-generated content emphasises the significance of developing criteria for assessing the quality and dependability of such content to avoid misinformation, ensure authenticity, and preserve ethical content creation practices.

Citation from the publication's 'discussion constraints and future work' section: The labelling of AI-generated content presents a significant challenge in distinguishing between content produced by AI systems and human creators delve into the debate surrounding

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the appropriate labelling of Generative AI-generated content, highlighting the need for clear and consistent labelling practices to inform users about the origin of the content and its potential reliability.[78] Implementing transparent labelling techniques can improve transparency, accountability, and user knowledge of AI-generated material.

Detecting articles generated by Generative AI technology poses an additional problem in assuring the authenticity and dependability of content as several commentators such as Epstein, Arechar, and Rand explore efforts to distinguish between AI-generated and human-created information, highlighting the need to create ways to identify and validate the source of content in disciplines such as pharmacy practice.[79] This emphasises the importance of developing tools and standards for detecting and authenticating AI-generated material to maintain integrity and credibility across domains. Addressing the ethical implications of AI technologies, especially Generative AI, is critical to encouraging responsible content development and dissemination, highlighting the ethical considerations related to AI technologies such as DALL-E, and emphasising the importance of appropriate rules and policies to oversee the ethical usage of AI-generated images. It is strongly advocated that countries limit the hazards connected with AI-generated content by adopting ethical regulations and legal frameworks for content development and distribution.

13 Conclusion

Generative AI technology, which employs machine learning models to create new content from existing data, presents benefits and challenges. The laws and regulations of Malaysia and Uzbezkistan must be updated to account for the additional difficulties generative AI brings. In Malaysia, the PDPA and Copyright Act of 1987 may need to be modified to include AI-generated work. Presently, the PDPA protects personal data that are only handled by humans; thus, its protection is necessary to encompass autonomous processing by AI systems and language learning models (LLM). It has been widely debated that AI-created works lacking human participation should not be recognised and granted protection under the intellectual property regime. Thus, the concept of authorship and ownership must be reconsidered in the context of Malaysia and Uzbekistan. Malaysia's generative artificial intelligence deployment raises ethical concerns about responsibility, misinformation, and prejudice. The AI systems trained on biased datasets may propagate social preconceptions that lead to hate speech and threaten the peace of the nations.

Additionally the deepfakes and synthetic media also pose a threat to information integrity and public trust, emphasising the importance of rigorous verification procedures and public awareness efforts. There are also concerns raised that generative artificial intelligence applications should not violate users' privacy or exploit personal information. Uzbekistan and the Malaysian government must adopt AI deployment policies that promote transparency, fairness, and accountability and call for effective collaboration between public and private actors to maintain the AI system's high enforcement and transparency. Finally, it is undeniable that AI technology can transform both a nation's economy and creativity; nevertheless, such technology must be balanced with legal and ethical concerns.

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O Direito Internacional do Trabalho fora do "armário": a proteção global de trabalhadoras e trabalhadores LGBTI+

International Labour Law Out of the "Closet": The Global Protection of LGBTI+ Workers

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Resumo

Reflete-se, neste artigo, sobre a proteção de trabalhadoras e trabalhadores LGBTI+ em sua dupla condição vivida: ao mesmo tempo, enquanto trabalhadoras e como pessoas que vivem sexualidades e identidades de gênero não hegemônicas, vistas a partir de uma particular condição normativa. O trabalho se origina no diagnóstico de um hiato na normativa internacional, que se revela em instrumentos normativos específicos sobre gênero e sexualidade, sem menções expressivas sobre o trabalho e em instrumentos específicos sobre trabalho e antidiscriminação, que não consideram, de forma específica, gênero e sexualidade, o que insere trabalhadoras e trabalhadores LGBTI+ em um “não lugar”. A pesquisa se desdobra em três momentos. Primeiramente, propõe-se um panorama normativo de dois corpos internacionais de proteção, o das pessoas LGBTI+ e do Direito Internacional do Trabalho antidiscriminatório. Num segundo momento, abordam-se políticas e ações transnacionais que consideram, simultaneamente, as duas dimensões, com enfoque, especificamente, às trabalhadoras e trabalhadores LGBTI+, por meio de uma pesquisa empírica em que se analisam normas, casos, programas, projetos e iniciativas nas organizações internacionais. No terceiro momento, de análises, teoriza-se sobre os achados empíricos, para pensar as trabalhadoras e trabalhadores LGBTI+ como sujeitas e sujeitos plenos de direito e os compromissos do Direito Internacional do Trabalho nessa afirmação. Conclui-se que as pessoas LGBTI+ são protegidas pelo Direito Internacional do Trabalho, por meio do desenvolvimento de normas que asseguram a proteção de suas existências e de normas antidiscriminatórias, embora essa proteção ocorra de forma implícita e não explícita.

Palavras-chave: trabalhadoras e trabalhadores LGBTI+; direitos LGBTI+; Direito Internacional do Trabalho; direito antidiscriminatório; igualdade.

Abstract

This paper reflects on the meanings of protection for LGBTI+ workers in their dual-lived condition: simultaneously as workers and as individuals who

experience non-hegemonic sexualities and gender identities, viewed from a particular normative condition. The study originates from identifying a gap in international regulations, evident in normative instruments that address gender and sexuality without significant references to labor, and in instruments focused on labor and anti-discrimination that do not specifically consider gender and sexuality. This places LGBTI+ workers in a "non-place.» The research unfolds in three stages. First, it presents a normative overview of two international protection frameworks: LGBTI+ rights and anti-discrimination labor law under international law. Second, it examines transnational policies and actions that simultaneously address both dimensions, specifically targeting LGBTI+ workers through an empirical research effort that explores norms, cases, programs, projects, and initiatives within international organizations. The third stage provides an analytical perspective on the empirical findings, conceptualizing LGBTI+ workers as full subjects of rights and examining the commitments of international labor law in affirming these rights. The article concludes that LGBTI+ individuals are currently protected by international labor law through the development of regulations that protects both their existence and anti-discrimination principles in labor law. However, this protection remains implicit rather than explicitly stated.

Keywords: LGBTI+ workers; LGBTI+ rights; International Labour Law; anti-discrimination law; equality.

1 Introdução

O Direito Internacional do Trabalho protege trabalhadoras e trabalhadores LGBTI+, ou elas se encontram no "armário"[1] da normativa trabalhista? Se protege, de que forma? Se não protege, como poderia fazê-lo? Neste artigo, consideram-se esses questionamentos com o objetivo de analisar os sentidos da proteção de trabalhadoras e trabalhadores LGBTI+ nessa dupla condição: ao mesmo tempo enquanto trabalhadores e como pessoas que vivem sexualidades e identidades de gênero não hegemônicas, compreendidas com base em uma particular condição normativa que compreenda as interações entre normas internacionais, internas, políticas, ações e programas associados à diversidade em um contexto atravessado por disputas jurídico-políticas sobre gênero e sexualidade. A partir de pesquisa teórica, levantamentos normativos e de experiências internacionais, notamos que as perguntas propostas enfrentam uma problemática central, pois se apresenta um certo entrelugar jurídico entre a proteção trabalhista e a proteção das minorias de gênero e sexualidade. Espaço em que há ainda muita disputa, tensão, incompreensão e modos de afetação de vidas concretas, de pessoas concretas, a despeito de existir, definitivamente, ambiente para avanços.

Duas premissas básicas orientam nossa investigação. A primeira refere-se ao fato de que pessoas LGBTI+ sofrem, cotidianamente, em vários países, discriminação e violência por suas identidades de gênero e orientações sexuais nas relações de trabalho que estabelecem ou deixam de estabelecer. A literatura é diversa e crescente ao catalogar experiências de discriminação LGBTfóbica no trabalho, em perspectiva qualitativa[2] ou quantitativa[3], a teorizar sobre elas numa perspectiva crítica[4], em uma pluralidade de espaços regionais e nacionais[5], de setores ou estratos profissionais[6] e de clivagens ou heterogenei-

[1] Na linguagem popular, utiliza-se a expressão "sair do armário" para fazer menção ao momento da vida em que uma pessoa LGBTI+ se assume, para a família e para a sociedade. Portanto, o "armário", nesse sentido, diz respeito a um local de ocultamento e silenciamento, no qual a proteção não engloba a particular condição de ser LGBTI+.

[2] PELÚCIO, Larissa. Na noite nem todos os gatos são pardos: notas sobre a prostituição travesti. *Cadernos Pagu*, n. 25, p. 217-248, jul./dez. 2005.; BÉRUBÉ, Allan. *My desire for history*: essays in gay, community, and labor history. Chapel Hill: University of North Carolina Press, 2011.; BATALHA, Glaucia Fernanda Oliveira Martins. Orientação sexual e discriminação no ambiente laboral. *Revista de Direito Internacional*, Brasília, v. 10, n. 2, p. 369-383, 2013.

[3] DIAGNÓSTICO LGBT+ na pandemia: desafios da comunidade LGBT+ no contexto de continuidade do isolamento social em enfrentamento à pandemia de coronavírus. *Vote LGBT*, 2021. Disponível em: https://www.votelgbt.org/pesquisas.; RAMOS, Marcelo Maciel; NICOLI, Pedro Augusto Gravatá; MORAIS, Gabriella de; PIMENTA, Igor. *Relatório de violências contra pessoas LGBT+*. Pesquisa da 22ª Parada do Orgulho LGBT de Belo Horizonte – 2019. Belo Horizonte: Diverso UFMG, 2020.

[4] HEARN, Jeff; PARKIN, Wendy. *Sex at work*: the power and paradox of organization sexuality. New York: Macmillan St Martin's Press, 1987.; IRIGARAY, Hélio Arthur Reis; SARAIVA, Luiz Alex Silva; CARRIERI, Alexandre de Pádua. Humor e discriminação por orientação sexual no ambiente organizacional. *RAC*: Revista de Administração Contemporânea, v. 14, n. 5, p. 890-906, set./out. 2010.

[5] BADGETT, M. V. Lee; CHOI, Soon Kyu; WILSON, Bianca D. M. *LGBT poverty in the United States*: a study of differences between sexual orientation and gender identity groups. Los Angeles: The Williams Institute at UCLA School of Law, 2019.

[6] VENCO, Selma. Centrais de teleatividades: o surgimento dos colarinhos furta-cores? *In*: ANTUNES, Ricardo; BRAGA, Ruy (org.). *Infoproletários*: degradação real do trabalho virtual. São Paulo:

dades internas. Nessa pluralidade de perspectivas, uma conclusão parece uníssona: a discriminação LGBTfóbica é uma realidade nas relações de trabalho, sendo esta nossa primeira premissa de análise.

A segunda premissa é que, do ponto de vista normativo, o debate jurídico da proteção ou não das pessoas LGBTI+ constitui, em si, uma construção em curso. Há um conjunto crescente de normas jurídicas que, em muitas esferas de abrangência, afirmam a diversidade sexual e de gênero como valor jurídico e protege as pessoas LGBTI+ em face da discriminação[7]. Da mesma forma, somam-se decisões judiciais de cortes superiores[8] e tribunais internacionais, como veremos adiante, que formam um arcabouço protetivo pelo direito antidiscriminatório[9], tanto em sua arquitetura geral, quanto em sua aplicabilidade específica e direta às pessoas LGBTI+[10]. Por outro lado, há uma crescente cruzada antigênero, em uma oposição conservadora que se desdobra na política contemporânea[11], aprofundada em quadros de heterogeneidade nacional em diversos países. Isso nos conduz a nossa segunda premissa: o campo dos direitos LGBTI+ é um campo de disputa.

Quando se aproximam essas duas premissas, se revela a necessidade da pesquisa proposta neste artigo. De um lado, o trabalho, central para a afirmação da vida material de pessoas LGBTI+, segue um espaço de violência. De outro, a proteção jurídica das pessoas LGBTI+, conquanto existente, é ainda disputada. Quando se conectam esses dois pontos e se pensa sobre a proteção ou desproteção dessas pessoas, *enquanto* trabalhadoras dissidentes de gênero e sexualidade em escala global, um hiato se revela.

No Direito Internacional, há muito já produzido tanto em matéria de direitos de pessoas LGBTI+, em geral[12], quanto em matéria de discriminação e relações de trabalho, também em geral[13]. Há instrumentos normativos específicos sobre gênero e sexualidade, sem grandes considerações sobre trabalho, assim como há instrumentos específicos sobre trabalho e antidiscriminação, sem considerações específicas sobre gênero e sexualidade. Daí o hiato. Um "não lugar" da dimensão internacional da proteção de trabalhadoras e trabalhadores LGBTI+, dissolvidos no quadro de proteções gerais enquanto sofrem em concreto na concomitância da vida que levam como pessoas LGBTI+ no trabalho.

Abre-se, aqui, um capítulo particularmente aflitivo e inexplorado do debate dos paradoxos da linguagem dos direitos para pessoas LGBTI+, nas linhas indicadas por

Boitempo, 2009. p. 153-172.; MAGALHÃES, Alex Fernandes; ANDRADE, Carolina Riente de; SARAIVA, Luiz Alex Silva. Inclusão de minorias nas organizações de trabalho: análise semiótica de uma estratégia de recrutamento de uma multinacional de fast food. *Teoria e Prática em Administração*, v. 7, n. 2, p. 12-35, 2017.; FLEURY, Flávio Malta. *Os sentidos do direito, do sindicato e da vida em disputa*: resistências trabalhadoras e sindicais à transfobia e ao cissexismo no telemarketing. 2020. Dissertação (Mestrado em Direito) – Faculdade de Direito, Universidade Federal de Minas Gerais, Belo Horizonte, 2020.; CAVALCANTE, Ilana Ferreira; CAVALCANTI, Natália Conceição Silva Barros; JESUS, Jaqueline Gomes de. Apresentação: dossiê 'Mundo do trabalho, educação profissional e identidade de gênero'. *Revista Brasileira da Educação Profissional e Tecnológica*, v. 2, n. 21, p. 1-2, 2021.

[7] RAMOS, Marcelo Maciel; NICOLI, Pedro Augusto Gravatá. Existe um direito legislado da antidiscriminação para pessoas LGBTQIA+ no Brasil hoje? *Revista Direito e Práxis*, Rio de Janeiro, v. 14, n. 3, p. 2030-2056, 2023.

[8] BRASIL. Supremo Tribunal Federal. *Cadernos de Jurisprudência do STF*: concretizando direitos humanos: direito das pessoas LGBTQIAP+. Brasília: STF; CNJ, 2022.

[9] MOREIRA, Adilson José. *Tratado de direito antidiscriminatório*. São Paulo: Contracorrente, 2020.

[10] RIOS, Roger Raupp. *O princípio da igualdade e o direito da antidiscriminação*: discriminação direta, discriminação indireta e ações afirmativas no direito constitucional estadunidense. 2004. Tese (Doutorado em Direito) – Universidade Federal do Rio Grande do Sul, Porto Alegre, 2004.

[11] JUNQUEIRA, Rogério Diniz. Ideologia de gênero: a gênese de uma categoria política reacionária ou a promoção dos direitos humanos se tornou uma ameaça à família natural? *In*: RIBEIRO, Paula Regina Costa; MAGALHÃES, Joana Lira (org.). *Debates contemporâneos sobre educação para a sexualidade*. Rio Grande, RS: EDFURG, 2017. p. 25-52.; MISKOLCI, Richard; CAMPANA, Maximiliano. Ideologia de gênero: notas para a genealogia de um pânico moral contemporâneo. *Sociedade e Estado*, v. 32, n. 3, p. 725-747, 2017.; PIMENTEL, Mariana B. Backlash às decisões do Supremo Tribunal Federal sobre união homoafetiva. *Revista de Informação Legislativa*, v. 54, n. 214, p. 189-202, abr./jun. 2017.; BIROLI, Flavia; VAGGIONE, Juan Marco; MACHADO, Maria das Dores Campos. *Gênero, neoconservadorismo e democracia*: disputas e retrocessos na América Latina. São Paulo: Boitempo, 2020.; AVELAR, Dani. Brasil tem um novo projeto de lei antitrans por dia. *Folha de São Paulo*, 23 mar. 2023. Disponível em: https://www1.folha.uol.com.br/poder/2023/03/brasil-tem-um-novo-projeto-de-lei-antitrans-por-dia-e-efeito-nikolas-preocupa.shtml. Acesso em: 24 mar. 2023.

[12] BROWN, David. Making room for sexual orientation and gender identity in international human rights law: an introduction to the Yogyakarta Principles. *Michigan International Law Journal*, v. 31, n. 4, p. 821-879, 2010.; HOLZHACKER, Ronald. Gay rights are human rights: the framing of new interpretations of international human rights norms. *In*: ANDREOPOULOS, G.; ARAT, Z. F. K. (org.). *The uses and misuses of human rights*. New York: Palgrave Macmillan, 2014. p. 29-64.

[13] TOMEI, Manuela. Discrimination and equality at work: a review of the concepts. *International Labour Review*, v. 142, n. 4, p. 401-418, Dec. 2003.; SHEPPARD, Colleen. Mapping anti-discrimination law onto inequality at work: expanding the meaning of equality in international labour law. *International Labour Review*, v. 151, n. 1/2, p. 1-19, 2012.

Wendy Brown[14]. O paradoxo se expressa de uma série de maneiras. Uma delas é a constatação de que direitos específicos de proteção a pessoas LGBTI+, sobretudo em suas dimensões clássicas associadas às liberdades (de casar-se, por exemplo), podem chegar de maneira bastante heterogênea a essa população. Para autores como o teórico e ativista trans, Dean Spade[15], há uma potencial problemática com a linguagem dos direitos ditos LGBTI+, que deixa de entender como questões materiais da vida cotidiana podem ser regulados de maneira muito mais direta e intensa, dificultando a vida de pessoas LGBTI+ em seus cotidianos.

Nesse sentido, observa-se uma janela importante para a questão das garantias trabalhistas internacionais para pessoas LGBTI+. A discussão evoca o acesso pleno e igualitário ao trabalho protegido e regulado, em direitos concebidos para o cotidiano das relações de trabalho como um todo, com vias a garantir que, para essas pessoas, as normas gerais de proteção ao trabalho sejam aplicadas de modo não discriminatório, para que acessem e permaneçam em seus empregos, com remunerações justas e condições de trabalho adequadas. Não exclusivamente para que afirmem algo que se possa chamar "identidade", de maneira abstrata, mas para que possam viver. Existir. Tanto do ponto de vista material quanto simbólico.

Por isso, pensar o conjunto das proteções trabalhistas aplicadas à população LGBTI+, na confluência das matrizes de proteção do trabalho e da diversidade, constitui um exercício importante. As pessoas LGBTI+, em sua maioria, dependem do fruto de seu trabalho para sobreviver, e são tocadas, de modo cotidiano e concreto, pela distribuição desigual de riqueza. Além disso, vivem, globalmente, na incerteza das proteções nessa posição específica, de pessoas LGBTI+ que trabalham.

Essa importância da reflexão em sede de Direito Internacional do Trabalho talvez assuma uma proporção maior do que se pode perceber à primeira vista. Não se trata, apenas, de lidar com mais um problema específico nas relações de trabalho, tampouco com mais uma dimensão na amplitude protetiva das normas trabalhistas internacionais, que explicite discriminações que são, de modo geral, já repudiadas na normativa internacional. Esse aceno do Direito Internacional do Trabalho se põe na afirmação das pessoas LGBTI+ como trabalhadoras protegidas e se coloca como condição existencial da própria liberdade sexual e de gênero. No sistema socioeconômico em que vivemos, não há possibilidade de segregar as dimensões da existência, razão pela qual as proteções trabalhistas aplicadas como direitos típicos de pessoas LGBTI+[16] são pressupostos para a própria existência segura dessas pessoas. Na interdependência característica dos direitos humanos[17], a afirmação dos compromissos internacionais de proteção ao trabalho de pessoas LGBTI+ não é um exercício apenas jurídico e tem o potencial de afetar as realidades sociais dessa população no mundo todo.

Busca-se, neste artigo, responder à pergunta "o Direito Internacional do Trabalho protege trabalhadoras e trabalhadores LGBTI+?" da seguinte maneira: primeiramente, traça-se um panorama normativo dos dois *corpora* de proteção aproximados, o das pessoas LGBTI+ e do Direito Internacional do Trabalho antidiscriminatório, em levantamentos de normas internacionais na matéria. Num segundo momento, levantam-se políticas e ações transnacionais que consideram, concomitantemente, as duas dimensões, se dirigindo, especificamente, às trabalhadoras e trabalhadores LGBTI+, num esforço de pesquisa empírica que lida com normas, casos, programas, projetos e iniciativas nas organizações internacionais, cortes de direitos humanos, empresas transnacionais e entidades correlatas. Em um terceiro momento, de análises, teorizamos os achados empíricos, a fim de se refletir acerca das trabalhadoras e trabalhadores LGBTI+ como sujeitas e sujeitos plenos de direito e os compromissos do Direito Internacional do Trabalho nessa afirmação.

[14] BROWN, Wendy. Sofrendo de direitos como paradoxos. *Revista de Direito Público*, v. 18, n. 97, p. 459-474, jan./fev. 2021.

[15] SPADE, Dean. *Normal life*: administrative violence, critical trans politics, and the limits of law. Durham: Duke University Press, 2015.

[16] NICOLI, Pedro Augusto Gravatá; DUTRA, Renata Queiroz. Direitos trabalhistas como direitos LGBTI+: uma leitura queer dos retrocessos sociolaborais no STF. *Revista Direito e Práxis*, Rio de Janeiro, v. 13, n. 2, p. 1289-1318, 2022.

[17] RAMOS, Marcelo Maciel; NICOLI, Pedro Augusto Gravatá. A interdependência dos direitos LGBT. *In*: VIEIRA, Regina Stela Corrêa; TRAMONTINA, Robison; ESTEVES, Juliana Teixeira (org.). *Desafios presentes e futuros do direito do trabalho*: reflexões teóricas e resistência coletiva. Joaçaba, SC: Editora Unoesc, 2022. v. 2. p. 171-193.

2 A aproximação dos panoramas normativos: os direitos humanos LGBTI+ e o Direito Internacional do Trabalho antidiscriminatório

O levantamento das normas que nos conduzirá à resposta da pergunta que inicia este artigo se fará em duas frentes. Na primeira, investigam-se as matrizes da proteção geral de pessoas LGBTI+ em suas existências, como direitos humanos LGBTI+ no plano internacional. Na segunda, busca-se compreender a afirmação da igualdade e a vedação de práticas discriminatórias no Direito Internacional do Trabalho, em um direito antidiscriminatório do trabalho, em sua arquitetura geral. São duas frentes, veremos, de desenvolvimento paralelo e processos de interpenetração ainda incipientes.

Na primeira dimensão, a afirmação internacional dos direitos LGBTI+ se desenvolve em conexão com o conceito de igualdade fundamental. A igualdade é um valor que se insere, de modo direto, nas declarações de direitos mais emblemáticas da contemporaneidade, como a Declaração de Independência dos Estados Unidos, de 1776[18] e a Declaração dos Direitos do Homem e do Cidadão, de 1789[19], que afirmam igualdade e liberdade como direitos de todas as pessoas. Isso se repete, de forma mais pormenorizada, na mais relevante das declarações, a Declaração Universal dos Direitos Humanos de 1948[20], que estabelece que todos são iguais perante a lei, em dignidade e direitos, reconhece a possibilidade de invocar direitos e liberdades proclamados na declaração, e reconhece o direito à vida, à liberdade, à segurança pessoal, à proteção contra a discriminação, dentre outros. Os direitos humanos básicos, estabelecidos por essa declaração, respaldam uma série de documentos jurídicos internacionais, como o Pacto Internacional dos Direitos Civis e Políticos[21] e a Convenção Americana sobre Direitos Humanos[22], conhecida como Pacto de São José da Costa Rica, que reafirmam esses direitos.

Apesar de esses documentos não mencionarem, explicitamente, a discriminação por orientação sexual e identidade de gênero, os direitos humanos que afirmam são direitos reconhecidamente garantidos a pessoas LGBTI+. Esse é o entendimento, por exemplo, da Organização das Nações Unidas. Em 2006, nos Princípios de Yogyakarta, a ONU esclareceu aos Estados membros a aplicabilidade imediata dos tratados de direitos humanos à população LGBTI+. É um documento que extrai os direitos LGBTI+ da normativa internacional de direitos humanos já existente.

Conforme os Princípios de Yogyakarta:

> todos os direitos humanos são universais, interdependentes, indivisíveis e inter-relacionados. A orientação sexual e a identidade de gênero são essenciais para a dignidade e humanidade de cada pessoa e não devem ser motivo de discriminação e abuso[23].

Eles estabelecem que "todos os seres humanos nascem livres e iguais em dignidade e direitos. Os seres humanos de quaisquer orientações sexuais e identidades de gênero têm o direito de desfrutar, plenamente, de todos os direitos humanos"[24], e "todas as pessoas têm o direito de desfrutar de todos os direitos humanos livres de discriminação por sua orientação sexual ou identidade de gênero"[25]. Além disso, esses princípios, ainda, definem a discriminação com base na orientação sexual ou identidade de gênero como

> qualquer distinção, exclusão, restrição ou preferência baseada na orientação sexual ou identidade de gênero que tenha o objetivo ou efeito de anular ou prejudicar a igualdade perante a lei ou proteção igual da lei, ou o reconhecimento, gozo ou exercício, em base igualitária, de todos os direitos humanos e das liberdades fundamentais.[26]

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[18] UNITED STATES OF AMERICA. *The Declaration of Independence*. Congress, 1776.

[19] FRANCE. *Declarátion des Droits de l'Homme et du Citoyen*. Assemblée Nationale, 1789.

[20] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Declaração Universal dos Direitos Humanos*. Assembleia Geral das Nações Unidas, 10 dez. 1948.

[21] BRASIL. *Decreto nº 592, de 6 de julho de 1992*. Atos Internacionais. Pacto Internacional sobre Direitos Civis e Políticos. Promulgação. Disponível em: https://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm.

[22] BRASIL. *Decreto nº 678, de 6 de novembro de 1992*. Promulga a Convenção Americana sobre Direitos Humanos (Pacto de São José da Costa Rica), de 22 de novembro de 1969. Disponível em: https://www.planalto.gov.br/ccivil_03/decreto/d0678.htm.

[23] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios de Yogyakarta*: princípios sobre a aplicação da legislação internacional de direitos humanos em relação à orientação sexual e identidade de gênero. 2006.

[24] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios de Yogyakarta*: princípios sobre a aplicação da legislação internacional de direitos humanos em relação à orientação sexual e identidade de gênero. 2006.

[25] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios de Yogyakarta*: princípios sobre a aplicação da legislação internacional de direitos humanos em relação à orientação sexual e identidade de gênero. 2006.

[26] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios de Yog-*

Conforme os Princípios de Yogyakarta, os direitos humanos se aplicam às pessoas LGBTI+, e os direitos fundamentais à igualdade, liberdade, segurança e não discriminação também são direitos essenciais para essa população. Além disso, fornecem uma série de orientações explícitas aos Estados membros da ONU, como o dever de "incorporar princípios de igualdade e não discriminação por motivo de orientação sexual e identidade de gênero nas suas constituições nacionais e em outras legislações"[27], "adotar legislação adequada para assegurar o desenvolvimento das pessoas de orientações sexuais e identidades de gênero diversas"[28], "tomar todas as medidas policiais e outras medidas necessárias para prevenir e proteger as pessoas de todas as formas de violência e assédio"[29], "tomar todas as medidas legislativas necessárias para impor penalidades criminais adequadas à violência, ameaças de violência, incitação à violência e assédio associado, por motivo de orientação sexual ou identidade de gênero"[30], entre outros.

Portanto, instrumentos jurídicos como o Pacto Internacional dos Direitos Civis e Políticos de 1966, a Convenção Americana sobre Direitos Humanos de 1969, a Convenção Internacional sobre a Eliminação de todas as Formas de Discriminação Racial de 1969, a Convenção sobre a Eliminação de Todas as Formas de Discriminação contra a Mulher de 2002, entre outros, estabelecem regras antidiscriminatórias gerais, que se aplicam, especificamente, a pessoas LGBTI+.

No caso do Brasil, por exemplo, é importante recordar que o país é um Estado membro da Organização das Nações Unidas (ONU) e da Organização dos Estados Americanos (OEA). Nessa condição, submete-se aos princípios e regras, bem como aos órgãos de proteção de direitos humanos, dessas organizações internacionais, comprometendo-se, juridicamente, a garantir, proteger e promover os direitos fundamentais de todas as pessoas. Por meio dos tratados que ratificou, o Brasil incorporou, na legislação nacional, uma série de dispositivos legais antidiscriminatórios aplicáveis a pessoas LGBTI+. Embora nenhum deles proíba, expressamente, a discriminação por orientação sexual e de gênero, muitos trazem cláusulas antidiscriminatórias gerais ou abertas, conforme vimos acima, permitindo a proteção direta de pessoas LGBTI+ — conforme explicitam os Princípios de Yogyakarta.

É comum, nos tratados de direitos humanos, cláusulas de abertura que explicitam o caráter exemplificativo (e não taxativo) dos tipos de discriminação proibidos pela legislação internacional. Essas cláusulas aparecem, normalmente, em dispositivos antidiscriminatórios que repudiam qualquer discriminação por raça, cor, sexo etc., indicando, ao final, a abertura a outras formas de discriminação não enumeradas com expressões como "ou qualquer condição" e "ou qualquer razão". Dentre os dois exemplos já mencionados: na Declaração Universal de Direitos Humanos de 1948, em seu artigo 2, temos que

> todo ser humano tem capacidade para gozar os direitos e as liberdades estabelecidos nesta Declaração, sem distinção de qualquer espécie, seja de raça, cor, sexo, língua, religião, opinião política ou de outra natureza, origem nacional ou social, riqueza, nascimento, *ou qualquer outra condição*.[31]

E, no Pacto Internacional dos Direitos Civis e Políticos de 1966, em seu artigo 2:

> os Estados Partes do presente pacto comprometem-se a respeitar e garantir a todos os indivíduos que se achem em seu território e que estejam sujeitos a sua jurisdição os direitos reconhecidos no presente Pacto, sem discriminação alguma por motivo de raça, cor, sexo. língua, religião, opinião política ou de outra natureza, origem nacional ou social, situação econômica, nascimento *ou qualquer condição*.[32]

Ademais, é comum em tratados internacionais de direitos humanos dispositivos antidiscriminatórios gerais

yakarta: princípios sobre a aplicação da legislação internacional de direitos humanos em relação à orientação sexual e identidade de gênero. 2006.

[27] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios de Yogyakarta*: princípios sobre a aplicação da legislação internacional de direitos humanos em relação à orientação sexual e identidade de gênero. 2006.

[28] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios de Yogyakarta*: princípios sobre a aplicação da legislação internacional de direitos humanos em relação à orientação sexual e identidade de gênero. 2006.

[29] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios de Yogyakarta*: princípios sobre a aplicação da legislação internacional de direitos humanos em relação à orientação sexual e identidade de gênero. 2006.

[30] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios de Yogyakarta*: princípios sobre a aplicação da legislação internacional de direitos humanos em relação à orientação sexual e identidade de gênero. 2006.

[31] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Declaração Universal dos Direitos Humanos*. Assembleia Geral das Nações Unidas, 10 dez. 1948.

[32] BRASIL. *Decreto nº 592, de 6 de julho de 1992*. Atos Internacionais. Pacto Internacional sobre Direitos Civis e Políticos. Promulgação. Disponível em: https://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm.

NICOLI, Pedro Augusto Gravatá; RAMOS, Marcelo Maciel; LIMA, Henrique Figueiredo de. O Direito Internacional do Trabalho fora do "armário": a proteção global de trabalhadoras e trabalhadores LGBTI+. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 215-231, 2025.

como "todos têm direito a proteção igual contra *qualquer discriminação*"[33].

A não discriminação, ou antidiscriminação, constitui, portanto, um direito humano básico. Portanto, sua experiência cotidiana incluirá também as relações de trabalho. Inclusive, na década 2000, a Organização das Nações Unidas elaborou Dez Princípios Universais de Direitos Humanos, Trabalho, Meio Ambiente e Anticorrupção, que devem ser seguidos pelas empresas aderentes para superar os desafios contemporâneos da sociedade. Dentre os princípios, destacam-se: "01 – As empresas devem apoiar e respeitar a proteção de direitos humanos reconhecidos internacionalmente. 02 – Assegurar-se de sua não participação em violação destes direitos [...] 06 – Eliminar a discriminação no emprego"[34].

Apesar da ausência de força normativa, o Pacto Global demonstra que a Organização das Nações Unidas reconhece que a discriminação, inclusive no trabalho é um problema relevante nas sociedades contemporâneas, que deve ser combatido. Em 2015, a ONU expandiu os princípios em Objetivos de Desenvolvimento Sustentável, e a não discriminação pode ser observada, expressamente, no objetivo 5, igualdade de gênero, e, no objetivo 10, redução das desigualdades.

Essa "agenda da boa governança"[35], derivada da iniciativa da Organização das Nações Unidas, em 2005 — que estabeleceu os princípios para o atingimento de um nível global de investimento sustentável cunhou os padrões políticos e econômicos conhecidos como ASG – Ambiental, Social e Governança, ou ESG – *Environmental, Social and Governance*[36] — insere a diversidade no trabalho como uma das metas que devem ser observadas pelas empresas, na dimensão social. As políticas de diversidade e inclusão, direcionadas a grupos vulnerabilizados subrepresentados, são interpretadas como fontes de normas antidiscriminatórias[37], que se originam nas iniciativas da própria ONU.

A respeito da Organização Internacional do Trabalho, abre-se nossa segunda matriz de levantamentos: a de um direito antidiscriminatório geral na regulação global do trabalho. Observa-se, nesse sentido, a existência de normas gerais e programáticas, que orientam, em certa medida, a proteção de trabalhadoras e trabalhadores contra distintas formas de discriminação no trabalho e no emprego. Como exemplo, podemos citar a Declaração Referente aos Fins e Objetivos da Organização Internacional do Trabalho[38], a Declaração da OIT sobre os Princípios e Direitos Fundamentais no Trabalho e seu Seguimento[39], e a Declaração Tripartite de Princípios sobre Empresas Multinacionais e Política Social[40],

[33] GALIL, Gabriel Coutinho. *Fora do armário, além das fronteiras*: a proibição da discriminação com base na orientação sexual e identidade de gênero no sistema global de direitos humanos. Rio de Janeiro: Lumen Juris, 2020. p. 65.

[34] Dados obtidos no endereço eletrônico: https://www.pactoglobal.org.br/sobre-nos/.

[35] AMPARO, Thiago de Souza; ANDRADE, Odara Gonzaga de; PEREIRA, Fernanda Reis Nunes. Capitalismo antidiscriminatório? Bolsa de Valores e governança de diversidade. *Revista Direito e Práxis*, Rio de Janeiro, v. 14, n. 3, p. 1904-1933, set. 2023.

[36] IRIGARAY, Hélio Arthur Reis; STOCKER, Fabricio. ESG: novo conceito para velhos problemas. *Cadernos EBAPE.BR*, Rio de Janeiro, v. 20, n. 4, jul./ago. 2022.

[37] DOBIN, Frank; KALEV, Alexandra. The origins and effects of corporate diversity programs. *In*: ROBERSON, Quinetta M. (org.). *The Oxford handbook of diversity and work*. New York: Oxford University Press, 2013. p. 253-281.

[38] ORGANIZAÇÃO INTERNACIONAL DO TRABALHO. *Declaração Referente aos Fins e Objetivos da Organização Internacional do Trabalho*. 1944. Conhecida como Declaração de Filadélfia, o como objetivo para a justiça social que "todos os seres humanos de qualquer raça, crença ou sexo, têm o direito de assegurar o bem-estar material e o desenvolvimento espiritual dentro da liberdade e da dignidade, da tranquilidade econômica e com as mesmas possibilidades", e institui que "a realização de condições que permitam o exercício de tal direito deve constituir o principal objetivo de qualquer política nacional ou internacional", em seguida, a mesma declaração atribui para si a obrigação de auxiliar as "Nações do Mundo" na execução de programas para "assegurar as mesmas oportunidades para todos em matéria educativa e profissional".

[39] ORGANIZAÇÃO INTERNACIONAL DO TRABALHO. *Declaração da OIT sobre os Princípios e Direitos Fundamentais no Trabalho e Seu Seguimento*. 1998. Datada de 1998, referida declaração reafirma o objetivo da OIT com a igualdade de oportunidades, relembra o compromisso de todos os Estados Membros com "a eliminação da discriminação em matéria de emprego e ocupação", obrigação que deriva do mero pertencimento à Organização.

[40] ORGANIZAÇÃO INTERNACIONAL DO TRABALHO. *Declaração Tripartite de Princípios sobre Empresas Multinacionais e Política Social*. 2000. O documento prevê da seguinte forma: "21. Todos os governos deveriam adotar políticas com vistas à promoção da igualdade de oportunidades e de tratamento no emprego, para eliminar toda discriminação por motivo de raça, cor, sexo, religião, opiniões políticas, origem nacional ou social. 22. As empresas multinacionais deveriam orientar-se por esse princípio em todas as suas operações, sem prejuízo das medidas previstas no parágrafo 18, e da política seguida pelos governos para corrigir situações históricas de discriminação e, nessa base, as ditas empresas deveriam estender a igualdade de oportunidades e de tratamento no emprego. Assim sendo, as empresas multinacionais deveriam fazer o necessário para que as qualificações profissionais e experiência sejam a base para contratação, colocação, formação profissional e promoção de seu pessoal em todos os níveis. 23. Os governos nunca deveriam pretender nem incentivar que empresas multinacionais discriminem com base em algum dos motivos mencionados no parágrafo 21; seria aconselhável

que delineiam princípios e compromissos gerais para a promoção da igualdade, e proíbem a adoção de condutas discriminatórias por parte dos empregadores.

Na década de 1950, a OIT editou duas convenções apontadas como marcos normativos em relação à proteção contra a discriminação no ambiente de trabalho. Trata-se das Convenções n. 100 e 111. A Convenção n. 100 sedimenta o Princípio de Igualdade de Remuneração por Trabalho de Igual Valor, ao estabelecer que homens e mulheres não poderão receber salários distintos por igual trabalho. Por sua vez, a Convenção n. 111 instaura o Princípio da Não Discriminação em matéria de emprego e profissão, ao definir discriminação como

> toda distinção, exclusão ou preferência fundada na raça, cor, sexo, religião, opinião política, ascendência nacional ou origem social, que tenha por efeito destruir ou alterar a igualdade de oportunidades ou de tratamento em matéria de emprego ou profissão" e ainda "qualquer outra distinção, exclusão ou preferência que tenha por efeito destruir ou alterar a igualdade de oportunidades ou tratamento em matéria de emprego ou profissão.[41]

Ou seja, tanto a Convenção n. 100, quanto a Convenção n. 111 compõem o repertório das convenções ditas fundamentais da Organização Internacional do Trabalho. Além desse contexto, destaca-se a Convenção n. 158, que reconhece que "a raça, a cor, o sexo, o estado civil, as responsabilidades familiares, a gravidez, a religião, as opiniões políticas, a ascendência nacional ou a origem social"[42] jamais poderão constituir justo motivo para a rescisão de um contrato de trabalho. No campo da antidiscriminação, observamos ainda a Convenção n. 183, para a proteção da maternidade e as Recomendações n. 165 e 191, que, respectivamente, orientam que os Estados Membros protejam trabalhadoras e trabalhadores com responsabilidades familiares e a maternidade.

Assim, a partir da análise dos panoramas gerais, observa-se a consolidação de duas matrizes de proteção paralelas. Uma, das pessoas LGBTI+ em suas existências, em relação à explicitação da aplicabilidade da normativa de direitos humanos a essas pessoas, a partir do Princípio da Igualdade. A segunda, da vedação de práticas discriminatórias nas relações de trabalho, como desdobramento do mesmo Princípio da Igualdade. Os pontos de interconexão, contudo, que evidenciem a relação intrínseca entre as dissidências de gênero e sexualidade e o trabalho, postulando uma igualdade no trabalho e vedação da discriminação para pessoas LGBTI+, ainda estão em processo de primeiras manifestações.

3 A expressão da proteção trabalhista de pessoas LGBTI+ em políticas, experiências e normas internacionais

Ao longo dos últimos anos, a Organização Internacional do Trabalho passou a dedicar maior atenção sobre temas de interesse de trabalhadoras LGBTI+, produzindo estudos, análises, documentos orientadores e informação explícita sobre a aplicação não discriminatória de suas regras a essas pessoas. Trata-se de um movimento muito significativo na direção de preencher a lacuna protetiva discutida neste artigo. Isso porque a Organização firma e explicita em seus documentos operativos um compromisso com a diversidade e decanta um caminho interpretativo de suas normas na direção de uma aplicabilidade plena às trabalhadoras e trabalhadores LGBTI+.

A mais recente dessas iniciativas é datada de 2023, intitulada "alcançando igualdade de gênero no trabalho"[43]. No documento em questão, a OIT[44] traça um breve panorama sobre as legislações de Estados Membros que trazem proteções específicas contra a discriminação por questões de orientação sexual e/ou identidade de gênero e aponta que há uma tendência na inclusão das expressões "orientação sexual" e "identidade de gênero" nos diplomas legais que versam sobre discriminação.

uma orientação permanente dos governos, em determinados casos, para evitar a discriminação no emprego"

[41] BRASIL. *Decreto n.º 10.088, de 5 de novembro de 2019*. Consolida atos normativos editados pelo Poder Executivo Federal que dispõem sobre a promulgação de convenções e recomendações da Organização Internacional do Trabalho - OIT ratificadas pela República Federativa do Brasil. Disponível em: https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/d10088.htm.

[42] BRASIL. *Decreto n.º 10.088, de 5 de novembro de 2019*. Consolida atos normativos editados pelo Poder Executivo Federal que dispõem sobre a promulgação de convenções e recomendações da Organização Internacional do Trabalho - OIT ratificadas pela República Federativa do Brasil. Disponível em: https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/d10088.htm.

[43] Tradução livre do título em inglês, "Achieving gender equality at work".

[44] O documento pode ser acessado no endereço eletrônico: https://www.ilo.org/resource/conference-paper/ilc/111/achieving-gender-equality-work.

Por outro lado, a OIT indica que determinados países, e, inclusive, organismos internacionais, interpretam que discriminações por "motivos de sexo", "contra outro grupo social", ou "qualquer outra forma de discriminação" abrangeriam as discriminações motivadas por orientação sexual e/ou identidade de gênero.

No ano de 2012, a Organização Internacional do Trabalho deu início ao projeto "*Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work (PRIDE)"*, com o apoio do governo da Noruega[45]. Trata-se de um programa que busca realizar pesquisas sobre discriminações contra pessoas LGBTI+ ao redor do mundo, com o objetivo de identificar os principais desafios vivenciados pela comunidade e indicar boas práticas que possam promover a inclusão. De acordo com a própria Organização, o projeto se alicerça nos quatros pilares da OIT, vinculados à agenda do trabalho decente, sendo eles "princípios fundamentais e direitos no trabalho, promoção do emprego, proteção social e diálogo social"[46], com a inclusão de um quinto pilar dedicado a compreender os principais desafios relacionados com a interrelação entre HIV/AIDS e problemas relativos às pessoas LGBTI+ no mundo do trabalho.

A primeira fase do projeto teve início na Argentina, Hungria e Tailândia. Em seguida, o projeto se debruçou sobre as questões existentes em Costa Rica, França, Índia, Indonésia, Montenegro e África do Sul. No primeiro relatório, a OIT concluiu que, apesar de existir um progresso na edição de leis protetivas para pessoas LGBTI+, elas permanecem a sofrer consideráveis discriminações e assédios. Na perspectiva da organização, os desafios são menores nos países em que possuem legislações antidiscriminatórias específicas, e o Diretor da Organização declarou que a OIT estaria comprometida com a causa LGBTI+, já que

> o trabalho decente apenas pode existir em condições de liberdade e dignidade. Isso significa abraçar inclusão e diversidade, e requer que nós nos levantemos contra todas as formas de estigma e discriminação... e para o papel insidioso da homofobia e da transfobia na promoção da discriminação"[47].

Esse mesmo projeto foi inaugurado no Brasil, no ano de 2022, com o título "PRIDE: Promovendo Direitos, Diversidade e Igualdade no mundo do trabalho", sendo desenhado em parceria com o Instituto +Diversidade, a Central Única dos Trabalhadores e das Trabalhadores e a Casa Neon Cunha. No cenário brasileiro, o objetivo principal do programa é desenvolver capacidades profissionais e habilidades socioemocionais de pessoas LGBTI+, com foco principal para as pessoas trans, tendo sido arquitetado, ainda, para permitir o desenho de políticas antidiscriminatórias e promoção do trabalho decente[48].

Segundo a Organização Internacional do Trabalho, o projeto PRIDE, no Brasil, se estrutura em três eixos. O primeiro busca reunir experiências bem-sucedidas de programas de qualificação profissional para desenvolver as aptidões profissionais e compreender as necessidades no aprendizado de pessoas LGBTI+, com foco principal em empregabilidade nos setores de hospitalidade e cozinha, em virtude da existência de parceria anterior com o Ministério Público do Trabalho, o projeto Cozinha&Voz, criado para qualificar pessoas em situação de vulnerabilidade para a realização de trabalhos na área culinária. O segundo eixo contempla a capacidade do governo, das organizações de empregadores e trabalhadores, das organizações LGBTI+ e da sociedade para alcançar os objetivos nacionais para a promoção do trabalho decente para pessoas LGBTI+. Por fim, o terceiro eixo se concretiza na elaboração de modelos e estratégias que possam ser adotados em outros países[49].

Apesar de ser a ação de maior visibilidade, atualmente, a OIT possui outros programas no Brasil, como o Observatório da Diversidade e da Igualdade de Oportunidades no Trabalho e o Diversidade Aprendiz. O Observatório, fruto de parceria com o Ministério Público do Trabalho, em 2019, constitui um banco de dados e informações para qualificar os debates nas tomadas de decisões sobre políticas públicas no Brasil, conjugando

[45] As informações sobre o projeto, analisadas neste artigo, podem ser consultadas no endereço eletrônico: https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@gender/documents/briefingnote/wcms_368962.pdf.

[46] Tradução livre do original "fundamental principles and rights at work, employment promotion, social protection, and social dialogue".

[47] Tradução livre de "Decent work can Only exist in condition of freedom and dignitiy. It means embracing inclusion and diversity. It requires us to stand up against all forms of stigma and discrimination… and to the insidious role of homophobia and transphobia in fostering discrimination".

[48] As informações podem ser consultadas no endereço eletrônico: https://www.ilo.org/pt-pt/resource/news/nova-iniciativa-da-oit-vai-desenvolver-habilidades-profissionais-e-promover.

[49] As informações podem ser consultadas no endereço eletrônico: https://www.ilo.org/pt-pt/resource/news/nova-iniciativa-da-oit-vai-desenvolver-habilidades-profissionais-e-promover.

diversos dados sobre os diferentes grupos sociais vulnerabilizados, inclusive a população LGBTI+[50].

Já o programa "Diversidade Aprendiz: aprendizados para um futuro inclusivo", realizado em parceria com o Ministério Público do Trabalho e a Somos Diversidade, em 2021, é mais abrangente[51], construído para

> identificar dificuldades, barreiras de entrada, oportunidades e demandas necessárias para a promoção da plural diversidade e inclusão nos processos seletivos de contratações e nas políticas internas de permanência e ascensão no local de trabalho[52].

Além disso, a organização promove seminários, congressos e eventos para o debate de questões afetas às pessoas LGBTI+ e o mundo do trabalho.

De todas essas iniciativas, crescentes em número e abrangência, percebe-se que o Direito Internacional do Trabalho vem produzindo compreensões com base em políticas e programas que explicitam e indicam caminhos de aplicação das suas normas para pessoas LGBTI+. Do ponto de vista normativo, contudo, o cenário se mantém o mesmo, de instrumentos gerais de enunciação dessa proteção, sem referência expressa às pessoas LGBTI+. Da mesma forma, não há, nos mecanismos de controle de aplicação das normas, nada propriamente consolidado na OIT a respeito da exigibilidade dessas garantias e do sancionamento internacional de violações.

4 Por que é importante proteger, globalmente, trabalhadoras e trabalhadores LGBTI+?

A afirmação da proteção global de trabalhadoras e trabalhadores LGBTI+, numa explicitação definitiva da relação entre o Direito Internacional do Trabalho e a diversidade sexual e de gênero, ainda não está totalmente sedimentada. No Direito Internacional, há um cenário de um crescimento de normas gerais de proteção de pessoas LGBTI+, de um lado, e de normas gerais antidiscriminatórias no trabalho, de outro, além de algumas ações, programas e políticas relevantes que juntam especificamente esses dois universos. Mas ainda resta uma lacuna bastante expressiva, de afirmação de trabalhadoras e trabalhadores LGBTI+ como sujeitos plenamente protegidos pelo Direito Internacional do Trabalho.

Um caso muito recente na OIT revela como a questão pode ativar posições recrudescidas e revelar a força desse debate também para o Direito Internacional do Trabalho. No relato da agência de notícias Reuters[53], um impasse firmou-se na Conferência Internacional do Trabalho, em junho de 2023, pela utilização das expressões "orientação sexual" e "identidade de gênero" no Programa e Orçamento da OIT para o biênio 2024-2025. De acordo com a Reuters, um grupo de

> 50 países africanos e árabes pretendem rejeitar a formulação sobre sexualidade e gênero, dizendo que ela usa 'linguagem não universalmente acordada'. O Paquistão, falando pela Organização de Cooperação Islâmica, expressou preocupação de que tal referência teria um 'impacto normativo enganoso' e criaria conflitos legais[54].

A questão, aparentemente, teve seus desenvolvimentos políticos internos e, na votação, o programa e orçamento foram finalmente aprovados. A fala do Diretor-Geral da OIT, transcrita na abertura do documento aprovado, indica a dimensão da controvérsia, a aparente tensão estabelecida e os compromissos finais da instituição:

> Primeiro, a luta contra a discriminação. Fiquei muito impressionado que, apesar da diversidade de opiniões, todos os constituintes em suas intervenções reafirmaram seu compromisso com o princípio da não-discriminação por qualquer motivo. Isto é sobre justiça social, isto é, sobre lutar contra as desigualdades, isto é, sobre princípios, isto é, sobre a razão de ser da nossa Organização. Isto é sobre o que a OIT representa. Lutar contra a discriminação tem sido e continuará sendo essencial e central para as ações da OIT. E o programa de trabalho do Escritório da Organização Internacional do Traba-

[50] Informação obtida nos endereços eletrônicos: https://www.ilo.org/pt-pt/resource/news/oit-e-mpt-lancam-o-observatorio-da-diversidade-e-da-igualdade-de. e https://smartlabbr.org/diversidade/localidade/0?dimensao=lgbt.

[51] De acordo com a OIT, que pode ser confirmada nas fontes acima indicadas, "o foco do projeto será a inserção de pessoas que tradicionalmente enfrentam exclusão e preconceitos diversos no mundo do trabalho: pessoas com deficiência, imigrantes, refugiados, negros e negras, LGBTI (especialmente pessoas transexuais), pessoas com mais de 50 anos e em situação de cerceamento de liberdade".

[52] Informação obtida no endereço eletrônico: https://brasil.un.org/pt-br/115633-oit-e-parceiros-lan%C3%A7am-mapeamento-in%C3%A9dito-sobre-diversidade-e-inclus%C3%A3o-no-mundo-do-trabalho.

[53] Dado obtido no endereço eletrônico: https://www.reuters.com/article/world/us/discord-over-lgbtq-protections-emerges-at-un-labour-body-sources-idUSL8N37Y49W/.

[54] Dado obtido no endereço eletrônico: https://www.reuters.com/article/world/us/discord-over-lgbtq-protections-emerges-at-un-labour-body-sources-idUSL8N37Y49W/.

lho, que tenho o privilégio de liderar, continuará a abranger todos os grupos que estão sujeitos a qualquer forma de discriminação, inclusive com base na orientação sexual e identidade de gênero[55].

Ou seja, a importância do debate sobre a relação entre Direito Internacional do Trabalho e trabalhadoras e trabalhadores LGBTI+ é bastante evidente, em várias perspectivas. Portanto, avançar nessa pauta é um movimento que congrega uma análise desdobrada em três tempos: passado, presente e futuro.

O passado do Direito Internacional do Trabalho é o que garante a solidez de suas afirmações, acumuladas na experiência histórica e nas disputas de força no mundo do trabalho. Nesse sentido, as normas internacionais representam uma certa síntese cumulativa, de afirmação da justiça social para todas e todos. Práticas desumanas no trabalho se proíbem, garantias individuais e coletivas se enunciam. Umas de modo mais explícito e precoce, outras atravessadas pelos estigmas e subalternidade, de modo mais tardio, como é o caso da proteção das trabalhadoras domésticas. Revelando a politicidade e historicidade do campo, mas sempre nesse horizonte de uma acumulação afirmativa, que vem, ao longo do último século, repudiando retrocessos, num processo de nomeação do que constitui o mínimo inegociável para as relações de trabalho.

As pessoas LGBTI+, contudo, estão ainda envoltas em um certo silêncio do Direito Internacional do Trabalho. Ou, nas entrelinhas de suas proteções gerais, traduzidas em políticas e ações localizadas. O que mantém essas pessoas em lugar jurídico que conhecem historicamente. De ocultação. É certo que se podem reclamar as dissidências sexuais e de gênero como plenamente contempladas pela expressão "qualquer outra distinção, exclusão ou preferência que tenha por efeito anular ou reduzir a igualdade de oportunidade ou tratamento no emprego ou profissão", ao lado das explícitas "raça, cor, sexo, religião, opinião política, nacionalidade ou origem social", nos termos da Convenção n. 111 da OIT. Ou seja, numa interpretação sistemática das normas da OIT, a discriminação LGBTfóbica já é sim repudiada. No entanto, ainda há espaço para avanços normativos e conceituais nessa arena, na direção de um esconjuro do silêncio.

Qual sentido tem se afirmar, explicitamente, essa proteção hoje no Direito Internacional do Trabalho? Nesse contexto, a dimensão presente, no segundo tempo da importância do debate, se coloca. Afirmar aspectos muito elementares ainda é uma questão que a perspectiva dos direitos LGBTI+ toma como pauta central. Talvez, hoje, mais do que nunca. Isso porque as afirmações mais básicas em termos de expressão das identidades de gênero e sexualidade são sempre acompanhadas de controvérsia, demonstrando que a norma jurídica não é o domínio de uma evolução progressiva e linear no sentido da proteção. Ela, para pessoas LGBTI+, constitui um campo de batalha.

De um modo geral, o processo de elaboração, assinatura e ratificação de tratados internacionais contempla um processo dificultoso, sobretudo em relação às matérias de gênero e sexualidade[56]. Na jurisprudência internacional, há uma tendência a reconhecer que as matérias relativas às pessoas de gêneros e sexualidades dissidentes, quando afetas à identidade de gênero, tendem a ser analisada à luz do "direito à vida privada", o que corrobora um ocultamento de pessoas LGBTI+[57].

Destarte, afirmar definitivamente trabalhadoras e trabalhadores LGBTI+ como sujeitos, direta e indisputavelmente, protegidos pelo Direito Internacional do Trabalho, por mais elementar que possa parecer em face das normas existentes, é uma formulação que, ainda, nos parece necessária. Faz parte de um processo de nomeação que projeta uma série de efeitos internacionais e internos, que atravessam, ainda, transversalmente, o debate sobre os direitos LGBTI+ em seu sentido mais amplo.

Uma série de inflexões jurídicas importantes se articulam a partir disso. Por exemplo, a exigibilidade dessas garantias explícitas em face de ordens jurídicas nacionais refratárias, ou de processos sociopolíticos de retrocessos. Essa dimensão da exigibilidade abre diálogo com a reflexão contemporânea do caráter de direitos fundamentais dos direitos LGBTI+[58] e com sua exigi-

[55] Dado obtido no endereço eletrônico: https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_mas/@program/documents/genericdocument/wcms_905532.pdf.

[56] FERREIRA, Gustavo Bussmann. A proteção da orientação sexual e identidade de gênero diversas na corte penal internacional: entre realpolitiks e os direitos humanos. *Revista de Direito Internacional*, Brasília, v. 14, n. 2, p. 312-329, 2017.

[57] GALIL, Gabriel Coutinho. A proteção da identidade de gênero na jurisprudência da Corte Europeia de Direitos Humanos. *Revista de Direito Internacional*, Brasília, v. 16, n. 2, p. 269-290, 2019.

[58] HOLZHACKER, Ronald. Gay rights are human rights: the framing of new interpretations of international human rights norms. *In*: ANDREOPOULOS, G.; ARAT, Z. F. K. (org.). *The uses and misuses*

bilidade geral e justiciabilidade[59]. Não se distancia, portanto, das tendências contemporâneas de integração de normas nos seus contextos mais amplos e nos sentidos principiológicos das normas de hierarquia superior. A teorização sobre o bloco de constitucionalidade[60], o controle de convencionalidade[61] e a força normativa de instrumentos formalmente não cogentes no direito internacional dos direitos humanos, tanto de maneira geral[62] quanto a respeito da temática da não discriminação[63], compõe o contexto dessa proposição.

Além dos efeitos imediatos dessa exigibilidade do conjunto normativo de proteção às pessoas LGBTI+ em face da discriminação, apresenta-se uma dimensão projetada no tempo que ganha, no cenário atual, uma importância ainda mais evidente. O da vedação do retrocesso em matéria de normas trabalhistas, que sinaliza para um tempo futuro de importância. Firma-se, nesse sentido, um efeito expansivo desse corpo de normas, inibitório de iniciativas políticas e legislativas que pretendam romper com a lógica subjacente da antidiscriminação. O horizonte é o da progressividade social e vedação ao retrocesso em matéria de direitos humanos, afirmados como princípios de força normativa, em seus sentidos mais gerais[64]. Não que essas práticas discriminatórias deixarão de aparecer na vida cotidiana e na arena político-jurídica. Contemporaneamente, aliás, o cenário é de proliferação de projetos de lei anti-LGBTI+, abertamente discriminatórios[65]. Mas qualquer resultado com pretensões legislativas nacionais que eventualmente advenha desses movimentos deverá ser avaliado diante desse quadro estabelecido. E, a não ser que se rompa com os fundamentos do Estado Democrático de Direito, deverão ser juridicamente rechaçados por representarem discriminação que se traduz em retrocesso inadmissível.

O Direito Internacional do Trabalho estende para as trabalhadoras e trabalhadores LGBTI+ uma dimensão típica de suas normas. Que funcionam como um catalisador jurídico nos planos internos, indicando a progressividade da proteção social e do trabalho como o único caminho possível. Em quadros de disputa em legislativos nacionais, o esforço da proteção de minorias ganha dimensão jurídica reforçada, com base na atuação contrahegemônica e comprometida de organismos internacionais e parecem compartilhar perspectivas de avanços tanto o Direito Internacional do Trabalho quanto os direitos LGBTI+ de maneira geral, no sentido de reafirmar seus compromissos em face das fortes pressões disruptivas de direitos do presente.

5 Considerações finais

As pessoas LGBTI+ são protegidas pelo Direito Internacional do Trabalho atualmente. A partir dos levantamentos normativos, de experiências internacionais e de políticas realizadas neste artigo, a conclusão, diante das perguntas que lançamos ao início deste artigo, não poderia ser outra. Tal proteção se articula com o desenvolvimento de normas que protegem, de um lado, as pessoas LGBTI+ em suas existências e, de outro, normas antidiscriminatórias gerais no Direito Internacional do Trabalho, entendidas como fundamentais e amplamente exigíveis. Uma leitura sistemática e inter-

of human rights. New York: Palgrave Macmillan, 2014. p. 29-64.

[59] ABRAMOVICH, Victor; COURTIS, Christian. *Los derechos sociales como derechos exigibles*. Madrid: Trotta, 2004.; LINS, Liana Cirne. A justiciabilidade dos direitos fundamentais sociais: uma avaliação crítica do tripé denegatório de sua exigibilidade e da concretização constitucional seletiva. *Revista de Informação Legislativa*, Brasília, n. 46, n. 182, p. 51-74, abr./jun. 2009.

[60] NORMANTON, Ana Catharina Machado. *Bloco de constitucionalidade*: a estatura das normas de direitos humanos e seus efeitos no direito brasileiro. 2021. Dissertação (Mestrado) – Universidade de São Paulo, São Paulo, 2021.

[61] LOPES, Ana Maria D'ávila; CHEHAB, Isabelle Maria Campos Vasconcelos. Bloco de constitucionalidade e controle de convencionalidade: reforçando a proteção dos direitos humanos no Brasil. *Revista Brasileira de Direito*, v. 12, n. 2, p. 82-94, jul./dez. 2016.

[62] CHARLESWORTH, Hilary; CHINKIN, Christine. The gender of jus cogens. *Human Rights Quarterly*, v. 15, p. 63-76, 1993.

[63] PALACIOS ZULOAGA, Patricia. *La no discriminación*: estudio de la jurisprudência del comité de derechos humanos sobre la cláusula autónoma de no discriminación. Santiago: LOM Ediciones, 2006.; BROWN, David. Making room for sexual orientation and gender identity in international human rights law: an introduction to the Yogyakarta Principles. *Michigan International Law Journal*, v. 31, n. 4, p. 821-879, 2010.; BRAGA, André Marinho Marianetti; MORAES, José Luiz Souza de. Direito das minorias: proteção internacional das minorias e o caso Christine Goodwin v. UK. *Revista da Faculdde de Direito da Universidade de Sâo Paulo*, v. 113, p. 669-683, jan./dez. 2018.

[64] QUEIROZ, Cristina. *O princípio da não reversibilidade dos direitos fundamentais sociais*. Coimbra: Coimbra Editora, 2006.; REIS, Daniela Muradas. *O princípio da vedação do retrocesso no direito do trabalho*. São Paulo: LTr, 2010.; PIMENTEL, Mariana B. Backlash às decisões do Supremo Tribunal Federal sobre união homoafetiva. *Revista de Informação Legislativa*, v. 54, n. 214, p. 189-202, abr./jun. 2017.

[65] AVELAR, Dani. Brasil tem um novo projeto de lei antitrans por dia. *Folha de São Paulo*, 23 mar. 2023. Disponível em: https://www1.folha.uol.com.br/poder/2023/03/brasil-tem-um-novo-projeto-de-lei-antitrans-por-dia-e-efeito-nikolas-preocupa.shtml. Acesso em: 24 mar. 2023.

NICOLI, Pedro Augusto Gravatá; RAMOS, Marcelo Maciel; LIMA, Henrique Figueiredo de. O Direito Internacional do Trabalho fora do "armário": a proteção global de trabalhadoras e trabalhadores LGBTI+. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 215-231, 2025.

dependente dessas formulações já nos insere de modo bastante sólido nessa direção. O que se confirma no número crescente de programas, políticas e experiências no horizonte de operação do Direito Internacional do Trabalho. A discriminação LGBTfóbica no trabalho, portanto, é vedada internacionalmente, por normas da mais alta fundamentalidade para esse campo da regulação.

A despeito de se formular com solidez e segurança esta conclusão, o Direito Internacional do Trabalho, ainda, não enunciou, de modo explícito e normativo, essa condição protetiva. Ele a opera a partir da interpretação — muito adequada — das discriminações inadmissíveis nas relações de trabalho. Sem que haja uma expressa menção à identidade de gênero e orientação sexual como fonte potencial dessa discriminação nas normas que, por exemplo, produziu, ao longo das décadas, a OIT. O trabalhador e a trabalhadora LGBTI+, portanto, não vigoram como sujeitos nessas normas. Estão, de certa maneira, nas entrelinhas, ainda que cada vez mais evidentes em programas e ações.

É como se ainda houvesse um "armário" jurídico nessa escala. Com uma porta entreaberta. Que, assim, está pelos processos históricos de luta por direitos de pessoas LGBTI+, fazendo avançar muito os debates sobre a discriminação, violência e a necessidade de proteção. Mas sem uma resposta institucional definitiva no Direito Internacional do Trabalho, com a formulação plena, explícita, aberta, inequívoca, dessa diretiva de proteção, que se colocasse como marco induvidoso para o debate global. É como se a normativa trabalhista internacional e os programas e políticas de diversidade associados a esse campo, progressivamente, se comprometessem com a questão. Mas ainda com um certo filtro, diante de temas normativos potencialmente "polêmicos". E, ainda que isso represente avanços significativos para o debate dos direitos LGBTI+, esse "não" lugar pode dar margem a refluxos e ambiguidades posicionais, num reforço de incertezas que, tradicionalmente, se associa à esfera dos direitos de minorias de gênero e sexualidade.

Dá-se, neste artigo, espaço para algo parecido com um texto curioso, publicado ao término dos anos 1990, num volume sobre novidades da época no Direito do Trabalho brasileiro. Um dos capítulos, escrito por Martha Halfeld Schmidt[66] considera a questão da proibição da discriminação por motivo de orientação sexual nas relações de trabalho no Brasil. E sustenta, a partir de textos normativos como a própria Convenção n. 111 da OIT, que, em hipótese alguma, seria razoável a discriminação de um homossexual no trabalho, que deve ser sempre respeitado em sua dignidade. Para, em seguida, pontuar algo insólito. A despeito dessa proteção derivada das normas gerais de igualdade, a autora compreende que a proteção jurídica pode dar origem a uma "reação de antipatia". Por isso "os homossexuais devem agir naturalmente, com discreção [sic], de modo a não atrair nem agravar a discriminação hoje sentida. Não devem eles fazer alarde, nem agredir a sociedade"[67].

É esse o risco de formulações protetivas feitas à metade, de modo indireto ou oblíquo. Pode-se admitir a existência da proteção. Mas não de modo explícito demais. Sem "chocar". Enquanto o Direito Internacional do Trabalho não sair definitivamente desse "armário", se colocando ao lado de trabalhadoras e trabalhadores LGBTI+, tomados como sujeitos plenos de direitos, ele poderá continuar cúmplice de violência e discriminação, ainda que de forma indireta. Para que tenhamos um Direito Internacional do Trabalho que, sim, definitivamente, proteja trabalhadoras e trabalhadores LGBTI+, é necessária uma posição pública, inequívoca, definitiva e normativa dessa sua posição.

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An old but gold challenge for international labour law: rethinking the personal scope of ILO standards

Um desafio antigo, mas valioso, para o direito internacional do trabalho: repensando o âmbito pessoal das normas da OIT

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An old but gold challenge for international labour law: rethinking the personal scope of ILO standards*

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Olívia de Quintana Figueiredo Pasqualeto**

Abstract

Who are the workers for the International Labour Organization (ILO)? Who do the ILO standards apply to? These are old questions, but to this day they still spark divergences in the literature on the personal scope of international labour law. Based on bibliographic and documentary research, this text aims to examine what is the personal scope effectively adopted by the ILO and analyze whether its expansion is necessary, reflecting on why we should consider the rationality of ILO Convention No. 190 as a starting point for such enlargement. The research showed that, despite the exceptions, the ILO standards are predominantly focused on the standard employment relationship. However, in a scenario of vertical disintegration and workplace fissuring, this becomes problematic, as it leaves many workers outside its protective umbrella. To face this old but gold challenge, I advocate expanding their personal scope inspired by the logic underlying Convention No. 190: express adoption of a broad personal scope, regardless of the contractual form; regulation of situations; and concern with current working conditions. Replicating this rationality in future standards can help international labour law deal with the organizational transformations in the world of work.

Keywords: personal scope; standard employment relationship; International Labour Organization; ILO Convention No. 190.

Resumo

Quem são as trabalhadoras e os trabalhadores para a Organização Internacional do Trabalho (OIT)? A quem se aplicam as normas da OIT? Essas são questões antigas, mas que, até os dias atuais, continuam a suscitar divergências na literatura acerca do alcance subjetivo do direito internacional do trabalho. Com base em pesquisa bibliográfica e documental, este texto tem como objetivo examinar qual é o âmbito pessoal efetivamente adotado pela OIT e analisar se a sua ampliação é necessária, refletindo sobre por que devemos considerar a racionalidade da Convenção nº 190 da OIT como ponto de partida para tal ampliação. A pesquisa revelou que, apesar das exceções, as

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normas da OIT concentram-se predominantemente na relação de emprego padrão. Contudo, em um cenário de desintegração vertical e de fragmentação dos locais de trabalho, tal enfoque se torna problemático, pois deixa muitas trabalhadoras e trabalhadores fora de seu guarda-chuva protetivo. Para enfrentar esse desafio antigo, porém valioso, defendo a ampliação do âmbito pessoal dessas normas, inspirando-me na lógica subjacente à Convenção nº 190: adoção expressa de um amplo escopo pessoal, independentemente da forma contratual; regulamentação de situações; e preocupação com as condições de trabalho atuais. Replicar essa racionalidade em futuras normas pode auxiliar o direito internacional do trabalho a lidar com as transformações organizacionais no mundo do trabalho.

Palavras-chave: alcance pessoal; relação de emprego padrão; Organização Internacional do Trabalho; Convenção nº 190 da OIT.

1 Introduction

In everyday language, the terms 'worker' (and 'work') and 'employee' (and 'employment') are often used as synonyms. However, they have – or may have – distinct legal connotations. Although there is no single definition, Davidov, Freedland and Kountouris[1] point out that most jurisdictions consider the terms employee/employment to be related to a specific type of work relationship: the standard employment relationship (SER).

SER is typically a full-time and year-round relationship for an indefinite duration (usually with a single employer) and responsible for being a springboard for entitlements, such as pensions and unemployment insurance[2]. Each jurisdiction defines who is an employee (or who is under a standard employment relationship) with more or less detail. Nevertheless, according to Davidov, Freedland and Kountouris[3], despite minor differences, there is a common characteristic across the laws of different countries: the SER is based on the employer's control over the employee, who does not act independently[4]. The SER reflects the subordination and dependence of the employee in relation to the employer. Therefore, employees are individuals who work under an employment relationship, while those engaged in other types of work relationships are considered workers. Thus, it can be stated that 'employee' and 'employment' represent a specific form of 'worker' and 'work'.

In this sense, non-standard forms of employment relationship (non-SER) or diverse forms of work refer to different work formats that deviate from standard employment, such as casual work and self-employment. According to the International Labour Organization (ILO)[5], they have been growing over the last few decades, spreading across the labour market in both developed and developing countries.

For Vosko[6], although we attribute the label of standard to the employment relationship, it has never been a reality for many workers. According to the author, this is a problem because the SER paradigm was the main pillar on which international labour standards (ILS) were built. For this reason, ILS were never truly universal, leaving other relationships outside the ILS framework and its protection system.

This concern about the marginalization of non-SER has a long story[7], but it has been revived with the current popularization of gig economy and the misclassification of platform workers[8]. It is a kind of old but gold

[1] DAVIDOV, Guy; FREEDLAND, Mark; KOUNTOURIS, Nicola. The subjects of labor law: 'employees' and other workers. *In*: FINKIN, M. W.; MUNDLAK, G. (ed.). *Comparative labor law*. Tallinn: Edward Elgar Publishing, 2015. p. 115-131.

[2] FUDGE, Judy. Precarious migrant status and precarious employment: the paradox of international rights for migrant workers. *Comp. Lab. L. & Pol'y J.*, v. 34, p. 95, 2012.

[3] DAVIDOV, Guy; FREEDLAND, Mark; KOUNTOURIS, Nicola. The subjects of labor law: 'employees' and other workers. *In*: FINKIN, M. W.; MUNDLAK, G. (ed.). *Comparative labor law*. Tallinn: Edward Elgar Publishing, 2015. p. 115-131.

[4] DAVIDOV, Guy; FREEDLAND, Mark; KOUNTOURIS, Nicola. The subjects of labor law: 'employees' and other workers. *In*: FINKIN, M. W.; MUNDLAK, G. (ed.). *Comparative labor law*. Tallinn: Edward Elgar Publishing, 2015. p. 115-131.

[5] ILO. *Non-standard employment around the world*: understanding challenges, shaping prospects. Geneva: International Labour Office, 2016.

[6] VOSKO, Leah F. *Managing the margins*: gender, citizenship, and the international regulation of precarious employment. Oxford: OUP, 2011.

[7] DAVIDOV, Guy; FREEDLAND, Mark; KOUNTOURIS, Nicola. The subjects of labor law: 'employees' and other workers. *In*: FINKIN, M. W.; MUNDLAK, G. (ed.). *Comparative labor law*. Tallinn: Edward Elgar Publishing, 2015. p. 115-131.

[8] STEFANO, Valerio De *et al.* Introduction to a research agenda for the gig economy and society. *In*: STEFANO, Valerio De *et al.* (org). *A research agenda for the gig economy and society*. [*S.l.*]: ElgarOnline, 2022. p. 1-12. Available at: https://www.elgaronline.com/edcollchap/book/9781800883512/book-part-9781800883512-8.xml. Access

challenge for international labour law, which remains unresolved and resurfaces from time to time: how to encompass different forms of work under its umbrella of social justice? For some more optimistic views, ILS would not be so far from involving non-SER. According to De Stefano[9], although some ILS apply exclusively to the employment relationship, there are ILS that apply to diverse forms of work.

Considering the friction between a more optimistic view of ILS scope and a view according to which standards are SER-centered, this study aims to examine what is the personal scope effectively adopted by the ILO and analyze whether its expansion is necessary, reflecting on why we should consider the rationality of ILO Convention No. 190 as a starting point to such enlargement. I therefore intend to identify if the ILO is reviewing the postulate on which its standards were created, expanding its normative beyond the employment relationship. This analysis of the personal scope focuses on the worker's pole. The central hypothesis is that although there are some exceptions, the personal scope is still quite restricted to the standard employment relationship (in other words, to employees).

The research methodology is based on bibliographic and documentary research. Regarding the documentary research, I used the content analysis technique supported by Atlas.ti software. Initially, I read all the Declarations, Conventions, Protocols and Recommendations published in the ILO Normlex database. The analysis was carried out in two stages. First, based on a more literal approach (grounded[10] in the data), I selected the standards that expressly mention the worker's definition and the personal scope, define to whom they apply or do not apply, considering the legal classification criteria[11] and excluding other criteria, such as age or nationality[12]. Standards that do not present definitions or do not determine their applicability were not considered[13]. Second, I categorized the standards considering the subjects covered by their scope and classified them into five categories: (i) express application only to employees; (ii) implied application only to employees; (iii) possibility or recommendation of expansion to non-employees; (iv) express application to non-employees; (v) application to any person, whether a worker or not. These categories are further detailed in item 3. Finally, comments[14] from supervisory bodies[15] on articles related to personal scope were mapped[16], seeking to assess whether supervisory bodies expand the ILS personal scope.

This paper presents the results of our investigation and is structured into three main parts: first, the article addresses the theoretical debate on the ILS personal scope; second, the text presents empirical evidence on the personal scope of ILO standards and supervisory bodies; third, I reflect on why we should take up the 'old but gold' challenge of rethinking the personal scope of ILO standards with ILO Convention 190 as a starting point. At the end, I present some final remarks.

2 The controversy over the ILS personal scope

The controversy over the ILS personal scope is not new. The fundamental question surrounding this "long story"[17] is: who are the workers covered by the ILO standards? This is a sub-question of an even broader one: who are the subjects of labour law? This is a critical question with major normative consequences, because it

on: 23 June 2024.

[9] STEFANO, Valerio De. Not as simple as it seems: the ILO and the personal scope of international labour standards. *International Labour Review*, v. 160, n. 3, p. 387-406, 2021.

[10] STRAUSS, A. L; CORBIN. *Grounded theory in practice*. London: Sage Publications, 1997.

[11] For example, ILO Convention No. 155 defines workers as "all employed persons, including public employees" (Article 3) and mentions that it applies "to all workers in the branches of economic activity covered" (Article 2). In this Convention, there is a well-defined definition and scope, based on a legal criterion (be an employee).

[12] For example, the scope of ILO Convention No. 60 is related to the age of workers. The Convention states that it applies "to any employment not dealt with in the Convention concerning the age for the admission of children to employment in agriculture (Geneva, 1921), the Minimum Age (Sea) Convention (Revised), 1936, or the Minimum Age (Industry) Convention (Revised), 1937".

[13] ILO Convention No. 105, for example, does not provide definitions or scope of applicability. Therefore, it was not considered in the analysis.

[14] Comments from ILO supervisory bodies are available in the Normlex database only since 1967. Previous years are not available in the database and, therefore, were not considered in this study.

[15] Committee on the Application of Standards (CAS) and Committee of Experts on the Application of Conventions and Recommendations (CEACR).

[16] To find the comments, I used the article numbers of each analyzed Convention as the search term.

[17] DAVIDOV, Guy; FREEDLAND, Mark; KOUNTOURIS, Nicola. The subjects of labor law: 'employees' and other workers. *In*: FINKIN, M. W.; MUNDLAK, G. (ed.). *Comparative labor law*. Tallinn: Edward Elgar Publishing, 2015. p. 115-131.

> determines if one is entitled to a significant package of rights or to no protection at all. It establishes a line between a group of workers who enjoy substantial regulatory support, and a group who just accept the dictates of market forces[18].

Different authors, on different occasions, have already reflected on the personal scope of labour law. When analyzing the need for regulatory reforms due to changes in the production structure, Collins[19], Fudge[20] and Regalia[21] found that the labour law personal scope is strongly limited to employment relationship. This narrow scope has become a problem because it leaves many workers outside the labour law framework, especially in the context of workplace fissuring[22].

In the same sense, the main guideline of the renowned report "Beyond employment: changes in work and the future of labour law in Europe" prepared in 1999 for the European Commission, under the direction of Alain Supiot – and therefore popularly known as the "Supiot Report" – was the need to broaden the social law scope of application to cover all forms of labour contracts, with the application of labour law (or at least some of its aspects) also to workers who are not employees in the strict sense[23]. Even though it is a recommendation of the report (or a "prospective wish"[24]), it was not yet (and still is not) a reality. Broadly speaking, labour law is still not widely applied to workers who do not fit into typical employment relationships. On the contrary, one of the concerns of the committee that prepared the report is the prevalence of the element of "subordination" – in a Fordist sense – to characterize the employment relationship and, therefore, to characterize who will be under or outside the protective umbrella of labour law.

In a comparative study, Davidov, Freedland and Kountouris[25] analyze who is considered an employee in different jurisdictions. According to the authors, understanding who is an employee means understanding the personal scope of labour law. This task has often been left to the courts, considering the existence of few normative definitions for employee. Despite the difference between the countries analyzed, the authors describe an important similarity between them: "the stronger the signs of control/subordination/integration, the more one is likely to be considered an employee [...] The stronger the signs of independence, the less likely is one to fall within the coverage of labor law"[26]. In this sense, the personal scope of labour law is linked to workers in a standard employment relationship, that is, to employees.

Freedland and Kountouris, in the seminal work on the legal construction of personal work relations, propose moving away from the contract of employment and moving towards the idea of relations of personal work (relations, in a broad sense, in which work is carried out personally), which should be the subject of concern for labour law. According to the authors, this approach is radical because

> confirms the inclusion of 'personal work' rather than 'employment' within the framing concept […] straddling the binary divide between those two spheres, only the first of which has traditionally or classically been regarded as the proper sphere of employment law[27].

Furthermore, they emphasize that the relational approach is broader than the contractual one: personal work relations go beyond the contract and involve non-contractual relationships as well, such as the work relations of public office-holding in some jurisdictions. According to this approach, non-SERs (such as self-employed, volunteers, temporary workers, etc.) would

[18] DAVIDOV, Guy; FREEDLAND, Mark; KOUNTOURIS, Nicola. The subjects of labor law: 'employees' and other workers. *In*: FINKIN, M. W.; MUNDLAK, G. (ed.). *Comparative labor law*. Tallinn: Edward Elgar Publishing, 2015. p. 115-131. p. 115.

[19] COLLINS, Hugh. Independent contractors and the challenge of vertical disintegration to employment protection laws. *Oxford Journal of Legal Studies*, v. 10, n. 3, p. 353-380, 1990.

[20] FUDGE, Judy. Fragmenting work and fragmenting organizations: the contract of employment and the scope of labour regulation. *Osgoode Hall Law Journal,* v. 44, p. 609-648, 2006.

[21] REGALIA, Ida. New forms of employment and new problems of regulation. *In*: REGALIA, Ida (org.). *Regulating new forms of employment*. New York: Routledge, 2006. p. 4-22.

[22] WEIL, David. *The fissured workplace*: why work became so bad for so many and what can be done to improve it. Cambridge: Harvard University Press, 2014.

[23] SUPIOT, Alain *et al. Au-delà de l'emploi*: les voies d'une vraie reforme du droit du travail. Paris: Flammarion, 2016. p. 516.

[24] SUPIOT, Alain *et al. Au-delà de l'emploi*: les voies d'une vraie reforme du droit du travail. Paris: Flammarion, 2016. p. 515.

[25] DAVIDOV, Guy; FREEDLAND, Mark; KOUNTOURIS, Nicola. The subjects of labor law: 'employees' and other workers. *In*: FINKIN, M. W.; MUNDLAK, G. (ed.). *Comparative labor law*. Tallinn: Edward Elgar Publishing, 2015. p. 115-131.

[26] DAVIDOV, Guy; FREEDLAND, Mark; KOUNTOURIS, Nicola. The subjects of labor law: 'employees' and other workers. *In*: FINKIN, M. W.; MUNDLAK, G. (ed.). *Comparative labor law*. Tallinn: Edward Elgar Publishing, 2015. p. 115-131. p. 119.

[27] FREEDLAND, Mark Robert; KOUNTOURIS, Nicola. *The legal construction of personal work relations*. Oxford: Oxford University Press, 2011. p. 434.

be covered by labour law, as Freedland suggested in a previous paper[28]. The need to expand the personal scope recognized by the authors highlights the centrality of the SER to labour law.

Although this debate has been much more developed in relation to labour law in a broad sense and sometimes regarding to domestic sphere of each country[29], I would like to highlight the controversy over the ILS personal scope based on the following theoretical contributions around international labour law specifically, considering the object of this study.

According to Vosko, the SER was the epicenter of the legal architecture from which the ILS emerged, based on the paradigm of employee status, standardized working time and continuous employment. "Through these pillars, the SER came to serve as a baseline for the extension of labour protections and social benefits, sufficient wages, and a social wage designed to support adult male citizens and their dependants"[30]. For the author, these pillars became unbalanced from the 1950s onwards, with the breakdown of the gender contract and the expansion of women's participation in the labour market. Since then, some international labour standards have been adjusted to reflect this new reality. However, these settings were made considering the SER paradigm, as if this were the only logical solution: "at the same time, despite the embrace of mechanisms fostering formal equality, there remained regulations preserving sex-specific measures and continued exclusions from the SER's central pillars" [31].

In turn, De Stefano argues that the "twentieth century aura surrounding the ILO"[32], its tripartite structure and the industrial work focus when adopting many ILS "could give the impression that the international labour standards only concern subordinate or "wage" work, especially in large vertical firms in the manufacturing sector. If this were true, the ILO standards would risk appearing increasingly obsolescent in those "industrialized" countries where the vertical firm has long been subject to "fissuring" trend" [33]. According to the author, the meaning of employee and employment relationship varies according to the ILS analyzed, involving other types of workers and relationships. Therefore, to understand the personal scope of the ILS, it would be necessary to analyze the situation on a case-by-case basis and consult the preparatory work and comments from the ILO supervisory bodies (that could adopt an expansive interpretation for the personal scope). For him, although some ILS apply exclusively to the employment relationship, there are ILS that apply to other relationships, such as self-employment.

In line with Stefano, in a more optimistic view, Creighton and Mccrystal argue that while some ILS apply only to the employment relationship, others have a broad scope and we could not reduce their application only to SER. For them, "it is clear that the eight core Conventions that constitute the basis of the 1998 Declaration are intended to apply to all persons who, as the Shorter Oxford English Dictionary has it, "make, produce or contrive" goods or services"[34]. According to the authors, the only exclusions are related to the armed forces and public servants, as they are expressly mentioned in Conventions No. 87 and 98. For them,

> there is nothing in the other core Conventions to suggest that their sphere of operation is intended to be any narrower than that of Conventions Nos. 87 and 98, and indeed it is probably wider in that none of them contains any express exclusions[35].

As seen above, there seems to be a certain consensus on the personal scope of labour law in a broad sense: it is closely linked to the standard employment relationship. However, in relation to international labour standards, there are divergences. On the one hand, there is a perspective aligned with that presented regarding labour law in a broad sense: ILS were built on the logic of SER and have employees as almost exclusive pro-

[28] FREEDLAND, Mark. Application of labour and employment law beyond the contract of employment. *International Labour Review*, v. 146, n. 1-2, p. 3-20, 2007.

[29] CREIGHTON, Breen; MCCRYSTAL, Shae. Who is a worker in international law. *Comparative Labor Law and Policy Journal*, v. 37, n. 3, p. 691-725, 2015.

[30] VOSKO, Leah F. *Managing the margins*: gender, citizenship, and the international regulation of precarious employment. Oxford: OUP, 2011. p. 52.

[31] VOSKO, Leah F. *Managing the margins*: gender, citizenship, and the international regulation of precarious employment. Oxford: OUP, 2011. p. 51-52.

[32] STEFANO, Valerio De. Not as simple as it seems: the ILO and the personal scope of international labour standards. *International Labour Review*, v. 160, n. 3, p. 387-406, 2021. p. 388.

[33] STEFANO, Valerio De. Not as simple as it seems: the ILO and the personal scope of international labour standards. *International Labour Review*, v. 160, n. 3, p. 387-406, 2021. p. 389.

[34] CREIGHTON, Breen; MCCRYSTAL, Shae. Who is a worker in international law. *Comparative Labor Law and Policy Journal*, v. 37, n. 3, p. 691-725, 2015. p. 722.

[35] CREIGHTON, Breen; MCCRYSTAL, Shae. Who is a worker in international law. *Comparative Labor Law and Policy Journal*, v. 37, n. 3, p. 691-725, 2015. p. 723.

tagonists of their personal scope. On the other hand, there are more optimistic views that foresee the application of many ILS to workers in general and not just to employees. This friction in the literature led to the idea of mapping the ILS personal scope, as detailed in the next item.

3 **Who are the workers?** Empirical evidence on the personal scope of ILO standards and supervisory bodies

The different points of view discussed here led me to map the ILS personal scope and the definition of worker in the ILO standards – ILO Declarations, ILO Conventions, ILO Protocols and ILO Recommendations – and in the ILO supervisory bodies' comments. In this section, I describe the results I found in this mapping, carried out according to the methodology presented in the introduction.

3.1 Declarations

Firstly, I analyzed the Declarations. These instruments do not present definitions. They use the expression 'worker' (and not employee), suggesting their application to any worker and not just those engaged in an employment relationship. I emphasize, however, that although the Declarations do not use the expression 'employee', they frequently adopt the terms 'employer' and 'employment' throughout their texts. Thus, a first question arises about the personal scope of the Declarations: is the term 'worker' used as a synonym for employee or does it intentionally carry a broad meaning, potentially making it applicable to workers in general, irrespective of legal status?

3.2 Conventions and Recommendations

Subsequently, I analyzed the Conventions (C) and Recommendations (R). These instruments employ a variety of terms - such as 'work', 'employ' and 'engage' (and their derivatives, such as 'worker', 'employees', etc.) – sometimes as synonyms, sometimes with distinct meanings, and at times without clarity regarding their significance. There is no common terminology or single personal scope for all of them. Consequently, the meaning of 'worker' in one Convention may differ from its meaning in another Convention, as also described by Creighton and Mccrystal,

> in some instances, ILS appear to use "worker" as a generic term that would encompass both employees and independent contractors (and perhaps other categories of persons who perform work), whilst in others it seems clear from the text or the context that the instrument is intended to cover only those whom the common law would recognize as standing in the relationship of employer and employee. There are also some international standard-setting instruments where it is not entirely clear to what categories of worker they are meant to apply[36].

Although I have identified that a few instruments make explicit reference to others (such as the mention made by C162 to C135), such cross-referencing is not common. There appears to be, in this regard, a certain lack of precision in the terms used in international standards. For instance, C84 regulates that the "rights of employers and employed alike to associate for all lawful purposes shall be guaranteed by appropriate measures" (Article 2) using the term 'employed alike', while the rest of the Convention uses the term 'workers'. The Article 6.1 – "Employers and workers shall be encouraged to avoid disputes, and if they arise to reach fair settlements by means of conciliation" – exemplifies this inconsistency. The Convention uses the terms interchangeably, as if they were synonymous. Conversely, other instruments employ the terms as if they were distinct, although they do not define what is meant by each. For instance, C77 emphasizes that the convention applies to children and young persons employed or working in, or in connection with, industrial undertakings, whether public or private (Article 1). The adoption of different terms - with apparently distinct meanings - also occurs in other instruments, such as C111 (which frequently uses 'employment' and 'occupation', although it does not explicitly explain the meaning of each term) and R206 (which uses 'labour' and 'employment', again without explicit definitions). This sense of imprecision is not exclusive to this topic. As already pointed out by Beltramelli Neto and Voltani[37] regarding the notion of

[36] CREIGHTON, Breen; MCCRYSTAL, Shae. Who is a worker in international law. *Comparative Labor Law and Policy Journal*, v. 37, n. 3, p. 691-725, 2015. p. 692.

[37] BELTRAMELLI NETO, Silvio; VOLTANI, Julia de Carvalho. Historical research of the decent work content in ILO ambit and an analysis of its justiciability. *Brazilizan Journal of International Law*, v. 16, n. 1, p. 166-185, 2019.

decent work, the ILO is not precise in many definitions and this can be seen here as well.

The table below systematizes the definitions of 'worker' found in the Conventions and Recommendations.

Table 1 - Definitions of 'worker'

DEFINITION: WORKER	NUMBER OF INSTRUMENTS
No definition	**339**
Definition	**66**
Employed	27
Employed or engaged or in service or occupied	14
Broad	12
Employed related	4
Engaged	4
Employed or self-employed	2
Members of co-operatives	2
Jobseekers	1

Source: Elaborated by the author.

As shown above, 339 ILS don't present any definition of 'worker'. Of the 66 ILS that present a definition, 27 relate it directly to the employment relationship and 4 make this reference throughout the text; 14 instruments use 'employed' in the definition and alternatively include another status, such as 'employed or occupied', without explaining if there is and what is the difference between the terms; 12 ILS has a broad definition, without indicating any restriction (normally using the expression 'any person'); 4 ILS define worker as someone engaged in something; 2 ILS define worker as somebody employed or self-employed; 2 ILS define worker as a member of co-operative and 1 defines workers as jobseekers. As we can see, half of the definitions (in grey) are exclusively associated with the employment relationship. The others also apply to typical employees and some other workers.

From this observation, the following questions arise: Is there internal coherence within the ILO normative system? Is it possible and desirable for one ILS to be interpreted in accordance with another? Do they necessarily relate to each other? Is there interdependence? Is it possible for this interdependence to exist considering that they are independent, and countries can ratify one instrument and not the other? These questions will be the subject of future studies.

The instruments also exhibit different structures concerning their drafting: in some cases, the instruments provide definitions and subsequently use them throughout the normative text (for example, they define the term 'worker' and the norm proceeds to establish rights for workers), as in C181. In other cases, the instrument does not provide definitions but specifies to whom the provisions apply through a list of persons encompassed by the norm, as in C190. In yet other cases, there are neither definitions nor a list of encompassed persons, as exemplified by C174.

The analysis revealed the existence of various personal scopes in the Conventions and Recommendations: (i) express application only to employees; (ii) implied application only to employees; (iii) possibility or recommendation of expansion to workers who are not employees; (iv) express application to non-employees; (v) application to any person, whether a worker or not. The table below systematizes the applicability of the instruments, highlighting the prevalence of categories (i) and (ii), both strictly related to the standard employment relationship (in grey). In category (iii), employees are also protagonists of the personal scope, but the instrument suggests expansion. Finally, in the last two categories, the employee is also present, but shares space with other types of workers or even non-work people.

Table 2 - Applicability

APPLICABILITY	NUMBER OF INSTRUMENTS
No mention	**289**
Mentions the applicability	**116**
Express application only to employees	46
Implied application only to employees	11
Possibility/recommendation of expansion to non-employees	10
Express application to non-employees	28
Application to any person, whether a worker or not	21

Source: Elaborated by the author.

(i) Many of the Conventions and Recommendations explicitly apply only to workers engaged in an employment relationship (that is, to employees), as exemplified by Conventions 151 and 155. C151 applies "to all persons employed by public authorities" (Article 1). C155

establishes that the "term workers covers all employed persons, including public employees" (Article 3) and that it "applies to all workers in the branches of economic activity covered" (Article 2). It should be noted that this definition of 'worker' as employed person – in other words, the definition of worker as an employee – is common in ILS.

Many of these Conventions that apply to employees allow the ratifying state to exclude certain sectors of economic activity or categories of employees, as exemplified by C171, which permits the exclusion of "wholly or partly from its scope limited categories of workers when the application of the Convention to them would raise special problems of a substantial nature" (Article 2). This type of exclusion falls under what Hilgert[38] calls flexibility clauses, which do not establish objective criteria for determining what constitutes a substantial problem or a peculiar problem, thus leaving an open path for non-compliance with the convention.

In addition to flexibility clauses, some of these Conventions that explicitly apply only to employees also have explicit exclusion clauses. There are clauses that exclude from the application of the norm certain types of employees, both in cases where there is a specific Convention on the subject (such as C132, which excludes seafarers and public employees, as there is a specific convention for these categories), and in cases where there is none (such as C31, which excluded employees with managerial powers from its application). There are clauses that exclude workers in non-standard employment relationships from the application of the norm, such as C130, which "excludes from the application of this Convention: (a) persons whose employment is of a casual nature" (Article 5).

(ii) Many Conventions and Recommendations use the term 'worker' generically, without presenting a definition tied to an employment relationship. However, throughout the normative text, there are several references to an employment relationship, as exemplified by C139, according to which "Each Member which ratifies this Convention shall take measures to ensure that workers are provided with such medical examinations or biological or other tests or investigations during the period of employment […]" (Article 5). In this same implicit model of restricted application to employees, there are Conventions that exclude other workers from their application, leaving only employees as the personal scope, as exemplified by C109, which excludes from its application "persons working exclusively on their own account or remunerated exclusively by a share of profits or earnings" (Article 3), among other workers.

(iii) There are Conventions and Recommendations that have employees as their main personal scope but allow or recommend expansion to other workers, as exemplified by the Article 7 of C150, according to which

> each Member which ratifies this Convention shall **promote the extension**, by gradual stages if necessary, of the functions of the system of labour administration to include activities, to be carried out in co-operation with other competent bodies, **relating to the conditions of work and working life of appropriate categories of workers who are not, in law, employed persons**, such as:
>
> (a) tenants who do not engage outside help, sharecroppers and similar categories of agricultural workers;
>
> (b) self-employed workers who do not engage outside help, occupied in the informal sector as understood in national practice;
>
> (c) members of co-operatives and worker-managed undertakings;
>
> (d) persons working under systems established by communal customs or traditions. (emphasis added)

This possibility of expansion appears more frequently in Recommendations, as exemplified by instruments R43, R134, R156, R164, R171 and R177. The main hypothesis for the prevalence of expansive clauses in Recommendations is linked to the fact that Conventions are binding, while Recommendations, although monitored, constitute soft law. The greater presence of this expansion in Recommendations may indicate that the SER-centrism mentioned by Vokso[39] still permeates the system of labour standards, given that employees' rights are present in binding norms, while rights of other workers are the subject of Recommendations.

(iv) There are Conventions and Recommendations that expressly apply to other types of workers (non-employees, in non-SER), either to specific categories or broadly to various workers. Some of them also apply to employees.

[38] HILGERT, Jeffrey. *Hazard or hardship*: crafting global norms on the right to refuse unsafe work. Ithaca: Cornell University Press, 2013.

[39] VOSKO, Leah F. *Managing the margins*: gender, citizenship, and the international regulation of precarious employment. Oxford: OUP, 2011.

There are norms specifically intended for certain categories of workers, such as R193 aimed at promoting cooperatives and R132 concerning tenants and share-croppers in agricultural work. R132, in fact, expressly excludes from its application "employment relationships in which work is remunerated by a fixed wage" (item I.2).

On the other hand, there are norms that apply to various categories of workers, such as self-employed workers and workers in atypical forms of dependent work. Examples of these instruments are C141, C167, C183, C190, R200 and R204. Among them, I highlight C190, whose "personal scope is deliberately broad"[40]. C190 is expressly not restricted to standard employment relationship, encompassing workers and other persons in the world of work more broadly, regardless of the legal nature of their contracts, even in the informal economy. According to its Article 2:

> 1. This Convention protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as **persons working irrespective of their contractual status**, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer. 2. This Convention applies to all sectors, whether private or public, both in the formal and informal economy, and whether in urban or rural areas. (emphasis added)

Regarding the ILS with a broader personal scope, I attempted to identify if there was any common issue surrounding them, but I did not identify a prevailing topic. My hypothesis is that topics related to a specific human right, such as freedom of association, could lead to a personal scope beyond the employment relationship. That would be exactly Atkinson's proposal: "where employment legislation functions to protect human rights the scope of these statutes should, at the level of normative principle, be constructed inclusively with any exclusions needing to be justified"[41]. Nevertheless, it was not possible to confirm my hypothesis, as the topics are diversified: workers' association, health, maternity protection, harassment.

Creighton and Mccrystal suggest that ILS linked to the theme of freedom of organization (and other fundamental conventions, which establish principles and fundamental rights) have a broad scope and apply indistinctly to all workers. While I agree with the authors on Convention No. 87, unfortunately this cannot be said for all the fundamental conventions. For example, Conventions No. 98 and No. 100 use 'workers' but refer to 'employment' throughout their text. In this sense, as much as I defend that non-employees have the right to organize and bargain collectively, the Convention No. 98 is not express in this sense (unlike others) and makes references to the notion of employment. For me, this example reinforces Vosko's argument that ILS still have SER as a paradigm.

(v) Other Conventions and Recommendations, especially those linked to the promotion of social security, apply to any person (worker or not) within a society, as exemplified by R202, which recommends to 'implement social protection floors within strategies for the extension of social security that progressively ensure higher levels of social security to as many people as possible" (item I.1). This type of International Labour Standard (ILS) is much less common than others. The notion of social rights linked to worker status (especially employee status) is still very prevalent.

Finally, I tried to identify whether there was any gradual expansion of the ILS personnel scope over the years. Indeed, there are more recent ILS that have a broad scope, such as C190 (the broadest). However, this expansion has not been linear or even cumulative, as older standards, such as C141, already had a slightly broader scope (and after it, we also had employee-oriented standards).

3.3 ILO supervisory bodies comments

In general, the analysis of supervising bodies' comments does not specifically indicate a trend towards expanding the personal scope of Conventions and Recommendations, except for the case of C189, as will be discussed below.

When Conventions and Recommendations allow for the exclusion of categories of workers from their application (flexibility clauses), supervising bodies analyze the exclusion and request explanations for the reasons for that, as well as issue recommendations for inclusion.

[40] TREBILCOCK, Anne. What the new Convention on violence and harassment tells us about human rights and the ILO. *In*: POLITAKIS, G. P. (ed.). *ILO 100 Law for Social Justice*. Geneva: International Labour Office, 2019. p. 1031-1058.

[41] ATKINSON, Joe. Employment status and human rights: an emerging approach. *The Modern Law Review*, v. 86, n. 5, p. 1166-1196, 2023.

An example is the Observation (CEACR) adopted in 2023 regarding the application of C52 in Paraguay:

> In response to the Committee's previous comment concerning the exclusion of homeworkers from the provisions on paid annual leave, the Government indicates that under article 61 of the Labour Code, duties and obligations may also be set out in the contract of employment. While noting, once again, the lack of legislative provisions in this regard, **the Committee requests the Government to take the necessary measures to guarantee homeworkers' right to paid annual leave**. (emphasis added)

When Conventions and Recommendations recommend expanding the personal scope to include other workers, comments request information about the evolution of this expansion. An example is the Direct Request (CEACR) adopted in 2022 regarding the expansion of labour inspection to self-employed workers in Denmark, as envisaged in C150:

> Article 7(b) of the Convention. Extension of the functions of the system of labour administration to self-employed persons and workers in the informal economy. The **Committee had previously requested the Government to provide information on measures taken or envisaged for the extension of labour administration activities to self-employed workers and workers in the informal economy**. The Committee notes that the Government reiterates that self-employed persons are, to a large extent, subject to the same health and safety rules as employees, including with regard to rules on performance of the work, technical equipment, substances and materials. The Government also reiterates that it has introduced a maternity equalization scheme for self-employed persons to provide these workers with improved income compensation during maternity and parental leave. Noting the absence of information regarding its previous request, the **Committee once again requests the Government to provide information on measures taken or envisaged for the extension of labour administration activities to workers in the informal economy**. (emphasis added)

In this case, in addition to the expansion of labour inspection, the comment also requests information about the informal economy more broadly.

In cases where Conventions and Recommendations expressly apply to workers in non-SER, comments reinforce the application of the standard not only to employees but also to these other workers. An example is the Direct Request (CEACR) adopted in 1993 regarding the application of C141 in Malta:

> The Committee also requests the Government to provide more information on the measures taken to facilitate the establishment, on a voluntary basis, of strong and independent organizations of rural workers, regardless of whether the workers are wage-earners or self-employed.

In the same vein, the Direct Request (CEACR) adopted in 2022 regarding the application of C190 in Uruguay, requesting clarifications on measures taken to ensure that the Convention is applied to all workers mentioned in its Article 2:

> The Government indicates that Acts 19.580 and 18.561 "protect all workers without exclusions and with no categories of workers being excluded", and that the General Inspectorate of Labour and Social Security (IGTSS) oversees their implementation, protecting all workers on an equal footing. It also indicates that these Acts do not distinguish between the public or private sector, the formal or informal economy, or urban and rural areas. The Committee notes in particular that Act 18.561: (1) refers to labour relations and to harassment that is detrimental to the work situation, the work environment or people's current or future situation (sections 1, 2 and 3); and (2) covers agency workers, pursuant to Decree No. 256/017 regulating the above Act (section 10). **The Committee requests the Government to provide information on the application in practice of Act 18.561 with respect to the protection of the persons mentioned in Article 2, taking into account that the Act refers to labour relations and the work situation**. (emphasis added)

The examples above shows that the ILO supervising bodies seem to reinforce the provisions of Conventions and Recommendations without innovating regarding the personal scope, except for the case of C189.

C189 applies to domestic workers, defined by the Convention as "any person engaged in domestic work within an employment relationship" (Article 1, b). In addition to this definition, according to C189, "a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker" (Article 1, c). C189 associates the concept of domestic worker with a person in an employment relationship (which, by default, is continuous) and expressly excludes those who perform domestic work non-professionally. However, it does not specifically address occasional domestic work performed on an occupational basis, leaving these occasional domestic workers in a kind of limbo.

Regarding this limbo, CEACR's position is to request clarification on what countries are doing to inclu-

de occasional domestic workers who work professionally, suggesting that these workers should be covered by the Convention. The CEACR bases its comment on Convention's preparatory work, when it was agreed to adopt the wording of Article 1, c precisely to include occasional domestic workers. An example is the Direct Request (CEACR) adopted in 2022 regarding the application of C189 in Ireland:

> Article 1 of the Convention. Definition of domestic work and domestic worker. The Government reiterates that Irish employment law does not treat domestic workers as a separate category of worker and that employment rights legislation in Ireland applies to all workers who are working under a contract of employment (written or verbal), on a full-time or part-time basis, including legally employed domestic workers. The Government reiterates that domestic workers are covered by the Code of Practice for Protecting Persons Employed in Other People's Homes (hereinafter the Code of Practice). Pursuant to the Code of Practice, an "employee" means a person who is employed in the home of another person, in accordance with the provisions of the Code of Practice for Determining Employment or Self-Employment Status of Individuals. Moreover, the Committee observes that, in defining the term "domestic worker", the booklet published by the Workplace Relations Commission (WRC) on the employment rights of domestic workers in Ireland refers to the definition of worker in the national legislation as well as to the definition of domestic work and domestic worker established in Article 1(a) and (b) of the Convention. The Committee nevertheless notes that the Government once again provides no information on the manner in which it is ensured that persons who perform domestic work occasionally or sporadically, but do so on an occupational basis, are covered by the guarantees established in the Convention. In this respect, the **Committee recalls that the definition of a domestic worker established in Article 1 of the Convention only excludes sporadic workers when they do not perform domestic work on an occupational basis**. The Committee draws the Government's attention to the preparatory work for the Convention, which indicates that this the wording of Article 1(c) was included in this provision for the purpose of ensuring that day labourers and similar precarious workers would be covered by the definition of domestic worker (see Report IV (1), International Labour Conference, 100th Session, 2011, page 5). **The Committee therefore reiterates its request that the Government indicate in what manner it ensures that persons who perform domestic work occasionally or sporadically, but do so on an occupational basis, are covered by the guarantees established in the Convention**. (emphasis added)

Regarding C189, CEACR comments contributed to some form of innovation or at least a clarification aimed at a broader personal scope. As proposed by De Stefano, at least in relation to C189, the preparatory work is considered by the CEACR and underpins the expansion of the personal scope of the Convention.

4 Facing the 'old but gold' challenge of rethinking the ILO standards personal scope: starting with ILO Convention 190

The mapping presented in the previous item reinforces Vosko's interpretation, according to whom international labour law has not advanced substantially beyond the SER, even though it has undergone changes. The results also confirm my initial hypothesis that although there are some exceptions, the personal scope is still quite restricted to the standard employment relationship. Despite the existence of standards with a broad personal scope and the expanded interpretation of the CEACR regarding the convention on domestic work, there is still a prevalence of standards linked to the standard employment relationship, both expressly and implicitly. Even though the optimistic views of De Stefano and Creighton and Mccrystal are confirmed in some aspects, such as the expansive interpretation of the CEACR for C189 and the broad scope of C87, ILS continue to be based on the SER paradigm (SER-centrism).

The SER-centrism of ILS has always been an issue to be overcome because it has historically left out of its umbrella many workers, because even at its peak, SER was not accessible to all workers[42]. Today, the challenge remains and have become even greater, considering the intensification of vertical disintegration, fragmenting organizations and the fissured workplace. Labour law was forged from the bilateral relationship between employee and employer. Organizational changes, however, challenge and undermine this formule. According to Fudge, there is a conceptual and normative crisis in labour law that occurs on two fronts: first, there is difficulty in identifying who is an employee and who is the respective

[42] VOSKO, Leah F. *Managing the margins*: gender, citizenship, and the international regulation of precarious employment. Oxford: OUP, 2011. p. 1.

employer; second, there are problems in assigning responsibility for the costs and risks of utilizing labour[43]. This article is dealing with the first front discussed by Fudge. As the author warns, the issue lies in the fact that the employment contract was born in circumstances in which there was a thriving welfare state, strong industrial-based unions and vertically integrated firms. These circumstances, however, are crumbling. Therefore, "limiting the scope of labour law to employees can only be understood as the outcome of a historical process that was contingent and contested, and not as an inevitable feature of a natural legal order" [44].

According to Collins, there is a trend towards vertical disintegration of production, mainly explained by employers' efforts to reduce labour costs (avoiding some fixed costs associated with employment, such as training; taking advantage of lower wages outside the firm; reducing concerns about compliance with labour laws; mitigating relational costs with long-term contract employees), in addition to enabling the transfer of production to networks of smaller businesses geared to rapid response to changes in consumer taste.

Despite the advantages for the employer, this trend is producing[45] diverse forms of work that differ from the SER. With the vertical disintegration, firms are fragmenting and moving away from workers: the workforce has been hired through a variety of contractual arrangements, such as subcontracting, franchising, outsourcing, self-employment, etc. Non-SERs are growing around the world, both in developed and developing countries[46]. The bilateral employee-employer relationship, previously direct, rigid and close, is loosening, disintegrating and gaining intermediary actors. This is placing many workers outside the paradigm of standard employment relationship and "therefore beyond the range of employment protection laws"[47].

This context of fissuring workplace is becoming even more complex due to technological developments, which "increasingly allow businesses to focus on core competencies while shedding activities not central to the firm's operation"[48]. In addition to reducing coordination costs, technological advance added two new elements to this scenario: it allowed more precise and remote control, erasing national boundaries: a great sneakers company based in United States can accurately monitor the production of sneaker insoles in Bangladesh in real time, for example; it enabled the emergence of contractual arrangements designed to deviate from SER through technology, creating an "organizational form in which firms have an ondemand workforce"[49], like those in the gig economy.

The intricate combination of vertical disintegration, workplace fissuring, technological advances and multiplication of non-SER require us to rethink the personal scope of (international) labour law and there is a "wide agreement over the need to reform"[50] it. As the results of the mapping of ILO standards have shown, ILS were designed based on the standard employment relationship and, in general, remain based on this logic. It is necessary to rethink them so that they can respond to the disintegrated organizational model of current firms.

To contribute to the difficult task of rethinking the personal scope of ILS, I want to reflect on ILO Convention No. 190, whose personal scope is the broadest among the ILO standards. C190 deals with violence and harassment in the world of work, with a gender perspective, recognizing that violence and harassment in the world of work are human rights violations that disproportionately affect women. The Convention adopts an expanded conception[51] of the work environment, covering everything in the course of, linked with or arising out of work. In addition, the C190 substantially advance regarding the personal scope: it expressly mentions

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[43] FUDGE, Judy. Fragmenting work and fragmenting organizations: the contract of employment and the scope of labour regulation. *Osgoode Hall Law Journal,* v. 44, p. 609-648, 2006.

[44] FUDGE, Judy. Fragmenting work and fragmenting organizations: the contract of employment and the scope of labour regulation. *Osgoode Hall Law Journal,* v. 44, p. 609-648, 2006. p. 647.

[45] DICKENS, Linda. Problems of fit: changing employment and labour regulation. *British Journal of Industrial Relations*, v. 42, n. 4, p. 595-616, 2004.

[46] ILO. *Non-standard employment around the world*: understanding challenges, shaping prospects. Geneva: International Labour Office, 2016.

[47] COLLINS, Hugh. Independent contractors and the challenge of vertical disintegration to employment protection laws. *Oxford Journal of Legal Studies*, v. 10, n. 3, p. 353-380, 1990.

[48] WEIL, David. *The fissured workplace*: why work became so bad for so many and what can be done to improve it. Cambridge: Harvard University Press, 2014. p. 10.

[49] WOODCOCK, Jamie; GRAHAM, Mark. *The gig economy*: a critical introduction. Cambridge: Polity Press, 2020.

[50] MARSHALL, Shelley. How does institutional change occur? Two strategies for reforming the scope of labour law. *Industrial Law Journal*, v. 43, n. 3, p. 286-318, 2014.

[51] LEROUGE, Loïc. *The ratification of the ILO Convention n. 190*: an opportunity to tackle psychosocial risks. 2022. Available at: https://halshs.archives-ouvertes.fr/halshs-03697423.

the application to persons working irrespective of their contractual status.

My proposal is to take the rationality of C190 as a starting point for expanding the ILO personal scope, because of threefold elements: mention of a broad personal scope, regardless of the contractual form; regulation of situations; and concern with current working conditions.

The first important element of C190 is, of course, the express mention of a broad personal scope in Article 2. It protects "workers and other persons in the world of work […] as well as persons working irrespective of their contractual status". The Convention applies to people who work, regardless of the contractual arrangement. Therefore, C190 does not enter into the treacherous discussion of who is or is not an employee or worker[52]. The dichotomy between standard and non-standard employment is getting more and more blurred[53]. "This problem will not be solved either by devising better tests to distinguish between subordinated labour and independent contracting, or by developing the concept of dependent contractor or worker"[54]. Relying on this differentiation or leaving it to the courts is perpetuating the problem, which tends not to be resolved. Overcoming this differentiation, C190 adopts a human rights approach stating that any person involved in the world of work will be under its scope and application. This approach can also make it easier for labour rights to be treated as human rights and to be more strongly considered in emerging reporting on business and human rights and due diligence legal requirements[55].

The second element derives from the first. As it is not restricted to a type of worker or a type of contract (and applies to anyone who works), C190 does not regulate a specific bilateral relationship. The Convention regulates occasions in which people are subject to harassment and violence, amplifying the notion of the work environment, which also reinforces its broader scope. Regulating situations rather than specific contracts is a useful tool for expanding the personal scope of ILS, because different people (regardless of contractual status) are exposed to the same situations, the same facts and actions. As an example, let's imagine a work environment where employees, interns and freelancers coexist. If management encourages a toxic atmosphere, with abusive and ultra-competitive goals, all these workers will be exposed. If there were only protection for the employee (due to contract of employment), the others would be unprotected, in a clear scenario of inequality. In turn, regulating situations (creating rules on productivity, for example) would encompass all these people who work there, especially when these situations are created or are under the responsibility or control of the same service purchaser.

The third element concerns the non-SER-centered character of C190. Vosko identified that many ILS are SER-centered, take SER as the only solution and are structurally shaped according to the SER paradigm. In my view, C190 is different because it seeks to eradicate harassment and violence at work for all people who work, including in the informal economy. C190 does not wait for the transition to the formal economy for these people to be protected. On the contrary, it applies even while people are in the informal economy or in a non-standard employment relationship.

My proposal certainly faces challenges to be implemented. I highlight two main points to be considered: heterogeneity of non-SER and resistance to expanding the scope of labour law.

Firstly, I highlight the heterogeneity of the "non-SER". Within this broad category, there is a huge variety of workers and legal relationships, both formal and informal. There are particularities of each segment that need to be observed. For example, considering that in the informal economy there may be different types of work – such as recyclable material pickers, app drivers, street vendors and sex workers, among others – it is necessary to bear in mind that the transition to the formal economy and/or the promotion of better working conditions in the informal economy may involve different measures[56]. As an example, the guarantee of rights

[52] FUDGE, Judy. Fragmenting work and fragmenting organizations: the contract of employment and the scope of labour regulation. *Osgoode Hall Law Journal,* v. 44, p. 609-648, 2006.

[53] FUDGE, Judy; TUCKER, Eric; VOSKO, Leah F. Changing boundaries in employment: developing a new platform for labour law. *Canadian Lab. & Emp. LJ*, v. 10, p. 329, 2003.

[54] FUDGE, Judy. Fragmenting work and fragmenting organizations: the contract of employment and the scope of labour regulation. *Osgoode Hall Law Journal,* v. 44, p. 609-648, 2006. p. 611.

[55] NOLAN, Justine. Hardening soft law: are the emerging corporate social disclosure laws capable of generating substantive compliance with human rights? *Brazilizan Journal of International Law*, v. 15, n. 2, p. 65-83, 2018.

[56] BENJAMIN, Nancy *et al.* Informal economy and the World Bank.

to recyclable material pickers can be easily accepted in many societies, considering that such workers help in recycling and reducing environmental damage. However, the same ease may not be found when it comes to sex workers, since in many societies there is great prejudice and taboo around the subject.

Secondly, I emphasize the need to break with the legal tradition in many jurisdictions with regard to labour law. It is necessary to expand its scope to encompass different forms of work (and not just SER). This is not simple because overcoming this tradition depends, above all, on legislative changes. Legislative changes of this nature may encounter resistance, particularly due to companies' fear of incurring higher costs. This kind of legislative change may be even more complex in a scenario of increasing business decentralization[57] and flexibility in labour regulation[58].

Being aware of these (and others) difficulties, I reinforce that the C190 can be an inspiration, a starting point. By considering C190 as a starting point I mean that the logic that permeates the Convention can serve as a tool for structuring future Conventions and Recommendations. It is a starting point because it helps to address the first front of the conceptual and normative crisis of labour law pointed out by Fudge. As the Convention adopts a human rights approach (considering that it applies to anyone in the world of work, does not restrict its personal scope to employees, does not define who workers are, and does not attempt to differentiate between employees and self-employed workers), C190 dispels any doubt about its personal scope.

5 Conclusion

This paper deals with an old but gold challenge for (international) labour law: rethinking the personal scope of ILO standards. In the literature, the debate on this topic has mainly focused on labour law in a broad sense. To get closer to my research question, I analyzed the contrast between two views on international labour standards: on the one hand, the perception that ILS are SER-centered and, on the other, a more optimistic view that ILS (or part of them) can apply beyond the employment relationship. Given this divergence, I mapped the ILO standards to find out whether they are SER--centered.

The results showed that the ILO standards adopt different meanings for the same terms, demonstrating conceptual multiplicity and some imprecision. There is no single meaning of worker for the ILO, although we can say that this expression tends to be frequently associated with the employment relationship. In this sense, ILS are indeed more focused on the standard employment relationship. In different instruments, however, ILO flirts with the idea that it is important to include other types of workers. There are standards that expressly include workers outside the SER, and there are standards that recommend applying the personal scope to different categories of workers. However, this expansion of the personal scope is not linear and does not occur in all ILS. The comments of supervising bodies, which could be a path for this expansion or even updating of the interpretation of the standards, did not substantially innovate compared to the ILS, except for C189. The mapping confirmed the hypothesis we initially raised: despite the exceptions, the standards are SER-centered.

The main problem with this SER-centric aura is that it leaves many workers outside the protective umbrella of international labour law. As analyzed above, this becomes even more problematic given the vertical disintegration of firms and workplace fissuring. This scenario of fragmentation, intensified by technological advances, highlights the pressing need to rethink the ILS personal scope, otherwise they will become useless or applicable to few workers.

To this end, I suggest that the rationale of ILO Convention No. 190 be used as a starting point for this change, seeking to contribute to the first front of the crisis that labour law is going through (identifying who is an employee) pointed by Fudge. The logic behind C190 would contribute to the reform of the personal scope because: expressly adopts a broad personal scope, applying to any person who is involved in the world of work, regardless of contractual status; regulates situa-

World Bank Policy Research Working Paper, n. 6888, p. 2-34, May 2014.

57 VILLASMIL PRIETO, Humberto. Pasado y presente del derecho laboral latinoamericano y las vicisitudes de la relación de trabajo (segunda parte). *Revista latinoamericana de derecho social*, n. 22, p. 1-27, 2016.

58 MURILLO, M. Victoria; SCHRANK, Andrew. With a little help from my friends: partisan politics, transnational alliances, and labor rights in Latin America. *Comparative Political Studies*, v. 38, n. 8, p. 971-999, 2005.

tions and not specific contracts, ensuring the right to equality; concern with current working conditions, that is, it does not wait for the transition to employment or the formal economy, and can be applied immediately to any sector, worker and dimension of the economy.

I know this starting point is not enough to overcome the whole challenge. It is necessary to go further to face the second front of the crisis pointed by Fudge (how to assign responsibility for the costs and risks of utilizing labour). However, the adoption of C190 rationality by future ILO standards could inaugurate a new ILS pattern: broader, inclusive and (more) suitable to respond to the organizational transformations that the world of work is undergoing.

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Balancing growth and responsibility: a review of Brazil's offshore wind farm regulation

Equilíbrio entre crescimento e responsabilidade: uma análise da regulamentação brasileira relativa aos parques eólicos offshore

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Balancing growth and responsibility: a review of Brazil's offshore wind farm regulation*

Equilíbrio entre crescimento e responsabilidade: uma análise da regulamentação brasileira relativa aos parques eólicos offshore

Danielle Anne Pamplona **

Abstract

This article examines the regulatory framework for offshore wind farms in Brazil, focusing on the potential socio-environmental and human rights impacts associated with this rapidly growing sector. Brazil, with its extensive coastline and favorable conditions, holds vast potential for offshore wind energy. However, while the newly enacted legislation provides for environmental impact assessments (EIA) to mitigate environmental risks, it lacks explicit provisions for human rights due diligence on its own activities and in the supply chain. This omission is significant given the socio-economic disruptions that offshore wind farms can introduce, such as impacts on fishing communities and cultural heritage sites, as well as the broader implications of sourcing materials like lithium, crucial for turbine production, with known environmental and human rights concerns. The analysis aligns the legislation with international standards, such as the UN Guiding Principles on Business and Human Rights, emphasizing the state's duty to prevent human rights abuses by private entities through appropriate regulation and corporate responsibility to respect rights. The article argues that effective regulation should have extended beyond EIAs to include comprehensive human rights safeguards also along the supply chain, ensuring that offshore wind energy remains a truly sustainable alternative; and, in the absence of such regulations, companies must still observe their responsibility to respect internationally recognised human and environmental rights. The findings suggest that while Brazil's regulatory efforts are commendable, a more robust framework addressing both local and supply chain impacts would have been essential for aligning the country's renewable energy expansion with global human rights and sustainability standards.

Keywords: offshore wind energy; human rights due diligence; Environmental Impact Assessment (EIA); socio-environmental impacts; sustainable energy regulation.

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Resumo

Este artigo examina a estrutura regulatória dos parques eólicos offshore no Brasil, com foco nos possíveis impactos socioambientais e nos direitos humanos associados a esse setor em rápido crescimento. O Brasil, com seu extenso litoral e condições favoráveis, tem um grande potencial para a energia eólica offshore. No entanto, embora a legislação recém-promulgada preveja avaliações de impacto ambiental (EIA) para mitigar os riscos ambientais, ela carece de disposições explícitas para a devida diligência em direitos humanos em suas próprias atividades e na cadeia de suprimentos. Essa omissão é significativa, considerando as interrupções socioeconômicas que os parques eólicos offshore podem causar, como impactos sobre as comunidades pesqueiras e locais de patrimônio cultural, bem como as implicações mais amplas do fornecimento de materiais como o lítio, crucial para a produção de turbinas, com preocupações conhecidas sobre direitos humanos e ambientais. A análise alinha a legislação aos padrões internacionais, como os Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos, enfatizando o dever do Estado de evitar abusos de direitos humanos por entidades privadas por meio de regulamentação adequada e responsabilidade corporativa de respeitar os direitos. O artigo argumenta que a regulamentação eficaz deveria ter se estendido além dos EIAs para incluir salvaguardas abrangentes de direitos humanos também ao longo da cadeia de suprimentos, garantindo que a energia eólica offshore continue sendo uma alternativa verdadeiramente sustentável; e, na ausência de tais regulamentações, as empresas ainda devem observar sua responsabilidade de respeitar os direitos humanos e ambientais reconhecidos internacionalmente. As conclusões sugerem que, embora os esforços regulatórios do Brasil sejam louváveis, uma estrutura mais robusta que abordasse os impactos locais e da cadeia de suprimentos teria sido essencial para alinhar a expansão da energia renovável do país aos padrões globais de direitos humanos e sustentabilidade.

Palavras-chave: energia eólica offshore; due diligence em direitos humanos; Avaliação de Impacto Ambiental (EIA); impactos socioambientais; regulamentação de energia sustentável.

1 Introduction

The race to generate renewable energy is nothing new. Science has been informing us for years[1] about the possibility of climate change with drastic consequences for the world's population, and the causes are closely related to the exploitation of fossil fuels. Research has informed discussions, voluntary documents and international conventions drawn up at the United Nations Organisation for years[2].

The effects of generating energy from fossil fuels are widely discussed in the literature. Environmental concerns related to the exploitation and degradation of natural resources, which began to gain momentum in the 1970s, have intensified over time, especially with the identification of climate change caused by human actions. On the international stage, the United Nations has worked hard to raise awareness among governments and civil society about the importance of the issue and, progressively, its urgency. The creation of the IPCC represents a significant milestone in recognising the need to integrate scientific knowledge into the debate. Today, there is no longer any controversy about the role of humanity, especially large corporations, in greenhouse gas emissions.

The development of new energy generation models, driven by scientific advancements, opens fresh avenues for economic growth. Currently, the world is moving from fossil fuel dependency to "clean" energy sources, spurred by the urgent need to reduce greenhouse gas emissions resulting from fossil fuel combustion. These emissions, particularly from oil and its derivatives, have accelerated climate change at a worrying rate, posing significant risks to humanity's future.

However, this energy transition is complex, involving political, economic, and social challenges. Clean energy generation—such as wind, solar, and hydropower—demands vast land areas, specialized technology, and access to "critical minerals" necessary for manufacturing essential components like lithium-ion batteries, wind turbines, and solar panels. These resources are indispensable for the transition but also raise

[1] ENERGIA eólica, os bons ventos do Brasil. *ABEEólica*, 2023. Available at: https://abeeolica.org.br.

[2] 1987 Montreal Protocol, 1997 Kyoto Protocol, 2015 Paris Agreement are only examples of the documents produced internationally regarding environmental action and climate change.

considerations around environmental impact, resource management, and global supply chains[3].

One of these models that responds to the need to change energy matrices is represented by wind farms. The so-called wind farms can be located on land or at sea, in other words, they can be on-shore or off-shore.

The first wind farm in Brazil was installed in 1992 and investment in the sector was small until, in 2009, under the Incentive Programme for Alternative Sources of Electricity - PROINFA, the business began to grow with the holding of auctions to sell this energy. The generation of onshore wind energy began at the end of the first decade of the 2000s and, from the middle of the following decade onwards, there was a boom in the installation of wind farms, reaching 883 farms in operation today[4]. Today, 50 per cent of the country's energy is generated by hydroelectric plants and wind farms are in second place, accounting for 15 per cent of the annual total generated. According to a report by the Global Wind Energy Council, Brazil was the third country to install the most wind farms in 2023[5].

Brazil notably has favourable characteristics for the installation and operation of offshore power generation projects[6]. With 7,367 km of coastline and 3.5 million km² of maritime space under its jurisdiction, the country has an extensive continental shelf, with shallow waters along the coast, which makes it easier to install blades. Add to this the high incidence of trade winds, with constant intensity and direction, and you have the perfect physical conditions for exploring offshore wind projects. Brazil's offshore wind energy potential exceeds 1,200 GW, with 480 GW coming from fixed foundations and 748 GW from floating foundations. Add to this the fact that the country is still very dependent on hydroelectric power generation[7], which can be greatly impacted by climate change as it depends on river water levels. The result is the obvious economic interest that this activity can generate.

We are dealing with a new business that has not yet been explored in the country and is subject to new regulations. As an economic activity, it is subject to constitutional rules and whatever else is available from the international forum to provide regulation. On the domestic front, however, there are still no rules.

There is, however, a bill that has already been approved by the Chamber of Deputies and is now awaiting approval by the Federal Senate. As it is the first Brazilian legislative framework on the subject, it is important to assess how much it is in line with the most advanced regulatory frameworks.

This text analyses the bill from the perspective of the potential for human rights and environmental impacts resulting from the activity it regulates. It analyses the UN Guiding Principles on Business and Human Rights and what has already been explored by the Inter-American Court of Human Rights (IA Court) in Advisory Opinion 23/2017[8]. In the end, it concludes that the bill under discussion in the Senate falls far short of the current stage of development about respect for human and environmental rights by companies.

2 The impacts of offshore wind farms

Although wind is considered a renewable and clean source of energy, as well as being a more sustainable alternative to fossil fuels, its energy utilisation is not completely free of environmental impacts.

The negative impacts of building offshore wind farms have already been documented by science. Marine fauna

[3] CEPAL analizó los desafíos de la extracción de minerales críticos para la transición energética durante el Foro de los Países de América Latina y el Caribe sobre Desarrollo Sostenible 2023. *CEPAL*, 7 July 2023. Available at: https://www.cepal.org/es/notas/cepal-analizo-desafios-la-extraccion-minerales-criticos-la-transicion-energetica-durante-foro.

[4] EMPRESA DE PESQUISA ENERGÉTICA (Brasil). Plataforma Interativa de Energia Eólica Onshore no Brasil. *EPE*, 2024. Available at: https://www.epe.gov.br/pt/publicacoes-dados-abertos/publicacoes/plataforma-interativa-de-energia-eolica-onshore-no-brasil.

[5] GLOBAL WIND ENERGY COUNCIL. *Global Wind Report 2024*. Brussels: GWEC, 2024. Available at: https://gwec.net/global-wind-report-2024/.

[6] In the bill, offshore activity is conceptualised as follows: 'Offshore concept: area of the Territorial Sea, Continental Shelf, Exclusive Economic Zone (EEZ) or other body of water under the domain of the Federal Government of the Union.'

[7] EMPRESA DE PESQUISA ENERGÉTICA (Brasil). *Balanço Energético Nacional 2023*. Rio de Janeiro: EPE, 2023. Available at: https://www.epe.gov.br/sites-pt/publicacoes-dados-abertos/publicacoes/PublicacoesArquivos/publicacao-748/topico-687/BEN2023.pdf.

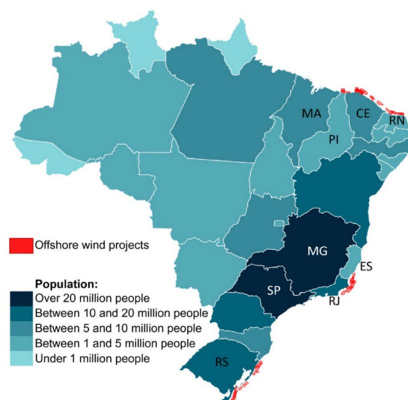
[8] This AO was requested by Colombia in 2016 and asked about the scope of application of state obligations related to the protection of the environment derived from the American Convention and the obligations of states in the field of the environment, within the framework of the protection and guarantee of the rights to life and personal integrity.

and the structure of ecosystems are greatly affected, as are birds that may see their migratory corridors reduced or eliminated[9], and the impacts are realised through 'habitat loss, collision risks, noise and electromagnetic field impacts, introduction of invasive species and visual or aesthetic impacts which may affect both human and animal populations in the vicinity of OWF turbines'[10].

At all times, it is necessary to ask whether the installation, exploitation and decommissioning of wind farms does not destroy the different ecosystems affected. After all, the exploitation of this type of energy generation is done precisely to protect all ecosystems from climate change.

In Brazil, the great potential for energy generation in offshore wind farms is divided into three regions, as shown in the map below:

Figure 1 - Proximity of potential offshore exploration sites to the population



Source: World Bank, 2024.[11]

The World Bank report is very instructive because, as well as investigating and reporting on the optimum conditions for energy generation in the different locations along the coast, it also identifies the potential impacts of each region. The two regions with significant socio-environmental impacts are the north-east and the south. In the north-east, the report indicates that "there are significant artisanal and commercial fishing areas near to these zones, as well as significant tourism activities. As such, it is expected that social sensitivities will be high, requiring careful consideration"[12]. In the south, the report indicates that the area "is located almost entirely within an Ecologically or Biologically Significant Area (EBSA) which increases the need for risk mitigation and careful designation of development zones"[13].

Although the environmental impacts caused by onshore wind farms are clear, largely due to the widespread use of the technique, for offshore wind turbines there are still doubts about the type and magnitude of the environmental impacts caused by their implementation and use. There are still few scientific conclusions about cumulative impacts[14] and the lack of consensus on the subject has motivated and continues to motivate the adoption of various measures to mitigate environmental impacts[15].

Not enough is known about the magnitude of the environmental impacts caused by the installation and operation of wind turbines, especially in areas beyond the Territorial Sea. Among the main points of concern are the noise and vibrations generated during the foundation works (pile-driving noise) and the operation of the wind turbines, the alteration of geomorphology, the

[9] LLORET, Josep; TURIEL, Antonio; SOLÉ, Jordi; BERDALET, Elisa; SABATÉS, Ana; OLIVARES, Alberto; GILI, Josep-Maria; VILA-SUBIRÓS, Josep; SARDÁ, Rafael. Unravelling the ecological impacts of large-scale offshore wind farms in the Mediterranean Sea. *Science of The Total Environment*, v. 824, 2022. DOI: https://doi.org/10.1016/j.scitotenv.2022.153803. WWF. *Environmental impacts of offshore wind power production in the north sea*: a literature overview. Oslo: WWF, 2014. Available at: https://tethys.pnnl.gov/sites/default/files/publications/WWF-OSW-Environmental-Impacts.pdf. GALPARSORO, I. *et al.* Reviewing the ecological impacts of offshore wind farms. *Ocean Sustain*, v. 1, n. 1, 2022. DOI: https://doi.org/10.1038/s44183-022-00003-5.

[10] WATSON, Stephen C. L.; SOMERFIELD, Paul J.; LEMASSON, Anaëlle J.; KNIGHTS, Antony M.; EDWARDS-JONES, Andrew; NUNES, Joana; PASCOE, Christine; MCNEILL, Caroline Louise; SCHRATZBERGER, Michaela; THOMPSON, Murray S. A.; COUCE, Elena; SZOSTEK, Claire L.; BAXTER, Heather; BEAUMONT, Nicola J. The global impact of offshore wind farms on ecosystem services. *Ocean & Coastal Management*, v. 249, 2024.

[11] WORLD BANK. *Scenarios for offshore wind development in Brazil*: executive summary. 2024. p. 15.

[12] WORLD BANK. *Scenarios for offshore wind development in Brazil*: executive summary. 2024. p. 15.

[13] WORLD BANK. *Scenarios for offshore wind development in Brazil*: executive summary. 2024. p. 15.

[14] Those that result from additive impacts caused by other past, present or reasonably foreseeable actions, together with the plan, programme or project itself and Synergistic Impacts (in-combination) that arise from the reaction between impacts of a development plan, programme or project on different aspects of the environment. RENEWABLEUK. *Cumulative impacts assessment*: guiding principles for cumulative impacts assessment in offshore wind farms. London: RenewableUK, 2013. Available at: https://tethys.pnnl.gov/sites/default/files/publications/Cumulative-Impact-Assessment-Guidelines.pdf.

[15] WILLSTEED, Edward A.; JUDE, Simon; GILL, Andrew B.; BIRCHENOUGH, Silvana N. R. Obligations and aspirations: a critical evaluation of offshore wind farm cumulative impact assessments. *Renewable and Sustainable Energy Reviews*, v. 82, part 3, p. 2332-2345, 2018.

impacts on the seabed due to the installation of electricity transmission cables and the potential harmful effects of the electromagnetic field generated. Birds, fish, aquatic mammals and corals may be affected to a degree that is still unclear by the installation and operation of offshore wind turbines. Experience with onshore wind turbines has shown that installations often coincide with migratory bird routes, requiring the adoption of mitigating measures to ensure that the wind potential is utilised in a way that does not harm the local fauna (and flora). In the case of offshore wind farms, in addition to birds, corals, migratory and straddling fish and especially aquatic mammals are also impacted, particularly by the noise generated by pile-driving.

It is true that the health of coastal communities depends on a balanced marine environment. If not managed properly, these projects can interfere with marine fauna and flora, which can impact fishing and biodiversity, affecting the food and health of local communities. In addition, noise and vibrations generated by turbines during construction and operation can impact marine life and, consequently, the economic activities and livelihoods of those who depend on the sea's resources. But the impacts are not only environmental. Human rights impacts are also foreseeable and cover social and economic issues that affect local communities, workers and the coastal ecosystem, as well as indirect impacts caused by damage to the environment. There are positive impacts, such as job creation, but it is the negative ones that are of interest here, as the text seeks to assess the bill's ability to address them, especially through prevention.

The communities' negative perception of the installation of these offshore farms is very much based on the environmental damage, the loss of value of the properties near the farms - including the decrease in tourism; the potential increase in the cost of energy; and the impacts on fishermen[16]. However, there are other impacts that must be considered if respect for human rights is to be taken seriously.

The installation and operation of offshore wind farms can generate direct and indirect jobs in the regions where they are implemented, offering opportunities in the construction, operation and maintenance phases. However, they can also impact traditional economic activities, such as fishing and tourism, which depend on free access to the sea and a healthy marine ecosystem.

The obstruction of fishing areas or the degradation of marine resources can reduce the livelihoods of local fishermen[17], jeopardising their right to work and their livelihoods[18]. The right to participation must be ensured for communities living in regions close to the installation areas of such projects, especially to verify whether and to what extent the projects interfere with their economic activities or quality of life. The right to participation is essential to ensure that communities' needs and concerns are heard, and that they have a real influence on the decision-making processes that affect their lives and territories.

If the sea and its coastal zones have profound cultural and spiritual meanings for the local inhabitants, the installation of offshore power plants could potentially alter areas of cultural importance, as well as modifying the marine landscape, which affects the identity and cultural connection of the populations with the territory.

Operating offshore wind farms requires skilled labour and exposes workers to challenging conditions, including isolated environments subject to inclement weather, so it is also necessary to plan mechanisms to guarantee safety at work in order to prevent accidents and ensure that workers' rights are respected. The significant changes brought to the site by major infrastructure projects must also be evaluated. The arrival of new workers and investments can cause changes in social dynamics and the local economy, such as inflation in the cost of living, increases in land prices and rents, and an increase in demand for infrastructure and basic services.

16 CIARA, E.; GARCIA, T.; ORTEGA, C.; RICHMOND, L. Social impacts to other communities that experienced offshore wind. *In*: SEVERY, M.; ALVA, Z.; CHAPMAM, G.; CHELI, M.; GARCIA, T.; ORTEGA, C.; SALAS, N.; YOUNES, A.; ZOELLICK, J.; JACOBSON, A. (ed.). *California North Coast Offshore Wind Studies*. Humboldt, CA: Schatz Energy Research Center, 2020. Available at: https://schatzcenter.org/pubs/2020-OSW-R20.pdf. p. 6-8.

17 SINCLAIR, M. *et al.* Responsible fisheries in the marine ecosystem. *Fisheries Research*, v. 58, n. 3, p. 255-265, 2002.

18 European regulations, for example, limit the mobility of fishermen to 500 metres away from offshore farms. CIARA, E.; GARCIA, T.; ORTEGA, C.; RICHMOND, L. Social impacts to other communities that experienced offshore wind. *In*: SEVERY, M.; ALVA, Z.; CHAPMAM, G.; CHELI, M.; GARCIA, T.; ORTEGA, C.; SALAS, N.; YOUNES, A.; ZOELLICK, J.; JACOBSON, A. (ed.). *California North Coast Offshore Wind Studies*. Humboldt, CA: Schatz Energy Research Center, 2020. Available at: https://schatzcenter.org/pubs/2020-OSW-R20.pdf. p. 5.

All these factors have a direct impact on the economic and social rights of local populations.

So many are the potential impacts of this economic activity that it is necessary to ask whether the regulatory frameworks are prepared to deal with the scenario, from the point of view of preventing the installation of activities and monitoring their impacts. In this sense, the legal instruments present in international and foreign law that aim to guarantee respect for human and environmental rights by economic activities deserve a problematised analysis. It is known that, in Brazil, 'The electricity matrix reached the mark of nearly 84% from renewable sources, establishing the country as an international reference in clean energy transitions', but is this growth accompanied by due respect for human and environmental rights? Let's look at the regulation of a specific type of clean energy generation, offshore wind farms.

3 The regulation of offshore wind farms in Brazil

Any economic activity with the potential to negatively impact rights attracts the application of the UN Guiding Principles on Business and Human Rights. They prescribe that companies must adopt measures that demonstrate that they respect rights, and that States must protect people by adopting measures that guarantee such business conduct. States must adopt any administrative, judicial or enforcement measures that can induce respectful business behaviour, avoiding or preventing negative impacts. The Principles are voluntary in nature, but as they do not innovate by creating new obligations for companies and they convey known content, it is not beyond their scope to state that companies operating offshore energy generation activities must comply with their precepts.

This means that it is up to the state to adopt measures that indicate to companies what behaviour they should adopt to respect rights. One of the ways to do this is to draw up laws that impose precautions to prevent impacts, as well as to mitigate them. Regulation is always frowned upon from the point of view of entrepreneurs who aim for a quick return on their investments[19], but this doesn't always reflect reality and shouldn't be enough to curb the care that must be taken to ensure that human and environmental rights are respected.

The exploitation of offshore energy generation is a relatively new activity that can start off well-regulated in material terms. In fact, by incorporating existing scientific studies, the legislature has an excellent opportunity to demonstrate how committed it is to the constitutional rules that establish respect for the environment and people.

Very recently, in Brazil, a decree[20] was issued on the assignment of the use of physical spaces and the utilisation of natural resources in inland waters under the control of the Union, in the territorial sea, in the exclusive economic zone and on the continental shelf for the generation of electricity from offshore projects. This decree establishes that the assignment of the use of physical spaces for the installation of offshore generation project must seek to promote sustainable development; the generation of employment and income; local and regional development, preferably with actions that reduce inequality and promote social inclusion, diversity and technological evolution; the harmonisation of the use of maritime space, in order to respect activities that have the sea and marine soil as a means or object of affectation; and responsibility for the impacts resulting from the exploitation of the energy generation activity.

Assignments of use follow two regimes: either it is a planned assignment, which consists of offering prisms[21] previously delimited by the Ministry of Mines and Energy to possible interested parties; or it is an independent assignment, when it arises from a request from those interested in exploring a prism themselves.

[19] RENEWABLEUK. *Cumulative impacts assessment*: guiding principles for cumulative impacts assessment in offshore wind farms. London: RenewableUK, 2013. Available at: https://tethys.pnnl.gov/sites/default/files/publications/Cumulative-Impact-Assessment-Guidelines.pdf.

[20] BRASIL. *Decreto nº 10.946, de 25 de janeiro de 2022*. Dispõe sobre a cessão de uso de espaços físicos e o aproveitamento dos recursos naturais em águas interiores de domínio da União, no mar territorial, na zona econômica exclusiva e na plataforma continental para a geração de energia elétrica a partir de empreendimento offshore. Available at: https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/Decreto/D10946.htm.

[21] According to Article 2, II of the abovementioned Decree, a prism is a vertical area of depth coinciding with the seabed, with a polygonal surface defined by the geographical coordinates of its vertices, where electricity generation activities can be carried out.

In order for the assignment to be authorised, different bodies must issue a Declaration of Prior Interference - DIP, with the aim of identifying whether the prism will interfere with other installations or activities. It will be up to the Navy Command to assess compliance with the maritime authority's rules on safeguarding human life, safety of navigation and prevention of water pollution, and the absence of damage to the planning of waterway traffic and national defence. Besides that, the Chico Mendes Institute for Biodiversity Conservation must provide information if the area is located in a conservation unit or if there is a conservation unit nearby and on the possible future uses of the area; the Ministry of Agriculture, Livestock and Supply must assess the possibility of interference in areas given over to aquaculture or fishing routes in the prism region and the possible future uses of the area; the Ministry of Tourism must assess the possibility of conflicts with tourist areas or the impact on the landscape of a contemplative tourist region that requires greater distance from the coast and the possible future uses of the area. There is a shared responsibility between different bodies, which is positive given their specialisation and greater capacity to assess such issues. This all precedes the implementation of a project.

Given these requirements, it is possible to conclude that, from a socio-environmental point of view, there are some relevant elements that will be assessed in the process: location of the prism in a conservation unit; interference with aquaculture or fishing routes; and conflict with exploitation of the space for tourism purposes. The Decree, however, does not establish rules for defining what should be done with this information and what result is required if one of these scenarios occurs. In other words, for example, it is not clear what can happen if the DIP identifies that the area of exploitation, the so-called prism, is overlapping with a fishing area of the communities established on the waterfront.

For three years a legislative complement has been under discussion in the Brazilian Parliament and in February 2025, law 15.097[22] has been passed aiming to regulate the utilisation of offshore energy potential. This law can be evaluated from two perspectives: the first is to assess the general principles it lays down and the existence of mechanisms for their realisation; the second is to assess the way in which the text deals with the duty to prevent impacts. We'll do both.

3.1 The general principles established in the regulatory framework

The law lays down the principles[23] and foundations for the exploration and development of energy generation from offshore installations. In this sense, the projects must promote sustainable development with social inclusion and reduce carbon emissions on the energy production process. It also establishes as principle harmonisation of knowledge, mentality, routine, traditional ways of life and customs, and maritime practices with respect for activities that have the sea and the seabed as their medium and the principle of transparency as means tp guaranteeing the public interest. Finally, it establishes civil responsibility for the impacts and externalities generated by the project[24].

By establishing that the undertakings covered by this framework must promote sustainable development, social inclusion and the fight against global warming, the law establishes clear guidelines that allow for interpretion and application of the rules. When in doubt, priority must be given to contexts in which sustainable development - and not economic development - is achieved; the application of the law must not be carried out to the exclusion of groups and undertakings must not contribute to the marginalisation of people; and, at the heart of the text, there is an interest in reducing the causes of global warming, after all, this is a regulatory framework for clean energy.

When the law establishes local and regional development as an objective, preferably with actions that reduce inequality and promote social inclusion, through transparency and popular participation, it is in line with UNGP 18, which dictates the need for affected groups or other interested third parties to be included in the processes of identifying and assessing potential or actual impacts. Similarly, in the AO 23/2017, the IA Court states that it is the duty of the State to guarantee

[22] BRASIL. *Lei nº 15.097, de 10 de janeiro de 2025*. Disciplina o aproveitamento de potencial energético offshore; e altera a Lei nº 9.427, de 26 de dezembro de 1996, a Lei nº 9.478, de 6 de agosto de 1997, a Lei nº 10.438, de 26 de abril de 2002, a Lei nº 14.182, de 12 de julho de 2021, e a Lei nº 14.300, de 6 de janeiro de 2022. Available at: http://www.planalto.gov.br/ccivil_03/_ato2023-2026/2025/lei/L15097.htm.

[23] Art.4 states ten different principles.

[24] Art.12, VI.

the public participation of people in decision-making that may affect the environment. The IA Court also recognises that such qualified participation can only take place if the right to information is guaranteed. This imposes a duty on states to provide mechanisms that allow people to request information and a duty to provide it in an accessible, effective and timely manner[25]. In fact, the law calls for free, prior and inform consult to ensure the participation of impacted communities, what could allow obstacles to be identified and the impact on fishing and extractive activities to be reduced as little as possible. It should be noted, however, that there is no room for not carrying out the project, since public consultation can only lead to the greatest possible reduction in impacts.

In relation to the responsibility for the impacts and externalities resulting from the exploitation of energy generation activities, there is also synergy with the UNGPs which establish that business activities must provide mechanisms for reparation, or collaborate in the operation of existing mechanisms, whenever the negative impact cannot be prevented (UNGP 29). To concretise this principle, the law establishes civil liability for the acts of employees and the duty to compensate for any damage resulting from electricity generation and transmission activities. There is no mention, though, to any responsibility arising from human rights abuses caused by the company, or that it had contributed or linked to.

Thus, it can be stated that the general principles enshrined in the law fall short of the standards set by the UNGPs and the rulings of the Inter-American Court. There remains ample room for progress, both in the development of mechanisms to ensure compliance with these principles and in the responsibility of corporations to step forward and fulfill their role.

3.2 The duty to prevent the impacts of offshore energy generation projects

The obligation of states to protect human rights is well-established, is the foundation of international human rights law and serves as the basis for the construction of regulations and public policies at national level[26]. Guiding Principle 1 reinforces the idea - already present in the International Covenants on Civil e Political and on Economic, Social and Cultural Rights - that this obligation implies the need to regulate private entities. In this sense, Principle 1 states that 'States must protect against human rights abuses in their territory and/or jurisdiction by third parties, including companies. This requires the adoption of appropriate measures to prevent, investigate, punish and redress such abuses through effective policies, legislation, regulations and judgements'.

This obligation is not restricted to passive protection, but implies positive and proactive action by the state, especially when it comes to regulating the activities of private entities such as companies. This regulation is essential to ensure that economic activities do not generate human rights abuses, thus placing a direct responsibility on the state to prevent and mitigate possible violations.

By creating regulations, the state must induce responsible behaviour on the part of companies to prevent their activities from having a negative impact on human rights. In practice, this requires a robust system of regulation that defines clear and enforceable standards aimed at identifying and preventing risks in economic sectors that could in some way expose individuals or communities to rights abuses. Measures such as requiring human rights due diligence processes, creating obligations for companies to identify and prevent risks and imposing sanctions in cases of non-compliance are instruments with which the state can induce such preventive behaviour.

There are cases in which the prevention of negative impacts may prove insufficient or even unfeasible, either due to the nature of the business activity or the context in which it takes place. In these situations, the state's obligation extends to requiring mitigation and dealing with the impacts caused. This means that the state must not only regulate the installation and execution of the activity and impose preventive regulations, but also monitor it and demand that companies adopt plans to mitigate, compensate and repair the damage caused.

All this can and should be done in the bill under discussion. In fact, since it is the regulatory framework for this activity, the ideal thing is for the state to already

[25] AO 23/2017, 221-222.

[26] SCHUTTER, Olivier de. *International human rights law*. Cambridge: Cambridge University Press, 2014. p. 427-526.

clarify what expectations it has of those who are going to exploit this activity.

3.3 Establishing prevention: regulatory and environmental assessment requirements for offshore wind projects

The business responsibility to prevent is also recognised by UNGP 13 and this creates an obligation for the state to regulate preventive mechanisms that must then be adopted by companies. One of the mechanisms widely used to prevent impacts on the environment is the Environmental Impact Assessment (EIA), which in Brazil is provided for in the Federal Constitution[27]. This study must be carried out when a work or activity potentially causing significant environmental degradation is installed. It is a document drawn up by a multidisciplinary technical team that analyses possible problems that could result from the installation, expansion or operation of potentially polluting industrial and business activities; its function is to identify, assess and predict the consequences of human actions on the environment, taking into account biological, physical and socio-economic issues. The EIA must contain an environmental diagnosis of the project's area of influence, with a description and analysis of environmental assets and their interactions; an analysis of the project's environmental impacts (positive and negative) and alternatives for mitigating damage; a proposal for measures to minimise negative impacts; and finally, the development of a programme for monitoring and following up on impacts.

The first draft of the law established the requirement for two studies as mechanisms to ensure that activities with a high negative impact on the environment were not installed or that effective prevention and mitigation plans were created. First, there was a requirement for a technical and economic assessment, in order to subsidise the formation of energy prisms and the analysis of the viability and externalities of the projects, as well as their compatibility and integration with other local activities; and then there is the requirement for an EIA, to be carried out to analyse the environmental viability of the project. In order to assign responsibility for prevention, the text of the bill distinguishes between two situations: a grant planned by the state; and an independent grant, whose exploitation is requested by the interested party. In the first case, the technical and economic assessment and the EIA would be carried out by the state; in the second case, they would have to be carried out by the interested party themselves, who will submit them with the application for exploitation and will be subject to approval. In the Chamber of Deputies, however, the bill was substantially amended to remove any mention of the need to conduct both studies. Vaguely, the law now leaves for regulation to require any assessment.

Regulation in Brazil provides that EIA is mandatory for 'activities or works potentially causing significant environmental degradation', in harmony with what the IA Court says, which states that in the event of 'the potential occurrence of significant environmental damage'[28], the EIA must be carried out. The law requires the EIA in the event of the installation of a work or activity that potentially causes significant environmental degradation, as prescribed by the Federal Constitution. In cases where the environmental aspects of the installation and operation of the project, when interacting with the environment, result in less significant impacts, a less complex study than the EIA may be required. This means that the need to carry out an EIA is defined in advance through an administrative process conducted by the competent environmental agency. In this process, information and technical documents related to the undertaking or activity in question are analysed, such as its location, characteristics, size and polluting potential. The conclusion about the degree of potential damage of an activity is defined by a regulation[29] that considers undertakings with a significant environmental impact to be those that may cause significant alterations to the environment or its natural resources.

Finally, the legislation prohibits the establishment of energy prisms in areas that coincide with areas protected by environmental legislation[30], such as conservation units, which is very welcome. This is an important preventive tool for protecting the environment.

[27] BRASIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil.* Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. art. 225, § 1º, inciso IV.

[28] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Advisory Opinion 23/2017, of november 15, 2017*. Available at: https://corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf. par. 180-181.

[29] IBAMA. *Resolução Conama nº 001, de 23 de janeiro de 1986*. Available at: https://www.ibama.gov.br/sophia/cnia/legislacao/MMA/RE0001-230186.PDF.

[30] Art.6o, par 1, VI.

PAMPLONA, Danielle Anne. Balancing growth and responsibility: a review of Brazil's offshore wind farm regulation. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 249-264, 2025.

4 The responsibility to respect rights

According to the UN Guiding Principles on Business and Human Rights (UNGPs), businesses have an autonomous responsibility to respect all internationally recognized human rights. This responsibility does not depend on the capacity or willingness of states to regulate. Rather, it reflects global normative expectations of corporate behaviour in a world where business activities can significantly affect individuals and communities. The State bears the responsibility to establish a duty for companies to adopt appropriate preventative measures. By initiating the legislative process to create a regulatory framework for offshore wind exploitation, the State is presented with a key opportunity to define the standards of conduct expected from companies engaged in this sector.

The cornerstone of this responsibility is the implementation of human rights due diligence (HRDD) processes. As defined in UNGP 17, due diligence is the primary mechanism through which companies are expected to operationalize their responsibility to respect rights. It is not merely a procedural formality—it is the main tool through which companies must identify, prevent, mitigate, and account for how they address their human rights impacts.

Human rights due diligence involves a continuous process that includes identifying and assessing actual and potential adverse human rights impacts that the company may cause, contribute to, or be directly linked to through its operations, products, or services; integrating and acting upon the findings, which means taking appropriate action to prevent or mitigate the risks identified; tracking the effectiveness of responses, through appropriate indicators and consultation with affected stakeholders; communicating externally how impacts are being addressed, particularly to those who may be affected.

This process applies not only to a company's direct activities but also to its entire value chain, including suppliers, contractors, and other business partners. Therefore, it must encompass both upstream impacts (e.g., the sourcing of materials like lithium or rare earth minerals) and downstream effects (e.g., impacts on communities located near wind farms or power transmission lines).

The HRDD process differs substantially from Environmental Impact Assessments (EIAs), which are more limited in scope and primarily designed to address environmental risks. While EIAs remain essential, they cannot substitute for HRDD because they do not comprehensively evaluate the social, cultural, economic, and labor-related dimensions of business impacts.

Despite the pivotal role of HRDD in the UNGPs, Brazil's Law 15.097/2025 makes no mention of it. The law focuses on environmental protection through EIAs and participatory consultations, particularly with local fishing communities. However, it fails to incorporate or require systematic human rights due diligence procedures either for companies operating offshore wind farms or throughout their supply chains. This omission is a significant gap and reveals a misalignment with global standards for responsible business conduct, according to the OCDE Guidelines for Multinational Enterprises.

The failure to require HRDD in legislation undermines the ability of Brazil's offshore wind regulatory framework to ensure that the development of clean energy is also socially just and rights-respecting. Offshore wind projects have well-documented potential to interfere with livelihoods, displace communities, disrupt cultural and spiritual ties to land and sea, and exacerbate social inequalities—especially if proper safeguards are not in place. These are precisely the types of risks that HRDD is designed to prevent.

Moreover, HRDD is essential, although it should not be the only tool[31], for addressing supply chain risks, such as the use of critical transition minerals like lithium, cobalt, and nickel. These minerals are often extracted in contexts plagued by human rights violations, including forced labour, environmental degradation, and the displacement of indigenous communities[32]. The absence of a requirement for companies to conduct HRDD in their supply chains permits a legal vacuum in which chances of occurrence of preventable abuses may increase.

Therefore, the inclusion of human rights due diligence within the offshore wind regulatory framework is

[31] LEITE, Marianna. Beyond buzzwords: mandatory human rights due diligence and a rights-based approach to business models. *Business and Human Rights Journal*, v. 8, n. 2, p. 197-212, 2023. DOI: https://doi.org/10.1017/bhj.2023.11.

[32] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT. *OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas*. 2. ed. Paris: OECD Publishing, 2013. DOI: https://doi.org/10.1787/9789264185050-en.

not merely a technical improvement—it is a normative imperative that stems from the international obligations the country is binding to as the American Convention on Human Rights[33]. By mandating HRDD, Brazil would not only align its law with the UNGPs and OECD Guidelines for Multinational Enterprises, but also strengthen the legitimacy and social license of its renewable energy projects. It would ensure that "clean" energy is not achieved at the cost of human dignity and rights.

In sum, any serious attempt to regulate offshore wind energy in line with international best practices must recognize human rights due diligence as a mechanism through which corporations fulfill their responsibility to respect rights. It is the missing link between environmental sustainability and social justice. Its absence in the current legislation constitutes a critical deficiency—one that future regulation must urgently address.

4.1 The absence of human and environmental rights due diligence

From what has been seen above, law 15.097/2025 explicitly provides for the use of EIA in the process of licensing undertakings, in accordance with item IV of §1 of art. 225 of the Federal Constitution. This EIA is necessary to analyse the environmental viability and identify the impacts of activities, and simplified studies are allowed for projects with a lower potential impact, according to §5 of art. 6 of the Bill.

With regard to the human rights due diligence process, the text makes no direct provision for this type of analysis, focusing mainly on environmental protection and the safety of maritime and aerial activities. It establishes the principle of 'protection and defence of the environment and ocean culture' and mentions the participation of impacted communities in public consultations. However, this public consultation is of a participatory and consultative nature, and it does not detail the specific assessment of impacts on human rights in a comprehensive manner, as advocated in the UN Guiding Principles.

The law, differently from what was provided for in the bill, does not even cover EIA requirements, leaving gaps in the implementation of a due diligence process focusing on environmental and social impacts and human rights of affected populations. The human rights due diligence introduced by the UN Guiding Principles focuses on identifying, preventing, mitigating and accounting for impacts on the human rights of affected individuals and communities. This process applies to all internationally recognised human rights and must be carried out independently of a formal legal requirement, treating human rights as universal values and transversal to all business operations. Unlike the EIA, which is more circumscribed to environmental impacts, human rights due diligence covers a broader spectrum, represented by all internationally recognised human rights and should be mentioned in the regulation.

Human Rights Due Diligence is a procedure composed of the following elements a) identifying and assessing the nature of actual and potential adverse human rights impacts in which a company may be implicated; b) preventing and mitigating adverse human rights impacts; c) monitoring and tracking the effectiveness of actions to respond to adverse human rights impacts; and communicating the management of adverse human rights impacts. In addition, these steps are complemented by a) a public commitment to respect human rights; and b) operational-level grievance mechanisms that enable them to redress negative impacts that have materialised[34]. Human rights impacts can be mitigated through a rigorous due diligence process, which includes broad consultation and the participation of affected communities at all stages of the project. This involves identifying risks in advance and implementing compensation measures to minimise negative effects on livelihoods, culture, health and the environment. Ongoing monitoring and reparation mechanisms for damage caused are also crucial to ensure that affected communities have access to justice and dignified living conditions.

[33] According to art.2 of the Convention, States need to provide for legislative or other provisions necessary to give effect to rights and freedoms enshrined. The duty to prevent human rights violations appears in several emblematic cases. This duty stems from Article 1.1 of the American Convention on Human Rights, which imposes on states the obligation to respect and guarantee the rights recognised in the Convention, which includes adopting measures to prevent, investigate and remedy violations. The leading case is *Velásquez Rodríguez* vs. Honduras (1988); but there are others such as *González y otras* («Campo Algodonero») vs. México (2009) and *Kaliña e Lokono* vs. Suriname (2015).

[34] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT. *OECD due diligence guidance for responsible business conduct*. [*S. l.*]: OECD, 2018. Available at: https://www.oecd-ilibrary.org/finance-and-investment/oecd-due-diligence-guidance-for-responsible-business-conduct_15f5f4b3-en.

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Since the law does not mention HRDD, it follows there are no responsibilities regarding the wind power plants' supply chain. The United Nations Development Programme (UNDP) has established 8 principles for a just energy transformation[35]. These principles are: a) be guided by science and understand the urgency to reduce greenhouse gas emissions in line with the Paris Agreement; b) be fair and defend the rights, needs and values of all without privileging any group, and should not fall on those who have less responsibility for the climate field or capacity to assume it; c) be sustainable, ambitious and consistent with broader and holistic strategies that contribute to the energy transition; d) be comprehensive, transparent and inclusive; e) ensure stakeholder participation and robust and meaningful dialogue, including a specific focus on social protection policies and gender equality to promote equitable access to benefits; f) be focused on climate justice; g) recognise energy access as essential for social welfare, economic growth, sustainable development and improved livelihoods; and h) ensure access to justice, decision making and information; i) ensure access to energy and energy services for all; j) ensure that the energy sector has the capacity and capacity to deliver on its promises. Legal provisions demanding corporate action toward human rights due diligence are able to tackle at least the needs of principles 'b', 'c', 'e', 'f', hence, again, the relevance of such disposition.

Considering that the installation of wind power plants is incentivised because they are an alternative to fossil fuel energy production, this gap cannot be ignored. If the aim is to produce clean energy, free from environmental degradation and human rights violations, it is essential that the law also addresses the production chain of these plants. The manufacture of wind turbines, for example, requires strategic minerals such as lithium, the extraction and production of which can have significant socio-environmental impacts[36]. Knowing the supply chain of a company, such as mining companies, is quite complex, and even more so when it comes to issues related to the energy transition, where not only local economic actors come into play but also international companies in highly complex political contexts, as the current political situation in Chile, Bolivia, Ecuador, Colombia, Peru and Argentina, just to give a few examples. These are great centres of exploitation of critical minerals for the transition and its value chain is not fully known to anyone. The International Energy Agency (IEA) emphasises the need to make information on companies that are part of the supply chain of the company linked to the energy transition and/or exploitation of critical transition minerals more transparent, following an adequate due diligence framework[37].

Therefore, comprehensive legislation on the subject should include due diligence mechanisms to ensure responsible and ethical practices throughout the supply chain.

4.2 A case for responsibility

Although the law does not mention it, Brazilian law allows us to conclude that the general duty of the corporation, in order to avoid civil liability, is not to act negligently[38].Thus, the negligence provided for in civil law can serve as grounds for liability for non-contractual damages. This has already been defined in Brazil in consumer, labour and environmental cases[39].

In addition, it is important to look at the regulatory frameworks that may apply to the company that decides to exploit wind power production in Brazil. In order to do this, it is necessary to look at the jurisdiction to which the company and its parent companies are subject, and to assess the frameworks affecting different stakeholders.

For example, if the company is a subsidiary of a multinational, the country where the company is headquartered will attract the application of regulatory

[35] UNITED NATIONS DEVELOPMENT PROGRAM. The 8 core principles of a just energy transformation: the alliance for a just energy transformation. *UNDP*, 2024. Available at: https://www.undp.org/energy/publications/8-core-principles-just-energy-transformation.

[36] ACTIONAID; SOMO. *Human rights in wind turbine supply chains*: towards a truly sustainable energy transition. Amsterdam: Actionaid, 2018. Available at: https://www.somo.nl/wp-content/uploads/2018/01/Final-ActionAid_Report-Human-Rights-in-Wind-Turbine-Supply-Chains.pdf.

[37] INTERNATIONAL ENERGY AGENCY. *Sustainable and responsible critical mineral supply chains*: guidance for policy makers. [*S. l.*]: IEA, 2023. Available at: https://iea.blob.core.windows.net/assets/7771525c-856f-45ef-911d-43137025aac3/SustainableandResponsibleCriticalMineralSupplyChains.pdf. p. 29-35.

[38] BRASIL. *Lei nº 10.406, de 10 de janeiro de 2002*. Institui o Código Civil. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm. art.186.

[39] Brazilian Federal Supreme Court case law confirms it: ARE 903265, 15.09.2015; ARE 1153199 AgR, 29.03.19; and Labour Superiour Court, Ag-Ag-ARR - 1001550-87.2015.5.02.0363, 14.04.25.

frameworks for exploitation in Brazil. The UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises are candidates for application. There is no self-regulatory initiative in this sector, hence the absence of principles agreed by the companies themselves. Responsibility, from the perspective of the Guiding Principles, derives from the social expectation formed from the exploitation of resources and people. In this sense, there is no doubt about the need to assign some responsibility to companies in the sector for the impacts that their activities generate. In practice, however, in the absence of other specific regulatory frameworks to assign responsibility for the impact of business activity, the provision in the legal framework for offshore companies of the obligation to adopt human rights due diligence processes would have the potential to make a significant difference.

5 Final considerations

The regulation of offshore wind farms in Brazil holds transformative potential for advancing the country's renewable energy goals and addressing global climate imperatives. Given Brazil's extensive coastline and ideal wind conditions, offshore wind energy presents a substantial opportunity for diversifying the national energy matrix, promoting economic growth, and supporting global shifts away from fossil fuels. However, this endeavor requires more than technological innovation and financial investment; it calls for a legal framework that balances environmental, social, and human rights considerations comprehensively and equitably.

The objective of the regulatory frameworks that will regulate energy generation in the context of the necessary transition from the use of fossil fuels to elements that are less harmful to the environment must take into account the necessary protection and respect for the people who may be affected by these new ventures. The history of fossil fuel energy generation has taught us, or should have taught us, that economic exploitation occurs at the expense of people and the environment whenever there is no state interest in protecting them or when institutions are so weak that they cannot sustain regulation. With all the known history of human rights abuses by private entities, approving a regulatory framework that regulates an activity so prone to violating human rights without any provision for the obligation to adopt preventive measures is irresponsible.

The new law has been in the right path, at least to provide for mandatory Environmental Impact Assessments (EIA) to help mitigate potential environmental harms. This was an essential foundation, ensuring that ecological risks — particularly to marine biodiversity — are identified, evaluated, and managed. At least, the law promotes sustainable development and responsible resource management, principles that align with Brazil's constitutional mandates on environmental protection. Yet, the regulation does not encompass the breadth of issues critical for true sustainability. Notably, it lacks explicit requirements for human rights due diligence also across the supply chain, a shortcoming that could undermine the social integrity of the industry as it grows.

In the context of human rights, the regulation falls short of providing adequate safeguards for local communities, particularly fishing and coastal populations, whose livelihoods and cultural heritage may be disrupted by offshore installations. Furthermore, the absence of due diligence requirements in the supply chain overlooks the environmental and social impacts associated with extracting and processing materials, such as lithium, essential for turbine production. Addressing this gap is crucial for offshore wind farms to genuinely represent "clean energy," as social and ecological impacts along the supply chain could otherwise perpetuate harm to vulnerable communities and ecosystems globally. International frameworks, such as the UN Guiding Principles on Business and Human Rights, emphasize the state's duty to prevent human rights abuses by businesses and to protect affected communities through adequate regulation, encompassing both local impacts and global supply chains.

Incorporating comprehensive human rights safeguards within the regulatory framework could position Brazil as a leader in socially responsible renewable energy development. Ensuring that human rights due diligence is applied to all stages of the offshore wind sector, including its supply chain, would align with international sustainability standards, protecting communities from indirect and direct impacts and strengthening Brazil's commitments to human rights and environmental justice. The addition of consultation processes with affected communities and more robust, enforceable guidelines around socio-economic compensation could

further ensure that the benefits of offshore wind development are widely and fairly distributed.

Lastly, the regulatory framework would benefit from incorporating clear mechanisms for monitoring and accountability, as well as independent oversight to assess compliance with environmental and human rights standards. These measures would enhance transparency, increase public trust, and help maintain Brazil's long-term commitment to a clean energy transition that respects both people and the planet. As the country seeks to expand its renewable energy capabilities, a more inclusive, comprehensive framework will be essential for mitigating unintended consequences and fostering a truly sustainable offshore wind sector that aligns with Brazil's environmental, economic, and social aspirations.

In conclusion, Brazil's approach to regulating offshore wind energy is commendable but incomplete. Provisions should have been kept in the final text to include EIA; and comprehensive human rights due diligence should have been added, especially in the supply chain. It was the chance for the country to set a global example for a balanced, just, and sustainable energy transition, addressing gaps that would ensure that the expansion of offshore wind energy contributes positively not only to Brazil's economy and environmental health but also to the rights and well-being of all communities touched by this ambitious endeavor.

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Autonomia municipal em litígios internacionais: desafios ao pacto federativo e à soberania nacional diante do desastre de Mariana*

Municipal autonomy in international litigation: challenges to the federal pact and national sovereignty in the aftermath of the Mariana disaster

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Resumo

O desastre ambiental de Mariana suscita debates sobre a atuação direta dos municípios brasileiros em litígios internacionais. Essa questão suscita a hipótese de desafio à competência exclusiva da União para representar o Brasil no exterior e levanta dúvidas sobre a autonomia municipal na proteção de interesses locais e do meio ambiente. O problema central deste trabalho consiste em avaliar se os municípios podem, à luz do pacto federativo e da soberania nacional, defender esses interesses internacionalmente. O objetivo do artigo é verificar as possibilidades dessa atuação, e, em caso afirmativo, delimitar os seus limites a partir de precedentes do Supremo Tribunal Federal – STF e bibliografia especializada. A metodologia, de cunho qualitativo, e caráter exploratório, centra-se em pesquisa documental, utilizando a jurisprudência pátria como base de dados, com análise centrada em princípios constitucionais, constitucionais ambientais e decisões do STF. Justifica-se o estudo pela importância de definir diretrizes que orientem os entes municipais, de modo a equilibrar a defesa de direitos humanos ambientais com a unidade federativa. O artigo estrutura-se em introdução, três capítulos e considerações finais: no primeiro capítulo, aborda-se o conceito de autonomia e paradiplomacia dos municípios em relação ao pacto federativo; no segundo, analisam-se, criticamente, os argumentos postos na ADPF n.º 1.178, ajuizada pelo Instituto Brasileiro de Mineração; e, no terceiro, abordam-se a tendência de posicionamento do STF a partir de casos análogos, o conceito de constitucionalismo global e busca prognóstico com base nos votos da Corte. Conclui-se que, para garantir a autonomia municipal com a integridade do pacto federativo, é necessário que o STF estabeleça diretrizes objetivas sobre a atuação internacional dos municípios, em respeito aos princípios da segurança jurídica, autonomia municipal, lealdade federativa e soberania nacional.

Palavras-chave: autonomia municipal; ADPF n.º 1.178; pacto federativo; soberania nacional; legitimidade internacional.

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Abstract

The Mariana environmental disaster has triggered debates on the direct participation of Brazilian municipalities in international litigation. This issue raises the hypothesis of a challenge to the Union's exclusive competence to represent Brazil abroad and generates questions about municipal autonomy in safeguarding local and environmental interests. The central problem of this article is to assess whether municipalities, in light of the federal pact and national sovereignty, may defend such interests internationally. The objective is to examine the possibilities of such action and, if so, to delimit its scope on the basis of precedents of the Federal Supreme Court (STF) and specialized scholarship. The methodology, qualitative and exploratory in nature, is based on documentary research, using domestic case law as its primary source, with an analysis focused on constitutional and environmental constitutional principles as well as STF decisions. The study is justified by the importance of defining guidelines that orient municipal entities so as to balance the protection of environmental human rights with federal unity. The article is structured into an introduction, three chapters, and final considerations: the first chapter discusses the concept of municipal autonomy and paradiplomacy in relation to the federal pact; the second critically analyzes the arguments raised in ADPF No. 1,178, filed by the Brazilian Mining Institute; and the third examines the STF's emerging stance in analogous cases, the notion of global constitutionalism, and a prognostic outlook based on the Justices' opinions. The conclusion reached is that, in order to safeguard municipal autonomy while preserving the integrity of the federal pact, it is necessary for the STF to establish objective guidelines on municipalities' international action, in line with the principles of legal certainty, municipal autonomy, federal loyalty, and national sovereignty.

Keywords: municipal autonomy; ADPF No. 1,178; federal pact; national sovereignty; international legitimacy.

Abstract

The environmental disaster in Mariana has sparked debate about the direct role of Brazilian municipalities in international disputes. This issue brings the hypothesis of challenge the exclusive jurisdiction of the Union to represent Brazil abroad and raises doubts about municipal autonomy in protecting local interests and the environment. The central issue is to assess whether municipalities can, in light of the federative pact and national sovereignty, defend these interests internationally. The objective of this article is to delimit the limits and possibilities of this role from the precedents from the Federal Supreme Court - FSC and specialized bibliography. The methodology combines qualitative documentary and case law analysis, focusing on constitutional principles, environmental constitutional principles, and decisions of the SFC. The study is justified by the importance of defining guidelines that guide municipal entities in order to balance the defense of environmental human rights with the federative unity. The article is structured in an introduction, three chapters, and final considerations: the first chapter addresses the concept of autonomy and paradiplomacy of municipalities in relation to the federative pact; The second chapter critically analyzes the arguments presented in ADPF No. 1,178, filed by the Brazilian Mining Institute; the third chapter addresses the tendency of the STF's positioning based on similar cases, the concept of global constitutionalism and seeks a prognosis based on the Court's votes. It is concluded that, in order to guarantee municipal autonomy with the integrity of the federative pact, it is necessary for the STF to establish objective guidelines on the international action of municipalities, in compliance with the principles of legal certainty, municipal autonomy, federative loyalty and national sovereignty.

Keywords: international legitimacy; federalism; municipal autonomy; national sovereignty; ADPF No. 1,178.

1 Introdução

O reconhecimento da autonomia dos municípios brasileiros é fruto de um amadurecimento progressivo do pacto federativo brasileiro, consagrado na Constituição de 1988. No entanto, essa autonomia enfrenta desafios quando se projeta no cenário internacional, especialmente em questões ambientais que envolvem corporações multinacionais. O desastre ambiental de Mariana (2015) representa um marco nesse debate, pois municípios diretamente afetados pelo rompimento da barragem acionaram a Justiça do Reino Unido para buscar reparações. Essa estratégia confrontou o entendi-

mento tradicional de que a União detém a competência exclusiva para representar o Brasil nas relações internacionais, gerando questionamentos sobre os limites de atuação de ente subnacional no direito internacional.

A escolha do caso de Mariana como objeto deste estudo justifica-se pela sua dimensão transnacional e caráter paradigmático. Trata-se de um dos maiores desastres ambientais da história do Brasil, com impactos humanos, ecológicos e econômicos que transcendem fronteiras. A decisão do STF na ADPF 1178, proposta pelo Instituto Brasileiro de Mineração (IBRAM), será determinante para definir se os municípios podem litigar no exterior contra corporações privadas, sem que isso seja afronta ao pacto federativo ou à soberania nacional. Além disso, insere-se este estudo em um contexto mais amplo de litígios climáticos internacionais, em que comunidades locais e entes subnacionais têm fortalecido um papel crescente na defesa ambiental e na responsabilização de atores privados.

Diante do cenário de protagonismo municipal observado em 2024, questiona-se se os municípios brasileiros possuem, de fato, o respaldo constitucional e jurídico para atuar em litígios internacionais, sobretudo quando voltados à defesa do meio ambiente e à reparação de danos. A autonomia municipal, embora assegurada pela Constituição, enfrenta limitações quando confrontada com princípios de soberania e imunidade de jurisdição internacional. Na presente pesquisa, explora-se essa tensão a fim de delinear o alcance e os limites da autonomia municipal em questões de interesse global.

O presente artigo tem como objetivo principal investigar a possibilidade de os municípios brasileiros atuarem em litígios internacionais relacionados à defesa do meio ambiente e à reparação de danos. Além disso, busca-se analisar até que ponto a autonomia conferida pela Constituição de 1988 permite essa atuação, bem como os possíveis impactos dessa prerrogativa no cenário jurídico e político internacional. Especificamente, pretende-se verificar como a autonomia municipal pode ser aplicada em casos de interesse internacional e, em particular, no enfrentamento de corporações que atuam no território brasileiro e são responsáveis por danos ambientais que afetam as populações locais e o meio ambiente.

A relevância social deste estudo fundamenta-se na necessidade de promover mecanismos de proteção mais eficazes para os direitos das populações locais, especialmente em casos de desastres ambientais. Os municípios, enquanto primeiros respondentes e responsáveis pela defesa dos interesses locais, desempenham um papel crucial na garantia de direitos fundamentais, sendo imperativo que possuam os recursos e as prerrogativas necessárias para exercer essa função de maneira efetiva e abrangente. Além disso, a relevância acadêmica reside na necessidade de análise aprofundada sobre os limites e as possibilidades da autonomia municipal em cenários de litígio internacional, contribuindo para a literatura jurídica ao explorar o papel dos municípios no âmbito das relações internacionais e na defesa de direitos humanos e ambientais.

A metodologia adotada é de natureza qualitativa e caráter exploratório, fundamentando-se em pesquisa bibliográfica e análise documental da legislação brasileira, da jurisprudência do Supremo Tribunal Federal, com destaque para a ADPF n.º 1178, e dos pareceres apresentados no contexto de litígios ambientais. Por meio da pesquisa proposta, examinam-se, ainda, os posicionamentos das principais instituições envolvidas, como a Advocacia Geral da União, a Procuradoria Geral da República e o Consórcio Público para a Defesa e Revitalização do Rio Doce (CORIDOCE), que atuaram como *amicus curiae* no caso em questão.

Estruturou-se este trabalho em três capítulos. No primeiro, aborda-se a autonomia dos municípios, à luz do pacto federativo de 1988 e a prática da paradiplomacia por entes subnacionais brasileiros. No segundo, analisam-se os principais pareceres ofertados na ADPF 1178, considerando o contexto do desastre ambiental de Mariana, suas implicações no cenário jurídico atual, com ênfase na imunidade de jurisdição e na soberania nacional. No terceiro, com base na abordagem do constitucionalismo global e dos litígios transnacionais, analisa-se a interação das doutrinas nacional e internacional com a jurisprudência do STF em casos correlatos, propondo um ambiente de evolução jurisprudencial para a aplicação prática das prerrogativas municipais em defesa do meio ambiente e dos direitos humanos.

Espera-se que este estudo ofereça análise crítica sobre os limites e possibilidades da autonomia municipal em litígios internacionais, que possam contribuir para a construção de jurisprudência sólida e para o fortalecimento das políticas públicas de proteção ambiental. Além disso, busca-se proporcionar perspectiva inovadora sobre a atuação dos municípios em defesa dos

interesses locais na esfera internacional, a fim de colaborar com a promoção de reparação integral e para a efetividade dos direitos humanos e ambientais assegurados pela Constituição de 1988.

2 Autonomia municipal e paradiplomacia no Direito brasileiro

Neste capítulo, analisa-se a autonomia municipal e sua relevância no contexto das relações internacionais e da proteção ambiental. Pretende-se explorar (i) a concepção de autonomia municipal à luz da Constituição de 1988, (ii) os princípios constitucionais que lhe são aplicáveis e (iii) a viabilidade de atuação internacional dos municípios, com foco no caso concreto de Mariana.

A Constituição Federal do Brasil de 1988 iniciou era democrática; para além de inovações em cidadania, provimento de direitos fundamentais, dedicou-se a temas que também se relacionam com a vida de um novo Estado. Deu-se aos municípios um novo posicionamento federativo, concedendo-lhes autonomia. Conferiu-se capacidade de auto-organização e normatização, autogoverno e autoadministração[1], bem como prerrogativas e competências, que permitem o amadurecimento das relações com os demais entes subnacionais e a inserção em relações internacionais.

A introdução da proteção do meio ambiente como direito fundamental, por meio do artigo 225 do texto constitucional, impôs à coletividade, bem como ao Poder Público, o dever de o preservar, tanto para a atual como para as futuras gerações. Este é o primeiro avanço em direção ao Estado Ambiental, que, para Canotilho, possui duas dimensões jurídico-políticas relevantes: obrigação do Estado, em cooperação com a comunidade, em promover políticas públicas; e o dever de adoção de comportamentos de concretude para a assunção de responsabilidades pelo poder público perante futuras gerações[2].

O Brasil é composto por entes federados possuidores de autonomia de poder político e competências específicas, delegadas de maneira expressa ou residual pela Constituição. Ricardo Lodi Ribeiro afirma que "o federalismo se fundamenta na descentralização do poder, permitindo a democratização das decisões que passam a ser tomadas numa esfera mais próxima do cidadão, que, com isso, tem maiores possibilidades de fiscalizar, controlar e influir nas decisões estatais"[3]. Paulo Bonavides explica que há garantia institucional do "mínimo intangível" na autonomia dos entes federados[4].

O município, antes extensão administrativa, tornou-se apto para atuar autonomamente, desde que não ofenda norma expressa e inequívoca da Constituição[5].

Conforme estabelecido pelos artigos 30 e 225, §3º da CF/88, respectivamente, os entes municipais possuem competências exclusivas para legislar sobre questões de interesse local e para defender o seu patrimônio. Além disso, há a obrigação conjunta do Poder Público de garantir o cumprimento do Princípio do Poluidor-Pagador, bem como buscar sanções penais, administrativas e cíveis contra os responsáveis pelos danos ambientais.O desastre de Mariana, que ocorreu em 2015, torna evidente os desafios impostos aos municípios brasileiros na defesa do interesse local e da proteção do seu patrimônio, inclusive o ambiental. Um grupo de 46 municípios atingidos pelo rompimento da barragem de Fundão, em Mariana/MG, busca a reparação pelos danos ambientais juntamente à Justiça do Reino Unido. Inicialmente recusada, a ação internacional restou aceita pelo Supremo Tribunal desse país (processo HT-2022-000304).

Contudo, a atuação dos municípios na esfera internacional, inclusive a respeito da busca por reparação decorrente de dano ambiental, tem encontrado questionamentos diante da possível existência de confronto entre princípios constitucionais relacionados, que representam diretrizes para compreender a autonomia municipal e sua atuação, inclusive em âmbito internacional. Por exemplo, o Princípio do Poluidor-Pagador, implícito no

[1] BRASIL. Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade n.º 6.617/PB*. Rel. Min. Alexandre de Moraes, 08 de mar. de 2021. Disponível em: https://portal.stf.jus.br/jurisprudencia/. Acesso em: 29 nov. 2024.

[2] CANOTILHO, José Joaquim Gomes. Estado de Direito. *Cadernos Democráticos n.º 7*. Lisboa: Gradiva, 1998.

[3] RIBEIRO, Ricardo Lodi. Do Federalismo dualista ao Federalismo de cooperação: a evolução dos modelos de Estado e a repartição do poder de tributar. *Revista Interdisciplinar de Direito*, v. 1, p. 3, jan./jun. 2018. Disponível em: https://revistas.faa.edu.br/FDV/article/view/498. Acesso em: 18 fev. 2025. p. 335-362.

[4] BONAVIDES, Paulo. *Curso de direito constitucional*. 33. ed. São Paulo: Malheiros, 2018.

[5] BRASIL. Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade n.º 6.617/PB*. Rel. Min. Alexandre de Moraes, 08 de mar. de 2021. Disponível em: https://portal.stf.jus.br/jurisprudencia/. Acesso em: 29 nov. 2024.

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art. 225 da Constituição, estabelece que os responsáveis por danos ambientais devem responder, integralmente, pelos prejuízos advindos de suas ações. O Princípio da Proteção Ambiental, igualmente fundamentado no art. 225, eleva o meio ambiente ao *status* de direito fundamental, conferindo à coletividade e ao poder público a responsabilidade pela sua preservação. Para os municípios, essa incumbência constitucional consolida sua competência na proteção do patrimônio ambiental local, inclusive mediante o ajuizamento de ações judiciais em jurisdições estrangeiras, quando necessário.

Sem embargo, a garantia de acesso à justiça e a busca por reparação integral dos danos estão intrinsecamente vinculadas ao Princípio da Dignidade da Pessoa Humana e asseguram que nenhum direito seja desprovido de tutela judicial efetiva. Em situações como o desastre de Mariana, tais princípios amparam a atuação dos municípios no esforço por reparações plenas para suas comunidades, abrangendo impactos ambientais, sociais e econômicos.

Por outro lado, princípios como a soberania e a imunidade de jurisdição apresentam, *a priori*, desafios à atuação internacional de entes subnacionais. Nesse cenário, a prática da paradiplomacia surge como resposta viável para compatibilizar a autonomia municipal com as limitações impostas por competências exclusivas da União, permitindo que os municípios defendam seus interesses sem transgredir essas prerrogativas.

Esses princípios operam em constante diálogo com o pacto federativo, que define e protege a autonomia dos entes federativos por meio da distribuição de competências. Contudo, situações de alcance global, como desastres ambientais, demandam um balanceamento delicado entre autonomia, soberania e a salvaguarda de direitos fundamentais. Esse equilíbrio será analisado à luz do caso de Mariana e das implicações jurídicas decorrentes da atuação internacional dos municípios nesse contexto.

Tal situação não é nova no direito pátrio e constitui decorrência da estabilização e busca por desempenho de prerrogativas dadas aos municípios face ao modelo federativo atual adotado no Brasil. Outrora, quando se discutiu a possibilidade de atuação de entes subnacionais em relações de direito público com outros entes privados (bancos, fundos etc.) ou mesmo por meio de relações com entes subnacionais de países diversos, debateu-se sobre a possível existência de usurpação de atribuições típicas soberanas da Estado Federal Brasileiro.

Como visto, denominou-se de paradiplomacia a possibilidade de entes subnacionais manterem relações na esfera internacional, desde que não estivesse exercendo atos típicos de soberania. Noé Cornago conceitua como:

> envolvimento de governo subnacional nas relações internacionais, por meio do estabelecimento de contatos, formais ou informais, permanentes ou provisórios (*ad hoc*), com entidades estrangeiras públicas ou privadas, objetivando promover resultados socioeconômicos ou políticos, bem como qualquer outra dimensão externa de sua própria competência constitucional[6].

Vincular a atuação dos municípios, em defesa dos interesses locais, inclusive no exterior, à subordinação da vontade da União, seria extrair a força normativa da Constituição por intermédio de limitações que o texto não previu. Tais balizas se tornam ainda mais evidentes em questões de índole ambiental e de direitos humanos que, tanto no costume internacional quanto internamente, se revelam exceção que equilibram o sopesamento de normas e princípios constitucionais.

Para Ferrajoli, apesar da complexidade e do elevado número de conflitos e desequilíbrios, o mundo se transformou em aldeia global em termos ecológicos, dada a crescente interdependência política, econômica, ecológica e cultural[7].

A paradiplomacia ambiental consolida-se como mecanismo legítimo de inserção de entes subnacionais no direito internacional. Segundo Postiga, a globalização jurídica promoveu o surgimento de novas formas de regulação transnacional que extrapolam o conceito tradicional de soberania estatal. A atuação internacional de municípios, na busca por reposição de danos ambientais, se insere em um contexto de descentralização do direito internacional e aumento da influência de atores subnacionais[8].

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[6] PRIETO, Noé Cornago. O outro lado do novo regionalismo pós-soviético e da Ásia-Pacífico: a diplomacia federativa além das fronteiras do mundo ocidental. *In*: VIGEVANI, Tullo *et al.* (coord.). *A dimensão subnacional e as relações internacionais*. São Paulo: Educ, 2004. p. 251.

[7] FERRAJOLI, Luigi. *A soberania no mundo moderno*: nascimento e crise do Estado nacional. São Paulo: Martins Fontes, 2002.

[8] POSTIGA, Andréa Rocha. A emergência do direito administrativo global como ferramenta de regulação transnacional do investimento estrangeiro direto. *Revista de Direito Internacional*, Brasília, v. 10, n. 1, p. 171-193, 2013. DOI 10.5102/rdi.v10i1.2369. Disponível

Delegar à União ou ao Estado Federal a atribuição de defender interesses locais de entes subnacionais interfere na harmonia constitucional desejada para os entes da federação, comprometendo o sistema de freios e contrapesos, e violando a baliza constitucional de natureza pétrea, que deve ser observada também nas relações entre entes de um mesmo poder. Por se tratar de limitação à prerrogativa e garantia fundamental da autonomia, deve, se for o caso, encontrar expressa disposição.

No Brasil, atento a essas particularidades, o poder constituinte derivado rechaçou tentativa de regulamentar e restringir a matéria. Deu-se por meio da propositura da PEC 475/2015, arquivada pela CCJ da Câmara dos Deputados. Extrai-se do voto condutor:

> Estado, Distrito Federal e Municípios podem celebrar quaisquer atos com cidadãos, organizações oficiais ou não-governamentais ou quaisquer entes de natureza estatal (o País, a Província, o Departamento, o Condado etc.). Para a prática de tais atos, os entes estatais não precisam de 'autorização' da União, como sugerido na proposta. [...] Assim, a sugestão de "autorização" viola a autonomia reconhecida aos entes estatais.[9]

O texto constitucional tem como balizas fundamentais a garantia do exercício da autonomia dos entes subnacionais em suas competências e interesses, a preservação da soberania do Estado Federal e a manutenção da eficácia do pacto federativo, evitando que ele se torne inócuo. Atenta-se que o poder derivado deixou firme a possibilidade da prática de atos de natureza estatal e a impossibilidade de prévia autorização da União para atos de autonomia que o texto constitucional não fez expressa restrição.

O direito ambiental internacional se desenvolve para considerar a necessidade de mecanismos transnacionais para a proteção do meio ambiente. Para Moraes, Moraes e Mattos, a harmonização legislativa no Mercosul tem sido um desafio, e a falta de um arcabouço jurídico unificado para resolver questões ambientais transfronteiriças dificulta a responsabilização de causadores de danos. Nesse sentido, a atuação de entes subnacionais em tribunais internacionais pode preencher essa lacuna e garantir recursos às comunidades afetadas[10].

No capítulo seguinte, analisa-se a tese posta a julgamento perante o STF, por meio da ADPF 1178 e as manifestações apresentadas pelos principais *amicus curiae*, bem como de que forma os princípios da soberania e imunidade de jurisdição, além de outros citados, devem se harmonizar ao novo modelo de pacto federativo, e a tendência mundial de preservação dos direitos humanos a fim de preservar a harmonia entre os poderes e entes federados.

3 A ADPF n.º 1.178 – Soberania, imunidade e lealdade federativa

Destina-se este capítulo à elaboração de um relatório objetivo que sistematiza os principais argumentos apresentados na ADPF 1178, protocolada no Supremo Tribunal Federal pelo Instituto Brasileiro de Mineração (IBRAM), entidade representativa do setor. O objetivo da ação é impedir que municípios brasileiros ajuízem demandas em tribunais estrangeiros, como no caso da ação proposta na Corte do Reino Unido por diversos municípios impactados pelas consequências ambientais, socioculturais e estruturais do rompimento da barragem de rejeitos em Mariana. A ADPF, enquanto instrumento de controle abstrato de constitucionalidade, possui potencial para influenciar o entendimento jurídico em demandas similares, atuais e futuras. Neste capítulo, limita-se à exposição dos fundamentos de mérito da ação, incluindo as teses e antíteses apresentadas pelas partes, as contribuições do *amicus curiae*, e os pareceres da AGU e da PGR, sem adentrar na análise crítica ou na avaliação da legitimidade da parte proponente.

Em primeiro lugar, o pedido principal do IBRAM é para

> que o STF fixe tese no seguinte sentido: é inconstitucional interpretação jurídica que autorize Municípios brasileiros a praticarem atos que possibilitem, determinem ou promovam a própria participação (seja como autores, seja como interessados) em

em: https://www.publicacoes.uniceub.br/rdi/article/view/2369. Acesso em: 29 nov. 2024.

[9] BRASIL. Câmara dos Deputados. *Parecer, Comissão de Constituição e Justiça, PEC n.o 475/2005*. Relator: Deputado Ney Lopes, 18 de abril de 2006. Disponível em: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=388392&filename=Tramitacao-PEC%20475/2005. Acesso em: 29 nov. 2024.

[10] MORAES, Isaías Albertin de; MORAES, Flávia Albertin de; MATTOS, Beatriz Rodrigues Bessa. O Mercosul e a importância de uma legislação ambiental harmonizada. *Revista de Direito Internacional*, Brasília, v. 9, n. 3, p. 91-101, 2012. DOI 10.5102/rdi.v9i3.1876. Disponível em: https://www.publicacoes.uniceub.br/rdi/article/view/1876. Acesso em: 29 nov. 2024.

> ações judiciais perante jurisdições estrangeiras, por violação aos artigos: 1o, *caput* e inciso I; 2o, 4o, incisos I e V; 5o, incisos XIV, XXXIII, XXXV, LIII, LIV, LV e LXXVIII; 13; 18, *caput*; 21, inciso I; 30; 37, *caput*; 52, inciso V; 93, inciso IX; 127; 129; 131; 132, *caput;* e 134; todos da Constituição.[11]

Essa relação de dispositivos inclui: a soberania, como expressão fundamental do Estado Democrático de Direito; os poderes da União, harmônicos entre si e independentes; as bases das relações internacionais, destacando a prevalência dos direitos humanos e a igualdade entre os Estados; imunidade de jurisdição; autonomia; acesso à informação; eficiência; legalidade; transparência, entre outros. A respeito da ação constitucional, determinou-se, por meio de medida cautelar[12], a suspensão de pagamento de qualquer verba honorária e a apresentação de vasta documentação referente aos procedimentos de contratação do escritório de advocacia estrangeiro considerado pelos municípios. No voto vencedor, de lavra do Ministro Flávio Dino (relator), apesar de requerido, preferiu-se não adentrar ao mérito da causa. Na prática, permitiu-se que os municípios continuem com o litígio cujo julgamento já iniciou e tem previsão de encerramento em fevereiro de 2025. Posta a julgamento pelo Colegiado, no Plenário Virtual, a decisão foi referendada por maioria.

Destaca-se o voto vogal do Ministro Edson Fachin. Nesse sentido:

> porque, ainda que, imediatamente, o tema possa amoldar-se ao debate, em tese, sobre conflito federativo ou a respeito da soberania, como se alega, mediatamente, nada obstante, aqui pode haver questões essenciais específicas de direitos fundamentais em interesses supraindividuais, não exclusivamente econômicos, emergentes de direitos fundamentais autônomos como aos vinculados ao meio ambiente. [...] Mais que isso: é da exata compreensão do federalismo que se trata, a desafiar uma hermenêutica protetiva de direitos fundamentais. Temas aflorarão como uma visão mais ampla que a dicotomia centralização e descentralização, e ainda o escrutínio possível de ações e atuações de entes subnacionais, seus limites e possibilidades numa perspectiva teleológica[13].

Registrou-se, ainda, a necessidade de que a interpretação a ser adotada abarque todos os entes subnacionais, e não apenas os municípios. Como mencionado, trata-se de uma questão aparentemente simples, mas de solução complexa.

O IBRAM argumenta que a iniciativa de propor ações em território estrangeiro por um ente subnacional brasileiro viola a soberania nacional externa, uma vez que, segundo a instituição, há uma extrapolação da autonomia municipal e uma ruptura do pacto federativo. Além disso, aponta que tal ato também prejudica a jurisdição interna, ao esvaziar a autoridade do Judiciário brasileiro. O IBRAM sustenta que, ao renunciar à imunidade de jurisdição, os municípios teriam agido como se fossem órgãos do próprio Estado, permitindo que, por meio de um ente subnacional, o Brasil se sujeitasse à jurisdição de um tribunal estrangeiro. Em um sentido similar, em relação ao parecer de Nádia de Araújo[14], os municípios brasileiros não devem ser sujeitos de Direito Internacional. Somente a União, representante do Estado Brasileiro, pode relacionar-se internacionalmente. O Brasil é signatário da Convenção de Montevidéu (Convenção de Montevidéu sobre Direitos e Deveres dos Estados de 1933)[15] que, em seu artigo 2º, afirma que "o Estado federal constitui uma só pessoa ante o Direito Internacional". Faltaria aos entes subnacionais personalidade jurídica para agir, exigir direitos e contrair obrigações.

Já em outro argumento construído por Daniel Sarmento[16], o ingresso de ação por município no plano internacional afrontaria o Princípio da Lealdade Federativa e ofende o pacto federativo. Nessa acepção abrangente, o simples ajuizamento de ação em foro estrangeiro seria usurpação de competência da União Federal que detém competência exclusiva para se relacionar com estados estrangeiros nos termos do art. 21, inciso I, da CF/88. Independentemente das partes envolvidas, corporação privada estrangeira ou um Estado, do

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[11] INSTITUTO BRASILEIRO DE MINERAÇÃO. *Petição inicial*. Processo n.º ADPF 1178. Brasília: Supremo Tribunal Federal, 2024. Disponível em: https://www.stf.jus.br. Acesso em: 29 nov. 2024.

[12] BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n.º 1.178*. Ministro Flávio Dino, novembro de 2024. Disponível em: https://portal.stf.jus.br/jurisprudencia/. Acesso em: 29 nov. 2024.

[13] BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n.º 1.178*. Ministro Flávio Dino, novembro de 2024. Disponível em: https://portal.stf.jus.br/jurisprudencia/. Acesso em: 29 nov. 2024.

[14] ARAÚJO, Nádia de. *Imunidade de jurisdição dos Estados e atuação internacional de municípios*: parecer elaborado para o Instituto Brasileiro de Mineração – IBRAM. Brasília, 2024.

[15] BRASIL. *Decreto n.º 1.570, de 1º de julho de 1937*. Promulga as Convenções sobre Direitos e Deveres dos Estados e sobre Asilo Político. Disponível em: https://legislacao.presidencia.gov.br/atos/?tipo=DEC&numero=1570&ano=1937&ato=f530TVU1EMZpXT830. Acesso em: 29 nov. 2024.

[16] SARMENTO, Daniel. *Parecer sobre a ADPF n.º 1.178*: análise jurídica e constitucional. Solicitação do Instituto Brasileiro de Mineração – IBRAM. Brasília, 2024.

polo na ação, promovente ou promovida, da natureza da ação, seja ela reparatória ou não, ao buscar tutela no judiciário internacional, o ente subnacional extrapolaria sua autonomia e quebra o dever de cooperação com os demais entes.

De fato, o STF reconhece a existência do Princípio da Lealdade à Federação. Isso pode ser visto por meio do julgamento da ADI n.º 6.220 quando entendeu sua atuação como

> um dos mecanismos de correção, de alívio das tensões inerentes ao Estado Federal, junto aos que já se encontram expressamente previstos na própria Constituição. Sua presença silenciosa, não escrita, obriga cada parte a considerar o interesse das demais e do conjunto.[17]

Nesse contexto, ao debate invocado pela ADPF 1178, percebe-se que os três entes subnacionais poderiam invocar o princípio. De partida, a União poderia fazê-lo por suposta afronta à matéria de sua esfera única de atribuição, que configuraria a renúncia à imunidade de jurisdição; os estados federados em função da retirada de apreciação pelos poderes judiciários estaduais da questão posta em litígio; e os municípios por ausência de cooperação dos demais entes em assunto de destacado interesse local.

Em face de tal panorama, registre-se o Parecer da Advocacia Geral da União ofertado nos autos. Apesar de não conhecer a legitimidade ativa no IBRAM para o ingresso da ADPF, no mérito, pediu a procedência da ação. Em suas razões, expôs que a atuação independente e isolada dos municípios, desconsiderando que o impacto de suas ações contra a Federação como um todo, "gera conflitos e desestabiliza o equilíbrio federativo, estando em dissonância com o espírito cooperativo que deve nortear as relações entre os entes federados"[18].

Mais adiante, a Procuradoria Nacional da União para Assuntos Internacionais destacou que a submissão de uma pretensão jurídica a um foro estrangeiro, em qualquer posição processual, viola a soberania, o pacto federativo e a própria estrutura do Estado brasileiro. Isso ocorreria ao permitir que uma ordem emanada de outro Estado fosse dirigida ao Brasil, sem que a União tenha renunciado, previamente, à imunidade de jurisdição. Até mesmo a possibilidade de outra nação, na esfera do seu poder jurisdicional, avaliar os direitos e argumentos da pretensão de relação nascida no Brasil configura ofensa a essa garantia[19].

Nessa seara, surge a opinião escrita por Mazzuoli[20] que aponta a existência de renúncia tácita da União a essa garantia, diante do conhecimento público e da inércia do poder central brasileiro com relação às ações que correm em foro estrangeiro ajuizadas pelos municípios. O parecerista afirmou que a imunidade de jurisdição representa medida protetiva para o Brasil face a outro Estado e não pode ser barreira ao direito de ação e acesso à justiça em causas em que o ente subnacional litigue em busca de interesses particulares (ato de gestão). No caso de Mariana, essas ações não guardariam relação com atos de império, típicos de defesa da soberania, do território e das relações diplomáticas entre Estados. Na ação intentada no Reino Unido, os municípios litigam contra empresa privada, na busca por reparação material e imaterial por danos causados ao meio-ambiente.

Recorde-se que o STF reconhece a clássica distinção entre atos de império e atos de gestão nas relações internacionais. Essa distinção e a relativização de regras de direito internacional quando a demanda envolva direitos humanos, inclusive o ambiental, deverão ser pontos decisivos no julgamento da ADPF 1178. Neste sentido, o reconhecimento da soberania e seus consectários como fundantes do Estado de Direito Brasileiro guardam conformidade com o texto constitucional de 1988. Esse texto também prestigia direitos fundamentais, humanos, sociais e ecológicos, por meio da força normativa que possui e da evolução doutrinária e jurisprudencial que propicia.

Em horizonte assemelhado, Sandra Balão ressalta que a definição das regras da Política Global (interna e externa) com o movimento de Globalização, "aquilo que os Estados conheciam como soberania na linha de Jean Bodin não pode deixar de sofrer alterações resultantes, sobretudo, da prática, da realidade, da conjuntura e dos acontecimentos nela considerados"[21].

[17] BRASIL. Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade n.º 6.220*. Rel. Min. Gilmar Mendes, 16 de abr. de 2021. Disponível em: https://portal.stf.jus.br/jurisprudencia/. Acesso em: 29 nov. 2024.

[18] BRASIL. Advocacia-Geral da União. *Manifestação na ADPF n.º 1.178*. Relator: Ministro Flávio Dino. Brasília, 2024.

[19] BRASIL. Advocacia-Geral da União. *Parecer n.º 00393/2024/PGU/AGU da PNAI*. Anexo ao parecer da AGU nos autos da ADPF n.º 1.178. Brasília, 2024.

[20] MAZZUOLI, Valério. *Parecer sobre a ADPF n.º 1.178*: análise jurídica e constitucional. Solicitação do Comitê Interfederativo do Corredor do Rio Doce (CORIDOCE). 2024.

[21] BALÃO, Sandra Maria Rodrigues. *A matriz do poder*. 2. ed. Lisboa:

O equilíbrio entre soberania e cooperação internacional, especialmente em questões ambientais, cujos impactos muitas vezes transcendem fronteiras, adquire grande importância no contexto do almejado constitucionalismo planetário. Fazem coro Gina Pompeu e Luciana Barreira que adicionam que os Direitos da Natureza, como consectários do paradigma ecocêntrico, "desvelam-se como novo aliado no desafio de concretização do direito ao meio ambiente ecologicamente equilibrado, o qual, na perspectiva aqui defendida, passa a ter como titular, além das presentes e futuras gerações humanas, também as não humanas"[22].

A expansão da responsabilidade das corporações em litígios internacionais se entrelaça com a relação entre tratados ambientais e acordos comerciais multilaterais. Morosini e Niencheski destacam que há uma tensão crescente entre os tratados ambientais e os compromissos comerciais da OMC, o que pode impactar a forma como empresas multinacionais são responsabilizadas por danos ambientais. Esse embate influencia, diretamente, a ocorrência de pressões e restrições para municípios não recorrerem a tribunais estrangeiros questões ambientais[23].

Encerra-se, portanto, por demonstrar que a ADPF 1178 envolve um complexo e denso debate jurídico e político acerca da interação entre soberania nacional, autonomia municipal e proteção aos direitos fundamentais. Analisaram-se, no capítulo, os principais argumentos propostos pelo IBRAM. Sustenta a inconstitucionalidade das ações judiciais promovidas por municípios em tribunais estrangeiros, por afronta ao pacto federativo, abdicação da imunidade de jurisdição e usurpação de competência da União.

Examinaram-se precedentes do STF que abordam as tensões intrínsecas ao federalismo, sobretudo em relação à centralização e descentralização, bem como à indispensabilidade de interpretação que atenda aos direitos fundamentais e às questões ambientais. Destacaram-se, ainda, os pareceres de especialistas e as manifestações da AGU e da PGR, que enfatizaram a relevância da lealdade federativa e da cooperação entre os entes subnacionais, além de reflexões sobre a diferenciação entre atos de império e atos de gestão em contextos de litígios internacionais.

Dessa forma, a solução dessa controvérsia demandará ponderação criteriosa e equilibrada entre a preservação da soberania nacional e a crescente necessidade de cooperação global, especialmente diante de desafios ambientais que transcendem fronteiras e tensionam os limites tradicionais do constitucionalismo.

No capítulo seguinte, analisa-se nova concepção doutrinária de constitucionalismo global que influencia os ordenamentos jurídicos nacionais, sobretudo nos litígios transnacionais com a relativização de conceitos tradicionalmente consolidados como soberania e imunidade. Além disso, o sistema judiciário brasileiro, à luz dos precedentes do STF, está atento a essa evolução e aos possíveis reflexos no julgamento da ADPF 1178.

4 Constitucionalismo global, Estado de direito ambiental e evolução do STF

A busca do desenvolvimento econômico e industrial, meta das nações nos últimos séculos, trouxe consequências a todos. Os fenômenos ambientais não conhecem fronteiras políticas. Os desastres ambientais causados pelo homem, individualmente ou por meio de Estados e corporações, além dos danos ao ecossistema, impactam, diretamente, a vida da população geograficamente contextualizada; em regra, as comunidades menos favorecidas do planeta. Os organismos internacionais têm buscado promover um novo momento de valoração e defesa do ambiente ecologicamente saudável.

Por meio de movimentos de natureza global (exemplo: Convenção de Estocolmo de 1972, Rio-92, Conferências das Nações Unidas sobre Mudanças Climáticas), que, às vezes, resultam em compromissos entre os países, influencia, positivamente, os ordenamentos jurídicos dos países, sobretudo os Estados Democráticos. Para Tiago Fensterseifer, "o projeto de modernidade

MGI, 2014.

[22] POMPEU, Gina Vidal Marcílio; VASCONCELOS, Luciana Barreira de. Direitos da natureza no Brasil à luz do Princípio da integridade ecológica. *Novos Estudos Jurídicos*, Itajaí, v. 28, n. 3, p. 615-641, 2023. DOI https://doi10.14210/nej.v28n3.p615-641. Disponível em: https://periodicos.univali.br/index.php/nej/article/view/17721/11671. Acesso em: 29 nov. 2024.

[23] MOROSINI, Fabio Costa; NIENCHESKI, Luisa Zuardi. A relação entre os tratados multilaterais ambientais e os acordos da OMC: é possível conciliar o conflito? *Revista de Direito Internacional*, Brasília, v. 12, n. 2, p. 150-168, 2014. DOI 10.5102/rdi.v11i2.3082. Disponível em: https://www.publicacoes.uniceub.br/rdi/article/view/3082. Acesso em: 29 nov. 2024.

ainda está em curso. Os direitos sociais foram deixados no meio do caminho, além de ter sido agregado um desafio existencial ao projeto: a proteção do ambiente."[24] Para Herman Benjamin, trata-se do contexto que envolve o surgimento do direito ambiental e do Estado Socioambiental.[25]

A globalização apresenta desafios ao direito constitucional para o trato cotidiano além-fronteiras. As relações deixaram de ser maciçamente entre Estados. O conceito tradicional de soberania tem sido relativizado. O ferimento a direitos humanos, mudanças climáticas, crises humanitárias, catástrofes ambientais possuem relevo para pautar a sociedade. Possibilita-se um avanço nas relações entre Estados e entre Estados e particulares.

Decisão da Suprema Corte dos Países Baixos no caso Fundação Urgenda *v.* Holanda (2015) (processo C/09/456689/HA ZA 13-1396) determinou que o Estado tem a obrigação de reduzir suas emissões de carbono com base no direito internacional dos direitos humanos, garantindo a proteção da população contra os efeitos das mudanças climáticas. Embora esse caso não envolva diretamente governos locais ou entidades subnacionais, ele reforça uma preocupação crescente dos tribunais internacionais com a conexão entre justiça ambiental e direitos fundamentais[26].

Nesse sentido as Regulações Europeias 1215/2012 e 864/2007 evidenciam a necessidade de se permitirem instrumentos para busca da efetividade de reparação de danos ambientais transnacionais, permitindo que os processos sejam movidos tanto no país onde ocorreu o dano quanto no país onde a empresa tem sua sede. Esse princípio jurídico foi determinante em casos como Okpabi *v.* Royal Dutch Shell ([2021] UKSC 3), no qual comunidades nigerianas processaram a Shell no Reino Unido. A decisão reforça a tendência global de facilitar o acesso à justiça ambiental para comunidades afetadas por atividades corporativas.[27] Conforme o artigo 7º da Regulação 864/2007:

> a lei aplicável a uma obrigação extracontratual decorrente de danos ambientais ou danos sofridos por pessoas ou bens como resultado de tais danos será a lei determinada de acordo com o artigo 4(1), a menos que a pessoa que busca indenização por danos opte por basear sua reivindicação na lei do país em que ocorreu o evento que deu origem ao dano[28].

O constitucionalismo global transcende os limites das perspectivas jurídicas e políticas tradicionais ao enfatizar a urgência de abordagem para garantir a sobrevivência da humanidade. Essa ideia está além do pluralismo e garantismo das Constituições modernas. Faz contraponto direito às visões soberanistas e evidencia que políticas exclusivamente nacionais são inadequadas e insuficientes para enfrentar desafios globais, inclusive desastres ecológicos. A incapacidade dos governos de agir de forma eficaz revela-se como consequência esperada de um sistema fragmentado, em que leis internas se mostram insuficientes para lidar com as crises ambientais contemporâneas[29]. Por meio da proposta do autor, pode-se ter maior facilidade em legitimar entes subnacionais em demandas internacionais.

É nesse contexto que se insere a ADPF 1178, em trâmite no STF, em que se discute a possibilidade de um ente subnacional litigar, em país estrangeiro, em desfavor de corporação privada. São necessárias respostas não somente jurídicas, mas civilizatórias, pedagógicas para a atual e futuras gerações, à reparação buscada.

A governança ambiental global exige articulação entre diferentes órgãos, incluindo tribunais nacionais e internacionais. Vieira e Varella argumentam que a interseção entre corrupção, direitos humanos e meio ambiente gerou pressão para que Estados e empresas considerem padrões mais rigorosos de compliance. No contexto brasileiro, essa tendência pode influenciar a decisão do STF sobre a possibilidade de municípios atuarem em questões internacionais, reforçando sua legitimidade na defesa do meio ambiente[30].

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[24] FENSTERSEIFER, Tiago. Estado socioambiental de direito e o princípio da solidariedade como seu marco jurídico-constitucional. *Revista Direitos Fundamentais e Justiça*, Porto Alegre, n. 2, p. 133, jan./mar. 2008.

[25] BENJAMIN, Antônio Herman. Função ambiental. *In*: BENJAMIN, Antônio Herman (coord.). *Dano ambiental*: prevenção, reparação e repressão. São Paulo: Revista dos Tribunais, 1993. p. 15.

[26] MAXWELL, Lucy; MEAD, Sarah; VAN BERKEL, Dennis. Standards for adjudicating the next generation of urgenda-style climate cases. *Journal of Human Rights and the Environment*: Special Issue, nov. 2021. Disponível em: https://ssrn.com/abstract=3955144. Acesso em: 29 nov. 2024.

[27] ROORDA, Lucas; LEADER, Daniel. Okpabi v Shell and four nigerian farmers v Shell: parent company liability back in court. *Business and Human Rights Journal*, Cambridge, v. 6, n. 2, p. 368-376, jun. 2021. Disponível em: https://ideas.repec.org/a/cup/buhurj/v6y2021i2p368-376_15.html. Acesso em: 18 mar. 2025.

[28] Regulações Europeias 1215/2012 E 864/2007.

[29] FERRAJOLI, Luigi. *Por uma constituição da Terra*: a humanidade em uma encruzilhada. Florianópolis: Emais, 2023.

[30] VIEIRA, Gabriela Alves Mendes; VARELLA, Marcelo Dias. A conexão entre os direitos humanos e a corrupção. *Revista de Direito*

A CF/88 apresentou avanço significativo nos dispositivos que tratam a matéria. Deu-se obrigação comum à toda coletividade e ao Poder Público para defender e zelar por um meio ambiente saudável. Inseriu-se o Princípio da Reparação Integral ao dano ambiental e do poluidor-pagador. No artigo 4º, estabeleceu a prevalência dos direitos humanos e a cooperação entre os povos para o progresso da humanidade.

Em relação ao julgamento da ADPF, tem-se ação movida por municípios brasileiros no Reino Unido, processo HT-2022-000304, em que a justiça estrangeira diz ser competente para processar e julgar a causa e que "uma "suspensão" (*stay*) dos processos não é do interesse da justiça nesse caso, que determina que os requerentes devem ser autorizados a prosseguir com as reivindicações na ação"[31].

Para Tiago Fensterseifer, quando a proteção do meio ambiente é posicionada na estrutura constitucional do Estado brasileiro, não só como dever de proteção estatal, mas também como direito fundamental da pessoa humana, "há que se remodelar a estrutura do Estado no intuito de traçar, de forma "transversal" e cooperativa, a atuação de todos os seus poderes políticos, entes estatais, órgãos administrativos etc., a fim de perseguir e atingir tal objetivo."[32] É essencial e natural promover um melhor relacionamento federativo entre os entes da federação, com mecanismos de freios e contrapesos, para viabilizar essa evolução.

O simples conhecimento dos comandos normativos não é suficiente para a boa aplicação da legislação disponível. Necessário o aprendizado dos fundamentos axiológicos, sobretudo na realidade ecológica, que permitem o aparecimento de multifacetadas orientações.[33] No Brasil, a evolução nas últimas décadas tem ocorrido com maior força por meio da evolução jurisprudencial dos princípios constitucionais ambientais explícitos e implícitos.

A ADPF 1178 é um bom exemplo desse cenário. O STF terá de decidir com efeitos para todos os entes subnacionais, inclusive os estados federados, se é possível a relativização da soberania com o intuito de permitir o ingresso de ações reparatórias decorrentes de desastre ambiental. O processo tramita no Reino Unido, abrange 720 mil participantes, dentre elas 46 municípios, várias empresas e povos indígenas que sofreram danos ambientais de elevada proporção e, após aproximadamente uma década, não tiveram resposta satisfatória do sistema de justiça brasileiro. Trata-se da maior ação coletiva da história judicial do Reino Unido.

Os precedentes do STF, desde a Constituição de 1988, tendem a valorizar a autonomia dos municípios, adotar a divisão de atos de soberania em império e gestão, reconhecer o direito ambiental como direito fundamental, reconhecer a prevalência dos direitos humanos, reconhecer a possibilidade de afastamento da imunidade de jurisdição e admitir a possibilidade de pessoas jurídicas de direito público serem titulares de direitos fundamentais.

O julgamento da ACi n.º 9.696-3 SP[34], no âmbito do STF, foi a primeira decisão pós-constituição de 88 que registrou a caducidade da imunidade absoluta no cenário internacional, sobretudo pelo desuso por boa parte dos países desenvolvidos. Fez surgir nova jurisprudência quando afastou a imunidade de jurisdição de um estado estrangeiro em decorrência de relação trabalhista. Nas décadas seguintes, fortaleceu-se, na esfera de julgamentos pelo Supremo, a adoção da distinção entre atos de gestão e atos de império.

Também no Superior Tribunal de Justiça, tornou-se solidificada essa construção jurisprudencial. Entendeu-se que "não há imunidade de jurisdição para o Estado estrangeiro, em causa relativa à responsabilidade civil"[35]. E, ainda que o objeto litigioso tenha como fundo relações de natureza meramente trabalhista, comercial ou civil,

Internacional, Brasília, v. 12, n. 2, p. 476-494, 2014. DOI 10.5102/rdi.v11i2.3118. Disponível em: https://www.publicacoes.uniceub.br/rdi/article/view/3118/pdf. Acesso em: 18 fev. 2025.

31 Municipio de Mariana and Others v. BHG Group (UK) LTD and BH Group LTD, [2022] EWCA Civ 951.

32 FENSTERSEIFER, Tiago. Estado socioambiental de direito e o princípio da solidariedade como seu marco jurídico-constitucional. *Revista Direitos Fundamentais e Justiça*, Porto Alegre, n. 2, p. 133, jan./mar. 2008.

33 BENJAMIN, Antônio Herman. A natureza no Direito brasileiro: coisa, sujeito ou nada disso. *Nomos*: Revista do Programa de pós-graduação em Direito – UFC, p. 83, 2011.

34 BRASIL. Supremo Tribunal Federal. *Ação Civil Originária n.º 9.696-3/SP*. Rel. Min. Sydney Sanches, 31 de maio de 1989. Disponível em: https://portal.stf.jus.br/jurisprudencia/. Acesso em: 29 nov. 2024.

35 BRASIL. Superior Tribunal de Justiça (2. Turma). *Agravo de Instrumento n.º 36.493-2/DF e Apelação Cível n.º 14-2/DF*. Rel. Min. Pádua Ribeiro,15 de agosto de 1994. Disponível em: https://processo.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=199300102427&dt_publicacao=19/09/1994. Acesso em: 29 nov. 2024.

> como ocorre na hipótese dos autos, onde o que pretende o autor da demanda é obter reparação civil pelo suposto descumprimento de contrato verbal celebrado com o demandado para a elaboração de projeto para realização de exposição que se realizaria no Rio de Janeiro[36].

A relativização da imunidade passa a possuir contornos objetivos.

Outra decisão paradigmática do STF ocorreu no julgamento do Caso Changri-Lá. Entendeu-se, por maioria de votos, 6x5, que, inclusive quando se tratar da prática de atos de império, é possível a adoção da Teoria Restritiva de Imunidade. Para o voto vencedor,

> nos casos em que há violação à direitos humanos, ao negar às vítimas e seus familiares a possibilidade de responsabilização do agressor, a imunidade estatal obsta o acesso à justiça [...]. Diante da prescrição constitucional que confere prevalência aos direitos humanos como princípio que rege o Estado brasileiro nas suas relações internacionais (art. 4º, II), devem prevalecer os direitos humanos — à vida, à verdade e ao acesso à justiça —, afastada a imunidade de jurisdição no caso.[37]

Trata-se de um precedente inédito no direito brasileiro e com poucos precedentes no direito internacional apesar da remanescente doutrina que empresta importância à relativização em casos de alta gravidade que envolvam direitos humanos[38].

É comum, na jurisprudência do STF, o reconhecimento do direito ao meio ambiente ecologicamente equilibrado como um direito fundamental, além de ser considerada uma política transversal que demanda a atuação coordenada dos órgãos e entidades da Administração Pública e de todo o Poder Público[39].

O Supremo assentou no Mandado de Injunção 725/RO que "não se deve negar aos Municípios, peremptoriamente, a titularidade de direitos fundamentais e a eventual possibilidade de impetração das ações constitucionais cabíveis para sua proteção". Não obstante, "a titularidade de direitos fundamentais tem como consectário lógico a legitimação ativa para propor as ações constitucionais destinadas à proteção efetiva desses direitos"[40]. Garante-se aos municípios o direito fundamental de ação para buscar em juízo direitos de interesse local violados nos casos em que não se trate de questões típicas de soberania de Estado.

A decisão do Supremo Tribunal Federal na ADPF 1178 terá implicações diretas e indiretas para a governança ambiental global e para a atuação internacional de entes subnacionais. Caso permita aos municípios ajuizarem ações internacionais contra empresas transnacionais, poderá representar um avanço para a defesa ambiental global, consolidando a prática da paradiplomacia ambiental e incentivando outros entes subnacionais pátrios e estrangeiros a adotarem estratégias jurídicas semelhantes. Por outro lado, caso a Corte limite essa possibilidade, fortalecerá a centralização e exclusividade da competência internacional na União, impactando-se a eficácia da proteção ambiental e a responsabilização de grandes corporações, especialmente em desastres que envolvem múltiplas jurisdições.

Além disso, o julgamento poderá influenciar a relação do Brasil com tratados internacionais sobre responsabilidade ambiental e direitos humanos, além de afetar investidores estrangeiros preocupados com a diligência regulatória no país. Uma decisão de apoio à atuação internacional dos municípios pode impulsionar as corporações a adotarem padrões mais rigorosos de conformidade ambiental.

O Supremo Tribunal Federal tem destacada responsabilidade para a construção de jurisprudência que reconheça, respeite, equilibre e promova: justiça e proteção ambiental, autonomia e lealdade federativa, segurança jurídica e responsabilidade internacional, prevalência dos direitos humanos e soberania. O conjunto desse entendimento, notadamente a evolução jurisprudencial e a busca por justiça ambiental, se refletirá no julgamento da ADPF 1178.

[36] BRASIL. Superior Tribunal de Justiça (3. Turma). *Recurso Ordinário n.º 26/RJ*. Rel. Min. Vasco Della Giustina, 20 de maio de 2010. Disponível em: https://www.stj.jus.br/websecstj/cgi/revista/REJ.cgi/ATC?seq=9901991&tipo=0&nreg=&SeqCgrmaSessao=&CodOrgaoJgdr=&dt=&formato=PDF&salvar=false. Acesso em: 29 nov. 2024.

[37] BRASIL. Supremo Tribunal Federal. *Agravo em Recurso Extraordinário n.º 954.858/RJ*. Rel. Min. Edson Fachin, 23 de ago. de 2021. Disponível em: https://portal.stf.jus.br/jurisprudencia/. Acesso em: 29 nov. 2024.

[38] TIBURCIO, Carmen. *Extensão e limites da jurisdição brasileira*. Salvador: JusPodivm, 2016. p. 451.

[39] BRASIL. Supremo Tribunal Federal. *Arguições de Descumprimento de Preceito Fundamental n.º 743, n.º 746 e n.º 857*. Rel. Min. André Mendonça, redação do acórdão por Min. Flávio Dino, 20 de março de 2024. Disponível em: https://portal.stf.jus.br/jurisprudencia/. Acesso em: 29 nov. 2024.

[40] BRASIL. Supremo Tribunal Federal. *Mandado de Injunção n.º 725/RO*. Rel. Min. Gilmar Mendes, 10 de maio de 2007. Disponível em: https://portal.stf.jus.br/jurisprudencia/. Acesso em: 29 nov. 2024.

Este capítulo demonstrou como a interlocução existente e necessária entre constitucionalismo planetário, precedentes nacionais, internacionais e litígios transnacionais, de forma coordenada, relativizam a soberania e tornam-se instrumento de amparo aos direitos humanos e de proteção ambiental.

5 Considerações finais

Apesar das conquistas alcançadas no direito brasileiro em relação ao reconhecimento do direito ambiental no campo dos direitos humanos, tanto por meio de instrumentos internacionais quanto pela evolução jurisprudencial do STF, ainda se observa um contexto de ineficiência na reparação dos danos ambientais, culturais e patrimoniais causados por desastres ambientais. O caso de Mariana, 2015, trouxe à tona não somente a necessidade da reparação ambiental, mas também questões sobre soberania, justiça transnacional e autonomia municipal, diante do ingresso de milhares de ações reparatórias, dezenas de autoria de entes subnacionais, perante a justiça do Reino Unido, sede da empresa demandada.

Por meio da ADPF 1178, o Instituto Brasileiro de Mineração busca obter no STF tutela para suspender as ações em curso no estrangeiro e impedir que a reparação perseguida seja alcançada. A Corte Constitucional brasileira, ao apreciar medida cautelar, em novembro de 2024, deferiu, em parte, o pedido dos autores para determinar a apresentação da documentação que substanciou a contratação de escritórios de advocacia estrangeiro por município. Resistiu, contudo, à apreciação de mérito cautelar.

A Constituição Federal de 1988 reconhece o direito ao meio ambiente ecologicamente equilibrado, também reparado, como direito fundamental e humano, e estabelece instrumentos para a efetivação da máxima reparação tanto para a sociedade quanto para o Poder Público. A defesa do interesse local e a proteção do patrimônio ambiental é consequência lógica do Princípio da Autonomia concedido ao município como inovação no texto de 88, ainda que relativo a litígio internacional e desafie ponderação em relação aos limites costumeiros do pacto federativo.

No caso de Mariana, não há sequer relação entre Estados a desafiar malferimento aos preceitos soberanos. Ainda que tal alegação exista, o STF é adepto da Teoria Relativa da Imunidade de Jurisdição, e posiciona os direitos fundamentais, humanos e ecológicos como preponderantes sobre os demais. Inexiste óbice para que os municípios busquem, também em foro estrangeiro, a reparação ambiental devida por corporações internacionais.

A cooperação internacional deve ter lugar de destaque nas demandas globais em que o meio ambiente seja motivador. Não se trata do interesse de direção única, mas de toda a humanidade. A ideia de constitucionalismo global e da constituição planetária indicam esse caminho. A aceitação pelo Reino Unido das ações movidas por municípios brasileiros em desfavor de corporações pátrias, como a BHP Billiton, demonstra o regular exercício de sua jurisdição ao propiciar a busca por reparação integral ambiental, que guarda interesse humano e não reflete quebra de relação entre Estados soberanos. O STF considera a postura mais ampla a partir do Caso Changri-Lá, oportunidade em que relativizou a soberania de Estado estrangeiro que envolvia atos de império violadores de direitos humanos. São atuações judiciais alinhadas aos preceitos de justiça global.

O julgamento da ADPF n.º 1.178 pelo STF representa oportunidade histórica para consolidar e alargar o direito ambiental como direito humano no Brasil e o posicionamento estratégico dos entes federados. Permitir e estabelecer diretrizes para a atuação dos municípios em jurisdição estrangeira, em matéria de interesse local e que não envolva relação típica de Estado, reforça o Princípio da Autonomia e da Lealdade Federativa, reafirma o compromisso do país com a justiça ambiental global, permite a busca pela reparação dos danos históricos, culturais e patrimoniais causados pelos desastres ambientais, mas também a edificação de um futuro cooperativo e ecologicamente equilibrado para as próximas gerações.

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Lacunas legislativas e vulnerabilidades digitais: reconceitualizando o arcabouço jurídico do Vietnã para combater a exploração sexual infantil online

Thuyen Duy TRINH

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Legislative gaps and digital vulnerabilities: reconceptualizing Vietnam's legal framework to combat online child sexual exploitation*

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Thuyen Duy TRINH**

Abstract

The increasing prevalence of internet use among Vietnamese children has exposed them to heightened risks of online sexual exploitation. This study hypothesizes that Vietnam's existing legal framework remains inadequate in addressing these risks when compared to international standards. Employing a mixed-method approach combining doctrinal analysis, comparative legal research, and empirical survey data from children, parents, and educators, the study assesses legal protections and identifies structural gaps in legislation and enforcement. The findings reveal definitional inconsistencies (notably regarding the age of a child), weak regulation of foreign platforms, and insufficient evidentiary procedures. Drawing from comparative models such as the UK's Online Safety Act 2023 and Australia's Online Safety Act 2021, the article proposes specific reforms to Vietnam's child protection regime. This paper contributes to global discourse by contextualizing international child protection norms within Vietnam's digital transformation and offering a policy roadmap grounded in both theory and field evidence.

Keywords: online child sexual abuse; cybercrime prevention; digital child protection; vietnamese legal framework; social media risks; parental and institutional supervision.

Resumo

O uso crescente da internet entre crianças vietnamitas tem exposto esse grupo a riscos ampliados de exploração sexual online. Este estudo parte da hipótese de que o arcabouço jurídico vigente no Vietnã é inadequado para enfrentar tais riscos quando comparado aos padrões internacionais. Utilizando uma abordagem metodológica mista, que combina análise doutrinária, pesquisa jurídica comparada e levantamento empírico com crianças, pais e educadores, o artigo avalia os mecanismos legais existentes e identifica lacunas estruturais na legislação e na sua aplicação. Os resultados revelam inconsistências conceituais (notadamente em relação à definição da idade da criança), fragilidade na regulação de plataformas digitais estrangeiras e

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insuficiência de procedimentos probatórios. A partir de modelos comparativos, como o Online Safety Act 2023 do Reino Unido e o Online Safety Act 2021 da Austrália, o artigo propõe reformas específicas ao regime de proteção infantil do Vietnã. A pesquisa contribui para o debate global ao contextualizar os padrões internacionais de proteção infantil dentro do processo de transformação digital vietnamita, oferecendo um roteiro normativo fundamentado tanto na teoria quanto em evidências de campo.

Palavras-chave: exploração sexual infantil online; prevenção ao cibercrime; proteção infantil digital; legislação vietnamita; riscos das redes sociais; supervisão parental e institucional.

1 Introduction

The digital age has fundamentally transformed the way people communicate, learn, and entertain themselves. The rapid development of social media platforms and the increasing accessibility of the internet have provided children and adolescents with unprecedented opportunities for education, social interaction, and personal growth. According to statistical data, at the beginning of 2024, Vietnam had 78.44 million Internet users (accounting for 79.1% of the population); 73.3% of the population used social media; there were a total of 168.5 million active mobile connections; and 92.7% of all Internet users had used at least one social media platform. According to data from the Authority of Information Security[1], Vietnam currently has approximately 24.7 million children, accounting for nearly 25% of the population. Among them, 96.9% use the Internet. Specifically, 82% of children aged 12-13 use the Internet, and this figure increases to 93% for children aged 14-15[2].

Social networking has also become an important platform with more than 70 million participants, bringing opportunities and challenges for businesses in the digital environment[3]. The Internet has become an integral part of the daily life of Vietnam's population having access to online platforms, including children and adolescents. This is reason Vietnam is one of the countries with the fastest internet development rate and highest number of social media users in the world[4].The expansion of digital technology has facilitated educational progress, enhanced connectivity, and allowed for a greater exchange of information and cultural interaction. As highlighted by Silva[5], the protection of children and adolescents in digital spaces requires not only updated legislation but also structural mechanisms of enforcement and prevention. While Silva's analysis centers on Latin America, similar vulnerabilities exist in the Vietnamese context, especially regarding the absence of a coherent regulatory system and lack of child-centered governance in cyberspace.

However, alongside these benefits, the online environment has also introduced serious risks, particularly for young users who lack the necessary cognitive and emotional maturity to navigate the complexities of cyberspace safely.[6] With increasing internet penetration, there has been a rise in online exploitation, particularly crimes related to child sexual abuse[7].Pedophiles have been taking advantage of social media and online chat forums to approach their victims and make sexual advances. The anonymity and borderless nature of the internet have made it easier for perpetrators to approach and ma-

[1] VIETNAM. Ministry of Information and Communications. *Statistical Data*. 2024. Available at: https://mic.gov.vn/so-lieu-thong-ke.htm. Access on: 5 Dec. 2024.

[2] ÁHN, Ha. 91% of children access the internet, but only 10% know how to use it safely. *Thanhnien*, 4 Oct. 2024. Available at: https://thanhnien.vn/91-tre-em-truy-cap-internet-nhung-chi-10-biet-cach-su-dung-an-toan-185241004210358766.htm#:~:text=S%E1%BB%91%20li%E1%BB%87u%20t%E1%BB%AB%20C%E1%BB%A5c%20An,tu%E1%BB%95i%2C%20s%E1%BB%AD%20d%E1%BB%A5ng%20m%E1%BA%A1ng%20internet. Access on: 05 Dec. 2024.

[3] DANG, Tony. Internet Vietnam 2023: latest figures and development trends. *VNetwork*, 4 Oct. 2024. Available at: https://www.vnetwork.vn/en-US/news/internet-viet-nam-2023-so-lieu-moi-nhat-va-xu-huong-phat-trien/. Access on: 20 Oct. 2024.

[4] VIETNAM NET. VN faces high risk of online child sexual exploitation. *Vietnam Net*, 22 Dec. 2018. Available at: https://vietnamnet.vn/en/vn-faces-high-risk-of-online-child-sexual-exploitation-E214696.html. Access on: 12 Dec. 2024.

[5] SILVA, M. A proteção de crianças e adolescentes na era digital. *Revista de Direito Internacional*, 2022. Available at: https://publicacoes.uniceub.br/rdi/article/view/6715. Access on: 10 June 2024.

[6] LUONG, Hai Thanh. Prevent and combat sexual assault and exploitation of children on cyberspace in Vietnam: situations, challenges, and responses. *In*: INFORMATION RESOURCES MANAGEMENT ASSOCIATION. *Research anthology on child and domestic abuse and its prevention*. Hershey: IPI Global, 2021. p. 68-94.

[7] VIÊT NAM NEWS. Child sexual abuse prevention needs to go beyond empty slogans. *Viêt Nam News*, 28 June 2018. Avaialble at: https://vietnamnews.vn/opinion/in-the-spotlight/450702/child-sexual-abuse-prevention-needs-to-go-beyond-empty-slogans.html. Access on: 12 Dec. 2024.

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nipulate minors, leading to growing concerns about the safety and security of children in digital spaces[8].

Child sexual abuse is a serious public problem that affects minors worldwide[9]. In Vietnam, efforts have been made to prevent and combat online sexual assaults and exploitations of children. The government and law enforcement authorities have established a professional task force to address this issue, with specific strategies and focuses on prevention and intervention. However, there are still challenges and barriers in effectively combating these crimes in cyberspace. Institutions play a crucial role in preventing child sexual abuse, including the use of situational crime prevention strategies to address child sexual abuse material offenses[10]. Pilot studies have been conducted to develop handbooks for primary students to educate them on preventing child sexual abuse[11]. These initiatives aim to empower children with the necessary skills and knowledge to protect themselves from potential abuse. Legal protection for children as victims of sexual exploitation through social media is also a significant concern[12]. The legal framework in Vietnam is focused on protecting children from sexual abuse in cyberspace, with the aim of creating a safe and healthy online environment for children[13]. The review of Vietnamese law in this area serves as a basis for proposing improvements to enhance the protection of children in the digital space.

Child sexual abuse is a significant issue that can have long-lasting effects on survivors. Research has shown that disclosure of child sexual abuse may not directly impact overall current mental health functioning, but it is associated with fewer intrusive and avoidant symptoms[14]. Additionally, studies have examined the prevalence of child sexual abuse internationally, highlighting the need for continued research in this area[15]. Parents play a crucial role in preventing child sexual abuse, and understanding their knowledge, attitudes, and practices can help inform prevention programs[16]. Overall, preventing child sexual abuse in cyberspace requires a multifaceted approach that involves educating parents, survivors, and the community at large. Continued research and innovative strategies are essential in addressing this critical issue in Vietnam.

Although Vietnam has adopted several legal instruments to protect minors from digital harms, its legal system still lacks a coherent and enforceable mechanism to address online child sexual exploitation. The main legal problem addressed in this article lies in the structural inconsistencies and enforcement limitations within the Vietnamese regulatory framework, particularly the absence of clear obligations for digital platforms, lack of child-specific procedural protections, and limited cross-border cooperation for evidence collection.

1.1 Methodology

This study adopts a multidisciplinary legal methodology combining doctrinal, comparative, and empirical approaches.

First, a doctrinal legal analysis was conducted on Vietnamese laws relating to child protection in cyberspace, including the Law on Children 2016, the Penal Code 2015 (amended 2017), and relevant provisions in the Constitution and Law on Cybersecurity. International legal instruments such as the Convention on the Rights of the Child (CRC), its Optional Protocols, and General Comment No. 25 were examined to assess Vietnam's compliance with global standards.

8 VIETNAM. Ministry of Information and Communications. *Statistical Data*. 2024. Available at: https://mic.gov.vn/so-lieu-thong-ke.htm. Access on: 5 Dec. 2024.

9 BROMBERG, D. S.; JOHNSON, B. T. Sexual interest in children, child sexual abuse, and psychological sequelae for children. *Psychology in the Schools*, v. 38, n. 4, p. 343-355, 2001.

10 KRONE, Tony *et al.* Child sexual abuse material in child-centred institutions: situational crime prevention approaches. *Journal Sexual Aggression*, v. 26, n. 1, p. 91-110, 2020.

11 VAN HUYNH, Son *et al.* Pilot results of a handbook: prevention skills of sexual-abuse for primary students. *International Journal of Learning and Development*, v. 9, n. 2, p. 40-48, 2019.

12 RIZKY, Mutiara Nastya *et al.* Perlindungan Hukum Terhadap Anak Korban Eksploitasi Seksual Komersial Melalui Media Sosial. *Media Iuris*, v. 2, n. 1, p. 197-215, 2019. Available at: https://e-journal.unair.ac.id/MI/article/download/13193/pdf/52657. Access on: 12 Jan. 2024.

13 THUY, P. Thi Thanh. Legal framework of vietnam in protecting children against sexual abuse in cyberspace. *International Journal of Current Science Research and Review*, v. 6, n. 12, p. 7805-7811, 2023. Available at: https://ijcsrr.org/wp-content/uploads/2023/12/37-1812-2023.pdf. Access on: 6 Sep. 2024.

14 ARATA, C. M. To tell or not to tell: current functioning of child sexual abuse survivors who disclosed their victimization. *Child Maltreatment*, v. 3, n. 1, p. 63-71, 1998.

15 PEREDA, Noemí *et al.* The international epidemiology of child sexual abuse: a continuation of Finkelhor (1994). *Child Abuse & Neglect*, v. 33, n. 6, p. 331-342, 2009.

16 BABATSIKOS, Georgia. Parents' knowledge, attitudes and practices about preventing child sexual abuse: a literature review. *Child Abuse Review*, v. 19, n. 2, p. 107-129, 2010. Available at: https://doi.org/10.1002/car.1102. Access on: 12 Feb. 2024.

Second, a comparative legal analysis was employed, focusing on how other jurisdictions such as the United Kingdom[17] and Australia[18] regulate the responsibilities of digital platforms and the protection of minors from online abuse.

Third, and significantly, the study includes an empirical component based on field research. The author conducted a sociological survey using structured questionnaires among 372 respondents, including children aged 12–17, parents, and teachers in urban and rural provinces of Southern and Southeastern Vietnam. The survey explored internet usage patterns, exposure to online risks, parental supervision, and the availability of digital safety education. Survey data were analyzed quantitatively and incorporated into the argumentation, particularly in Section 2.3 and 2.4, to identify behavioral trends and institutional gaps in protection.

Additionally, qualitative data from in-depth interviews with law enforcement officers and observations at academic conferences on online child protection were used to enhance contextual understanding. Court judgments from 2021 to 2024 were also examined to trace enforcement outcomes and challenges in judicial proceedings.

This mixed-method approach grounded in legal theory, cross-jurisdictional comparison, and empirical investigation ensures a comprehensive and evidence-based assessment of Vietnam's digital child protection framework.

2 Content

This section explores the legislative foundations, current trends, root causes, and legal-policy recommendations regarding online child sexual exploitation in Vietnam. The aim is to offer a structured assessment that integrates international standards, national regulations, and field-based data analysis to propose effective protective solutions for children in cyberspace.

2.1 Legal framework protects the child

According to the United Nations Convention on the Rights of the Child (CRC), a child is defined as any person under the age of 18, unless national law establishes the age of majority earlier (Article 1)[19]. The CRC establishes fundamental principles and affirms the recognition of children's rights as independent legal subjects, rather than merely as dependents under adult guardianship. One of the core principles of the CRC is non-discrimination (Article 2), which mandates that all children, irrespective of race, gender, socio-economic status, or any other distinguishing factor, are entitled to equal rights and protections. This principle imposes an obligation on state parties to actively address inequalities, ensuring that vulnerable groups, such as children with disabilities or those in conflict zones, receive adequate protection and support, thereby guaranteeing that no child is left behind. Additionally, the best interests of the child (Article 3) serve as a fundamental guiding principle, requiring that all actions concerning children whether legislative, administrative, or judicial prioritize their welfare and holistic development. This principle functions as a framework for policymakers, judicial bodies, and national welfare systems in formulating and implementing measures that safeguard children's physical, mental, and emotional well-being. Furthermore, the CRC establishes the right to life, survival, and development (Article 6) as a fundamental human right. This provision underscores the duty of state parties to ensure that every child has access to the necessary resources and opportunities to lead a healthy, secure, and meaningful life. Article 34 of CRC imposes an obligation on Member States to protect children from all forms of sexual exploitation and abuse. This provision mandates that States adopt appropriate measures at both national and international levels to prevent: (i) the coercion of children into unlawful sexual activities, (ii) the exploitation of children in prostitution or other forms of sexual abuse, and (iii) the use of children in sexually explicit performances or materials. This underscores the necessity of comprehensive and coordinated efforts at the international level to safeguard children from severe forms of abuse and exploitation.

[17] UNITED KINGDOM. Parliament. *Online Safety Act 2023*. Avaialble at: https://www.legislation.gov.uk/ukpga/2023/50/enacted. Access on: 6 Sep. 2024.

[18] AUSTRALIA. Government. *Online Safety Act nº 76 2021*. Available at: https://www.legislation.gov.au/Details/C2021A00076. Access on: 23 June 2024.

[19] UNITED NATIONS. General Assembly. *Convention on the Rights of the Child*. 1989. Avaialble at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child. Access on: 10 June 2024.

However, due to the general nature of the CRC, several optional protocols have been adopted to further specify the obligations of State Parties. The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography[20] serves as a crucial legal instrument that strengthens the provisions of the Convention on the Rights of the Child (CRC) by addressing specific forms of child exploitation. This Protocol imposes clear obligations on State Parties to enhance legal frameworks, improve international cooperation, and ensure the protection and rehabilitation of child victims. Key aspects of the Protocol include:

- Specifying Criminal Offenses: Pursuant to Articles 1 and 3, State Parties are required to prohibit and criminalize acts related to the sale of children, child prostitution, and child pornography.
- Enhancing International Cooperation: Article 6 emphasizes the necessity of cooperation among States in investigating, prosecuting, and exchanging information to prevent crimes related to the sexual exploitation of children.
- Protecting and Supporting Child Victims: This Protocol not only establishes the obligation to prosecute offenders but also requires States to implement measures to support victims, ensuring the recovery and reintegration of affected children.

General Comment No. 25 on Children's Rights in Relation to the Digital Environment has been adopted, becoming the latest legal instrument of the United Nations aimed at assisting Member States in improving their domestic legal frameworks on this matter. This instrument reaffirms the commitment of the United Nations and its Member States to protecting children's rights in light of both the opportunities and challenges presented by the digital environment.[21] Through this document, the United Nations calls upon governments, technology companies, and educators to collaborate in managing unreliable information online.

All legal frameworks international above serve as a protective framework, safeguarding children's economic, social, and cultural rights by recognizing that child development is intrinsically linked to the socio-economic environment. This includes provisions related to education, healthcare, and adequate living conditions, ensuring that states implement measures to support the holistic well-being of children. Member States are responsible for ensuring that children receive special care and support appropriate to their family's circumstances. They are also obligated to provide access to free education, healthcare, rehabilitation, recreation, and entertainment services whenever possible.

Amid digital transformation and the rapid expansion of the internet, children in Vietnam are increasingly vulnerable to online sexual exploitation and abuse. To address this risk, Vietnam has established a comprehensive legal framework aimed at safeguarding children's rights and preventing sexual abuse in the digital sphere. This framework is grounded in the Constitution, sector-specific laws, and implementing decrees, providing a regulatory foundation for child protection in cyberspace. The principle of protecting children from violence is enshrined in Clause 1, Article 37 of the 2013 Constitution of Vietnam, which states:

> Children shall be protected, cared for, and educated by the State, family, and society; they shall have the right to participate in matters concerning them. Any act of harassment, torture, maltreatment, neglect, abuse, labor exploitation, or any other violation of children's rights is strictly prohibited.[22]

Building upon this constitutional foundation, subsequent legal instruments have been developed to further strengthen children's rights. These legal provisions affirm the recognition of children as legal subjects entitled to full human and civil rights, including the right to protection from all forms of violence. According to Clause 5 Article 4,

> Child abuse refers to any act that results in harm to the body, emotion, psychology, honor or human dignity of such child through violence against the child, child exploitation, sexual abuse, neglect and

[20] UNITED NATIONS. General Assembly. *Optional protocol to the convention on the rights of the child on the sale of children, child prostitution and child pornography, 25 May 2000*. Avaialble at: https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child. Access on: 12 Feb. 2024.

[21] UNITED NATIONS. Committee on The Rights of the Child. *General comment nº 25 (2021) on children's rights in relation to the digital environment*. 2021. Avaialble at: https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation. Access on: 10 June 2024.

[22] VIETNAM. National Assembly. *Constitution of the Socialist Republic of Vietnam*. 8 Dec. 2013. Avaialble at: https://vietnamlawmagazine.vn/the-2013-constitution-of-the-socialist-republic-of-vietnam-4847.html. Access on: 19 Jan. 2024.

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abandonment, and other forms of causing harm to the child.[23]

Also, according to the provisions of this law, Article 6 stipulates prohibited acts against children, including: Providing internet services and other services; producing, reproducing, releasing, operating, disseminating, possessing, transporting, storing, and trading in publications, toys, games, and other products whose contents cause adverse influence on children's healthy development.

Vietnamese law establishes a range of sanctions for violations related to children's rights. In the administrative domain, offenses concerning marriage and family, gender equality, and domestic violence may be subject to fines of up to 30 million VND, as stipulated in the 2012 Law on Handling of Administrative Violations[24]. For more serious offenses, the 2015 Penal Code (as amended and supplemented in 2017) provides a comprehensive legal framework to address various forms of violence against children. Specifically, the law criminalizes: Sexual abuse (Article 142: Rape of a person under 16; Article 144: Sexual abuse of a person aged from 13 to under 16; Article 145: Engaging in sexual intercourse or other sexual activities with a person aged from 13 to under 16; Article 146: Molestation of a person under 16; Article 147: Employment of a person under 16 for pornographic purposes)[25]. To criminally handle acts of child abuse in the online environment, the Council of Judges of the Supreme People's Court has issued specific guidelines[26]. Accordingly:

- *"Pornographic performance"* in Clause 1 Article 147 of the Criminal Code means using gestures, actions, words, writing, symbols, pictures and sound to sexually stimulate a person under 16; exposing a reproductive organ or private part, completely or partially undressing or committing other acts that imitate sexual activities (including sexual intercourse, masturbation and other sexual activities) in any shape or form.
- *"Watch a pornographic performance"* in Clause 1 Article 147 of the Criminal Code means the case where a person under 16 watches another person giving a sexual performance in any shape or form.
- *"Participate in a pornographic performance or watch a pornographic performance"* in Clause 1 Article 147 of the Criminal Code includes: Giving a pornographic performance to a person under 16 or enticing a person under 16 to participate in a pornographic performance; Showing a pornographic performance involving a person under 16; Enticing, persuading or forcing a person under 16 to photograph or record their pornographic performance and distributing such photo or video; Enticing, persuading and forcing a person under 16 to undress completely and live stream; Showing pornographic contents involving a person under 16 or running simulation of a person under 16 (animated works or digitally-created characters); Description of human reproductive organs and private parts, excluding the cases provided for in Clause 2 Article 5 herein; Other forms of pornographic performances or watching of pornographic performances.

Notably, when the victim is a child, this constitutes an aggravating circumstance, potentially resulting in the most severe penalties, including the death penalty. This strict legal approach underscores Vietnam's strong commitment to upholding its obligations under the CRC. All acts constituting indications of a criminal offense shall be subject to criminal proceedings including initiation of prosecution, investigation, indictment, and adjudication by the competent authorities in accordan-

[23] VIETNAM. National Assembly. *Children Law*. Hanoi, 5 Apr. 2016. Available at: https://thuvienphapluat.vn/van-ban/van-hoa-xa-hoi/Law-102-2016-QH13-children-312407.aspx. Access on: 19 Jan. 2024.

[24] VIETNAM. National Assembly. *Law on handling administrative violations*. Hanoi, 20 June 2012. Avaialble at: https://www.tracuuphapluat.info/2011/05/phap-lenh-xlvphc-nam-2002-ban-tieng-anh.html#:~:text=Lu%E1%BA%ADt%20x%E1%BB%AD%20l%C3%BD%20vi%20ph%E1%BA%A1m,Law%20on%20handling%20administrative%20violations. Access on: 20 Jan. 2024.

[25] VIETNAM. National Assembly. *Penal code*. Hanoi, 27 Nov. 2015. Avaialble at: https://www.tracuuphapluat.info/2010/05/bo-luat-hinh-su-viet-nam-tieng-anh.html. Access on: 16 Jan. 2024.

[26] COUNCIL OF JUSTICES THE SUPREME PEOPLE'S COURT. *Guiding the application of a number of regulations of articles 141, 142, 143, 144, 145, 146 and 147 of the criminal code and settlement of cases of sexual exploitation and abuse of persons under 18*. 2019. Avaialble at: https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Nghi-quyet-06-2019-NQ-HDTP-huong-dan-Bo-luat-Hinh-su-xet-xu-vu-an-xam-hai-tinh-duc-nguoi-duoi-18-tuoi-414764.aspx. Access on: 15 Jan. 2024.

TRINH, Thuyen Duy. Legislative gaps and digital vulnerabilities: reconceptualizing Vietnam's legal framework to combat online child sexual exploitation. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 282-303, 2025.

ce with the provisions of the 2015 Criminal Procedure Code (CPrC).

2.2 current situation of online child sexual abuse in Vietnam

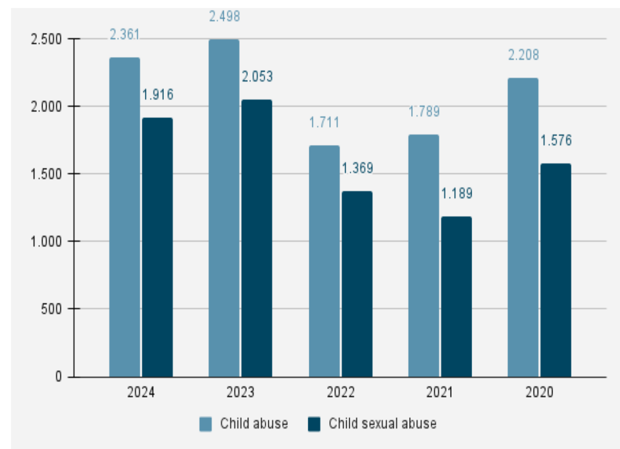
Early exposure to the Internet and online activities through smart connected devices has significantly impacted children today, leading to notable changes in communication, play, and daily routines. The online environment provides favorable conditions for intellectual development and expanding social interactions. However, this same environment also increases the risk of exposure to harmful, inappropriate, and misleading content, as well as online violence and exploitation. Among these risks, sexual abuse is one of the most deeply damaging threats, leaving severe and lasting consequences.

Online child sexual abuse in Vietnam has emerged as a pressing societal concern, drawing significant attention from the public, civil society organizations, and governmental authorities. The prevalence of such offenses is increasing, with perpetrators employing increasingly sophisticated methods, thereby complicating detection and legal intervention. Alarmingly, many instances occur within environments traditionally considered safe for children, such as homes, schools, and community spaces.

Statistics on acts and data related to online child sexual abuse in Vietnam as of 2022 are documented in the report titled *Preventing Harmful Practices in Vietnam [Current Status] – Evidence on Online Child Sexual Exploitation and Abuse.*[27] This report is one of the key documents under the project "*Disrupting Harm.*" The report indicates that only one-third of children using the Internet in Vietnam receive information on how to stay safe online. The lack of such information makes children more vulnerable to online exploitation and sexual abuse in Vietnam. Survey results show that most children who reported experiencing online exploitation or sexual abuse did not disclose their experiences to anyone or only confided in a friend. Very few children reported the incidents to their caregivers and/or an official channel, such as the police or a helpline. Specifically, 8% of children aged 12-17 who use the Internet reported receiving inappropriate comments that made them uncomfortable within the past year (12 months prior to the survey). Among them, 43% did not disclose the incident to anyone, primarily because they believed that reporting it would not change anything or lead to any action. Additionally, 5% of children reported receiving unsolicited explicit images, with nearly half of them choosing not to tell anyone because they did not know whom to confide in.

According to data from Datareportal, Vietnam is experiencing significant growth in internet penetration and network coverage nationwide. As of January 2024, the country recorded 78.44 million internet users, representing 79.1% of the total population of 99.19 million. Concurrently, approximately 72.70 million individuals are active on social media platforms[28], with nearly one-third of them being adolescents aged 15 to 24. While this rapid digital expansion offers numerous socio-economic benefits, it also presents substantial challenges, particularly concerning online safety, digital rights, and the protection of vulnerable groups, including children. This is the main reason online child sexual abuse in Vietnam has increased. Statistics indicate that more than 720,000 images related to child abuse are uploaded online every day. However, the prevalence and scale of online child abuse remain immeasurable.[29]

Figure 1- Statistics of child abuse and child sexual abuse from 2020-2024 in Vietnam



In recent times, despite efforts from relevant sectors, schools, and families to manage and educate children, as

[27] ECPAT, I.; UNICEF. *Preventing harmful practices in Vietnam [current status]*: evidence on online child sexual exploitation and abuse. 2022.

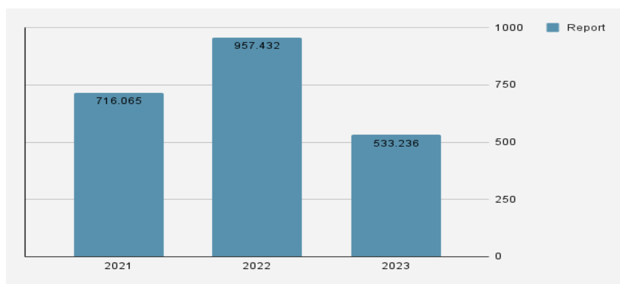
[28] KEMP, Simon. Digital 2024: Vietnam. *Data Reportal*, 23 Feb. 2024. Available at: https://datareportal.com/reports/digital-2024-vietnam. Access on: 14 Dec. 2024.

[29] KHANG, Minh. Online child abuse – heartbreaking stories. *Cand*, 27 May 2020. Available at: https://cand.com.vn/Muon-mau-cuoc-song/Xam-hai-tre-em-tren-moi-truong-mang-nhung-cau-chuyen-nhoi-long-i567274/. Access on: 20 Feb. 2024.

well as the police force's intensified efforts to combat and strictly handle child sexual abuse crimes, the situation remains complex. In 2023, a total of 2,498 cases of child abuse were recorded nationwide, marking a 9.2% increase compared to 2022, with child sexual abuse accounting for 82.2% of cases. In 2024, the total number of child abuse cases in Vietnam is 2,361 case, showing a slight decrease from 2,498 cases in 2023. However, the number remains alarmingly high, with child sexual abuse cases accounting for 1,916, representing over 81% of all reported incidents. Although there is a marginal decline compared to 2023, the overall trend indicates a persistent and serious issue. The figures remain significantly higher than those recorded in 2022 and previous years, suggesting either an actual increase in abuse cases or improved reporting mechanisms. The provinces and cities with the highest number of child abuse and violence cases include Hanoi, Thai Binh, Hoa Binh, Ho Chi Minh City, Dong Nai, Can Tho, and Lam Dong.[30]

Additionally, The data from the US National Center for Missing and Exploited Children (NCMEC) highlights a serious concern regarding child sexual abuse material (CSAM) in cyberspace(NCMEC, 2023), with Vietnam ranking among the countries with the highest volume of reported cases globally. According to Figure 2 - Appendix 2, the number of CSAM-related reports in Vietnam has been alarmingly high, with 716,065 cases in 2021, increasing to 957,432 in 2022, and 533,236 in 2023.

Figure 2 - Child sexual abuse (CSAM) data on cyberspace from the US National Center for Disrespected and Exploited Children (NCMEC)



Specifically, according to statistics from the Ministry of Public Security, the number of cases related to online child abuse has increased significantly. Over the past three years, more than 400 cases have been recorded in which social media platforms were exploited to lure and abuse children using the following methods and tactics:

First, sexual exploitation is carried out while the victim is online, such as by luring, manipulating, or threatening children into engaging in sexual acts via webcam. A case was brought to trial in Hanoi in 2021, where the perpetrator got to know the victim through an online gaming application. The perpetrator used deceitful tactics, promising to take the victim out and upgrade their game account faster in exchange for the victim taking and sending nude photos and videos via Zalo. Additionally, the perpetrator also sent images of his genitals and masturbation videos to the victim[31]. Additionally, there are still many other cases[32]

Second, identifying and/or soliciting (grooming) children online for the purpose of sexual exploitation, regardless of whether the subsequent acts take place online or offline. Online child sexual offenders often have the ability to exploit and understand children's psychology and vulnerabilities. They take advantage of children's desires, needs, and innocence to carry out their wrongful acts. Specifically, they may lure children with affectionate words, promises of attractive gifts, or by enticing them to participate in online games to build trust. Most recently, a criminal case transpired in Buon Ma Thuoc City in 2022, wherein an individual exten-

[30] VIETNAM. Ministry of Public Security. Warning on the situation of child abuse in the online environment. *Congan*, 26 Nov. 2024. Available at: https://congan.nghean.gov.vn/thong-tin-chuyen-de/canh-bao-toi-pham/202411/canh-bao-tinh-trang-xam-hai-tre-em-tren-moi-truong-mang-1027651/. Access on: 10 Dec. 2024.

[31] VIETNAM. People's Court of Nam Tu Liem District. *Judgment nº 52/2021/HSST dated April 8, 2021, of the People's Court of Nam Tu Liem District, Hanoi City*. Avaialble at: https://congbobanan.toaan.gov.vn/2ta703354t1cvn/chi-tiet-ban-an. Access on: 6 Sep. 2024.

[32] PEOPLE'S COURT OF AN GIANG PROVINCE. *Judgment nº 44/2021/HS-ST dated June 30, 2021, of the People's Court of QA City, An Giang Province*. Available at: https://www.bing.com/ck/a?!&&p=-a2b963f2a37595cad5399c170df595f6461792a5fd2f14242350a1cddda11620JmltdHM9MTczODYyNzIwMA&ptn=3&ver=2&hsh=4&fclid=0f45cc8c-d03b-64bc-18f5-d906d13365fb&psq=b%e1%ba%a3n+%c3%a1n+s%e1%bb%91%3a+44%2f2021%2fHS-ST+ng%c3%a0y+30%2f6%2f2021+c%e1%bb%a7a+TAND+th%c3%a0nh+ph%e1%bb%91+QA%2c+t%e1%bb%89nh+An+Giang+v%e1%bb%81+tr%c6%b0%e1%bb%9dng+h%e1%bb%a3p+c%e1%bb%a7a+em+L%c6%b0%c6%a1ng+Th%e1%bb%8b+KL%2c+sinh+ng%c3%a0y+11%2f7%2f2005%3b+ng%e1%bb%a5+t%e1%bb%95+14%2c+kh%c3%b3m+C%2c+ph%c6%b0%e1%bb%9dng+Cp%2c+th%c3%a0nh+ph%e1%bb%91+QA%2c+t%e1%bb%89nh+An+Giang.&u=a1aHR0cHM6Ly9jb25nYm9iYW5hbi50b2Fhbi5nb3Yudm4vNXRhNzUzMDIxdDFjdm4vNDRfTm-d1eWUlQ0MlODIlQ0MlODNuX01pbmhfQ3UlQ0MlOUJvJUNDJTlCJUNDJTgwbmdfLnBkZg&ntb=1. Access on: 6 Sep. 2024. KHANG, Minh. Online child exploitation – heartbreaking stories. *Cand*, 27 May 2020. Available at: https://cand.com.vn/Muon-mau-cuoc-song/Xam-hai-tre-em-tren-moi-truong-mang-nhung-cau-chuyen-nhoi-long-i567274/. Access on: 12 Feb. 2024.

ded a loan to a 14-year-old minor under the condition of securing the debt with nude photographs, explicit video recordings, and the minor's consent to engage in sexual intercourse with a person of the opposite sex. In the course of this case, the perpetrator further disseminated the aforementioned explicit materials across social media platforms and distributed them to several members of the minor's family, intending to coerce and intimidate the minor into repaying the debt upon her failure to meet the repayment obligations.[33]

Third, the production, distribution, dissemination, importation, exportation, offering, solicitation, possession, or intentional online access to child sexual exploitation materials, even when the sexual abuse depicted in the materials is shared through means other than mass media or communication channels. A notable case involves the abduction of children for the production of pornographic materials with the intent of profiting. On April 12, 2024, the Investigation Police Agency of Ho Chi Minh City arrested and temporarily detained Phạm Huỳnh Nhật Vi, aged 21. Through the investigation process, the authorities determined that Vi had conspired with a foreign individual to target children aged 6 to 12. Vi employed various tactics to lure the children, bringing them to his residence and coercing them into engaging in sexually explicit acts, which were then filmed and photographed to be sent to the foreign accomplice for profit. On April 3, 2024, taking advantage of a moment when no adults were present to supervise, Vi approached and enticed two children, M (7 years old) and L (3 years old), taking them to his apartment and forcing them to comply with his demands. Fortunately, on April 8, the two children were rescued and returned to their families. Simultaneously, Vi was arrested to assist in the investigation and to clarify the details of the case.[34]

In addition to traditional cybersecurity concerns, online sexual harassment has emerged as a serious and escalating issue within contemporary society. Globally, including in Vietnam, this form of misconduct is becoming increasingly prevalent and alarming. According to data published on the Government Portal in 2020, approximately 18,000 incidents related to online sexual harassment were recorded in Vietnam alone. One contributing factor to this rising trend is the lack of legal awareness among certain segments of social media users. Many individuals mistakenly perceive comments or conduct regarding others' physical appearances as mere jokes or harmless banter. However, such behavior may, in fact, constitute a form of sexual harassment, particularly when it infringes upon the dignity or psychological well-being of the recipient. At present, both in Vietnam and internationally, there remains an absence of a uniform legal definition or codified concept of "online sexual harassment." Nevertheless, from a substantive perspective, it may be understood as any sexually motivated conduct perpetrated via digital platforms, whether in public or private virtual spaces, that has a detrimental effect on the victim's dignity, reputation, or mental health. This form of harassment encompasses not only inappropriate or unsolicited comments but also includes actions such as manipulating images with indecent content, sending spam messages, or disseminating obscene photos and videos. Victims have reported that upon uploading personal images to social media platforms, they frequently receive unsolicited messages including requests for social interaction, invitations to dine or travel, and, in more severe cases, explicit or indecent proposals.[35] Even more concerning is the widespread prevalence of vulgar and sexually suggestive language, including mocking, flirtation, or exaggerated and offensive commentary on appearance conduct which not only infringes legal protections but also contributes to the creation of a toxic and unsafe digital environment. Online sexual harassment constitutes a violation of legal rights protected under Vietnamese law, particularly those concerning honor, dignity, and personal privacy. Furthermore, victims often experience severe psychological consequences, including prolon-

[33] THÀNH, Van. Lending money to a girl with the requirement of using nude photos and explicit clips as collateral. *Cand*, 17 Aug. 2022. Available at: https://cand.com.vn/ban-tin-113/cho-be-gai-vay-tien-voi-yeu-cau-the-chap-anh-khoa-than-clip-nong--i664332/. Access on: 10 June 2024.

[34] HO CHI MINH CITY MEDIA CENTER. Ho Chi Minh City's public security have prosecuted Phạm Huỳnh Nhật Vi for the crimes of 'Abducting a person under 16 years of age' and 'Using a person under 16 years of age for pornographic purposes. *Trung Tâm Báo Chí Thành Phố Hồ Chí Minh*, 12 Apr. 2024. Available at: https://ttbc-hcm.gov.vn/cong-an-tphcm-khoi-to-pham-huynh-nhat-vi-ve-toi-chiem-doat-nguoi-duoi-16-tuoi-va-su-dung-nguoi-duoi-16-tuoi-vao-muc-dich-khieu-dam-46052.html. Access on: 5 May. 2024.

[35] HIẾU, Dao Trung. Beware of new tactics in sexual harassment. *Cand*, 4 May 2021. Available at: https://cand.com.vn/Ho-so-Interpol/Canh-giac-voi-thu-doan-quay-roi-moi-i604186/. Access on: 4 May 2024.

TRINH, Thuyen Duy. Legislative gaps and digital vulnerabilities: reconceptualizing Vietnam's legal framework to combat online child sexual exploitation. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 282-303, 2025.

ged anxiety, emotional distress, and, in extreme cases, clinical depression.

It is noteworthy that this phenomenon is not novel. Women, as a vulnerable demographic group, have long been subjected to verbal and behavioral misconduct with underlying sexual connotations disguised as humor. A study conducted by ActionAid revealed that 87% of Vietnamese women reported having been subjected to some form of sexual harassment, ranging from inappropriate remarks to acts of sexual violence an incidence rate that surpasses that of countries such as India, Cambodia, and Bangladesh.[36] These figures paint a grim picture, especially within a nation that traditionally upholds and cherishes cultural values and ethical norms.

2.3 Causes and conditions leading to the increase in sexual abuse crimes in cyberspace in Vietnam

To identify the causes and conditions of child sexual abuse crimes in cyberspace, the author has conducted research on specific criminal cases and participated in scientific conferences organized by Vietnam's legal universities, as well as the scientific conference held at the People's Police University in Ho Chi Minh City. This conference brought together investigators, case officers, and leaders who have been actively engaged in the prevention and suppression of such crimes. Additionally, the author directly conducted sociological surveys involving key groups, including children, families, and schools, to gain comprehensive insights into the issue.

Firstly, the psychology of criminals plays a crucial role. The root cause of child sexual abuse, particularly in the online environment, often stems from the moral decadence and psychological disorders of offenders. These individuals, lacking fundamental human values, willingly disregard the rights, dignity, and safety of their victims to fulfill their selfish desires. Behind every act of abuse, there are not only material motives or the mere satisfaction of sexual urges but also a deeper compromise with deviant desires, sometimes influenced by external factors. One such factor is the infiltration of toxic cultural elements from external sources[37] or exposure to negative role models in society. The proliferation of violent and pornographic imagery, along with deviations in sexual expression, can sometimes serve as the foundation for moral transgressions, as criminals may perceive them as standards to be pursued for self-gratification.

Abusive acts no longer have to take place openly, but are hidden under invisible layers, making the process of tracing and preventing more complicated than ever. Social network, with infinite connectivity, is the perfect tool for abusers to approach and build trust with victims.[38] Additionally, That distorted mentality views children as easy targets, unable to recognize and respond to danger due to their lack of knowledge and skills necessary for self-protection in the virtual environment. This vulnerability enables offenders to approach and manipulate children, drawing them into dangerous interactions by exploiting their trust through deception. Pereira underscores that digital child victimization is deeply connected to their psychological vulnerability, which is often exacerbated by legal ambiguity and weak state response. In the Vietnamese context, this translates into an urgent need for coordinated family-school-state interventions, especially when children are left unsupervised online[39]. Persuasive words,[40] false commitments, and even enticing virtual "gifts" serve as common tactics used to lure children into harmful situations.

Secondly, the prevalence of child sexual abuse in cyberspace is escalating, particularly in Vietnam, due to various complex factors. One of the primary causes is excessive internet and social media usage. Children tend to spend several hours each day browsing the web, watching videos, playing games, or interacting on social media platforms such as Facebook, TikTok, and Zalo. This prolonged exposure increases their susceptibility to inappropriate content, online predators, and dangerous situations such as fraud, extortion, or coercion

[36] ACTION AID VIET NAM. *For women and girls*: can dreams come true? Hanoi: Action Aid, 2024.

[37] TRA VINH PROVINCIAL POLICE DEPARTMENT. The situation of child sexual abuse crimes in tra vinh province and solutions to improve the effectiveness of crime prevention and control in the future. *In*: SCIENTIFIC conference on child sexual abuse on the internet and prevention solutions. [*S. l.*]: People's Police University, 2024. p. 171.

[38] VAN TUAN, N.; DINH TUAN, D. Sexual crimes against children in cyberspace and solutions to enhance prevention effectiveness. *In*: SEXUAL exploitation of children online and preventive solutions. [*S. l.*]: People's Police University, 2024. p. 54.

[39] PEREIRA, J. Cibercrime e direitos humanos: a vulnerabilidade de crianças na internet. *Revista de Direito Internacional*, 2021.

[40] LAM, M. G. R. L. The prevention and suppression of child sexual abuse crimes in gia lai province and solutions to enhance effectiveness in the future. *In*: SCIENTIFIC conference on child sexual abuse on the internet and prevention solutions. [*S. l.*]: People's Police University, 2024. p. 38.

into sending sensitive images. Certain forms of sexual harassment are also identified as potential precursors to future acts of sexual abuse. 8% of children reported receiving inappropriate comments that made them feel uncomfortable such as jokes, stories, or remarks about their bodies, appearance, or sexual activities primarily on Facebook (including Messenger) and TikTok[41] 5% of children reported receiving unsolicited sensitive images via social media platforms such as Facebook and Zalo. These images were predominantly sent by unknown individuals (40%) and adult friends or family members (40%). According to surveyed parents in Vietnam, their children use the following social media applications: 43.6% use Facebook; 23.3% use Zalo; 25% use Instagram; 45.9% use TikTok; 50.6% use Telegram; 35% use Threads. These statistics indicate that Telegram and TikTok are the most widely used platforms among children, followed by Facebook and Instagram. (Question 8).[42]

Additionally, Children's inherent curiosity and desire to explore new and unfamiliar content make them more susceptible to accessing violent, pornographic, and other harmful, unregulated materials online. Moreover, social media usage encourages behaviours that may put children at risk, such as sharing personal images, disclosing private information, or providing sensitive data to strangers. Beyond curiosity, the primary reason children face online risks is their lack of education in sexual awareness and essential skills to prevent sexual abuse both in general and in cyberspace specifically. As a result, many children become victims of threats, coercion, and psychological manipulation, leading to fear, shame, and low self-esteem, which prevent them from reporting offenders to their families or schools. This silence further increases their vulnerability, potentially resulting in repeated victimization or real-life exploitation[43].

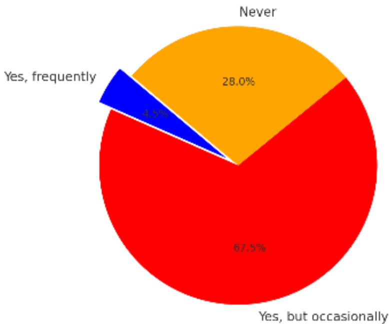
According to sociological survey results in Vietnam (See Question: 2,3,4,6,8)

30% of children use the Internet for more than two hours per session, while 37% spend between one and two hours per session. The highest internet usage rate occurs in the evening, reaching 78.5%.

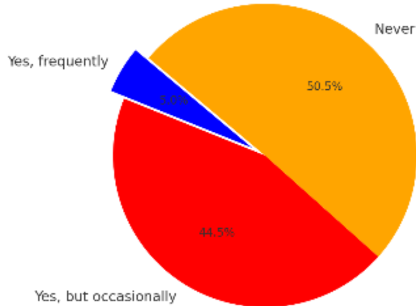
Recklessness in Making Friends and Sharing Personal Information: 4.5% of children regularly share personal information online, while 67.5% do so occasionally. Many children are lured by individuals impersonating friends, celebrities, or seemingly trustworthy figures online. These perpetrators exploit children's curiosity and lack of awareness to manipulate, coerce, and ultimately subject them to abusive acts. Additionally, 44.5% of surveyed children reported occasionally interacting with strangers on the Internet, and 5% indicated frequent interactions with unknown individuals. Personal images are the most frequently shared personal information, accounting for 55.5%. More concerning is that 6% of children share their current location. This data suggests that these groups are at high risk of online exploitation and abuse in cyberspace.

Figure 3 - Sociological survey results conducted by the author during the research process

Do you frequently share personal information on the Internet?

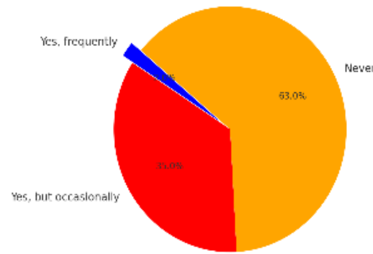


Do you frequently interact with strangers on the Internet?



[41] ECPAT, I.; UNICEF. *Preventing harmful practices in Vietnam [current status]*: evidence on online child sexual exploitation and abuse. 2022.
[42] SURVEY. *Survey on awareness of child sexual abuse prevention in cyberspace*. 2024. Available at: https://docs.google.com/forms/d/1BEjY92xv9ZkZlGflSUgEDLnxLirvx0S3K_636i3jYKE/edit?ts=67868aea&fbclid=IwZXh0bgNhZW0BMQABHXUjfCKpAW3FC1hMM2XQI-d4w2DbDyzbBcUHAQTxzPduQNz-Y33YG-UdXQ_aem_MPM4Eh_2gE5l-w8Yk2TxsQ. Access on: 10 June 2024.
[43] VIETNAM. Ministry of Labor Invalids and Social Affairs. Còn nhi□ u tr□□ ng h□ p tr□ em b□ xâm h□ i nh□ ng ch□ a đ□□ c phát hi□ n k□ p th□ i. *Molisa*, 27 Apr. 2020. Available at: https://molisa.gov.vn/baiviet/222534?tintucID=222534. Access on: 12 Jan. 2024.

Do you have a habit of receiving or sending messages from/to strangers on the Internet?



Moreover, the rapid proliferation of anonymous messaging applications, live streaming platforms, and video call services has further facilitated the access and manipulation of children by sexual offenders. These platforms provide offenders with opportunities to engage with and exploit minors effortlessly, sometimes allowing them to commit crimes without immediate detection. What is concerning is that not only do girls become victims of these illegal acts, but boys do as well. Abusers often employ sophisticated tactics, exploiting children's curiosity and lack of experience to approach them and commit crimes.

Fourth, the Lack of Parental and School Supervision as a Concerning Factor.

Parents and caregivers often lack basic knowledge and skills in information technology, making it difficult for them to guide children in identifying, filtering, and blocking harmful online content. Additionally, many families are preoccupied with financial stability, while others face economic hardship, divorce, or involvement in social vices and legal violations. According to the Supreme People's Court of Vietnam, the number of children with divorced parents remains significantly high, accounting for approximately 1.8% of the total population.[44] Conversations and emotional exchanges between parents and children are often neglected in many families. Even when such discussions occur, parents tend to doubt their children's statements, especially regarding online sexual abuse. Many dismiss these concerns as imaginary or insignificant, failing to acknowledge the real dangers their children may face. This creates a favourable environment for sexual predators to exploit children. These factors result in a lack of parental attention and supervision, leading to neglect. Consequently, children are left to study, play, and entertain themselves online without adequate guidance, increasing their exposure to online risks. Many parents lack sufficient knowledge about the online environment and are unable to monitor their children's internet activities effectively.

According to sociological survey results in Vietnam (See Question: 1,2)

Parental Supervision of Children's Social Media Usage: 2.9% of parents do not pay attention to their children's social media use; 40.1% occasionally inquire about their children's online activities; 60.5% express concern about their children's internet usage. However, when asked whether they know what type of information their children share online: 52.3% of parents responded that their children share personal images; 13.4% indicated that their children disclose their current location; 49.4% noted that their children share details about their daily activities. Parents reported that children use the internet primarily for: Watching videos or online movies; Playing online games… Social media access (58.7%) a significant concern due to potential online risks; Academic purposes (39.5%) a relatively lower proportion.

Meanwhile, schools have yet to implement comprehensive digital literacy programs, leaving children without the necessary awareness and skills to protect themselves from online risks. Communication, education, and social advocacy efforts for child protection and care remain ineffective.[45] The awareness and skills of parents, family members, teachers, community members, and even children themselves regarding child protection are inadequate and incomplete. Specifically, many children are not equipped with the necessary knowledge and skills to prevent sexual abuse. Victims of sexual abuse often experience fear, shame, and low self-esteem, making them reluctant to speak out or report offenders. Parental Monitoring of Children's Online Activities: 55.8% of parents occasionally check their children's online activities; 4.7% of parents do not monitor their children's online activities at all (Question 4)

Fifth, Legal Gaps and Weak Enforcement in Handling Online Child Abuse Cases

[44] GOVERNMENT. *Implementation of Legal Policies on Child Abuse Prevention*. 2019. GOVERNMENT. *Implementation of Legal Policies on Child Abuse Prevention*. 2020. GOVERNMENT. *Implementation of Legal Policies on Child Abuse Prevention*. 2021.

[45] VIETNAM. Ministry of Labor Invalids and Social Affairs. Innovating methods for child protection and abuse prevention. *Molisa*, 23 abr. 2022. Available at: https://molisa.gov.vn/baiviet/231307?tintucID=231307. Access on: 16 May 2024.

According to Article 1 of Vietnam's Law on Children (2016), a children is defined as "A child is a human being below the age of 16" In contrast, the CRC defines a child as "every human being below the age of eighteen years." This discrepancy reflects a fundamental divergence between Vietnam's domestic legal framework and international standards regarding the legal definition of a child. Under Vietnamese law, individuals aged from 16 to under 18 are classified as "adolescents" rather than "children." As a result, they may not fall within the protective scope of certain legal mechanisms specifically designed for children. This becomes particularly problematic in the context of online sexual abuse and exploitation. Acts of sexual harassment or abuse targeting individuals in the 16–18 age group may not be treated as violations against children under Vietnamese law, even though such acts would clearly constitute child rights violations under international law. Consequently, this legal gap creates challenges in ensuring the full implementation of international child protection obligations. In practice, individuals aged 16 to under 18 may be deprived of specific safeguards and rights afforded to children under the CRC, particularly in digital environments where risks of sexual abuse, grooming, and harassment are increasingly prevalent.

The resolution of child sexual abuse cases faces significant challenges in collecting evidence to prove the crime. In addition to traditional forms of evidence commonly found in child sexual abuse cases in Vietnam, electronic evidence is also considered a new and complex area. This issue has garnered special attention from the leadership of the People's Procuracy and was the main topic of an international conference co-organized by the Hanoi Procuratorate University, the Department of International Cooperation and Mutual Legal Assistance in Criminal Matters (Department 13), and the United Nations Office on Drugs and Crime (UNODC) in Vietnam. In some cases, children have been blackmailed and threatened with the distribution of sensitive images. However, when families detect and report these incidents, law enforcement agencies often face difficulties in identifying the perpetrators due to the following reasons: Use of Anonymous or Fake Accounts: Offenders frequently create fake social media accounts or use temporary profiles, making it difficult to trace their real identities. Advanced Anonymity Technologies: Many criminals exploit VPNs, encrypted messaging platforms, and dark web services to hide their digital footprints, complicating investigations. The Vietnamese The CrPC has provisions on electronic data as evidence. However, for electronic data to be considered a source of evidence under Article 86, it must meet specific requirements,

> Evidences are de facto and collected as per the sequence and formalities defined by this Code. Evidences are grounds for the determination of a crime, perpetrators of such crime, and other valuable facts for the settlement of the case.

In practice, the provision "Evidence collected as per the sequence and formalities defined by this Code" faces many challenges. This is because all such information exists in the online environment. In cases of sexual abuse in the online environment, the victims, their families, and defense lawyers often provide screenshots of phone or computer screens as evidence. Difficulties arise when electronic data discovered and submitted by individuals, agencies, or organizations lack complete information about the process of collection, as well as the origin and source of the data. The legality of electronic evidence is only recognized when it is collected directly by the investigating agency itself. While the victim or the defense has the right to provide electronic documents as evidence, these materials can only be used in a criminal case if the investigating agency verifies their legality. Currently, Vietnam has no specialized agency responsible for collecting this data to ensure its legality. Additionally, there is no specific regulation in criminal procedure law defining when mandatory expert examinations of electronic data are required (Article 206). This issue depends on the discretion of the investigating agency in deciding whether to conduct forensic examination.

Typically, to verify the information and documents provided, the investigating agency combines these materials with other evidence-gathering measures, such as taking statements, confrontation, identification, and investigative experiments to verify electronic evidence. As a result, the provided information and documents only serve as supporting materials for the investigating agency to collect additional evidence. The evidence in the case must still be verified through direct investigative measures. This process can significantly prolong the time required to prove the crime, making the investigation more complex and time-consuming. As a result, without a specialized authority to certify the legality of electronic evidence, there is a high possibility that docu-

TRINH, Thuyen Duy. Legislative gaps and digital vulnerabilities: reconceptualizing Vietnam's legal framework to combat online child sexual exploitation. Revista de Direito Internacional, Brasília, v. 22, n. 2, p. 282-303, 2025.

ments submitted by the victim or defense counsel to the investigating agency will not be accepted as evidence.

Cooperating with foreign-based service providers to collect evidence poses a significant challenge for authorities conducting legal proceedings. Most major online service providers, such as Google, Facebook, YouTube, TikTok, and Instagram, have their servers located abroad. This difficulty is not unique to Vietnam but is also encountered in European countries. As noted,

> authorities can request and collect necessary documents for criminal investigations within their national jurisdiction, but electronic evidence stored online is often held by service providers based in another country, even when the crime occurs solely within one nation.[46]

Therefore, "to obtain such data, cooperation with service providers through international legal assistance channels is required." However, this process is extremely challenging due to: Differences in legal regulations between countries; Language barriers, and Service providers often citing customer confidentiality as a reason to refuse or ignore requests for data.

2.4 Some Recommendations to Ensure Effective Prevention and Combat Against Online Sexual Exploitation of Children

This section outlines five targeted policy and legal reform proposals derived from doctrinal analysis, comparative legal review, and empirical findings. Each subsection addresses a core factor contributing to the persistence of online child exploitation and suggests concrete regulatory improvements aligned with global best practices.

2.4.1 Addressing the psychological disorders and moral decay of offenders

To address the psychological disorders and moral degradation that underpin child sexual abuse in cyberspace, it is essential to establish a legal framework enabling behavioral risk assessments and psychological profiling of individuals exhibiting deviant tendencies particularly first-time or content-related offenders alongside mandatory rehabilitation programs focused on cognitive-behavioral therapy, moral reasoning, and impulse control, while simultaneously strengthening the regulation of pornographic, violent, and sexually deviant materials (especially those disseminated through foreign platforms) via content licensing, classification systems, and interjurisdictional enforcement cooperation; moreover, ethical and legal education emphasizing respect for human dignity and children's rights should be incorporated into both formal schooling and offender rehabilitation programs, and in cases involving foreign offenders.

2.4.2 Minimizing Children's overexposure to social media and risky digital behavior

To minimize children's overexposure to social media and risky digital behavior which significantly increases their vulnerability to online sexual abuse it is imperative to establish a robust legal framework that mandates default safety settings for minors on digital platforms, including age verification, real-time content moderation, and automated content filtering systems, in accordance with the principle of proactive child protection as recognized in Article 6 of the the CRC and reflected domestically in Article 54 of Vietnam's Law on Children (2016); concurrently, digital literacy must be codified as a compulsory component of national education programs to empower children with the legal and practical capacity to recognize and respond to grooming, manipulation, and exploitative behavior online, thereby operationalizing the child's right to be protected from all forms of abuse under Article 19 of the CRC; in addition, legal instruments should require platforms and public institutions to implement confidential, child-friendly reporting and redress mechanisms, with obligations to respond in a timely and protective manner consistent with due diligence standards; and finally, national criminal law such as Articles 155, 146, and 147

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[46] EUROPEAN COMMISSION. *Questions and answers*: mandate for the EU-U.S. cooperation on electronic evidence. Brussels, 5 Feb. 2019. Available at: https://www.bing.com/ck/a?!&&p=1ced2820af431fcbc11da5efbe007d3f76c83505f9c2b3f65d5c0f535e7ede26JmltdHM9MTczODk3MjgwMA&ptn=3&ver=2&hsh=4&fclid=34c3cce0-fbc4-631c-3481-d96efacc62cc&psq=European+Commission%2c+%e2%80%9cQuestions+and+Answers%3a+Mandate+for+the+EU-U.S.+cooperation+on+electronic+evidence%e2%80%9d&u=a1aHR0cHM6Ly9lYy5ldXJvcGEuZXUvY29tbWlzc2lvbi9wcmVzc2Nvcm5lci9hcGkvZmlsZXMvZG9jdW1lbnQvcHJpbnQvZW4vbWVtb18xOV84NjMvTUVNT18xOV84NjNfRU4ucGRm&ntb=1. Access on: 16 Jan. 2024.

of Vietnam's Penal Code 2015 should be revised and clarified where necessary to explicitly criminalize online grooming, the unsolicited transmission of sensitive materials, and persistent sexually suggestive communication, ensuring that such acts are prosecutable even absent physical contact, thereby closing legislative gaps and affirming the State's responsibility to prevent abuse in both physical and virtual spaces.

2.4.3 Mitigating the impact of anonymous communication tools and technological exploits

To mitigate the growing risk of undetectable child sexual abuse facilitated by anonymous communication tools, livestreaming platforms, and encrypted messaging services, it is essential to enact legal provisions requiring high-risk platforms to incorporate mandatory child-safety protocols such as AI-driven abuse detection systems, user behavior analysis, and metadata-sharing frameworks with law enforcement agencies while concurrently establishing binding data-sharing agreements between technology providers and competent state authorities to ensure that suspicious patterns of predatory conduct are promptly flagged and investigated in accordance with the principles of proactive intervention and digital accountability; this approach is consistent with Article 19(1) of the CRC, which obligates States Parties to take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of abuse, including in online environments. In the Vietnamese legal context, while the Law on Cybersecurity 2018 (Articles 5 and 26)[47] prohibits the use of cyberspace for illegal acts and allows for the collection of user data in national security or criminal cases, there remains a gap in specifically requiring foreign or anonymous platforms to implement preventive child protection technologies. Similarly, the Law on Children 2016 (Articles 54 and 55)[48] affirms the child's right to be protected from abuse and assigns responsibilities to agencies and organizations to ensure child safety, but lacks detailed procedural mechanisms for identifying and interrupting exploitative conduct occurring through anonymous or encrypted channels.

In contrast, jurisdictions such as the United Kingdom have enacted the Online Safety Act 2023,[49] which imposes statutory duties of care on online platforms to proactively identify and remove harmful content, including child sexual abuse material (CSAM), and requires platforms to deploy systems to detect grooming and encrypted exploitation, under the supervision of the national regulator (Ofcom). Similarly, Australia's Online Safety Act 2021,[50] administered by the eSafety Commissioner, mandates the swift takedown of harmful content, empowers the regulator to request user data, and places strong legal obligations on both domestic and foreign service providers to prevent child abuse online. Therefore, for Vietnam to effectively protect children in cyberspace, especially in relation to anonymous or foreign-origin abuse, the legal framework should evolve to reflect international best practices by mandating preventive safety technologies, formalizing cooperation obligations for digital platforms (regardless of country of origin), and assigning regulatory oversight to a specialized agency with enforcement authority thereby transforming child protection in the digital space from a passive duty to an active legal mandate.

2.4.4 Enhancing parental and institutional supervision

The United Kingdom promotes the "Whole-School Approach to Online Safety" under the *Keeping Children Safe in Education* (KCSIE) statutory guidance, which requires all school staff to be trained to identify risks and respond to online abuse, and mandates integration of online safety into both the curriculum and school culture.[51] Similarly, Australia implements the eSafety Schools Framework, a national initiative by the eSafety Commissioner that combines teacher training, student

[47] VIETNAM. National Assembly. *Law on Cybersecurity*. Hanoi, 2018. Available at: https://thuvienphapluat.vn/van-ban/Cong-nghe-thong-tin/Luat-an-ninh-mang-2018-351416.aspx. Access on: 16 Jan. 2024.

[48] VIETNAM. National Assembly. *Children Law*. Hanoi, 5 Apr. 2016. Available at: https://thuvienphapluat.vn/van-ban/van-hoa-xa-hoi/Law-102-2016-QH13-children-312407.aspx. Access on: 19 Jan. 2024.

[49] UNITED KINGDOM. Parliament. *Online Safety Act 2023*. Avaialble at: https://www.legislation.gov.uk/ukpga/2023/50/enacted. Access on: 6 Sep. 2024.

[50] AUSTRALIA. Government. *Online Safety Act nº 76 2021*. Available at: https://www.legislation.gov.au/Details/C2021A00076. Access on: 23 June 2024.

[51] UNITED KINGDOM. Department for Education. *Keeping Children Safe in Education: Statutory Guidance for Schools and Colleges*. 2023. Available at: https://www.gov.uk/government/publications/keeping-children-safe-in-education--2. Access on: 6 May. 2024.

education, and parental engagement in digital safety.[52] These approaches emphasize multi-level engagement, institutional accountability, and child participation principles that can be adapted into the Vietnamese context to build a proactive, community-centered digital child protection system.

Vietnam has taken some legislative steps through the Law on Children (2016) and Law on Education (2019), but implementation remains limited in scope and practice. For instance, while Article 92 of the Law on Children assigns community responsibility for child protection, the lack of legal enforcement mechanisms, resource allocation, and cross-sector coordination weakens its effectiveness. Moreover, schools have yet to fully incorporate digital risk education into formal programs, and many parents lack the necessary awareness or skills to guide their children in the online space. Learning from international models, Vietnam should consider adopting a national framework for digital child safety in education and parenting, with enforceable obligations for institutions and supportive systems for families, particularly in vulnerable settings.

2.4.5 Measures to strengthen the prevention and combat of online child sexual abuse crimes

Pursuant to Article 1 of the CRC, to which Vietnam is a State Party, a child is defined as any human being below the age of eighteen. However, Article 1 of Vietnam's Law on Children (2016) currently defines a child as a person under sixteen years of age. This inconsistency creates a legal gap for individuals aged 16 to under 18, who are excluded from child-specific protections, including in cases involving online sexual abuse. To ensure conformity with international obligations and enhance substantive legal protection, it is necessary to amend the Law on Children to redefine "child" as "a person under eighteen years of age." This revision would harmonize domestic law with the CRC, extend the scope of child protection policies, and close the legal loophole that leaves older minors vulnerable in the digital environment.

The State must reinforce international cooperation through mutual legal assistance treaties (MLATs) and extradition agreements, especially with countries where offenders are likely to reside. Vietnam should proactively engage in bilateral and multilateral treaties focused on cybercrime and child protection, enabling authorities to request user data, freeze online accounts, or initiate joint investigations with foreign counterparts. Integration with frameworks such as the Budapest Convention on Cybercrime or deeper cooperation with INTERPOL and regional ASEAN mechanisms would enhance response capacity. Legal obligations should be imposed on foreign digital platforms operating within Vietnam's digital space (such as social media companies, messaging services, and livestreaming apps) to ensure they comply with national child protection standards. Rodrigues has emphasized the importance of treaty-based cooperation frameworks in facilitating cross-border enforcement of child protection laws. Her analysis reinforces this article's call for Vietnam to adopt not only stricter local requirements but also stronger bilateral and multilateral engagement mechanisms to ensure access to evidence hosted by foreign platforms[53]. This includes the implementation of real-time content monitoring, AI-based detection of grooming behavior, immediate takedown of exploitative content, and mandatory cooperation with Vietnamese authorities in cases involving child abuse or suspected predatory conduct. In parallel, technical and educational prevention strategies must be localized. Vietnamese children, especially in rural and vulnerable communities, must be equipped with tools to identify and report suspicious behavior from foreign strangers online. Digital literacy programs should include simulated scenarios involving impersonation, online luring, and exposure to inappropriate content from unknown contacts, highlighting risks that may originate beyond national borders. Reporting mechanisms, both governmental and platform-based, should include multilingual options, simplified interfaces, and secure communication channels to enable child victims to safely report abuse, even when the offender is not physically present in Vietnam.

Vietnam needs to establish a specialized center for collecting electronic data as evidence to provide accurate information to judicial authorities for investigation and trial proceedings. Currently, if funding is not yet available to implement such a center, an urgent solution would be to issue guidelines on the application of

[52] AUSTRALIA. Government. Office of the eSafety Commissioner. *eSafety Toolkit for Schools*. 2022. Available at: https://www.esafety.gov.au/educators/toolkit-schools. Access on: 23 June 2024.

[53] RODRIGUES, A. Cooperação internacional no combate à exploração sexual infantil online. *Revista de Direito Internacional*, 2020.

certain regulations regarding procedures and methods for collecting electronic evidence. Currently no official recognition of tools and software used for digital forensics investigations. In contrast, developed countries have long standardized digital forensic tools. In the United States, organizations such as the National Institute of Standards and Technology (NIST), the Scientific Working Group on Digital Evidence (SWGDE), and the International Organization for Standardization (ISO) have established standards and methodologies to validate digital forensic tools. These standards have been legally recognized as technical benchmarks, including ISO/IEC 27041:2015.[54] In many countries, forensic investigation software includes widely used tools such as EnCase and FTK.[55] These tools are essential for analyzing, extracting, and preserving electronic evidence in a legally admissible manner. In addition to adopting advanced forensic software, it is crucial to provide regular training for investigators, prosecutors, and judges on detecting, handling, and analyzing electronic evidence. Training should cover technical knowledge, investigative skills, and the use of forensic tools to enhance the efficiency and reliability of electronic evidence collection in legal proceedings.

Additionally, it is essential to strengthen international cooperation with law enforcement agencies worldwide to collect electronic evidence stored on servers located abroad. There should be a framework for collaboration between police forces of different countries to facilitate information exchange and evidence collection in support of criminal investigations. Establishing clear coordination mechanisms will enhance the efficiency of cross-border digital forensics and improve the ability to combat cyber-related crimes effectively.

3 Conclusion

This study aimed to critically evaluate the Vietnamese legal framework for protecting children against online sexual abuse, with a particular focus on compliance with international standards. The findings demonstrate that although Vietnam has developed a multilayered legal infrastructure, significant gaps remain particularly regarding the definitional age of children, evidentiary procedures, and regulatory obligations for digital platforms. These deficiencies hinder effective prevention and prosecution of online child exploitation.

By integrating doctrinal legal analysis with empirical insights, this research identified five core areas requiring reform: psychological assessment of offenders, safe platform design, anonymous communication oversight, institutional supervision, and cross-border evidence cooperation. Each recommendation is grounded in both international best practices and Vietnam's legal context.

Nonetheless, this study is limited by the availability of official judicial data and the absence of detailed platform-specific cooperation mechanisms. Future research should explore comparative legislative effectiveness across ASEAN countries and assess the long-term impact of child-centered digital literacy programs.

This study aimed to assess Vietnam's legal and institutional responses to online child sexual exploitation, with the goal of identifying structural gaps and recommending reforms aligned with international standards. The findings show that Vietnam's current framework, though evolving, remains insufficiently responsive to the complex nature of digital abuse, particularly with regard to legal definitions, procedural safeguards, and platform regulation. While the research is grounded in doctrinal, comparative, and empirical methods, it is limited by the availability of official judicial data and the rapid evolution of digital platforms. Future research should examine the long-term effectiveness of newly implemented regulations and explore regional cooperation mechanisms within ASEAN for more harmonized child protection in cyberspace.

- *Ethical Approval*

  Not applicable

- *Informed Consent*

  Not applicable

- *Statement Regarding Research Involving Human Participants and/or Animals*

  Not applicable

[54] INTERNATIONAL ORGANIZATION FOR STANDARDIZATION. *ISO/IEC 27041:2015(en)*: Information technology — Security techniques — Guidance on assuring suitability and adequacy of incident investigative method. 2015. Available at: https://www.iso.org/standard/44405.html. Access on: 15 Jan. 2024.

[55] BRITZ, Marjie T. *Computer forensics and cyber crime*: an introduction. Upper Saddle River, NJ: Pearson Prentice Hall, 2009.

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