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Editorial

In this issue of the Basel Papers, we are happy to showcase the research of three of the Institute's recent graduates, which they conducted as part of their dissertation theses. Although they investigate distinct phenomena, these works share an interdisciplinary approach as they bring together knowledge and methods from jurisprudence, philosophy, and political science.

Fabia Betschart investigates interference between competing policy goals by analysing the lack of clear liability for environmental damages caused by sanctioned assets. She specifically studies the case of Russian yachts seized in EU territories following the Russian attack on Ukraine and the difficulties inherent in a nuanced application of the Environmental Liability Directive. While the ELD sets out key principles for preventing and addressing environmental harm, its application to sanctioned vessels remains ambiguous, leaving legal gaps that can shift responsibility from operators to public authorities.

Niamh O'Neill studies the power of categories in her interdisciplinary approach to armed conflicts, specifically anticolonial resistance. Using legal analysis and social constructionism to critique each other, she moves beyond the binary of 'terrorist vs freedom fighter', and draws attention to the implicit assumptions made by legal scholars and social scientists. This allows for a more nuanced understanding and reveals the practical implications of categorisation, particularly with regard to the classification of armed actors in asymmetric conflicts.

Giulia Schneitter contributes to our understanding of Switzerland's place in Europe by tracing Swiss contributions to and participation in Frontex, with a focus on illegal pushbacks of migrants during the agency's operations. Going beyond a strictly legal analysis, Schneitter ventures into philosophical terrain by raising questions about the moral responsibility of collectives such as Switzerland. Given Switzerland's self-proclaimed humanitarian tradition, is the nation and its government under a moral obligation to oppose illegal pushbacks?

As the so-called 'Western' world grapples with a global expansion of authoritarianism, crumbling international and institutionalist norms, and a much-diminished vision of itself and its capacity to lead by example, these studies address salient questions of collective and individual responsibility, morality, and epistemology. How do we understand and ultimately judge those involved in violent conflicts? How do we respond to humanitarian and military crises pragmatically but without compromising core values? How do we assess and adapt policies and institutions to the complexities of our times? The fact that these questions do not lend themselves to easy or comfortable answers makes them all the more worthwhile to investigate.

Prof. Corey Ross	Director of the Institute for European Global Studies
Paul Blickle	Editor

Fabia Betschart

Environmental Damage Caused by Frozen Vessels under EU Sanctions

Current EU Legislation and its Compliance with EU Environmental Policy Principles

Abstract: Since the Russian-Ukrainian war began in February 2022, EU Member States have seized and immobilized numerous yachts linked to sanctioned Russian individuals. A key concern arising from these seizures is the environmental risk posed by abandoned or poorly maintained vessels, as neither their sanctioned owners nor the seizing states may assume responsibility for their upkeep. This paper focuses on whether and to what extent existing EU environmental law offers legal grounds for dealing with environmental harm caused by frozen vessels. It further examines whether the current legal framework aligns with core EU environmental policy principles such as the polluter-pays, preventive, and precautionary principles. Methodologically, it is grounded in a descriptive legal analysis of current EU environmental law and is complemented by a qualitative examination of three core EU environmental policy principles. The findings reveal significant legal ambiguities and enforcement challenges that hinder effective environmental protection in this context. Ultimately, the study contributes to the broader discourse on legal liability regarding environmental damage in the light of EU sanctions offering insights for both scholars and policymakers seeking to navigate the complex legal-political landscape of environmental protection.

Keywords: EU Environmental Liability Directive, Environmental Damage, Sanctions against Russia, Frozen Vessels, Polluter-Pays Principle

Fabia Betschart studied International Relations at the University of Geneva, spending her final semester at Universidad Pompeu Fabra in Barcelona. A highlight of her MA in European Global Studies was participating in the Regional Final of the European Law Moot Court 2022/2023, which also inspired the topic of her master thesis. After graduating in 2024, she continued working in Zurich, where she manages client relations for Oxygen at Work AG dedicated to promoting green, sustainable, and healthy workplace environments.

Introduction

In the context of the Russian-Ukrainian war which started in February 2022, the European Union (EU) has adopted restrictive measures against individuals of Russian and Belarusian nationality.[1] Part of these restrictive measures against Russia involve the freezing of assets and economic funds of sanctioned persons in order to weaken the aggressor and to bring the war to a quicker end.[2] As one of many tools of restrictive measures, the freezing of assets is a targeted sanction, tailored to address individuals and entities included in the list of the relevant EU legal acts.[3] Such targeted assets often belong to Russian oligarchs who have been a particular target of Western sanctions because, in addition to their wealth, they are often deemed to be politically influential or close to the government.[4] One of the overarching objectives of the sanctions is to limit such influence on the sanctioned government. Although the primary focus and purpose of these sanctions lie in the EU's Common Foreign and Security Policy (CFSP), it is important to recognise that imposing sanctions also has significant impacts on other policy areas – for instance if these frozen assets pose a threat to the environment. This is the case with several superyachts anchored in EU waters and seized from sanctioned persons linked to the Russian government. Even though exact figures are difficult to confirm due to complex ownership structures, at least 13 superyachts worth over $2 billion were detained across Europe within the first months.[5]

Vessel-based pollution is among the most prevalent sources of marine environmental damage and has been a long-standing concern.[6] But how exactly do these vessels threaten a healthy marine environment? Whether intentional or not, it is usually caused either by emergencies, discharges, accidents, dumping of residue and waste or cleaning processes.[7] Scholars have pointed out that "marinas and yachts represent an unexplored domain of coastal risk"[8] and that the growth in this sector increases concerns about the adverse effects of leisure boating on the environment

1 European Commission, "Ukraine: The Commission Proposes Rules on Freezing and Confiscating Assets of Oligarchs Violating Restrictive Measures and of Criminals," European Union, 2022, https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_3265 (accessed October 19, 2023).

2 European Commission, "Questions and Answers: The Commission proposes rules on freezing and confiscating assets of oligarchs violating restrictive measures and of criminals," European Union, 2022, https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_3265 (accessed on 19 October 2023).

3 European Data Protection Supervisor, "Asset Freezing," European Union, 2023, https://edps.europa.eu/data-protection/data-protection/reference-library/asset-freezing_en (accessed October 19, 2023).

4 Sergei Guriev and Andrei Rachinsky, "The Role of Oligarchs in Russian Capitalism," *The Journal of Economic Perspectives* 19, no. 1 (2005): p. 132.

5 "Russian Superyachts Worth Over $2 Billion Are Detained in Europe," *Bloomberg.Com*, April 4, 2022, https://www.bloomberg.com/news/articles/2022-04-04/russian-superyachts-worth-over-2-billion-are-detained-in-europe (accessed May 5, 2025).

6 Marie-Louise Larsson, *The Law of Environmental Damage: Liability and Reparation* (Stockholm: Kluwer Law International–Norsteds Juridik: Martinus Nijhoff Publishers, 1999): p. 132.

7 Larsson, *The Law of Environmental Damage*. p. 132

8 Eli D. Lazarus and Leonidas A. Ziros, "Yachts and Marinas as Hotspots of Coastal Risk," *Anthropocene Coasts* 4, no. 1 (January 2021): p. 62.

in the Mediterranean Sea, specifically in so-called marine protected areas.[9] Although there are relatively more smaller boats than large superyachts[10], the impact of a large vessel can be disproportionately severe and irreversible, especially in confined areas like a marina.[11] Vessels pose a risk to the marine environment because of the release of various types of substances which can be summarized as general harmful substances, oil, sewage, garbage and harmful emissions.[12] Besides oil waste and oil derivatives[13], hydrocarbons are one of the most dangerous threats to harm the environment and are often released from poorly maintained engines, during maintenance procedures or structural vessel failure.[14] Regular maintenance is essential for both safety and environmental reasons, and typically occurs in marinas, slipways or dry docks, depending on the size of the vessel.[15] Thereby, pollutants such as "spent engine fluids, waste hydrocarbons and used ethylene glycol (anti-freeze), waste solvents from parts-cleaning operations; detergents; paints; vessel scrapings and dust; metals from worn parts and replacement batteries and acids" can enter the marine ecosystem solely as part of the routine maintenance of a vessel.[16] Based on these considerations, it is evident that vessels pose a considerable danger to the surrounding ecosystem, particularly when not well maintained or safely stored.[17] Yet, the repercussions of recreational boating on coastal waters often escape the attention of policymakers or remain inadequately managed.

At the same time, storing and maintaining these assets comes at a significant expense to local authorities, raising the question of financial responsibility for maintenance costs if the vessel is

9 Arnau Carreño and Josep Lloret, "Environmental Impacts of Increasing Leisure Boating Activity in Mediterranean Coastal Waters," *Ocean & Coastal Management* 209 (August 1, 2021): p. 2.

10 Lazarus and Ziros, "Yachts and Marinas as Hotspots of Coastal Risk," p.63.

11 Carreño and Lloret, "Environmental Impacts of Increasing Leisure Boating Activity," p. 2.

12 Agnieszka Deja et al., "Analysis and Assessment of Environmental Threats in Maritime Transport," *Transportation Research Procedia*, 14th International scientific conference on sustainable, modern and safe transport, vol. 55 (January 2021): p. 1075.

13 Larsson, *The Law of Environmental Damage*, p.132–134.; Deja et al., "Analysis and Assessment of Environmental Threats in Maritime Transport," p. 1075.

14 Troy A. Byrnes and Ryan J. K. Dunn, "Boating- and Shipping-Related Environmental Impacts and Example Management Measures: A Review," *Journal of Marine Science and Engineering* 8, no. 11 (2020): p. 10.

15 Byrnes and Dunn, "Boating- and Shipping-Related Environmental Impacts," p. 12.

16 Byrnes and Dunn, "Boating- and Shipping-Related Environmental Impacts," p. 12.

17 Annabelle Fox, "Marine Surveyors Van Ameyde McAuslands Warn Seized Yachts Must Be Decommissioned to Mitigate Safety and Environmental Risks," *The International Institute of Marine Surveying (IIMS) News*, April 7, 2022, https://www.iims.org.uk/marine-surveyors-van-ameyde-mcauslands-warn-seized-yachts-must-be-decommissioned-to-mitigate-safety-and-environmental-risks/ (accessed October 19, 2023).

in government custody.[18] In addition to the costs of maintenance and storage, the general issue of liability becomes even more pressing if these frozen vessels cause damage to the environment. Who should be primarily liable for the damage and who should bear the costs of cleanup? As these sanctions against Russia are part of a rather recent development, there has not yet been extensive research conducted on this issue. On the face of it, it remains unclear whether the operator of the vessel or the seizing government would be legally responsible for the care of the asset and the prevention and remediation of environmental damage.

According to Article 191 of the Treaty on the Functioning of the European Union (TFEU)[19], EU environmental policy is essentially based on the precautionary principle, the preventive principle, as well as the principles that pollution should be rectified at the source and that the polluter should pay.[20] In theory, EU environmental legislation is thus based on environmental policy and should therefore incorporate the objectives of the environmental policy principles. Beyond its legal basis, the consideration of environmental policy in the context of sanctioned yachts in EU marinas is crucial for several reasons. Environmental policy provides a framework for sustainable practices and ensures that the maritime industry is in line with wider EU environmental objectives. Additionally, the integration of environmental policy perspectives also enhances the social responsibility of marina operations and promotes responsible environmental management. In situations where there is a risk of environmental damage, environmental policy-making can be more flexible than existing environmental legislation. As the issue of frozen vessels under EU sanctions is of a cross-border nature and concerns the sound protection of the environment, EU environmental policy is therefore also involved. Since these vessels pose a threat to the environment, the associated sanctions create uncertainty as to the fate of these frozen assets and the party responsible in the event of an incident. Thus, while embedded in the context of the CFSP, it cannot be denied that it is also highly relevant to EU environmental policy which is guided by its fundamental principles aiming to protect the environment. EU environmental policy not only reflects a shared responsibility to protect the planet but also serves as a model for cooperative and effective policy-making to minimise pollution as much as possible.

18 Stephen Burgen, "Could Sanctions Leave Oligarchs' Super Yachts High and Dry in Spain?," *The Guardian – The Observer Russia*, February 26, 2022, https://www.theguardian.com/world/2022/feb/26/could-sanctions-leave-oligarchs-super-yachts-high-and-dry-in-spain (accessed October 19, 2023).; Giacomo Tognini, "Inside the 150 Frozen Homes, Yachts and Jets of Sanctioned Russian Oligarchs," *Forbes*, April 14, 2023, https://www.forbes.com/sites/giacomotognini/2023/04/14/inside-the-150-frozen-homes-yachts-and-jets-of-sanctioned-russian-oligarchs/ (accessed October 19, 2023).

19 Consolidated version of the Treaty on the Functioning of the European Union (TFEU). (2016). OJ C 202, 7.6.2016, p. 47–199, Art. 191.

20 Christian Kurrer and Nicoleta Lipcaneanu, "Environment Policy: General Principles and Basic Framework," *European Parliament*, 2023, p. 1.

Since this paper spans multiple policy areas and no clear guidance exists for this specific case, examining the current EU framework on the environmental liability of frozen vessels offers the best insight into the present status quo. In attempting to find an answer to this issue, this paper seeks to shed light on whether there is a potential gap between the implementation of EU environmental policy objectives and the current state of environmental liability legislation based thereon. Based on the preceding, this paper addresses two principal research questions:

Which party can be held legally liable for environmental damage caused by seized vessels under EU sanctions?

Does the current EU legislation reflect the polluter-pays, the precautionary and the preventive principles?

The intersection of EU security and environmental policy is examined by analysing legal liability for environmental damage caused by vessels seized under EU sanctions against Russia. The analysis focuses on assessing how well the current EU legal framework protects the environment in such cases. The two disciplines of law and politics are combined to examine the topic at hand from these two perspectives. By integrating methods and analytical tools from law and environmental policy, the study captures dimensions that would remain overlooked if approached from a single field.

This paper first outlines the legal requirements and concepts necessary to understand environmental liability before applying a descriptive legal method concerning the legal part of the research question, which is particularly suited for studies aiming to clarify and explain a specific issue.[21] As the primary objective of descriptive legal research is to depict events that have taken place in the past, this approach emphasises the examination of the research subject matter, the *what* rather than its underlying motivations, the *why*.[22] Therefore, this section focuses on the Environmental Liability Directive (ELD) and EU Regulation 269/2014[23] since they are the most prominent and fitting legislation to date. Besides the ELD, Directive 2008/99/EC[24] on the protection of the environment through criminal law also exists, however it only becomes applicable in case a vessel was seized under criminal allegations in relation to the vessel. Therefore, this Directive is not relevant unless the sanctioned vessel was linked to environmental crimes. This provides further opportunity to look at the topic from a different angle, which is not covered in this paper.

21 M.D. Pradeep, “Legal Research: Descriptive Analysis on Doctrinal Methodology,” (Rochester, NY, December 29, 2019).
22 Uchenna Abugu, “Legal Research Methodology and Applicable Procedures to Legal Research in Nigeria,” 2021, p. 5.
23 Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. OJ L 78, 17.3.2014, p. 6–15.
24 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328, 6.12.2008, p. 28–37.

After the legal descriptive part, this paper turns to an environmental policy analysis, applying a qualitative content analysis and using a deductive approach. A qualitative content analysis is essentially based on categories and aims to depict the "meanings of the phenomenon" rather than just counting words.[25] For this paper, the research by Wibisana (2006)[26] forms the basis for the creation of the deductive categories, as this paper has carried out similar research to find out whether the polluter-pays, the preventive, and precautionary principles were respected within a selected piece of legislation. The analysis assesses how the current EU legislation, particularly the ELD, aligns with three core environmental policy principles: the polluter-pays, preventive, and precautionary principles. While Regulation 269/2014 governs asset freezes under the CFSP, it contains no environmental provisions. Therefore, the analysis focuses solely on the ELD to evaluate whether it effectively incorporates these principles and can protect the environment from risks posed by frozen vessels. Thus, the analysis evaluates the extent to which the polluter-pays, preventive, and precautionary principles are reflected in relevant legislation, aiming to determine whether these principles are upheld or circumvented.

The discussion then critically examines the combined legal and policy findings, and the paper concludes by summarizing key insights, identifying open questions, and outlining potential implications for future liability cases under sanctions. Based on my analysis, I believe that the current EU legislation does not sufficiently support the protection of the environment in such a case and that the taxpayers ultimately have to pay for the damages in case of an incident.

Legal Descriptive Analysis

This section examines the current EU framework governing liability under sanctions, assessing whether environmental pollution caused by a seized vessel triggers any applicable EU liability provisions at present. It provides a descriptive analysis of existing sanctions and liability legislation and concludes that the EU's liability regime in the context of restrictive measures remains underdeveloped, offering insufficient means to hold responsible operators fully accountable for resulting environmental damage.

25 Ying Zhang and Barbara Wildemuth, "Qualitative Analysis of Content," in *Application of Social Research Methods to Questions in Information and Library Science* (2009): p. 308.
26 Armin Wibisana, "Three Principles of Environmental Law: The Polluter-Pays Principle, the Principle of Prevention, and the Precautionary Principle," in *Environmental Law in Development* (2006): p. 24–75.

Understanding Legal Foundations for Environmental Liability

Establishing liability requires demonstrating causation, which in tort law means proving a link between an action and the resulting harm. This task is complicated by the distinction between scientific causality and legal causation.[27] The legal 'but-for' test asks whether the harm would have occurred absent a specific act, yet scientific uncertainty often obscures this determination, allowing wrongdoers to evade responsibility.[28] Courts increasingly counter this by lowering the requirement for full scientific certainty or reversing the burden of proof, compelling the alleged injurer to disprove their role in the damage.[29] Establishing causality demands attention not only to active conduct but also to omissions or negligence that may have contributed to the harm. In environmental tort cases, both general causation (that a substance is harmful) and specific causation (that it caused the particular damage) must be shown. Yet this process is complicated by causal chains, multiple responsible parties, and the diffuse nature of pollution. These complexities can make pinpointing liability impossible, especially where the damage may stem from several interlinked actions or inactions. In the context of this paper, while a seized vessel might be assumed to pose environmental risks, such assumptions cannot by themselves establish legal responsibility; the challenge lies in attributing the harm to a specific actor within a potentially tangled web of causes. It is imperative to closely examine how causality is defined and required in the relevant EU legislation, for instance, if a causal link is necessary and which party bears the burden of proof. As this paper does not analyse a case that has actually occurred, it explores in which case the authorities or the operator of the vessel would be liable for the damage, or if there is no clear answer to this question.

When it comes to the attribution of liability, a distinction can usually be made between strict liability and fault-based liability schemes. This does not exclude the need to prove a causal relationship between the damage and an activity leading to the damage, but the strict liability scheme does not require the demonstration of fault or negligence on the part of the operator. On the other hand, the fault-based liability system operates on the premise that, in addition to proving causation, either fault or negligence must be demonstrated. Another option to escape liability within this scheme is that even though the operator caused the damage, he/she does not have to pay for it in case the operator fulfilled all due care standards.[30] Hence, the fault-based liability scheme is sometimes also referred to as a negligence scheme.

27 Robert Young et al., "Causality and Causation in Tort Law," in *International Review of Law and Economics* 24, no. 4 (2004): p. 509.

28 Young et al., "Causality and Causation in Tort Law," p. 509.

29 Young et al., "Causality and Causation in Tort Law," p. 508.

30 Kristel De Smedt, "Is Harmonisation Always Effective? The Implementation of the Environmental Liability Directive," in *European Energy and Environmental Law Review* 18, no. 1 (2009): p. 3.

In addition to these two liability schemes, there are also the proportional liability rule and the joint and several liability rule when it comes to covering the costs of the damage. They become relevant when more than one party can be held liable for causing damage, and the question arises as to how the remedial costs should be apportioned. The proportional liability rule implements that each potential tortfeasor can be held liable in proportion to the probability that they are responsible for the damage.[31] Thus, each liable party would need to pay for the costs of the damage according to their share of responsibility for causing the harm. Precisely in this context, environmental risks have been mentioned as a prime example, where such a rule fits this reasoning.[32] Alternatively, the joint and several liability rule states that if the plaintiff sues many defendants and wins only against one, "it can recover its full damages from that defendant".[33] If, for example, multiple defendants are convicted but one of them is insolvent, the entire costs would be shared amongst the remaining defendants.[34] Proportional liability, on the other hand, can only charge a defendant according to this defined share of damage, and if one party is insolvent, these costs are not covered.[35] Thus, the joint and several liability rule intends to ensure that the full costs of the damage are covered no matter the state of solvency of the defendants and is hence advantageous in light of the increased burden it places on the operators.[36] Having outlined key legal concepts, it is now necessary to turn to the legal basis of EU sanctions in order to assess how environmental liability may arise in this context.

The EU Sanctions Framework against Russia

First of all, we will have a look at the current EU legislation regarding sanctions, which are one of many tools of the EU's CFSP aiming at weakening the economy of the sanctioned government or entity. Following Russia's military actions against Ukraine in February 2022, the European Union adopted additional sanctions, complementing the restrictive measures introduced in 2014 after the annexation of Crimea. Stemming from 2014, Regulation 269/2014 introduces the "restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine"[37] and introduces sanctions against Russia as well as defines the

31 Young et al., "Causality and Causation in Tort Law," p. 508.; see also Steven Shavell, "Uncertainty over Causation and the Determination of Civil Liability," *The Journal of Law and Economics* 28, no. 3 (1985): p. 587–609.

32 Young et al., "Causality and Causation in Tort Law," p. 508.; see also Shavell, "Uncertainty over Causation and the Determination of Civil Liability," p. 587–609.

33 Lewis Kornhauser and Richard Revesz, "Joint and Several Liability," in *Tort Law and Economics* (2009): p. 109.

34 Kornhauser and Revesz, "Joint and Several Liability,", p. 109.

35 Kornhauser and Revesz, "Joint and Several Liability," p. 109.

36 De Smedt, "Is Harmonisation Always Effective?," p. 11.

37 Regulation 269/2014, European Commission, (2022). 'Ukraine: The Commission Proposes Rules on Freezing and Confiscating Assets of Oligarchs Violating Restrictive Measures and of Criminals', retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3264 (last accessed on 21 October 2023).

necessary terms with regard to the delimitation of the scope. Furthermore, Annex I of Regulation 269/2014 contains the list of persons affected by the measures and the provisions set in place.[38] Regarding the provisions established in Reg. 269/2014, Art. 1 lays out all definitions necessary for the correct understanding of the Regulation. For example, the "freezing of economic resources" is defined as the prevention of the use of economic assets to receive funds, services or goods, including their sale, hiring or mortgaging.[39] Art. 2(1) of Reg. 269/2014 addresses the explicit freezing order, pursuant to which all funds and economic resources shall be frozen that either belong to, are owned, controlled, or held by any natural or legal persons or entities on Annex I, or bodies associated with them[40] enabling any EU Member State to freeze the vessels of persons or entities named in Annex I of Reg. 269/2014 or who are associated with them. Thus, frozen vessels are put in a state that operators are not allowed to use or access them. The freezing order itself allows Member States to seize the assets of persons subject to or connected with the restrictive measures and access to funds and economic resources. However, Regulation 269/2014 introduces the exception to make funds or economic resources available if they are "intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources".[41] This thus presents governments with the opportunity to pass on the costs of maintenance and safe storage to the owner of the frozen vessels. In line with the objectives of the sanctions, a government that seizes an asset has the responsibility to make it unavailable to the sanctioned person and must guard the value of the assets to return them in the same state as it was previously seized.[42] Given the temporary nature of the sanctions, the seizing authority has the responsibility to take all necessary measures to ensure the vessel maintains its state and condition.

While Regulation 269/2014 establishes the legal framework for the imposition of sanctions, this paper will now direct its attention to the Environmental Liability Directive, as it constitutes the fundamental legislative instrument for the determination of liability for environmental damage.

The Environmental Liability Directive (ELD)

The ELD intends to hold operators liable who cause damage to the environment or who pose an imminent threat thereof, and establishes a liability regime based on the polluter-pays principle

38 Regulation 269/2014, Annex I.
39 Regulation 269/2014, Art. 1(e).
40 Regulation 269/2014, Art. 2(1).
41 Regulation 269/2014, Art. 4(1)(c).
42 Regulation 269/2014, Art. 1(e).

(PPP).[43] In general, a directive binds Member States to EU law regarding the result but leaves them room to decide how to implement it in their national laws. The ELD either applies if the damage to the environment was caused by an occupational activity specified in Annex III of the Directive as written in Art. 3(1)(a) ELD, such as waste management operations or the transport of dangerous substances, or if the damage was caused by an occupational activity other than those mentioned in Annex III but the operator has been at fault or negligent, see Art. 3(1)(b) ELD.44 Without further constraints, we can determine that the context of this paper does not concern Art. 3(1)(a) ELD, as none of the occupational activities listed in Annex III of the ELD are concerned.[45] Art. 3(1)(b) ELD, on the other hand, introduces the potential applicability of the ELD to our case at stake, yet, there are three requirements to fulfil.[46] First, it is necessary to engage in an occupational activity. Second, fault or negligence must be established. Lastly, only damages to protected species and natural habitats of a certain significance are applicable as defined in Art. 2(3) ELD.[47]

The ELD only applies if the activity that caused the damage was carried out in the course of an occupational activity, as defined in Art. 2(7) of the ELD and supported by its recital 8.[48] According to this definition, an occupational activity is "any economic activity, business or undertaking, irrespective of its private or public, profit or non-profit character".[49] Opposing this definition, other legal scholars have defined non-occupational activity as "any activities of individuals carried out in a purely private and domestic capacity outside the public arena of gainful employment or self-employment".[50] Based on these two definitions, private and domestic activities would cause the ELD to be inapplicable. However, one of the difficulties in defining occupational activity is to distinguish between what can be considered occupational and what is purely private. In the case of a seized vessel, the operator is not able to carry out any occupational or non-occupational activities at all. If the vessels had been used for occupational or purely for leisure purposes before the freezing of the asset, this would need to be determined in each case. In fact, while some yachts are only used for private purposes and others for chartering on a commercial basis, many

43 Jonathan Kemp, Ning Li, Alberto Nieto, et al., "Experience Gained in the Application of ELD Biodiversity Damage: Final Report," European Commission, Directorate-General for Environment, 2014, p. 3.
44 ELD, Arts. 3(1)(a) and 3(1)(b), and Annex III.
45 ELD, Art. 3(1)(a) and Annex III.
46 ELD, Art. 3(1)(b).
47 ELD, Art. 2(3).
48 ELD, Arts. 2(7) and 3(1)(b) and recital 8.
49 ELD, Art. 2(7).
50 Martin Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (London: Routledge, 2015): p. 604.

of these vessels apply a mix of both.[51] Regarding a yacht seized by Italy in May 2022, worth $700 million and linked to Vladimir Putin, the Italian authorities stated that "its owner had significant economic and business links to prominent elements of the Russian government".[52] This suggests that at least some vessels of sanctioned Russian oligarchs show this required link to an economic activity that could make the ELD applicable.

First, Art. 4(5) ELD is the only provision in the ELD explicitly addressing the requirement of a causal link between an activity and the resulting damage for the ELD to be applicable.[53] However, this only applies to pollution of a diffuse nature. Otherwise, the ELD only uses the term "caused by" to indicate the necessity to prove causation. Thereby, the ELD does not specify what type of causal test needs to be fulfilled to prove legal causation.[54] Even though the ELD is not necessarily explicit about the necessity of legal causation, the competent authorities bear the burden of proof and must demonstrate legal causation in order for the ELD to apply at all. When it comes to the matter of financial liability, the burden of proof is reversed onto the operator following Arts. 8(3) and 8(4) ELD. According to these provisions, in case the operator can prove that he was not at fault or negligent, financial liability will be reimbursed.[55] This shift in the burden of proof shows us a first sign in favour of a strong will to hold an operator at least financially liable for the damage caused.

Further, the ELD establishes a mix of both liability rules, as discussed before. Any occupational activities referred to in Art. 3(1)(a) ELD and explicitly listed in Annex III are subject to strict liability[56], whereas fault-based liability can be found in Art. 3(1)(b) ELD.[57] According to this provision, any occupational activities other than those listed in Annex III of the ELD are concerned, but only if there is either fault or negligence in the operator's behaviour and a causal link can be established between the activity and the environmental damage.[58] Therefore, fault-based liability outlined in Art. 3(1)(b) ELD poses a higher risk that an operator of a vessel may escape being held

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51 Chris Balls, "MASS – Potential Applications in Superyachts," *Journal of Physics: Conference Series 1357* (2019): p. 1.; Kate Duffy Bienasz et al., "Oligarchs Don't Just Love Their Superyachts – They Also Use Them to Cement Their Status among Russia's Elite," *Insider*, April 7, 2022, https://www.businessinsider.com/russian-oligarch-billionaires-love-superyachts-megayachts-status-luxury-elite-2022-3?r=US&IR=T (accessed October 21, 2023).

52 Bruce Zagaris, "Oligarch Sanctions," *International Enforcement Law Reporter* (2022): p. 200.

53 ELD, Art. 4(5).

54 Lucas Bergkamp and Peter van Bergeijk, "Scope of the ELD Regime," *The EU Environmental Liability Directive: A Commentary* (Oxford: Oxford University Press, 2013): p. 70.; ELD, Art. 3(1).

55 ELD, Arts. 8(3) and 8(4).

56 ELD, Art. 3(1)(a) and referring to Annex III.

57 ELD, Art. 3(1)(b).

58 ELD, Art. 3(1)(b).

liable for causing damage if any of these requirements were not fulfilled. Keeping this in mind, the situation of frozen vessels would trigger Art. 3(1)(b) ELD and thus be subjected to the fault-based liability scheme. Thus, an operator of a vessel can be held liable if the operator's actions cause environmental damage, by either fault or negligence in the course of an occupational activity other than those listed in Annex III of the ELD.

Turning to the defences, two are clearly outlined in Arts. 8(3)(a) and 8(3)(b) ELD. The first option allows for the redirection of financial liabilities provided that the operator can prove that the damage was caused by a third party and despite having taken all necessary safety measures.[59] The second alternative for eliminating liability is when the operator can prove that the environmental damage arose due to compliance with a compulsory order or instruction from a public authority.[60] Both of these defences are further supported by recitals 18 and 20 of the ELD. Recital 18 states that in case the competent authority acted itself or in place of the operator, financial liability of the operator shall be recovered.[61] Recital 20 of the ELD introduces leeway for the operator's liability, presenting a situation beyond the operator's control.[62] If the operator can prove that the situation at stake was beyond his/her control, the operator shall not be held liable according to the ELD. In our specific context, the operators of the vessel are denied access to the frozen asset as the sanctions in Reg. 269/2014 have established.[63] Thus, anything that happens to the vessel while in the custody of the local authorities may therefore be considered outside the operator's control and the freezing order can be considered to be a compulsory order from a public authority. Scholars also agree that in certain circumstances, such as in the case of a compulsory order by a public authority, operators are not required to bear the financial burden.[64]

Art. 8(4)(a) ELD outlines the so-called permit defence which holds that if an event has been expressly authorised, the operator can recover the costs of remedial actions.[65] Art. 8(4)(b) ELD introduces the state-of-the-art defence which describes the occasion where costs for remedial actions are reimbursed in case it can be proven that the activity was not considered likely to cause any

59 ELD, Art. 8(3)(a).
60 ELD, Art. 8(3)(b).
61 ELD, recital 18.
62 ELD, recital 20.
63 Reg. 269/2014, Art. 2.
64 ELD, recital 20.; Esther Brans and Gerrit Betlem, "Environmental Liability in the EU: An Introduction," in *Environmental Liability in the EU* (2006), p. 21.
65 ELD, Art. 8(4)(a).

damage according to the state of scientific knowledge.[66] Both these defences present further potential situations for the operator to circumvent liability in the case.

Art. 9 ELD stipulates that it is up to each Member State to decide on the exact method of liability with regard to cost allocation.[67] In other words, Member States are authorised to determine between proportional or joint and several liability if there is possibly more than one polluter.[68]

This section clarified how liability would be allocated under the ELD by tracing the attribution process and applying it to a hypothetical case. Under the ELD, attribution of liability generally follows a clear sequence: first, environmental damage is identified; then, causation is established; and finally, liability is assigned to the operator responsible for the polluting activity. If the operator is unknown, insolvent or exempt, liability may shift to the owner, the authority holding the asset or ultimately, public funds. In the case of a seized vessel causing pollution, the operator would usually be held responsible if their negligence had contributed to the damage. However, if sanctions prevented enforcement or if the seizing authority had control, liability could transfer to the custodian. If no party can be held accountable, the state bears the costs, highlighting a shortcoming in ensuring that the polluter pays.

Summary of the Legal Framework Regarding the First Research Question

We have seen that the sanctions are set out in Reg. 269/2014, which introduces the freezing order in its Art. 2(1). Furthermore, we have observed that the ELD is the correct EU liability legislation for this case and the only instrument that fits our situation. Nonetheless, some obstacles could hinder the applicability of the ELD, as it is not entirely clear whether it can be applied to frozen vessels in EU waters. The requirements for applicability outlined in Art. 3(1)(b) ELD are firstly, significant damage to protected species or habitats, secondly, being able to establish a causal connection based on fault or negligence, and thirdly, while conducting an occupational activity. If these requirements are met, local competent authorities have a good chance of holding an operator of a vessel liable for environmental damage. The first criterion is straightforward, as it is necessary to exceed a certain threshold or threaten certain species to invoke the ELD. The second criterion, a causal link due to fault or negligence, has to be established by the competent authority. The third criterion, the presence of an occupational activity, is the one most likely to pose a problem for the ELD to apply to environmental damage caused by frozen vessels. It can

66 ELD, Art. 8(4)(b).
67 ELD, Art. 9.
68 Monika Hinteregger, "International and supranational systems of environmental liability in Europe," (2008), p. 22.

be argued that the vessels of sanctioned persons cannot be assumed to be purely private, nor necessarily of an occupational nature. It is therefore necessary to determine in each case whether the vessel was used for occupational purposes or not. Ultimately, it is for the competent national authorities to decide whether or not an activity can be considered occupational and whether all conditions for the application of the ELD are met. Therefore, an operator of a sanctioned vessel can be held liable for environmental damage under the ELD if the national court considers that the vessel was carrying out an occupational activity while exceeding the threshold of significant damage to a protected species or habitat, and a causal link between the operator's activity and the damage can be established based on fault or negligence. However, the operators of the vessel may try to invoke one or more of the defences mentioned above in an attempt to deflect or evade liability. The most probable possibility would be that the seizure was an order explicitly authorised by the authorities and resulted in a situation beyond the operator's control, under given grounds. In such a case, the operator could escape financial liability for the damage since costs would be reimbursed.

At the same time, under the terms of the freezing order, the local authorities have the duty to take care of the frozen assets so that they can be returned in the same condition. As the operator of the vessel is no longer allowed to board the vessel, the seizing government is responsible for the maintenance of the asset. Therefore, if the local authorities have failed to maintain the vessel properly or if the environmental damage can be attributed to some other act, the seizing government may also be held liable for causing damage.

Against this background, almost all points discussed before have been confirmed by EU case law.[69] Only in relation to the legal causation requirement has the Court of Justice of the European Union (CJEU) reached differing conclusions depending on the specific circumstances, but always in favour of stringent environmental protection. Most importantly, it has been emphasised on several occasions that the protection of the environment is a high priority, and that the polluter-pays principle is of substantial value. In conclusion, the current jurisprudence shows that each case must be assessed in its own context and that the interpretation of crucial terms must be made in the light of the objective of the ELD and must ultimately aim to ensure a sound protection of the environment.

69 Judgments of 4 March 2015, *Fipa Group and Others*, C534/13, EU:C:2015:140 ; of 13 July 2017, TTK, C129/16, EU:C:2017:547 and of 9 July 2020, *Naturschutzbund Deutschland*, C-297/19, EU:C:2020:533.

Environmental Policy Analysis

Building on the preceding descriptive legal analysis of the ELD, this chapter turns to an environmental policy perspective. The analysis is carried out using a qualitative content analysis with a deductive approach based on the analysis carried out in Wibisana (2006)[70] which analysed the extent to which the polluter-pays, preventive and precautionary principles are recognised and interpreted in Indonesian legislation.[71] Wibisana, a legal scholar outside Europe, provides a clear framework of the mentioned principles that is directly useful for analysing the EU Environmental Liability Directive in this case.

Using a deductive approach based on the five criteria outlined by Wibisana, this chapter examines how these principles are implemented in practice. The analysis highlights areas where the application could be strengthened, revealing gaps between the legal framework and policy outcomes and providing a foundation for the subsequent discussion on liability and enforcement. Consequently, the categories applied in Wibisana serve as a basis for the analysis of current EU legislation in relation to the research questions of this paper and can be summarised in the following categories: 1. Recognition of the Principle; 2. Interpretation of Fault; 3. Interpretation of Causality; 4. Interpretation of Liability; 5. Function and Aim of the Principle. The category 'Recognition' examines whether and where the principle is explicitly mentioned and thus if and how it is recognised in the legislation in question. Next, the concepts of 'Causality', 'Liability', and 'Fault' are examined each in a separate category. More specifically, it is essential to consider whether causality and/or fault is required and what the implications are for the underlying liability. Additionally, one of the most important aspects is the question of which liability scheme is applicable and how this affects the possibility of holding an operator or the seizing government liable. Finally, the last category intends to conclude whether the 'Function and Aim' of the principle have been achieved within the current EU legislation regarding sanctioned vessels linked to Russia. Before delving into the analysis, each principle is briefly introduced.

The Preventive Principle

The preventive principle, grounded in scientifically proven evidence[72], is applied in policies to avert environmental harm before it occurs, particularly in sectors such as waste incineration and water management.[73] Its focus lies on preventing damage rather than bearing the greater cost of

70 Wibisana, "Three Principles of Environmental Law,", p. 24–76.

71 Wibisana, "Three Principles of Environmental Law,", p. 24.

72 Nigel Haigh, *EU Environmental Policy: Its Journey to Centre Stage* (London: Routledge, 2016): p. 153.; Wibisana, "Three Principles of Environmental Law," p. 39.

73 European Commission, "Principles of EU Environmental Law," E*uropean Academy of Law*, https://www.era-comm.eu/Introduction_EU_Environmental_Law/EN/module_2/module_2_9.html (accessed on 16 November 2023).

remediation[74] and it often operates in tandem with the polluter-pays principle which incentivises proactive measures by holding polluters financially responsible. In the context of this paper, the preventive principle is, in theory, upheld when all parties comply with international standards for vessel operation and maintenance, thereby safeguarding the environment. No specific legal framework exists to regulate preventive measures for sanctioned vessels, making adherence to general maintenance obligations essential. Where responsibility for a seized vessel's upkeep is unclear, the risk of environmental harm rises, making invocation of the preventive principle more compelling. Although the current EU legislation does not explicitly refer to the preventive principle, the ELD embeds prevention as a core incentive part of the PPP, as evidenced in multiple provisions. To conclude, this principle could not be examined in the context considered here.

The Precautionary Principle

The precautionary principle, closely related to but distinct from the principle of prevention, applies where scientific certainty is lacking[75] but the risk of serious or irreversible environmental harm is high.[76] It enables governments to restrict or prohibit potentially harmful activities even without conclusive evidence, as famously demonstrated in measures to protect the ozone layer before its depletion was definitively proven. [77] Its application, however, is complicated by the absence of a precise legal definition and the difficulty of determining when scientific uncertainty has been sufficiently resolved.[78] In the context of seized vessels under EU sanctions, there is no evidence to suggest they pose a greater environmental threat than other neglected vessels. Even though there are studies that show that vessels can potentially damage the environment, there is no scientific evidence yet that a seized vessel of a sanctioned person puts the environment at special risk. In the absence of reasonable grounds, such as the presence of highly toxic substances like plutonium, there is no basis for invoking the precautionary principle. Consequently, analysing current EU legislation through this lens is unwarranted in the present case.

74 Tom Delreux and Sander Happaerts, *Environmental Policy and Politics in the European Union* (London: Palgrave Macmillan, 2016): p. 20.

75 Haigh, *EU Environmental Policy*. p. 153.; Delreux and Happaerts, Environmental Policy and Politics in the European Union. p. 20.; Geert van Calster and Leonie Reins, "The ELD's Background," in *The EU Environmental Liability Directive: A Commentary*, edited by Lucas Bergkamp and Barbara J. Goldsmith (Oxford University Press, 2013): p. 28.

76 Stavros G. Poulopoulos, "Introduction to Environment and Development," in *Environment and Development: Basic Principles, Human Activities, and Environmental Implications*, edited by Stavros G. Poulopoulos and Vassilis J. Inglezakis (Amsterdam: Elsevier, 2016): p. 39.

77 Haigh. *EU Environmental Policy*, p. 153.

78 Haigh, *EU Environmental Policy*. p. 153.

The Polluter-Pays Principle (PPP)

The PPP was established to hold an operator liable for the actions that are responsible for having caused environmental pollution. This way, the cost of economic externalities should be internalized and paid for by the entity causing the pollution.

First Category: Recognition

The PPP is explicitly stated in Art. 1 of the ELD as well as in its recitals 2 and 18. Art. 1 ELD defines the 'subject matter' and strongly states that the objective of the ELD shall be to introduce "a framework of environmental liability" relying on the PPP.[79] In almost the same line, recital 2 of the ELD refers to the advancement of the PPP and requests the operator whose activity caused the environmental damage to be financially responsible for the harm caused. The aim is to provide incentives to minimise the risks of environmental damage in the first place.[80] While Art. 1 ELD and its recital 2 introduce the provision that the operator responsible for the environmental harm shall be financially liable and give further explanations as to how this shall be achieved, recital 18 ELD goes a little further. Besides a short repetition regarding the aim of the PPP, it states potential defences that may exclude an operator's liability. This can be the case if the "competent authority acts, itself or through a third party, in the place of an operator".[81] Thus, recital 18 ELD provides a possible way out for the operator to avoid financial liability and circumvent the PPP.
Ultimately, there is no doubt that the ELD recognizes the PPP, using it as a basis for its existence and referring to it explicitly on multiple occasions. Nevertheless, the PPP is also recognized in relation to potential cases where the operator could recover the costs from the authorities and therefore escape financial liability.

Second Category: Interpretation of Fault

We have seen that in our specific situation of interest, only the fault-based liability system is likely to be invoked, as the occupational activities that trigger strict liability are quite specific and are not usually associated with the vessels in question. Thus, fault or negligence is one of the essential conditions for the ELD and consequently the PPP to be effective.[82] Therein, according to Wibisana, the necessity to prove fault or negligence can be seen and interpreted as an unlawful activity in the sense that "liability will only come into play if the action infringes the law".[83] If the operator were to fulfil all standard obligations and comply with all legal provisions, fault could

79 ELD, Art. 1.
80 ELD, recital 2.
81 ELD, recital 18.
82 ELD, Art. 3(1)(b) and recital 9.
83 Wibisana, "Three Principles of Environmental Law," p. 36–37.

not be established and the operator of the vessel would not have to pay for any pollution. In case all due care standards have been followed and the accident did not show faulty or negligent behaviour, the ELD is not applicable. In this sense, this is a slight limitation to the full coverage of liability. Therefore, we are ultimately able to see that a sound implementation of the PPP requires the establishment of fault and/or negligence which can be challenging depending on the circumstances.

Even more limiting, we have seen that the ELD also introduces the permit and state-of-the-art defence, where the operator does not have to bear any costs for remedial measures if he/she can prove an absence of fault.[84] Again, this shows us that the PPP faces a few obstacles and is implemented with a few limitations. On the one hand, fault must be proven in order for the PPP to come into effect, and on the other hand, if the operator can prove that he/she was not at fault, the costs for any remedial measures may have to be covered by the taxpayers.

Third Category: Interpretation of Causality

The ELD generally requires that the damage to the environment is “caused by” an occupational activity.[85] This is not necessarily a requirement with stringent conditions, yet it shows that legal causation is a necessity for the ELD to hold a party liable. The explicit wording of a ‘causal link’ between the activity causing environmental harm and the resulting damage is explicitly mentioned only in the context of diffuse pollution.[86] This provision is further supported by recital 13 of the ELD which explains in more detail that there is a more stringent need to prove a causal link between individual actors and “pollution of widespread, diffuse character”.[87] This leads to a clearer understanding of how the causal relationship must be proven regarding diffuse pollution but essentially establishes the same requirement as for the general establishment of liability. Either way, the authority raising the case must provide evidence of legal causation between the action and the environmental damage. Additionally, as the description of the current EU framework regarding the research context has shown, such a situation would trigger the fault-based liability scheme as set out in Art. 3(1)(b) ELD. Consequently, the authorities would need to provide further evidence that the damage resulted from either faulty or negligent behaviour of the operator.

84 ELD, Arts. 8(4)(a) and (b), recital 20.
85 ELD, Art. 3(1).
86 ELD, Art. 4(5) and recital 13.
87 ELD, recital 13.

At the same time, we were able to observe that the burden of proof is reversed when it comes to covering the costs for remedial and preventive measures. This tells us that in terms of pure financial liability, there is a stronger incentive to enforce the PPP, as the operator must prove that he/she did not actually cause the damage by disproving fault, negligence or proving that all due care standard was fulfilled.

It is therefore standard practice to place the initial burden of proof on the competent authority. However, if legal causation cannot be established, the PPP does not fulfil its purpose of holding a polluter liable and ensuring that society does not bear the costs. With regard to pure financial liability, on the other hand, competent authorities can shift the burden of proof to the operator according to the ELD and thus increase the likelihood that the PPP is followed, as the operator will be liable if he cannot disprove a causal link. This means that there is a greater risk that the operator will not be able to escape liability to pay for any preventive or remedial measures and thus favours the sound implementation of the PPP.

Fourth Category: Interpretation of Liability

As mentioned before, the current EU legal framework for the environmental liability of sanctioned ships points to the application of a fault-based liability regime, provided that all conditions for the applicability of the ELD are met. Thereby, in terms of liability and an efficient implementation of the PPP, the weaker negligence rule would be applied instead of the strict liability scheme. As we heard before, the strict liability scheme would induce a stronger implementation of the PPP, as the operator of a vessel causing damage would directly be responsible without the need to prove fault or negligence. Strict liability would further suggest that operators take stronger preventive measures as compared to the negligence standard. More precisely, this means that in our case there is a higher probability that the operator of a vessel does not have to pay for the costs of pollution and that the social costs of the environment are not internalised. This is further aggravated by the fact that non-negligent activities are not considered at all by this liability scheme.[88] Thus, this finding suggests that the operators of sanctioned vessels face an increased possibility of escaping liability as not only a causal connection between activity and damage must be proven but either fault or negligence too. We can therefore see that the system in question respects the PPP to some extent but could be applied more stringently by applying the strict liability regime.

88 Barbara Luppi et al., "The Rise and Fall of the Polluter-Pays Principle in Developing Countries," in *International Review of Law and Economics 32*(1), (2012), p. 136; Brans and Betlem, "Environmental Liability in the EU," p. 21.

However, this is not the only weakness of the current EU environmental liability legislation in terms of respecting the PPP. In addition to the fault-based liability scheme, there are several defences that an operator of a vessel can use to avoid its responsibility to clean up or prevent environmental damage. It is likely that Arts. 8(3)(a) and/or 8(3)(b) ELD could be used by an operator to argue that the damage was caused by a third party as the vessel had been in the custody of the public authorities, or that the seizure of the vessel could be considered as an order from the public authority.[89] These reasonings are further supported by recitals 18 and 20 ELD which postulate that the operator shall not bear the costs of preventive or remedial measures whenever the competent authority acted itself or in place of the operator.[90] Furthermore, the permit and state-of-the-art defence established in Art. 8(4) ELD introduce further options that the operator cannot financially be held liable for any remedial measures under EU law. We are therefore able to observe that these four defences outlined in the ELD significantly limit the possibility to hold a polluter fully liable and thus to properly implement the PPP.

Most EU Member States have adopted the joint-and-several liability mechanism. Therefore, at least in this aspect, most Member States have opted for a strong application of the PPP compared to the proportional liability rule. The choice of the joint-and-several liability rule is aimed at covering the full cost of the damage, thus avoiding the possibility of operators declaring bankruptcy and passing the costs on to the taxpayer. It still requires proof of causality and fault or negligence but there is a greater likelihood that clean-up costs will be borne in full by the responsible parties rather than by society.

Last but not least, as Art. 9 ELD allows multiple parties to be held liable for causing damage to the environment, it is possible that both the seizing government and the owner of a sanctioned yacht could be held liable at the same time. Thus, the ELD does not exclude shared responsibility for the damage between these two parties. Depending on the specific circumstances in each case, both parties may have to pay their share of involvement in the remedying of the environmental pollution.

Fifth Category: Function and Aim of the PPP

Last but not least, this criterion serves to conclude whether the principle is fulfilled in its function and initial aim. Several authors have highlighted that the polluter-pays principle is a fantastic instrument aiming to incentivise pollution reduction by removing the burden from the

89 ELD, Arts. 8(3)(a) and 8(3)(b).

90 ELD, recitals 18 and 20.

taxpayer and placing it on the polluter itself.[91] However, is the PPP able to fulfil its aims and purpose in the current EU legislation regarding sanctioned vessels?

The need to establish both causality and fault in order to determine liability is not inherently bad, but as we have seen before, both are crucial concepts of tort law that ensure legality, lawfulness and a reasonable basis. However, in case these two requirements cannot be covered, the ELD is not applicable and therefore, the PPP cannot fulfil its function to make the polluter pay. In simple terms, fault and legal causality introduce an additional effort for the PPP to pursue its intention. Thus, this finding suggests that the purpose and function of the PPP are slightly diminished by the liability regime compared to its overarching purpose of internalising external environmental costs and shifting them away from society.

If environmental liability was determined by strict and not fault-based liability, the aim of the principle to hold an operator liable would be reached more easily. On the one hand, it would only be necessary to prove that the damage was caused by that vessel. On the other hand, strict liability generally provides greater incentives to internalise any external costs, thereby improving environmental protection while encouraging the implementation of preventive measures. Therefore, the application of a fault-based liability scheme results in a weaker function and a higher probability of failure to achieve the objectives of the PPP. All these reasonings do not necessarily only apply to the operator or owner of a vessel, but the same is true for seizing governments, who also have an interest in keeping their marinas safe and free from pollution. Therein, strict liability would also induce them to take any action that prevents any damage from happening. As one of the objectives of the ELD is to prevent environmental damage, the ELD requires operators and the local authority to take all necessary preventive measures where there is an imminent threat of harm to the environment.[92] Thus, fulfilling the function and aim of the PPP also means that the seizing government should pay for the damage if it can causally be attributed to an activity which led to the damage.

91 Sandra Cassotta, *Environmental Damage and Liability Problems in a Multilevel Context* (Kluwer Law International, 2012): p. 49.; Jan Jans and Hans B. Vedder, *European Environmental Law* (Groningen: Europa Law Publishing, 2008): p. 43.; Ludwig Krämer, *EC Environmental Law (2007)*, p. 27–29.
92 Edward H. P. Brans, “Fundamentals of liability for environmental harm under the ELD,” in *The EU Environmental Liability Directive: A Commentary*, edited by Lucas Bergkamp and Barbara J. Goldsmith (Oxford University Press, 2013): p. 46.; ELD, Arts. 5(1) and 6(1).

Discussion

The analysis aimed to show whether and to what extent the selected environmental principles are reflected and thus respected in the current legislation and how far they can be applied to sanctioned vessels.

As the preventive and precautionary principles both concern actions taken before any damage occurs, policy makers need to be sure of a certain threshold of significant risk to implement either principle. In our case, however, the necessary level of risk is not exceeded for either principle, as these vessels are unlikely to be carrying particularly toxic substances. Nevertheless, the preventive principle is partially addressed and included in the sense that the implementation of the PPP leads to the execution of preventive measures and that the ELD requires operators to take preventive measures.

We will now turn to the results of the analysis of the PPP. The first category of the analysis showed us that the PPP is well recognised, represented and described in the ELD – a first strong indication that the current legislation reflects the principle. The interpretation of fault revealed that the requirements of an occupational activity, significant damage, as well as the presence of fault or negligence, exclude any other activity that could cause environmental damage. These findings therefore show that the objective of the PPP, to hold a polluter liable for the damage caused, is reflected to a lesser extent, as any other activity leading to environmental damage would not trigger the ELD. With regard to the results on causality, we found that the ELD does not directly require a specific test of causality and places the initial burden of proof on the competent national authorities. Only in the case of financial liability is the burden of proof shifted to the operator. In this respect, the reflection of the PPP is therefore most evident in the reversal of the burden of proof, as this increases the chances of holding an operator liable. All in all, causality is an essential concept of tort law and is implemented in the ELD to a satisfactory degree. The fourth category, liability, is certainly one of the most important as it is ultimately the question of whether an operator can be held liable. The analysis indicated that the application of a fault-based liability regime limits the extent to which a polluter can be held liable compared to the implementation of a strict liability regime. In this sense, it can be concluded that the PPP does not reach its full potential in the current EU legislation to make the polluter pay for the damage caused. The final criterion analysed was whether the function and objective pursued by the PPP could be achieved by the relevant EU legislation. The results showed that the PPP only partially achieves its objectives due to the implications of the interpretation of fault, causality, and liability. Therefore, the analysis shows that the PPP is, at least to some extent, in line with the legislation. However, the principle could be implemented more strongly in order to achieve its full potential and guarantee that the costs of pollution are shifted from society to those responsible for the damage. Changes could be made by EU institutions to ensure that the PPP is fully reflected in the legal framework, particularly in relation to the fault-based liability scheme and the potential defences to invoke, where we have identified some weaknesses of the ELD.

Based on the results of the analysis, a key finding is that costs to society could be more easily avoided if a strict liability regime was introduced. This was also stated in a concluding remark in a report linked to the European Commission aiming to expand strict liability of the ELD to all occupational activities and all biodiversity damage, as well as in a Resolution of the European Parliament.[93] The introduction of a strict liability scheme would be a way to ensure a strong and efficient implementation of the PPP and thus a higher level of environmental protection. At the same time, a strict liability system would promote the optimal level of preventive measures and thus increase efficiency compared to a fault-based liability scheme. The implementation of a strict liability regime would also eliminate the issue of fault, as this would no longer be a prerequisite for establishing liability. In such a case, only the scope of application of the ELD would remain. As mentioned above, it would make sense to extend the strict liability scheme to at least all occupational activities. In an even more stringent way, the strict liability regime could also be applied to all activities, both occupational and purely private. This would have much more impact and show an even greater respect for a sound protection of the environment.

The finding that the current EU legislation on environmental liability only partly complies with the PPP was also identified in the Special Report on the PPP from 2021, which further supports the results of the analysis.[94] Although not a direct result of the analysis, the descriptive legal section of this paper has highlighted several weaknesses of the ELD which were confirmed in the same Special Report and a report of the European Commission from 2016.[95] These include the inconsistent application of the ELD across Member States, a lack of clear definitions of ELD concepts, restrictions on scope due to defences, and financial uncertainty in the event of insolvency, all of which limit the effectiveness and efficiency of the liability regime and thus also the PPP.[96] While all of these points have been shown to weaken the legal implementation of the PPP, the analysis has also highlighted that the defences in the ELD allow an operator to escape liability if

93 Kemp et al. "Experience Gained in the Application of ELD Biodiversity Damage," p. vi.; European Parliament, "European Parliament Resolution of 26 October 2017 on the Application of Directive 2004/35/EC," p. 189.

94 European Court of Auditors, *Special Report: The Polluter Pays Principle* (Luxembourg: Publications Office of the European Union, 2021): p. 35.

95 European Commission, "Report from the Commission to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage," COM/2016/0204 final (2016), p. 5–9.

96 European Court of Auditors, *Special Report: The Polluter Pays Principle*, p. 24–25.

valid reasons can be brought up. Therefore, the findings of this paper support the argument that the permit- and the state-of-the-art defence should be removed for the sake of an efficient implementation of the PPP, as also suggested in the European Parliament Resolution.[97]

This shows us that the lack of full implementation of the PPP and its objective creates legal uncertainties and leads to a weak EU legislation in relation to the underlying environmental policy principles. Thus, the findings of this paper suggest that EU environmental liability legislation should aim to implement environmental policy principles, in particular the PPP, more rigorously in order to avoid situations such as exist in the ELD with regard to the PPP under fault-based liability.

Based on the legal instruments currently available, it is safe to say that the current EU legislation does not directly increase the risk of environmental damage. As the particular situation of frozen vessels is rather recent and does not involve a significant number of cases, no legal or environmental policy document has yet been implemented to deal with this specific situation. However, the current legislation provides a limited level of protection in certain circumstances. The current legislation is therefore technically ready to deal with such a situation but needs to rely on the interpretation of many terms by the national competent authority, such as “occupational activity” or “significant damage”.

Potential Scenarios and Most Favourable Situations for Each Party

Under the ELD, both the owner of a frozen vessel and the seizing government may be held liable for environmental damage, depending on the specific circumstances of each case. Vessel owners may benefit from legal uncertainties around the applicability of the ELD and can invoke fault-based liability defences, such as arguing that the seizure resulted from a public authority’s order, potentially shifting the cost burden to the state. This undermines the PPP and risks transferring environmental remediation costs to society. A key legal hurdle lies in determining whether the vessel was engaged in an occupational activity, which national authorities must assess individually. While governments are responsible for maintaining seized vessels, invoking Article 4(1)(c) of Regulation 269/2014 early on could allow them to recover maintenance costs from the owner and avoid environmental decay. Still, legal causation could be shared between both parties, making joint liability a plausible outcome depending on the facts of the case.

97 European Parliament, “European Parliament Resolution of 26 October 2017 on the Application of Directive 2004/35/EC,” (2018), p. 189.

Conclusion

The answer to the question of liability can only be determined in each specific case and depends heavily on whether causality based on fault or negligence can be scientifically proven and to whom they can be attributed. The final answer to the first research question is therefore that it depends on whether the requirements for the applicability of the ELD are met. Most importantly, environmental liability depends on the precise circumstances of the case and in particular whether the interpretation of occupational activity and legal causation based on fault or negligence can be established. This ultimately determines whether the operator can be held liable under the ELD, or whether society must bear the cost of the environmental damage. Moreover, in case the causal action can be traced to the seizing government, costs would also be borne by the taxpayers.

Regarding the second research question, the current EU legislation regarding environmental liability for sanctioned vessels complies with the selected principles inasmuch as it strongly recognises the PPP in the legislation. However, the fault-based liability scheme limits the effectiveness of the principle to a certain extent and provides more options to escape liability for the operator of the vessel compared to a strict liability scheme. Another limiting factor is the limited scope of applicability of the ELD, which only considers damage caused to protected species and habitats and from an occupational activity. Finally, the function and aim of the PPP are targeted but have not entirely been fulfilled due to these weaknesses regarding the requirement of fault-based liability and the ELD's scope. Therefore, the second research question leads to the answer that the current EU legislation reflects the PPP to a limited extent. While the PPP builds the foundation of the ELD and is well outlined and recognised in the document, the relevant EU legal framework ultimately only complies in part with the PPP based on the application of the fault-based liability regime.

In general, EU environmental law, as it is currently structured, does not adequately address the risks posed by frozen vessels under sanctions. While principles like the polluter-pays principle are enshrined in legislation, their implementation is inconsistent and often ineffective. Clarifying liability and reinforcing policy principles within the legal framework is essential to ensure the EU's environmental objectives are met even in the complex terrain of sanctions enforcement. It is strongly recommended that competent authorities consider the objectives of the environmental policy principles and aim for their full implementation in their decisions.

Future sanction agreements should clearly specify who is responsible for upkeep and which funds are to be used to ensure environmental risks are managed and the polluter-pays principle is upheld. EU institutions, particularly the European Commission, along with Member States and the CJEU, are best positioned to effect these changes through legislation, enforcement, and interpretation. The current gaps in liability partially undermine the effectiveness of sanctions by shifting environmental costs to the public. Failing to address these issues risks undermining the effectiveness of sanctions by creating loopholes or shifting costs to taxpayers and highlights how environmental considerations are often sidelined when security and political priorities take precedence. This situation illustrates that environmental policy is often subordinated to security and political considerations, revealing a persistent tension between environmental protection and broader policy priorities.

List of Abbreviations

Art(s).	Article(s)
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
ELD	Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive)
Et al.	et alia (and others)
EU	European Union
PPP	Polluter-Pays Principle
Reg.	Regulation
TFEU	Consolidated Version of the Treaty on the Functioning of the European Union (2016)

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Niamh O'Neill

Bridging Meaning across Disciplines: Construction, Interpretation and Categorisation in Armed Conflict

Abstract: This research investigates how the disciplines of social science and law construct meaning in fundamentally different ways, and how these divergent disciplinary approaches shape the categorisation of actors in international armed conflicts. It juxtaposes social constructionism, which emphasises the fluidity, contextuality and performativity of categorisation, with the interpretive methodology codified in the Vienna Convention on the Law of Treaties, which seeks determinacy, stability and objectivity. Focusing on asymmetric conflicts such as anti-colonial struggles, the research explores how political discourse constructs labels like 'terrorist' or 'freedom fighter' to reinforce dominant narratives, while international humanitarian law imposes strict binary categories such as 'combatant' and 'civilian'. The approaches are placed in dialogue to reveal tensions, overlaps and the potential for mutual enrichment. Ultimately, the article draws attention to the implicit, often obscured effects of categorisation and advocates for a more reflexive, interdisciplinary engagement with processes of meaning-making.

Key Words: social construction, treaty interpretation, armed conflict, IHL, interdisciplinarity

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Introduction

This research seeks to investigate how the disciplines of social science and law approach the construction of meaning in different ways, shaping and determining their understanding of given phenomena. These processes of meaning construction or interpretation are often subconscious, implicit and/or obscure, yet they fundamentally determine the way phenomena are engaged with by scholars and practitioners in the respective fields. Drawing attention to this fact is a key aim of this interdisciplinary inquiry, as scholars generally take for granted that their discipline's way of understanding things is the 'right' way, indeed: "[w]e tend to take 'the sense we make of things' to be 'the way things are'. We blithely do that and, just as blithely, hand on our understandings as quite simply 'the truth'."[1] This research does not seek to make normative arguments or state that one discipline's approach is superior to another's, but simply to draw attention to the fact that when studying what may be understood as the 'same' phenomenon, scholars from different disciplines may actually be proceeding from very different points of departure as a result of their divergent epistemologies and disciplinary aims. Furthermore, it raises the question as to how these disciplinary approaches can coexist in scholarship and practice, and what can be learned from attempting to bridge their differences.

In the following, the term 'categorisation' will be favoured to refer to processes of constructing meaning.[2] This term is chosen as it encapsulates the essence of the process by which meaning is ascribed to a phenomenon. However, categorisation should not simply be understood as a descriptive act; as will be shown below, it is also performative, shaping the phenomena under scrutiny as much as it reflects them. Finally, the term also conveniently avoids using vocabulary employed by the two disciplinary approaches under study: social construction and treaty interpretation. Social constructionism is the chosen approach for the political or social scientific understanding of categories because it not only looks at the processes by which phenomena come to be constructed and categorised, but also emphasises the underlying social dynamics which inform and produce certain categorisations and make them appear inevitable. It is a relatively well-known and popular approach, and aspects of the theory at least – such as the observation that the meanings and significance of social phenomena are culturally contingent rather than pre-given or natural – enjoy relatively widespread acceptance across a number of disciplines and, indeed, in public discourse. Furthermore, given the interdisciplinary approach of this research,

1 Michael Crotty, *The Foundations of Social Research. Meaning and Perspective in the Research Process* (New York: Sage, 1998), 60.

2 For the purposes of the research undertaken here, 'categorisation' is understood as the process(es) by which phenomena are classified or subsumed under certain headings (categories) according to explicit and/or implicit criteria. The Oxford English Dictionary defines 'category' as "a class, or division, in any general scheme of classification", specifying that in philosophy in particular, its use varies greatly from author to author. "Category," Oxford English Dictionary, www.oed.com/dictionary/category_n. Accessed 8 June 2025.

it offers a very different starting point to interpretation and meaning from the method used in public international law and thus raises some interesting points of comparison. As regards the legal approach to categorisation, the methodology of interpretation set out in the 1969 Vienna Convention on the Law of Treaties (VCLT) is the clear choice for such a study. This method is the most widely recognised standard for interpretation in public international law; indeed, the rules set out in Arts. 31 and 32 VCLT are customary rules of international law.[3] The VCLT looks to the wording and context of an individual provision, alongside the 'object and purpose' of the treaty as a whole, in order to establish its meaning and pave the way for subsequent categorisation.[4]

The scope of this research is largely limited to the two chosen theoretical approaches which are juxtaposed in an interdisciplinary synthesis, but the thematic area of focus is the study of peace and conflict, and specifically on the categorisation of actors engaged in international armed conflicts (IACs). Within this context, the tension between the disciplinary approaches or framings is particularly clear. Politics and law have vastly different aims, as can be demonstrated through their respective ways of categorising groups in armed conflict situations. On the one hand, there is categorisation based on 'political criteria', that is, labelling a group to fit a certain narrative of the ongoing conflict situation; on the other, there is categorisation based on the fulfilment of strict, legally-defined criteria. The former presents a much more dynamic process of categorisation, whereby the group may appear to affect the conception of the category as much as the category affects the group. Meanwhile, in the latter approach, the category stands as fixed, and the group, or rather its members, are subsumed under it so long as they fulfil the required criteria. It could be argued that this is simply stating the obvious; after all, it is not surprising to find that politics and the law approach such processes differently, with the former embracing greater fluidity and subjectivity, while the latter aims for determinacy and objectivity. Constructionism maintains and indeed promotes plurality and redefinition, while legal interpretation requires a degree of closure and the use of fixed definitions in order to function. What is interesting to explore, however, is how these disciplinary approaches coexist in the 'real world': where they diverge, but also where they are surprisingly similar, and what can be learnt from looking at one approach through the lens of the other.

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3 Oliver Dörr, "Article 31. General Rule of Interpretation," in *Vienna Convention on the Law of Treaties. A Commentary*, ed. Oliver Dörr and Kirsten Schmalenbach (Berlin, Heidelberg: Springer, 2012); Jean-Marc Sorel and Valérie Boré Eveno, "Art. 31 1969 Vienna Convention," in *The Vienna Convention on the Law of Treaties: A Commentary*, ed. Olivier Corten and Pierre Klein (Oxford: Oxford University Press, 2011).

4 'Categorisation' in this context is relevant with regard to those provisions which provide for categories of person with individual rights, protections and obligations. Naturally, not every legal provision will result in some form of categorisation.

The following section sets out the two chosen approaches, or methodologies: social construction and treaty interpretation. They are then briefly brought together to analyse how actors are categorised in political discourse and international humanitarian law (IHL) in contexts of armed conflict – specifically asymmetric IACs, such as anti-colonial struggles[5] – to demonstrate the extent to which disciplinary processes of meaning construction differ in practice. This is followed by a synthesis, in which the processes are juxtaposed and placed in dialogue in an attempt to bridge their differences through interdisciplinary analysis. By analysing one discipline's process of categorisation using the methodology of the other, this research demonstrates that innovative interdisciplinary work offers opportunities to create space for a more nuanced and reflective engagement with the categories through which we make sense of phenomena. The main arguments are then brought together in a conclusion.

Theoretical basis

Social construction

The notion of social construction continues to permeate discussions across academic disciplines and in public discourse, giving rise to a multiplicity of uses for the term and what it is taken to imply.[6] At its core, the claim that something is 'a social construct' seeks to challenge the common or taken-for-granted understanding of the phenomenon, and instead draw attention to its meaning as a product of social practices. This distinguishes it from the objectivism inherent in positivist stances, that is, "the notion that truth and meaning reside in their objects independently of all consciousness".[7] To set out the key ideas of social constructionism,[8] this research employs the terminology of Canadian philosopher Ian Hacking as presented in his 1999 book *The Social Construction of What?*, complemented by his earlier chapter 'The Looping Effects of Human Kinds' (1995). His approach is chosen as it offers a clear and well-delineated scheme for analysing the construction of meaning and focuses on how social constructionist analyses are employed in philosophy and research. Hacking defines the constructionist approach as "various sociological, historical, and philosophical projects that aim at displaying or analysing actual, historically

5 This context was chosen because of the particularly opaque nature of the categories employed. Furthermore, the struggles over the categorisation of non-state actors in these contexts have a more profound relevance, raising questions about power structures and the persistence of colonial imbalances, the concepts of statehood and sovereignty, the idea of legitimacy and the use of violence, the politics of language, discrepancies between international law and politics, etc.

6 Sally Haslanger, *Resisting Reality. Social Construction and Social Critique* (Oxford: Oxford University Press, 2012).

7 Crotty, *Social Research*, 42.

8 The term "constructionism" as opposed to the perhaps more common "constructivism" is used throughout this paper in line with Ian Hacking's terminology, who argues the latter belongs fundamentally to the field of mathematics. There is no theoretical difference between the two terms, however, and both are used by social scientists to refer to what is fundamentally the same approach.

situated, social interactions or causal routes that led to, or were involved in, the coming into being or establishing of some present entity or fact."[9] At its core, then, this approach is concerned with drawing attention to the observation that things are not necessarily what they seem; that a great deal (if not all) of our understanding of our lived experience, and of the world we inhabit, is to be conceived of as produced by social processes of construction rather than being inevitable, preordained or pre-existing.[10] It is for this reason that thinkers such as Michel Foucault sought to draw attention to the power dynamics that underpin the social production of meaning and the idea that one version of things among many may be presented as 'the truth', emphasising that the processes of construction are, themselves, "the power which is to be seized".[11]

A central tension in constructionist thought is the notion of 'construction' itself. The claim that something is 'a social construct' is often taken to mean that it is somehow illusory, or not fully real.[12] Sceptics of constructionism are quick to criticise that the approach loses sight of the 'real' existence of the things it claims are constructed, or their profound effects on individuals' lives. Yet constructionists do not maintain that everything – that is, the things or objects themselves – is constructed, but that their meanings are, along with how we interact with them, our classifications of them, interests in them, etc.[13] The 'social' in social constructionism, then, refers to the process of meaning generation rather than the kind of object that has meaning.[14] Individuals learn the meaning of chairs, or womanhood, or terrorism, through the culture – the context or 'matrix' – they inhabit and in which they themselves are embedded as constituent parts.[15]

Hacking argues that the "primary use" of social constructionist analyses is to raise consciousness, i.e., to draw attention to the fact that things we may take for granted or consider inevitable are, in fact, (socially) constructed.[16] In other words, such approaches have the potential to disrupt the status quo as they "involve iconoclastic questioning of varnished reality, of what the general

9 Ian Hacking, *The Social Construction of What?* (Cambridge, Mass.: Harvard University Press, 1999), 48.
10 Ibid.
11 Foucault writes about 'discourse' rather than social processes of construction, but for the purposes of the argument being highlighted here, his point is most relevant: "discourse is not simply that which translates struggles or systems of domination, but is the thing for which and by which there is struggle, discourse is the power which is to be seized." Michel Foucault, "The Order of Discourse," in *Language and Politics*, ed. Michael J Shapiro (New York: NYU Press, 1984) 110. See also Stuart Hall, *Representation* (New York: Sage, 2011), 29–30.
12 Haslanger, *Resisting Reality*, 5.
13 Hacking, *Social Construction*.
14 Crotty, *Social Research*.
15 Stanley Fish, *Is there a Text in this Class?* (Cambridge, Mass.: Harvard University Press, 1980). The term 'matrix' is used by Hacking to refer to the social setting within which an idea, a concept or kind is formed. See Hacking, Social Construction, 10.
16 Hacking, *Social Construction*, 6.

run of people take for real."[17] However, Hacking emphasises that, in principle, constructionist analyses do not strive to provide a new conception of whatever X they are investigating. Rather, the point of such analyses is simply to draw attention to the fact that X is not inevitable, that its meaning is the product of particular social factors and relations of power, and that it can therefore be changed or re-conceptualised. He refers to this as the 'unmasking' of X: "[Talk of construction] challenges complacent assumptions about the inevitability of what we have found out or our present ways of doing things – not by refuting or proposing a better, but by 'unmasking'."[18] This process does not necessarily imply that the current form of X is automatically a bad thing. However, 'unmasking' does imply a zero condition, "a precondition for a social constructionist thesis about X."[19] This is:

> In the present state of affairs, X is taken for granted; X appears to be inevitable.[20]

Condition (0) is not an assumption or presupposition about X; rather, it is a necessary prerequisite to talk about the social construction of X. If there is no question as to the character of X as a social construct, of there being something 'masked', then there is no need for further discussion on the matter or for 'unmasking'. In other words, "there is no point in making construction claims with respect to items whose nonnaturalness is obvious".[21] The US Federal Reserve, for example, is clearly the contingent upshot of social arrangements, and there is thus little value in analysing its constructedness.[22] The idea of gender, however, has been interrogated by social constructionists to great effect, because it was for a long time taken to be a natural reflection of biological differences between the sexes, rather than a cultural imposition typically serving the interests of the male sex.[23]

Similarly, the concept of armed conflict may be taken for granted, with political analysts, social scientists, jurists, humanitarian actors, etc. rarely stopping to question whether they are, in fact, talking about the same thing. While few would question that the underlying grievances or motivations for a conflict, or the best proposals for its resolution, are subjective questions, most approaches choose to assume that the basic 'fact' of an armed conflict involving certain actors is a given. And yet, upon closer inspection, it becomes clear that even this 'fact' can look very

17 Hacking, *Social Construction*, 49.
18 Ibid., 58.
19 Ibid., 12.
20 Ibid.
21 Finn Collin, "Bunge and Hacking on Constructivism," *Philosophy of the Social Sciences* 31, no. 3 (2001), 443.
22 Hacking, *Social Construction*, 13.
23 Collin, "Constructivism". Indeed, Hacking maintains that gender has been the object of the most influential social construction doctrines, paving the way for a vast array of further studies. Hacking, *Social Construction*, 7.

different from various social or disciplinary viewpoints, for example with regard to the actors engaged in the conflict, as outlined in more detail below. The idea of armed conflict can thus also be effectively interrogated from a constructionist viewpoint, highlighting the taken-for-grantedness of there being a state of war between two or more parties. This is all the more pertinent in asymmetric contexts where the dominant party sets the narrative and may seek to delegitimise the struggle being waged against it by an armed group by denying its very existence. The constructionist approach can therefore be applied to unmask the power dynamics underpinning a narrative promoted by the dominant party as the 'truth' of the conflict.

Treaty interpretation

Turning to the discipline of law, this research focuses on the legal method set out in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT) to illustrate how meaning is constructed in public international law through the interpretation of codified treaty provisions. In order to apply or implement a given rule, the latter must first undergo a process of interpretation.[24] However, it is essential to note from the outset that interpretation should not be considered a secondary process which only comes into play when the wording of a provision is unclear. As Oliver Dörr argues, "to know whether the wording is clear or 'makes sense' presupposes a process of interpretation and cannot, therefore, preclude that operation."[25] All use of treaty provisions thus necessitates interpretation, whether explicit or implicit.

The legal method of treaty interpretation set out in the VCLT forms the backbone of much international legal practice; indeed, Arts. 31–33 VCLT are considered to have customary status in international law.[26] Article 31 sets out the general rule of interpretation, while Article 32 provides for supplementary means of interpretation, and Article 33 covers treaties that are authenticated in more than one language.[27] Taken together, these so-called 'Vienna rules' are best understood as an attempt to provide a "framework and guiding principles […] for interpretative reasoning", rather than as strictly prescribing the process of interpretation itself.[28] Interestingly, therefore, the Vienna rules provide relatively few pointers on how these individual elements are to be used

24 Dörr, "Article 31".
25 Ibid., para 15.
26 Dörr, "Article 31"; Sorel and Eveno, "Article 31".
27 "Vienna Convention on the Law of Treaties," (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Arts. 31–33, https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf. Accessed 8 June 2025.
28 Richard K Gardiner, "Characteristics of the Vienna Convention Rules on Treaty Interpretation," in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, ed. Michael J Bowman and Dino Kritsiotis (Cambridge, UK: Cambridge University Press, 2018), 335; Dörr, "Article 31," para 2.

in practice during the interpretive operation.[29] Indeed, the flexibility in application offered by the VCLT interpretation regime implies that their functionality in a given context depends on how the Vienna rules are themselves interpreted.[30] This, in turn, grants the interpreter an important role which cannot be disregarded in favour of focusing on the outcome of the interpretive operation, i.e. the meaning of the provision under scrutiny.

Article 31 VCLT consists of four paragraphs which together set out the general rule of interpretation for treaties. It is considered the "sacrosanct core" of treaty interpretation,[31] and its provisions are to be considered a "single, closely integrated" entity.32 It is for this reason that Art. 31(1), as the initial statement of the rule in its most essential form, is formulated as one continuous paragraph, rather than a separate, itemised list.[33] The focus of interpretation following the general rule contained in Art. 31 is the written word, as "the text [is] presumed to be the authentic expression of the intentions of the parties."[34] It thus follows that the automatic point of departure is a linguistic and grammatical analysis of the provision in question, in order to ascertain its "ordinary meaning"; that is, "the meaning that is 'regular, normal or customary'."[35] However, the concept of 'ordinary meaning' cannot be taken for granted in the interpretive operation, as what is the 'ordinary' meaning of a term in one context may be rather extraordinary in another. Given that the provisions of Art. 31 VCLT are to be applied in tandem in the process of interpretation, the establishment of 'ordinary meaning' is impossible without simultaneously accounting for the context.

The general rule thus provides guidelines on how to account for this context, which may take a number of different forms. These are set out in paragraphs 2 and 3 of Art. 31 VCLT and include the text of the treaty itself, alongside the title, preamble and annexes; i.e., the systematic structure of the treaty and the position of the provision under interpretation within the whole, as well as other acts and agreements made in connection with the treaty's conclusion. Paragraph 3 introduces "subsequent" agreements which arise independently from the process of conclusion, as well as practice and relevant international law. The latter refers to both the law as it stood when the treaty was adopted, as well as to the law as it stands at the moment of interpretation.[36] This

29 Gardiner, "Characteristics of the Vienna Convention".
30 Ibid.
31 Sorel and Eveno, "Article 31", para 8.
32 Gardiner, "Characteristics of the Vienna Convention", 352.
33 Richard K Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008).
34 Dörr, "Article 31", para 38.
35 Ibid., para 41.
36 Jean-Marie Henckaerts and Elvina Pothelet, "The Interpretation of IHL Treaties: Subsequent Practice and other Salient Issues," in *Law-Making and Legitimacy in International Humanitarian Law*, ed. Heike Krieger and Jonas Püschmann (Cheltenham: Edward Elgar, 2021).

provides scope for the potential evolution of a treaty provision's meaning over time in the light of changes to the wider international legal framework. Overall, these provisions underscore that interpretation does not happen in isolation; rather, it is embedded within the systemic coherence of international law and legal practice.

The final words of the first paragraph of Art. 31 VCLT refer to the "object and purpose" of a treaty, introducing a teleological element to interpretation.[37] A close reading of Art. 31 suggests that the 'object and purpose' is not a standalone element of the interpretive operation, but may only be used directly in relation to the establishment of the meaning of the individual terms employed.[38] Thus, the 'object and purpose' cannot be used to "establish a reading that clearly cannot be expressed with the words used in the text", i.e., which undermines the 'ordinary meaning' or dislocates it from its context.[39] But what constitutes the 'object and purpose' of a treaty? Though often established, at least in part, through recalling the title and/or preamble of a treaty, the 'object and purpose' is an inherently fluid concept which is open to contestation.[40] Furthermore, from the perspective of the argumentation in this research, the concept is perhaps particularly significant, as it "averts our gaze away from the four corners of [a treaty's] text […] to something that is altogether more mercurial but which is also, if the Vienna Convention is to believed, no less real than the written word."[41] The requirement for interpretation "in good faith" (Art. 31(1) VCLT) similarly raises a subjective aspect to the interpretive operation, highlighting the normative expectations placed on the interpreter rather than necessarily shaping the interpretation itself. Here, again, the role of the interpreter in determining the meaning of a textual provision comes to the fore.

Article 32 VCLT provides for recourse to "supplementary means of interpretation," which can be used either to confirm the interpretation reached through Art. 31 or, in limited circumstances, to resolve ambiguity or avoid "manifestly absurd or unreasonable" outcomes of the interpretive operation.[42] These means, while not mandatory, play a significant role in practice.[43] Art. 32 identifies preparatory work (more commonly known as *travaux préparatoires*) and the circumstances of a treaty's conclusion as a key supplementary means of interpretation. *Travaux préparatoires*

37 Gardiner, *Treaty Interpretation*; Dörr, "Article 31".
38 Gardiner, *Treaty Interpretation*.
39 Dörr, "Article 31", para 58.
40 Dino Kritsiotis, "The Object and Purpose of a Treaty's Object and Purpose," in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, ed. Michael J Bowman and Dino Kritsiotis (Cambridge, UK: Cambridge University Press, 2018).
41 Ibid., 238.
42 Oliver Dörr, "Article 32. Supplementary Means of Interpretation," in *Vienna Convention on the Law of Treaties. A Commentary*, ed. Oliver Dörr and Kirsten Schmalenbach (Berlin, Heidelberg: Springer, 2012).
43 Yves le Bouthillier, "Art. 32 Vienna Convention" in *The Vienna Convention on the Law of Treaties: A Commentary*, ed. Olivier Corten and Pierre Klein (Oxford University Press, 2011).

often reveal the negotiating history of a given provision and thus provide indications as to its intended meaning. Similarly, understanding the historical context of its drafting can shed light on a treaty's rationale and objectives. The open-ended nature of Art. 32 (the list of means provided is not exhaustive) allows interpreters to consider additional materials, such as academic commentary or state practice not covered by Art. 31, granting a degree of discretion that complements the structured approach of the general rule.[44]

Categorising actors in international armed conflicts

The disciplines of social science and law, through the different methodologies outlined above, approach meaning in fundamentally different ways, which in turn shapes and determines their understanding of given phenomena. This section will briefly attempt to juxtapose the two approaches by applying them in a practical case – the categorisation of actors in armed conflict – to demonstrate how their methodologies lead the respective disciplines to very different results. As has been shown, constructionists understand meaning as a product of social forces. The meaning we make of things is dependent on context and cultural influences and is thus fluid, depending on the unique positionality of the interpreter. However, prevailing power structures in society may make certain meanings dominant and appear inevitable, presenting them as 'the truth', thus obscuring the nature of the phenomenon as a social construct. The primary legal approach, meanwhile, maintains that meaning – understood as the outcome of the process of interpretation – can be arrived at by following a fixed and clearly-defined set of rules. The process is pre-given and determinate so as to guarantee the stability and transparency of the interpretive operation. This limits the scope for individual subjective influences or the interpreter's positionality to affect the meaning. After all, law is a discipline within which precision is highly prized; indeed, clarity and consistency in definition are necessary for it to function. It must be noted, however, that the VCLT rules are themselves subject to interpretation. Indeed, the very names given to the methodologies are already revelatory as to their different approaches to meaning and categorisation. Constructionists work with something which is not pre-given but must first be constructed, while legal interpreters take a given provision as their starting point and attempt to make sense of it.

If the comparison is applied to the phenomenon of international armed conflict, and the characterisation of individuals/groups engaged in such struggles, we see how the different disciplinary

44 Henckaerts and Pothelet, "Interpretation of IHL Treaties".

approaches to meaning play a huge role in creating two very different understandings of these actors and how they are to be categorised. In asymmetric contexts such as anti-colonial conflict, armed groups engaged in struggles against state forces are[45] frequently characterised as 'terrorists', a term which constructs a certain conception of both the actor/group and the struggle in which they are engaged.[46] Indeed, the expression 'one man's terrorist is another man's freedom fighter' lays bare the social construction of actors engaged in anti-colonial struggles, highlighting that the character of a given actor and their cause is fundamentally in the eye of the beholder. And yet, the 'fact' of this process of social construction is often obscured by the dominant discourse in such contexts – that of the colonial state – which deliberately forces the supposed inevitability of the non-state group's character as 'terrorist'.[47] The connotations of the term 'terrorist' have the effect of delegitimising the group and the ends it seeks to achieve, in line with the narrative which the more powerful state against whom the so-called 'terrorists' are fighting seeks to uphold.[48] Constructionism sheds light on how these categorisations are not inevitable, but rather produced in such a way as to reinforce a certain narrative, revealing the dynamics of politics and power which enable and uphold such constructions. In conflict situations, these dynamics have a profound effect on how a given struggle may be perceived both internally and externally, while remaining largely unseen. Regardless of this, the constructionist approach highlights that depending on whom you ask, the perception or interpretation of a given actor and their actions will vary. Furthermore, there is scope for nuance, with an arguably infinite number of possible characterisations or categorisations available, due to ever-shifting contexts and power dynamics. Meanwhile, the law of international armed conflict functions on the basis of the assumption that a given actor can only be categorised as one of two mutually exclusive types of person: 'combatant' or 'civilian'. These are clearly defined under IHL, with each category enjoying a specific set

45 The use of the present tense to discuss anti-colonial struggles is intentional, as there are a number of cases of armed struggles for self-determination which continue to this day and where similar discourses prevail, for example in Western Sahara and in the Occupied Palestinian Territories.

46 Charlotte Heath-Kelly, "Post-Structuralism and Constructivism," in *Routledge Handbook of Critical Terrorism Studies*, ed. Richard Jackson (New York: Routledge, 2016); Helen Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (New York: Cornell University Press, 2011); Joseba Zulaika, "The Real and the Bluff. On the Ontology of Terrorism," in *Routledge Handbook of Critical Terrorism Studies*, ed. Richard Jackson (New York: Routledge, 2016).

47 Priya Dixit, "Securitisation and Terroristisation: Analysing States' Usage of the Rhetoric of Terrorism" in *State Terror, State Violence*, ed. Bettina Koch (Wiesbaden: Springer, 2016); Ana Camacho, "Terrorism and War in the Sahara," Grupo de Estudios Estratégicos, https://www.gees.org/articulos/terrorism-and-war-in-the-sahara. Accessed 8 June 2025; Harmonie Toros, "'We Don't Negotiate with Terrorists!' Legitimacy and Complexity in Terrorist Conflicts," *Security Dialogue* 39, no. 4 (2008).

48 Edward Said, "Identity, Negation and Violence," New Left Review 46 (1988); Eqbal Ahmad, "Comprehending Terror," *MERIP Middle East Report* 2 (1986).

of obligations, entitlements and protections.[49] An individual can, at any time, only have one or the other status – not neither, nor both; there is little to no scope for nuance or hybridity, though provision is made for actors to shift from one status to the other under specific conditions.[50] The VCLT rules imply that it should be objectively discernible whether an actor falls into one or the other category; this strictness is necessary to uphold two of the core principles of IHL – the 'equality of belligerents' and the 'principle of distinction'. The former maintains that all combatants have the same rights, privileges and obligations, regardless of the cause or 'side' for which they are fighting, provided they uphold IHL. The latter requires parties to a conflict to distinguish at all times between combatants and civilians and to target only combatants. The strict definitional criteria to establish the categorisation or status of an actor is thus essential to ensure these principles – and the integrity of the IHL regime as a whole – are upheld, and that all parties can clearly identify who is who according to 'objective' criteria. Nevertheless, there are numerous cases where the distinction between the two is rather blurry, highlighting the importance of the interpretive operation which leads to categorisation and the power dynamics inherent in this process. Despite the supposed precision and rigorousness of the legal rules for interpretation, there thus remains a great deal of scope for deviation and interpretive flexibility. The role of the interpreter as an individual subject with certain interests, biases, limited knowledge, etc. must also be taken into account.

Bridging law and social science

Having outlined the disciplinary approaches and demonstrated how they differ in practice, the following section will place them in dialogue in an attempt to bridge their differences, and explore what can be learnt by studying one through the lens of the other. The two distinct disciplinary approaches explored in the above revealed vastly different ways of establishing meaning, categorising people and phenomena, and understanding the role of these categories in characterising armed groups and their struggles. This is not necessarily surprising, given the respective aims and functions of the two fields and their methodologies. The social constructionist approach seeks to unmask ideas and categories in order to draw attention to their non-inevitable nature and the specific narratives they are constructed to serve; it is a political project which questions the status quo and challenges widespread, complacent assumptions about the nature

49 The main treaty provisions which set out the two categories are as follows. *Combatant*: Article 4 GC III (Third Geneva Convention, 1949), Articles 43 and 44 AP I (First Protocol Additional to the Geneva Conventions, 1978); *civilian*: Article 50 AP I. For reasons of space, scope and relevance, the definitions themselves are not discussed here.

50 A discussion of these provisions would require an extensive digression into IHL which exceeds the scope of this paper.

of social reality. Meanwhile, IHL pursues its practical, humanitarian aim of protecting people and limiting the destructive effects of war through a reliance on strict, precise and objective criteria for the categorisation of persons in armed conflict. The two categories of persons in IHL are thus clearly defined and stable in their meaning, and their application in a given case rests on the rules of interpretation codified in the VCLT, through which the meaning of provisions can be reliably established in line with fixed requirements. As a result of these divergent aims and points of departure, the two approaches differ in many of the assumptions they make as to how meaning is established, the prospect of 'objective truth' or stable definition, the role and purpose of categories and their flexibility, and the ultimate significance of their impact on real-world conflict situations. On the one hand, social constructionism argues for the fluidity and instability of meaning, the indispensability of context, and the inherent subjectivity of the process of categorisation. On the other hand, international law relies on, and thus emphasises, the existence of stable meanings, the ability for clear definition, and the objectivity of classificatory criteria. The main point of tension underlying the interdisciplinary discussions in this research, then, is the question of how these two approaches can coexist.

There are two primary explanations for this. First, as has already been detailed above, each approach stems from a different field and seeks to achieve a very different goal. In this sense, it is necessary that they make their respective assumptions and rely on distinct frameworks in order to work towards their individual aims. This is the case with regard to both the theoretical aspects (that is, the social constructionist and VCLT approaches to the establishment of meaning and the process of categorisation) and the practical aspects (the actual categorisation of actors engaged in asymmetric IACs, particularly anti-colonial struggles). Politics relies on the malleability of categories, playing with – and indeed at times exploiting – the lack of stable meanings which characterises the social world in order to construct and uphold certain narratives which support the dominant group's interests. In contrast, public international law exists, fundamentally, to impose order on a fluid and dynamic social world. To this end, it seeks to find applicability in as wide a variety of contexts as possible. This is more easily achieved in the abstract, through the codification of rules and definitions, such as those of the VCLT and the treaty regime of IHL. Precise and tangible laws are essential prerequisites for the functioning of the legal system.[51] For example, it was shown how the mutually exclusive binary of 'civilian' and 'combatant' is essential to the effective functioning of IHL, as it underpins some of its fundamental principles, such

51 Consider, for example, one of the key universal legal maxims: *ignorantia juris non excusat.* That is, not knowing something was illegal is not a defence against prosecution or other proceedings if the law is breached. This could not hold if recourse could not be had to clearly-defined legal provisions.

as the ‘equality of belligerents’ and the ‘principle of distinction’. Nevertheless, the codified rules of the international legal system are designed to regulate an idealised form of the ‘real world’, and the application of categories or definitional provisions in practice can prove rather challenging, despite the supposed clarity of their formulation. In IHL this is evidenced in complex contemporary conflict situations which fail to fit into the categories it prescribes. In other words, the actual legal work of imposing order on social reality may face significant problems if it fails to account for the fluidity that characterises the latter.

The second explanation for how the legal and political approaches can coexist is that they are not, in fact, as clear-cut or divergent as might be assumed. Despite constructionists’ rejection of the prospect of the existence of objective truths applicable in manifold situations regardless of context, there have nonetheless been numerous attempts to find a definition of the inherently unstable term ‘terrorism’.[52] Hacking recognises a similar tendency in the social sciences more broadly.[53] Thus, while recognising the futility of claims to objectivity with regard to socially-constructed categories, constructionists acknowledge that there is scope for attempting to capture the meaning of a category at a given moment, in order to subject the phenomenon to further study. Another area of similarity is that of the nature of categories as such. While it has been argued that the fixed definition and codification of categories in international law – such as ‘combatant’ and ‘civilian’ in IHL – suggests that these categories are understood as pre-existing in given conflict situations, they were, in the first place, established in response to the ‘reality’ of armed conflict; that is, historical cases of how wars were and are fought, and taking note of the kinds of people involved in, and affected by, conflict. Thus, while the criteria to be met by individual actors in order to attain combatant status may appear essentialised, due to the nature of their definition, the categories themselves ultimately also constitute impositions on reality, just like their constructionist counterparts.[54]

This raises the prospect that there is a great deal to be learned from juxtaposing the approaches by interrogating each discipline using the methodology of the other. Indeed, one of the goals of

52 Indeed, these definitional endeavours have been a core focus area of research in Critical Terrorism Studies, a school which seeks to highlight the ideological, ethical and political dimensions to terrorism research which are often obscured. A great deal of the theoretical framework of this school is based on social constructionist approaches. See Richard Jackson (and others), *Terrorism: A Critical Introduction* (Basingstoke: Palgrave Macmillan, 2011) and Richard Jackson (ed), *Routledge Handbook of Critical Terrorism Studies* (New York: Routledge, 2016).
53 See Ian Hacking, “The Looping Effects of Human Kinds,” in *Causal Cognition. A Multidisciplinary Debate*, ed. Dan Sperber (and others) (Oxford: Clarendon Press, 1995), 361.
54 Paraphrasing Collin, “Constructivism”, 444: “the concepts in terms of which we describe reality are not derived from the latter but are imposed upon it.”

an interdisciplinary inquiry such as this is to demonstrate the respective strengths and weaknesses of the different approaches, and attempt to synthesise certain elements in order to broaden the prevailing understanding of phenomena beyond the constraints of (perceived) disciplinary boundaries. Their differing stances on the stability of meaning and their respective emphases on objectivity and subjectivity in their methods and outlook on the world have been identified as the main point of tension between the two disciplinary approaches presented here. And yet, they are not mutually exclusive but coexist in a complex relationship of tension and overlap. Against this background, the following section will attempt to outline some arguments derived from reading the interpretive approach of international law and the categorisation processes of IHL from a social constructionist perspective, and vice versa.

Constructing international law

By looking at the law from a social constructionist perspective, a few illuminating observations and potential pitfalls can be identified. This section will focus on three main arguments: the need to account for 1) the subjectivity of the legal interpreter; 2) the unmasking of the definability of legal concepts; and 3) the matrix of legal phenomena. It has been shown that the field of IHL offers a particularly interesting case to examine in the context of the methodological comparison undertaken in this thesis because of the assumptions it makes regarding neutrality under the banner of the 'equal application' principle and the field's strict delimitation from jus ad bellum.[55] In this sense, it arguably already tests the limits of the legal approach to interpretation by drafting its provisions in such a way as to make interpretation and categorisation possible without regard for certain aspects of the context, such as the legality of the parties' struggle or the justness of their cause. The social constructionist lens, in turn, only serves to magnify these challenges by emphasising the contextual factors which inevitably contribute to the understanding of categories and their applicability.

Turning to the first observation, one of the central aspects of the constructionist approach is precisely this emphasis on the non-inevitability of categories and the ensuing project of unmasking, whereby attention is drawn to the positionality of the constructor and/or categoriser. This may be compared to the role of the legal interpreter. In the presentation of the VCLT method of treaty

55 *Jus ad bellum*, or the regime of law concerning the justification or prevention of war, considers questions including the legitimacy of armed struggle and a group's right to resort to the use of violence. However, this field is strictly delimited from IHL (*jus in bello*), and as soon as there is a state of war, the IHL regime comes into force and applies equally to all parties irrespective of the 'justness' of their causes. See Adam Roberts, "The Equal Application of the Laws of War: A Principle under Pressure," *International Review of the Red Cross* 90, no. 872 (2008).

interpretation provided above, the role of the individual interpreter was briefly alluded to with regard to the recognition of their role in giving meaning to a text.[56] Legal scholars emphasise that interpreters must carry out the interpretive operation "properly", following the guiding principle of 'good faith'.[57] This implies that there must be a proper or 'correct' way to apply the rules, resulting in a 'correct' interpretation of the provision in question, guiding the interpreter to its 'true' meaning, i.e. the intention of the drafting parties. This implicit assumption, it may be argued, underpins the functioning of the entire VCLT regime. However, this directly contradicts the social constructionist approach, which would encourage analyses to account more for the individual interpreter and their power to frame or present – to not say construct – their interpretation in a certain way. Every interpretation is the result of a human process of analysis and inference. Assumptions will be made and contributing factors considered or neglected due to their perceived relevance or irrelevance, or because they were simply unknown to the interpreter. This is inevitable and not necessarily good or bad. The constructionist approach draws attention to these aspects without seeking to judge, or assess, the result which is produced by the interpretation; it merely seeks to shed light on the complexity that underlies any human process. The VCLT's requirement that multiple sources be consulted in order to support the outcome of the interpretive operation may certainly be considered a step in a similar direction as regards the law's attempts to account better for the subjectivity inherent in the process of interpretation. However, having considered the constructionists' arguments on the social dynamics which shape all aspects of human experience, this lack of attention paid to the positionality of the interpreter may be considered a weak spot in the legal method.

Secondly, the legal approach emphasises that the applicability of its categories and concepts depends on the fulfilment of objective criteria. Its definitions consist of (often cumulative) requirements which an individual, group or action must meet in order to be considered to legally constitute a type of person or a specific form of conduct, e.g. the definition of combatant status (Arts. 43 and 44 AP I). While any constructionist would call into question the purported objectivity of these criteria, a more nuanced argument could be made by looking at the phenomena which are deemed definable according to such objective criteria in the first place. There are any number of prominent contemporary phenomena which remain undefined by the IHL regime; to stay with the examples explored here,

56 For example: "The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some preexisting specific intention of the parties with respect to every situation arising under a treaty … In most instances, therefore, interpretation involves giving meaning to a text." Humphrey Waldock quoted in Gardiner, "Characteristics of the Vienna Convention", 338, emphasis in original. Waldock was one of the original architects of the VCLT rules.

57 Mahnoush Arsanjani and Michael Reisman quoted in Gardiner, "Characteristics of the Vienna Convention", 356. See Henckaerts and Pothelet, "Interpretation of IHL Treaties", 155.

we need look no further than the concept of 'terrorism' and its absence from codified IHL.[58] Such phenomena are not defined in international law because their fluidity, susceptibility to politicization, and/or vagueness is deemed to make them unmanageable. 'Terrorism', for example, is recognised as fundamentally in the eye of the beholder, and instances of its occurrence thus cannot be determined according to objective criteria. Arguably, then, the law recognises the phenomenon's nature as a socially constructed idea. But how does the law establish which concepts or categories are stable enough to warrant assessment according to (supposedly) objective standards? Where is the line to be drawn between the nebulous social constructs and the tangible, definable concepts?

To take perhaps one of the most significant examples, we can examine the concept which underpins the entire body of IHL and without which the regime would serve no purpose: armed conflict. This concept is, in many respects, very fluid and at times highly controversial. It should be noted from the outset that armed conflict is not actually defined in the IHL treaties; rather, its understanding is derived from customary law, state practice and scholarship.[59] Nevertheless, it is considered a 'known' concept, and the existence of a state of armed conflict hence assessable according to accepted criteria. And yet, it can equally be argued that the existence of an armed conflict may be in the eye of the beholder, as alluded to above. This has been the case in countless colonial contexts where states have been known to deny the presence of ongoing conflict in order to eschew the obligations of the IHL regime and avert the critical gaze of the international community.[60] There are thus many legal concepts, including those central to the functioning of the IHL regime, which are socially constructed and thus inherently instable and liable to misconstrual, politicisation and instrumentalisation, despite the fact that they are supposedly subject to the fulfilment of strict criteria. The constructionist perspective highlights these aspects and problematises how exactly the law purports to distinguish between tangible and intangible concepts.

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58 'Terrorism' is not defined under international law, and 'terrorist' is not a category of person or recognised means of warfare under IHL.

59 Common Article 2 of the Geneva Conventions together with Article 1(4) of the First Additional Protocol to the Geneva Conventions contain the various recognised forms of international armed conflict (IACs), while non-international armed conflicts (NIACs) are understood according to the provisions of Common Article 3 of the Geneva Conventions and Article 1(1) of the Second Protocol Additional to the Geneva Conventions.

60 This was the case, for example, in Algeria, where the French authorities maintained that the violent struggle between the FLN and the French colonial army were simply "internal problems of public order", and it was not until 1999 that the French government officially recognised that the liberation struggle from 1954–1962 had, in fact, been a 'war'. See Robert Gildea, *France since 1945* (Oxford: Oxford University Press, 2002), 25; William B Cohen, "The Algerian War, the French State and Official Memory," *Historical Reflections/Réflexions Historiques* 28, no. 2 (2002), 219; Jessica Whyte, "The 'Dangerous Concept of the Just War': Decolonisation, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions," *Humanity* 9, no. 3 (2018).

The final observation from the constructionist viewpoint draws attention to the importance of the historical and social context in establishing the meaning and applicability of constructed categories. It could be argued that this is recognised to a certain extent in the VCLT method of interpretation, namely in its recommendation that recourse be had to *travaux préparatoires* and the circumstances of a treaty's conclusion (Art. 32 VCLT).[61] However, this is not the same sense in which 'context' is understood by the constructionist approach, and, furthermore, the provisions arguably do not go far enough. For one thing, Art. 32 VCLT is a supplementary means of interpretation distinct from the general rule; that is, the reference to context in this sense is not an intrinsic part of the interpretive method. Nevertheless, almost all interpretive operations do, in fact, make use of *travaux préparatoires* in practice.[62] Secondly, the provisions of Art. 32 VCLT relate only to the interpretive method, and are not, as such, a general principle of international law. In other words, drawing on the broader context of a legal category, definition or provision is not necessarily a constituent element of the legal method for working with these phenomena outside of the interpretive operation. Constructionists, in contrast, would encourage consideration of the context every time a category, or construct, is employed. This is because the constructionist viewpoint accounts for the so-called 'matrix' as a central element in establishing meaning, as it upholds, enables and determines a particular understanding of the term in question.

Particularly relevant in international law in this regard, then, is the historical and cultural context of a legal category. Was the provision perhaps drafted and the definition fixed in a colonial context, thus implicitly upholding racialised structures of domination and oppression? Is the concept and/or its definition outdated today in the face of technological advancements, e.g. in weapons technology? Does the IHL regime as a whole adequately reflect and account for the contemporary contexts in which armed struggles are waged? In the 21st century, there is an increasing prevalence of complex phenomena which complicate the 'traditional' scenarios of declared war between two states and thus pose a challenge to the prevailing IHL regime and its adaptability. Among these, and worthy of note, are: the engagement by states of private military and security companies and mercenaries; lethal autonomous weapons systems; urban warfare; proxy wars; and conflicts involving multinational troop units, such as those of the UN and NATO. How do existing concepts and legal instruments work with, and around, these phenomena and adapt to the new order, particularly given the relative age of the core IHL treaty regime? The

61 The 'context' referred to in the general rule in Art. 31 VCLT has a very different meaning, namely the text of the treaty and closely related instruments (so-called 'extrinsic context') and can thus not be compared to the constructionist sense of the word, namely the broader social, cultural and historical setting in which a given provision or term is embedded.
62 See Gardiner, *Treaty Interpretation*, 323.

constructionist viewpoint encourages reflection on these questions and emphasises the need to take the contemporary context and social dynamics into account at all times when applying legal categories. The law is not blind to these observations; indeed, scholars and practitioners are well aware of the challenge posed by legal provisions which no longer reflect contemporary realities accurately. However, the provisions nevertheless continue to apply. As Abi-Saab argues, "the acceptance of this sociological observation about the disparity between law and the social reality it is called upon to regulate does not extend to the legal consequences to be drawn from it."[63] In other words, recognition and acceptance of the fact that legal provisions may not, or no longer, correspond to contemporary situations does not imply that the provisions themselves are no longer applicable.

Interpreting social science

The three arguments presented above demonstrate the value of regarding the workings of the law from a social constructionist perspective. Likewise, there are a number of insights to be gained from observing the social constructionist approach and the political use of constructed categories from the point of view of the legal methods examined in this research. The below argues that there is value in 1) recognising the need for a certain degree of fixity when working with phenomena; 2) reflecting on what exactly constitutes the matrix of a phenomenon; and 3) considering the genealogy or methodological framework of social constructs.

The first observation stems from the law's reliance on established categories with stable, codified definitions. The existence of these categories, which can subsequently be interrogated and deconstructed, is essential for the functioning and practical work of the legal order, as has been argued above. The provision of exception clauses or derogations further enables the application of such categories in practice. It can thus be recognised that there is value in having established categories and tangible definitions in order to work with concepts. To take the argument to its extreme, if everything is reduced to a construction, inherently obscure and ambiguous, where might the analysis even begin? There can be no unmasking without consensus on the existence of a mask. At the most banal level, then, categories, no matter how fuzzy or undefined, are preconditions to constructionist analysis and to testing the limits of the approach. Moreover, they are also representative of the reality of how phenomena are engaged with in the 'real world'. That is, while constructionists may recognise objects, ideas and concepts as inherently fluid and

63 Georges Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols," *Collected Courses* 165 (1979), 421.

thus indefinable, every individual who employs or engages with any kind of category in their daily life will have a certain understanding of what it consists of. Their understanding may not be static, and they may not even be fully aware of it, but the individual will nonetheless have an implicit definition, or set of criteria, which must be met in order for the category to be considered applicable. Even within the social sciences, where the constructionist approach finds broad acceptance and use, scholars frequently work with definitions as a way of fixing the understanding of a given construct for purposes of conceptual orientation, comparison, etc. Finally, as has been argued above, acknowledgment of the value of having tangible categories or definitions should not be taken to undermine the social constructionist approach. Both can co-exist; indeed, there is potential for mutual enrichment.

The second observation emerges from the interpretive method set out in the VCLT, which requires recourse be had to multiple sources in order to support and justify a given interpretation. In the case of a judicial decision, such as an ICJ ruling in the event of an unclear treaty provision, these sources of meaning are explicitly stated. As revealed by the constructionist approach, the processes by which meaning is ascribed in politics and society tend to be hidden, and the existence of constructs (and their meaning) taken for granted. While it would be impossible to hold socially-constructed concepts to the same requirements as legal interpretations in this regard, it is nonetheless an interesting exercise for constructionist scholars and critics to consider how exactly the conception of a given object or idea is arrived at in practice by making reference to multiple sources. For example, by subjecting to scrutiny the various institutions and processes which constitute Hacking's 'matrix' of a given idea, and their individual roles in ascribing and upholding meaning, or how they interact to produce a certain understanding, different aspects of the process of social construction may be revealed. Attempting to pin down these inherently nebulous elements would be a challenging exercise, but considering them as sources of meaning which support a dominant understanding of the idea or category might shed some light on how it is that categories are constructed as inevitable in mainstream discourse.

Finally, and in the same vein, the introduction to the legal approach revealed that it is, in a sense, more transparent overall than the political processes of categorisation, including through social construction. A final way in which the constructionist approach can be studied through applying the legal lens is by examining more closely the process of categorisation itself. The clear set of rules for interpretation in the VCLT provides a framework which can be disassembled in order to study the constituent parts from which an interpretation was made. In other words, the interpretive process can be 'reversed' by using the VCLT method as a kind of trail of evidence which can be followed in order to ascertain how a certain interpretation or categorisation was arrived at. With regard to the constructionist approach, this is, again, significantly more challenging. However, to think about the political processes whereby an armed actor is constructed and construed in a certain way and referred to as 'terrorist' offers a potentially enlightening exercise for the constructionist: Reversing the approach by taking the categorised phenomenon and trying to trace it back to its origins through a genealogical approach – that is, which characteristics of the group were perhaps overstated and which brushed aside in order to subsume it under the category 'terrorist' – might put the constructionist in a better position to interrogate the result and the interests it serves.

Not seeking to claim that the above observations or proposed angles for future legal and constructionist analyses are necessarily original, the observations in this section serve to demonstrate how the legal and philosophico-political approaches which have been juxtaposed throughout this research may also complement and enrich one another.

Conclusion

This research set out to examine and compare two distinct disciplinary approaches to the construction of meaning and categorisation – social constructionism, representative of political and social theory, and the legal method of interpretation as codified in the Vienna Convention on the Law of Treaties, emblematic of public international law – through the lens of how actors engaged in international armed conflict are understood and categorised. The goal was not to evaluate these frameworks normatively or to determine their relative superiority, but to investigate how their contrasting assumptions and methodologies shape the phenomena they purport to describe, and how these interpretations coexist in real-world contexts, such as in the study of armed conflict. The juxtaposition of these two approaches reveals not only divergent epistemologies and disciplinary aims but also some surprising points of intersection. Social constructionism, grounded in the idea that meaning is not pre-given but produced through social processes, highlights the fluidity of categories and draws attention to the contextual, contingent, and often politicised nature of how phenomena are understood. Law, by contrast, and particularly the interpretive rules set out in the VCLT, operates under the assumption that meaning can be clarified and stabilised through the application of structured interpretive principles. The legal framework depends on fixed rules for interpretation to enable consistent application and, ultimately, uphold the legitimacy of the rule of law. Yet as this research has shown, the disciplinary distinctions are not always so clear-cut. While the legal approach emphasises consistency and stability in definition, it is inescapably mediated by human interpreters, whose subjectivities and positionalities inevitably influence the interpretive process. Despite its objective posture, the legal method, too, is implicated in the construction of meaning – not least because the rules of interpretation must themselves be interpreted. Meanwhile, though constructionism questions the inevitability of meanings and categories, it cannot escape the practical necessity of working with provisional definitions in order to engage in analysis. This mutual reliance on – and simultaneous interrogation of – categorisation underscores that meaning-making is a dynamic process, even in domains where precision is highly prized.

A particularly fruitful site for this comparative inquiry has been the classification of actors in armed conflict. In political discourse, especially in asymmetrical or anti-colonial struggles, actors are routinely constructed in strategic ways: they may be labelled as terrorists or freedom fighters, insurgencies or liberation movements, depending on the interests and narratives of those in power. The constructionist lens draws attention to these processes, revealing how such labels are deployed to legitimise or delegitimise, include or exclude, and ultimately reinforce certain power structures. These categorisations are not neutral; they are imbued with political meaning and social consequence. IHL, by contrast, insists on strict, mutually exclusive categories such as 'combatant' and 'civilian', which are foundational to the legal regime's ability to function. These categories enable the application of essential principles which are designed to mitigate the harms of armed conflict, such as the 'principle of distinction'. But as this research has demonstrated, the reality of contemporary conflict challenges the adequacy of these binary classifications. While the legal framework aims to impose clarity, it must simultaneously grapple with the ambiguities and complexities of the real world.

The interplay between these approaches becomes particularly illuminating when each is used to interrogate the other. A social constructionist perspective reveals the latent assumptions embedded in legal interpretation – the role of the interpreter, the selective invocation of context, and the extent to which legal categories can ever be truly objective or context-free. Conversely, legal reasoning offers constructionism a model of rigour and transparency, particularly through its structured use of sources and explicit justificatory methods. While social and political categorisations often emerge through diffuse and opaque processes, legal interpretation at least aspires to be traceable and accountable, and its methodology may offer useful tools for constructionist scholars seeking to retrace the genealogy of social categories. Both approaches also illuminate the challenges of operating across disciplines. While constructionism invites openness to plurality, instability and redefinition, law requires a degree of closure in order to function. These demands are not easily reconciled. The necessity of legal determinacy can obscure the fluid and contested nature of the categories the law employs, while the openness of social constructionism can risk undermining the possibility of shared meaning or coordinated action. The value of this interdisciplinary inquiry lies precisely in its ability to hold these tensions in view: to acknowledge the strengths and limitations of each approach, and to resist the temptation to evaluate them normatively.

This has significant practical implications. In conflict situations, the way actors are categorised – whether in political rhetoric or legal analysis – has profound effects on their treatment, their rights, and their legitimacy and can result in the denial of legal protections, the perpetuation of violence, or the entrenchment of unjust power structures. A more reflexive approach to categorisation, informed by both legal rigour and constructionist critique, highlights these often implicit or obscure effects and offers a way to engage more responsibly with these issues. Furthermore, it demonstrates that categorisation is not simply a descriptive act, but a performative one – a move that shapes the world as much as it reflects it.

Ultimately, this research has argued that while law and social science may construct meaning in different ways, their respective approaches are not mutually exclusive. Rather, they exist in a complex relationship of tension, overlap and mutual influence. Acknowledging this relationship does not diminish the disciplinary merit of either field; on the contrary, it enriches both. Legal scholars may benefit from greater attentiveness to the constructedness of their categories and the positionality of their interpretations, while political and social theorists may gain from engaging more directly with the structural constraints and normative commitments of legal reasoning. By placing these approaches in dialogue and attempting to bridge their differences, space is opened for a more nuanced and reflective engagement with the categories through which we understand and navigate the world.

Main Treaty Provisions cited

Vienna Convention on the Law of Treaties (1969)

Article 31 – General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
    a. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
    b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
    a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
    b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
    c. any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a. leaves the meaning ambiguous or obscure; or
b. leads to a result which is manifestly absurd or unreasonable.

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Giulia Schneitter

Rechtliche Grauzone, ethische Pflicht: Die Schweiz und ihre Verantwortung für Pushbacks während Frontex-Einsätzen

Navigating Legal Ambiguity and Moral Responsibility: Switzerland's Role in Pushbacks During Frontex Operations

Abstract: In recent years, the European Border and Coast Guard Agency (Frontex) has faced sustained scrutiny for its alleged involvement in pushbacks at the European Union's external borders. Switzerland, while legally obliged to participate in Frontex operations, is also bound by the non-refoulement principle, a cornerstone of international human rights law that pushbacks contravene. This article investigates Switzerland's legal and ethical responsibilities in this context. The analysis applies the doctrine of state responsibility to assess Switzerland's legal liability and employs the framework of collective responsibility to evaluate its ethical accountability. Juxtaposing these perspectives reveals a significant disparity between Switzerland's legal obligations and its ethical commitments. The article concludes by suggesting measures to close this responsibility gap, such as withholding funds or personnel until Frontex implements effective measures to prevent pushbacks, actively promoting human rights within the agency, and using diplomatic channels to ensure respect for human rights. These steps would help reconcile Switzerland's self-image regarding its humanitarian tradition and commitment to human rights with its involvement in Frontex.

Key Words: Pushbacks, non-refoulement principle, Frontex, state responsibility, collective responsibility

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Einleitung

Seit 2014 verschwanden knapp 30'000 Flüchtende beim Versuch nach Europa zu gelangen.[1] Diese Zahl macht die tödliche Realität an Europas Grenzen deutlich. Dazu zählen auch sogenannte Pushbacks – illegale Zurückweisungen schutzsuchender Menschen unmittelbar nach dem Grenzübertritt, ohne dass diese einen Asylantrag stellen konnten oder die Zurückweisung gerichtlich geprüft wurde.[2]

Im letzten Jahr gab es gemäss dem European Pushback Report 2024 an den europäischen Aussengrenzen über 120'000 Fälle. Der Bericht legt offen, dass Asylsuchende geschlagen, auf dem Meer ausgesetzt oder in Wäldern zurückgelassen wurden. Die Gesamtzahl bezieht sich auf Pushbacks aus EU-Staaten in Nicht-EU-Staaten.[3]

Beim Schutz der europäischen Aussengrenzen werden die Schengen-Staaten von Frontex, der Europäischen Agentur für die Grenz- und Küstenwache, unterstützt.[4] Sie wurde 2004 als ergänzende Massnahme zum freien Personenverkehr innerhalb des Schengen-Raums errichtet.[5] 20 Jahre später verfügt Frontex über ein deutlich ausgeweitetes Mandat, das unter anderem die Bekämpfung grenzüberschreitender Kriminalität, die Durchführung eigener Grenzüberwachungsoperationen sowie die Integration von EUROSUR zur Echtzeit-Lagebeobachtung[6] umfasst. Dafür wurden die personellen und finanziellen Ressourcen von Frontex ausgeweitet.[7] Gleichzeitig steht Frontex wiederholt in der Kritik, an Pushbacks beteiligt zu sein.[8]

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3 11.11.11 (Belgium), Hungarian Helsinki Committee, We Are Monitoring Association (Poland), Center for Peace Studies (Croatia), Lebanese Center for Human Rights (CLDH), Sienos Grupė (Lithuania), Centre for Legal Aid – Voice in Bulgaria (CLA), Foundation Mission Wings (Bulgaria), I Want to Help Refugees/Gribu palīdzēt bēgļiem (Latvia), «Pushed, beaten, left to die – European Pushback Report 2024», zugegriffen 26. August 2025, https://web.archive.org/web/20250821095800/https://11.be/sites/default/files/2025-02/Pushbacks%20Report%202024.pdf.

4 Frontex, «Who we are», zugegriffen 20. August 2025, https://web.archive.org/web/20240706085414/ https://www.frontex.europa.eu/about-frontex/who-we-are/tasks-mission/.

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6 Melanie Fink und Jorrit Rijpma, «The Management of the European Union's External Borders», in *Research Handbook on EU Migration and Asylum Law*, hg. von Evangelia Tsourdi und Philippe De Bruycker, Research Handbooks in European Law (Cheltenham/Northampton: Edward Elgar Publishing, 2022), 419.

7 Vgl. Frontex-VO; Verordnung (EU) Nr. 2019/1896 des Europäischen Parlaments und des Rates vom 13. November 2019 über die Europäische Grenz- und Küstenwache und zur Aufhebung der Verordnungen (EU) Nr. 1052/2013 und (EU) 2016/1624, ABl L 295/1 vom 14. November 2019 (nachfolgend: Europäische Grenz- und Küstenwache-Verordnung (EGKW-VO)).

8 Vgl. FragDenStaat, «OLAF Final Report on Frontex, Case No. OC/2021/0451/A1», zugegriffen 11. April 2024, https://web.archive.org/web/20240411075022/https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/; Lighthouse Reports, «Frontex, the EU Pushback Agency», zugegriffen 11. April 2024, https://web.archive.org/web/20240315101551/https:/www.lighthousereports.com/investigation/frontex-the-eu-pushback-agency/; SRF, Christina Brun, Sebastian Ramspeck, «Festung Europa: Frontex in der Kritik», 6. Juli 2024, https://web.archive.org/web/20240706090223/https://www.srf.ch/news/international/umstrittene-praktiken-festung-europa-frontex-in-der-kritik; SRF, Michael Zollinger, «Frontex in Pushbacks in Ägäis involviert», zugegriffen 11. April 2024, https://web.archive.org/web/20240320154042/https://www.srf.ch/news/abstimmungen-15-mai-2022/finanzierung-frontex/migration-frontex-in-pushbacks-in-aegaeis-involviert?wt_mc_o=srf.share.app.srf-app.unknown; u.a.

Werden Menschen abgewiesen, ohne einen Asylantrag stellen zu können, verstösst dies gegen das Non-Refoulement-Prinzip. Dieses verbietet es Staaten, eine Person in einen Staat abzuschieben oder auszuliefern, in dem ihr die Todesstrafe, Folter oder andere menschenrechtswidrigen Behandlungen drohen.[9] Pushbacks sind nicht nur rechtlich problematisch, sondern missachten auch den Grundsatz des Eigenwerts und der Würde jedes Menschen. Durch die Zurückschiebung in ihr Heimat- oder Drittland, ohne die Möglichkeit zu haben, Asyl zu beantragen oder Schutz zu suchen, wird der intrinsische Wert von schutzsuchenden Menschen negiert. Dies legt die ethische Dimension von Pushbacks offen.

Im Frontex-Einsatz sind diverse Akteur*innen involviert. In diesem unübersichtlichen Kontext stellt sich die Frage, wer für die mutmasslichen Menschenrechtsverletzungen verantwortlich ist: Der Staat, auf dessen Gebiet der Einsatz stattfindet? Frontex selber? Oder die unterstützenden Staaten, die Personal zu Frontex-Einsätzen entsenden?

Als Schengen/Dublin-Mitglied ist die Schweiz Teil der europäischen Migrationspolitik und zur Beteiligung an Frontex verpflichtet.[10] 2021 beteiligte sie sich mit einem Beitrag von 24 Millionen Franken. Im Jahr 2027 soll dieser auf 61 Millionen Franken steigen. Dies entspricht rund 4,5 Prozent des Frontex-Budgets.[11] Personell wird sich die Schweiz 2027 mit maximal 39 Vollzeitstellen beteiligen.[12] Gleichzeitig wirft diese Beteiligung Fragen im Hinblick auf mögliche Menschenrechtsverletzungen auf. Als Vertragsstaat der Genfer Flüchtlingskonvention (GFK)[13] und der Europäischen Menschenrechtskonvention (EMRK)[14] ist die Schweiz an das Non-Refoulement-Prinzip gebunden. Darüber hinaus betont sie regelmässig ihre humanitäre Tradition.[15]

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9 Melanie Berger und Sarah Progin-Theuerkauf, «Die Haftung von Frontex für Grundrechtsverletzungen: Eine Analyse des Urteils des Europäischen Gerichts EuG ‹WS u.a. gegen Frontex› (Rs. T-600/21)», *sui generis*, 2024, 37.

10 Stephan Breitenmoser und Robert Weyeneth, *Europarecht: Unter Einbezug des Verhältnisses Schweiz – EU*, 4. Aufl. (Zürich/St. Gallen: Dike, 2021), 233; Eidgenössisches Departement für auswärtige Angelegenheiten, «Schengen/Dublin – eine gemeinsame Grenze», zugegriffen 7. August 2025, https://web.archive.org/web/20240707092122/https://www.eda.admin.ch/missions/mission-eu-brussels/de/home/dossiers/schengen-dublin.html.

11 Erläuterungen des Bundesrates – Volksabstimmung vom 15. Mai 2022, 46.

12 Botschaft zur Übernahme und Umsetzung der EGKW-VO, 7172–7173.

13 Internationales Abkommen über die Rechtsstellung der Flüchtlinge vom 28. Juli 1951 (Genfer Flüchtlingskonvention, GFK), SR 0.142.30.

14 Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950 (Europäische Menschenrechtskonvention, EMRK), SR 0.101.

15 Eidgenössisches Departement für auswärtige Angelegenheiten, «Frieden und Menschenrechte», zugegriffen 19. August 2025, https://web.archive.org/web/20240708072715/https://www.eda.admin.ch/eda/de/home/aussenpolitik/frieden-menschenrechte.html; Eidgenössisches Departement für auswärtige Angelegenheiten, «Humanitäre Tradition», zugegriffen 19. August 2025, https://web.archive.org/web/20240306140551/https:/www.eda.admin.ch/aboutswitzerland/de/home/politik-geschichte/die-schweiz-und-die-welt/humanitaere-tradition.html.

Vor diesem Hintergrund stellt sich die Frage: Welche rechtliche und ethische Verantwortung trägt die Schweiz für die Beteiligung an einer Agentur, der wiederholt Menschenrechtsverletzungen – namentlich Pushbacks – vorgeworfen werden?

Dieser Artikel zeigt die Diskrepanz zwischen rechtlicher und moralischer Verantwortung auf und untersucht die Beteiligung der Schweiz an Frontex im Hinblick auf den Schutz der Menschenrechte. Dafür muss der Kontext der Schweizer Beteiligung bekannt sein. Deshalb wird im nächsten Kapitel dargelegt, inwiefern sich die Schweiz an Frontex beteiligt und welches Selbstbild sie in Bezug auf ihre humanitäre Tradition hat. Kapitel III befasst sich mit der rechtlichen Verantwortlichkeit. Dafür wird ein theoretischer Analyserahmen entlang des Entwurfs für «Die Verantwortlichkeit von Staaten für völkerrechtswidriges Handeln» (DASR) entwickelt. Dieser wird anschliessend auf die Rapid Border Intervention (RBI) Evros 2020 angewendet – ein Frontex-Einsatz, an dem sich auch Schweizer Personal beteiligt hat.[16] Während die rechtliche Verantwortlichkeit auf das Verhalten der Schweizer*innen vor Ort fokussiert, beleuchtet die ethische Perspektive die Frage der Verantwortung für die Beteiligung im Allgemeinen. Diese Ergänzung ermöglicht ein umfassenderes Verständnis der Verantwortungsfrage. In Kapitel V erfolgt schliesslich eine Gegenüberstellung und die Diskussion der Ergebnisse aus den beiden Disziplinen. Darüber hinaus werden konkrete Massnahmen aufgezeigt, mit denen die Schweiz auf wiederholte Grundrechtsverletzungen an den EU-Aussengrenzen reagieren könnte – etwa durch die Zurückhaltung von Geldern oder Personal, eine stärkere Förderung der Menschenrechte innerhalb von Frontex oder die Nutzung diplomatischer Kanäle.

16 Frontex Annual Implementation Report 2020, 38–39.

Beteiligung der Schweiz an Frontex

Um die Frage der Verantwortung der Schweiz für Menschenrechtsverletzungen während Frontex-Einsätzen untersuchen zu können, muss vorangehend der Kontext beleuchtet werden, in dem die Schweizer Beteiligung stattfindet. Folglich erläutert dieses Kapitel die rechtlichen Grundlagen der Beteiligung, ihre finanzielle und personelle Dimension sowie die Rolle der Schweiz auf der internationalen Bühne.

Die Rechtsgrundlagen über Frontex sind Schengen-relevant und die Schweiz demnach zur Beteiligung an Frontex verpflichtet (Art. 1 Abs. 1 und Art. 2 Abs. 3 SAA[17] und Art. 1 Abs. 3 DAA).[18] Diese erfolgt seit 2010 jährlich in finanzieller und personeller Form.[19]

Die Schweiz leistet gemäss Bundesamt für Zoll und Grenzsicherheit (BAZG) pro Jahr durchschnittlich 1'400 Einsatztage in Frontex-Einsätzen.[20] Die Agentur gibt vor, welche Berufsprofile für die Einsätze benötigt werden (Grenzschutzexpert*innen, Dokumentenspezialist*innen, Hundeführer*innen, Rückkehrspezialist*innen).[21] Sie gehören entweder dem BAZG oder der Zürcher Kantonspolizei an.[22] Im Falle von kurz- sowie langfristigen Auslandseinsätzen können insbesondere Rückkehrspezialist*innen des Staatssekretariats für Migration sowie polizeiliche Begleitpersonen der Kantone zum Einsatz kommen.[23] Das Schweizer Personal beteiligt sich grösstenteils an Einsätzen in Griechenland, Italien, Bulgarien, Spanien oder Kroatien,[24] wobei es bisher nicht auf Küstenschiffen eingesetzt wurde.[25]

Genaue Details zu Frontex-Operationen, bei denen Schweizer*innen im Einsatz stehen, gibt es kaum. Bekannt ist jedoch die Schweizer Beteiligung im Zeitraum von November 2014 bis Januar 2015 an der Frontex-Operation Triton. Im Rahmen dieser Operation wurde eine Grenzwächterin entsandt, die dazu beauftragt war, Geflüchtete zu ihren Fluchtgründen, Reiserouten und

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17 Abkommen zwischen der Schweizerischen Eidgenossenschaft, der Europäischen Union und der Europäischen Gemeinschaft über die Assoziierung dieses Staates bei der Umsetzung, Anwendung und Entwicklung des Schengen-Besitzstands vom 26. Oktober 2004 (Schengen-Assoziierungsabkommen, SAA), SR 0.362.31.
18 Breitenmoser und Weyeneth, *Europarecht: Unter Einbezug des Verhältnisses Schweiz – EU*, 233.
19 Peter Uebersax und Rhea Weitzel, «FRONTEX und die Schweiz – ein Blick auf die Regelung der Beteiligung der Schweiz und der Verantwortlichkeiten beim europäischen Aussengrenzenschutz», in *Schengen und Dublin in der Praxis: aktuelle Fragen | Schengen et Dublin en pratique*, hg. von Stephan Breitenmoser, Sabine Gless, und Otto Lagodny (Zürich/St. Gallen: Dike, 2015), 162.
20 Bundesamt für Zoll und Grenzsicherheit, «FRONTEX», zugegriffen 6. Juli 2024, https://web.archive.org/web/20240412095735/https://www.bazg.admin.ch/bazg/de/home/themen/auslandeinsaetze/frontex.html.
21 Botschaft zur Übernahme und Umsetzung der EGKW-VO, 7138.
22 Botschaft zur Übernahme und Umsetzung der EGKW-VO, 7172.
23 Botschaft zur Übernahme und Umsetzung der EGKW-VO, 7174.
24 Botschaft zur Übernahme und Umsetzung der EGKW-VO, 7173.
25 Bundesamt für Zoll und Grenzsicherheit, «FRONTEX».

Schlepperstrukturen zu befragen. Ein weiterer Grenzwächter war zuvor an den Vorbereitungen der Mission in Italien beteiligt.[26] Ebenso bekannt ist die Beteiligung an der RBI Evros 2020 mit vier Schweizer Grenzschützer*innen. Dieser Einsatz bildet nachfolgend die Grundlage, die rechtliche Verantwortlichkeit der Schweiz zu untersuchen.

Angesichts der wiederkehrenden Menschenrechtsverletzungsvorwürfe gegen Frontex[27] bedarf es einer besonderen Betrachtung der Verantwortung der Schweiz – nicht zuletzt aufgrund der wiederholten Betonung ihrer humanitären Tradition. Der Bund verweist dabei auf eine jahrhundertealte Praxis der Aufnahme von Flüchtenden als Teil dieser Tradition. Sichtbar werde diese zudem in der Rolle der Schweiz bei der Entstehung des Roten Kreuzes und ihrem aktiven Engagement in der Entwicklungszusammenarbeit sowie der Nothilfe bei humanitären Katastrophen und Konflikten.[28] In der Aussenpolitischen Strategie 2020–2023 wurde der Schutz der Menschenrechte und besonders verletzlicher Gruppen betont.[29] Der Ausdruck der «humanitären Tradition» ist zwar wenig erforscht, was die genaue Ermittlung seiner Herkunft sowie die Bestimmung des Begriffsinhaltes erschwert,[30] gleichwohl lässt sich festhalten, dass sich die Schweiz als Förderin der Menschenrechte versteht und ihrer humanitären Tradition eine wichtige Rolle beimisst.[31]

Aufgrund dieser Ausführungen – insbesondere der humanitären Tradition als Teil des nationalen Selbstverständnisses – geht dieser Artikel davon aus, dass die Schweiz sich der Verantwortungsfrage für Menschenrechtsverletzungen während Frontex-Einsätzen explizit stellen sollte.

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26 SWI swissinfo.ch, «Swiss border guard to help Frontex in Italy», zugegriffen 28. August 2025, https://web.archive.org/save/https://www.swissinfo.ch/eng/politics/swiss-border-guard-to-help-frontex-in-italy/41081110.

27 Vgl. FragDenStaat, «OLAF Final Report on Frontex, Case No. OC/2021/0451/A1», zugegriffen 11. April 2024, https://web.archive.org/web/20240411075022/https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/; Lighthouse Reports, «Frontex, the EU Pushback Agency», zugegriffen 11. April 2024, https://web.archive.org/web/20240315101551/https:/www.lighthousereports.com/investigation/frontex-the-eu-pushback-agency/; SRF, Christina Brun, Sebastian Ramspeck, «Festung Europa: Frontex in der Kritik», 6. Juli 2024, https://web.archive.org/web/20240706090223/https://www.srf.ch/news/international/umstrittene-praktiken-festung-europa-frontex-in-der-kritik; SRF, Michael Zollinger, «Frontex in Pushbacks in Ägäis involviert», zugegriffen 11. April 2024, https://web.archive.org/web/20240320154042/https://www.srf.ch/news/abstimmungen-15-mai-2022/finanzierung-frontex/migration-frontex-in-pushbacks-in-aegaeis-involviert?wt_mc_o=srf.share.app.srf-app.unknown; u.a.

28 Historisches Lexikon der Schweiz (Sandoz), «Rotes Kreuz», zugegriffen 19. August 2025, https://web.archive.org/web/20240313103354/https:/hls-dhs-dss.ch/de/articles/025812/2016-06-27/.

29 Aussenpolitische Strategie 2020–2023, 11.

30 Miriam Baumeister, Thomas Brückner, und Patrick Sonnack, Hrsg., *Wo liegt die «humanitäre Schweiz»? – Eine Spurensuche in 10 Episoden* (Frankfurt am Main: Campus Verlag, 2018), 9.

31 Vgl. Aussenpolitische Strategie 2020–2023; Eidgenössisches Departement für auswärtige Angelegenheiten, «Humanitäre Tradition».

Rechtliche Verantwortlichkeit der Schweiz

In diesem Kapitel wird die rechtliche Verantwortlichkeit der Schweiz für Verletzungen des Non-Refoulement-Gebots in Frontex-Einsätzen untersucht. Den Rahmen der Analyse bilden die Regeln der völkerrechtlichen Verantwortlichkeit beziehungsweise der Staatenverantwortlichkeit. Dabei wird die Staatenverantwortlichkeit des Staates für eigene Handlungen, für Handlungen von geliehenen Organen und für Unterstützungshandlungen untersucht. Dieses Prüfschema wird in einem zweiten Teil auf Schweizer*innen im Frontex-Einsatz angewendet. Zur Veranschaulichung wird dabei auf die RBI Evros 2020, an der die Schweiz teilgenommen hatte,[32] verwiesen.

Damit das Recht der Staatenverantwortlichkeit greift, müssen folgende Elemente vorliegen: ein tatsächliches Verhalten eines Staates, die Zurechnung dessen zu einem Staat und die Verletzung einer völkerrechtlichen Pflicht, die aus dem Verhalten resultiert.[33]

Pushbacks stellen einen Verstoss gegen das Flüchtlingsrecht (Art. 33 GFK) und gegen die Menschenrechte (Art. 3 EMRK) dar. Die Schweiz ist Vertragspartei dieser Abkommen.[34] Selbst wenn die Schweiz nicht durch diese Verträge an das Non-Refoulement-Gebot gebunden wäre, müsste sie dieses beachten, da es als zwingendes Völkergewohnheitsrecht gilt.[35] Dies bedeutet, dass die Schweiz für Verletzungen des Non-Refoulement-Prinzips völkerrechtlich verantwortlich gemacht werden kann, sofern die übrigen Tatbestandsmerkmale der Staatenverantwortlichkeit erfüllt sind.

Damit Handlungen von Personen einem Staat zugerechnet werden können, muss es sich dabei um eine Handlung in Vertretung des Staates handeln (Art. 4 DASR). In einer zunehmend vernetzten Staatengemeinschaft, deren Mitglieder in globalen Strukturen interagieren, resultieren Völkerrechtsverletzungen jedoch nicht selten durch das Zusammenwirken von mehreren Staaten.[36] Situationen, in denen mehrere Staaten involviert sind, verlangen eine Untersuchung *welchem* Staat ein Verhalten zugerechnet wird. Dabei muss die Organleihe im Sinne von Art. 6 DASR sowie die Unterstützung eines Staates im Sinne von Art. 16 DASR untersucht werden.

32 Frontex Annual Implementation Report 2020, 39.

33 Knut Ipsen u. a., *Völkerrecht: ein Studienbuch*, hg. von Volker Epping und Wolff Heintschel von Heinegg, 8. Aufl. (München: C.H. Beck, 2024), 661.

34 Internationales Abkommen über die Rechtsstellung der Flüchtlinge vom 28. Juli 1951, SR 0.142.30; Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950, SR 0.101.

35 Urteil *Hirsi*, Concurring opinion of Judge Pinto de Albuquerque, 64.

36 Andreas Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit*, Arbeiten aus dem Iuristischen Seminar der Universität Freiburg Schweiz 256 (Zürich/Basel/Genf: Schulthess, 2007), 84.

Bei der Organleihe im Sinne von Art. 6 DASR wird ein staatliches Organ einem anderen Staat zur Verfügung gestellt. Die Organleihe des Staates A an Staat B resultiert in der Verantwortlichkeit des Staates B, wenn folgende drei Bedingungen erfüllt sind: Das entsendete Organ muss (1) Staatsorgan-Status innehaben, (2) hoheitliche Gewalt ausüben und (3) dem Empfängerstaat «zur Verfügung gestellt» werden, sprich das entsendete Organ handelt mit der Zustimmung, unter der Kontrolle und für die Zwecke des Empfangsstaats handelt.

Art. 16 DASR regelt, was im innerstaatlichen Recht als «Mittäterschaft» oder «Beihilfe» bezeichnet wird.[37] Es handelt sich dabei um eine *abgeleitete* Verantwortlichkeit: Das «widerrechtliche Verhalten eines Staates [führt] zur Verantwortlichkeit eines anderen Staates».[38] Dafür müssen drei Voraussetzungen erfüllt sein: Erstens muss Staat A Kenntnis von den Umständen der völkerrechtswidrigen Handlung des Staates B haben. Zweitens muss die Handlung, die Staat B begeht und bei der Staat A unterstützt, auch dann völkerrechtswidrig sein, wenn Staat A sie selbst begehen würde. Drittens muss die Unterstützung in einem solchen Zusammenhang zur Handlung des Staates B stehen, dass deren Begehung erleichtert wird.

Dieser Analyserahmen soll im Folgenden auf die Schweizer Beteiligung angewendet werden. Als Fallbeispiel dafür dient die RBI Evros 2020. Es handelt sich dabei um eine gemeinsame Operation von Frontex und den griechischen Behörden zum Schutz der griechisch-türkischen Landgrenze. Pushbacks passieren nicht ausschliesslich auf See, es kann auch zu Vorfällen an Landgrenzen kommen. Es ist schwierig, genau abzuschätzen, wie viele Menschen auf dem Landweg nach Griechenland gelangen und zurückgeschoben werden. Gemäss Schätzungen handelte es sich im Jahr 2022 um rund 70’000 Menschen, die in Griechenland ankamen. Knapp 17’000 wurden als Neuankömmlinge registriert.[39]

Die RBI Evros 2020 resultierte aus einer Anfrage der griechischen Behörden. Der Frontex-Exekutivdirektor entschied über den Start der Operation, die die Grenzkontrolle vor Ort verstärken sollte. Geplant war ein kurzfristiger Einsatz, wobei die Operation auf Bitte Griechenlands mehrfach verlängert wurde. Sie dauerte letztlich vom 11. März bis zum 30. Oktober 2020.

37 James Crawford, *State Responsibility: The General Part*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2013), 395.

38 Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit*, 84.

39 «Greece: Conflicting Messaging by Government as Evros Border is Further Fortified and Pushbacks Continue, Syrian Refugees Increasingly Unsafe in Turkiye Deemed Safe by Greece», zugegriffen 6. Juli 2024, https://web.archive.org/web/20240505130204/https://ecre.org/greece-conflicting-messaging-by-government-as-evros-border-is-further-fortified-and-pushbacks-continue-syrian-refugees-increasingly-unsafe-in-turkiye-deemed-safe-by-greece/.

Während der Operation leistete Frontex den griechischen Behörden technische und operative Unterstützung, einschliesslich des Einsatzes von Personal, Fahrzeugen und Ausrüstung.[40]

Frontex ist bereits seit 2010 in der Region Evros präsent. Berichte über Pushbacks in dieser Region gibt es seit jeher, seit 2017 steigen sie jedoch drastisch an.[41] Gemäss Amnesty International wurden die Rückschiebungen im März 2020 gar offen durchgeführt und mit einer «Ausnahmesituation» in der Region begründet.[42] Der Frontex-Grundrechtsbeauftragte[43] äusserte hinsichtlich der Durchführung der RBI Evros 2020 Bedenken. Das Engagement in der RBI Evros 2020 könne im Hinblick auf die Untergrabung des internationalen Schutzes und Non-Refoulement-Gebots zu schwerwiegenden Grundrechtsrisiken führen. Unter Verweis auf Art. 46 Abs. 4 und 5 der EGKW-VO wurde empfohlen, die Bedingungen des Einsatzes zu überdenken.[44]

An der Operation beteiligten sich auch «vier Schweizer Grenzschützer*innen im Bereich Grenzüberwachung».[45] Es liegen keine genauen Details über das Vorgehen der beteiligten Schweizer*innen vor, Menschenrechtsverletzungen wurden der Zollverwaltung keine gemeldet.[46] Gleichzeitig erfuhren in dieser Zeit zahlreiche Schutzsuchende an der griechisch-türkischen Grenze körperliche Gewalt, Inhaftierung und widerrechtliche Abschiebungen.[47]

Handlungen von Grenzschutzbeamt*innen, die Exekutivbefugnisse voraussetzen, werden als Handlungen des Staates im Sinne von Art. 4 DASR betrachtet.[48] Einwanderungskontrollen setzen zum Beispiel die Ausübung hoheitlicher Gewalt voraus und sind im Kontext von

40 Frontex Annual Implementation Report 2020, 38; Frontex, «Frontex launches rapid border intervention on Greek land border», zugegriffen 6. Juli 2024, https://web.archive.org/web/20230606203548/https:/frontex.europa.eu/media-centre/news/news-release/frontex-launches-rapid-border-intervention-on-greek-land-border-J7k21h.

41 Respond, Lena Karamanidou, Bernd Kasparek, «What is Frontex doing about illegal Pushbacks in Evros?», zugegriffen 8. Juli 2024, https://web.archive.org/web/20240708173154/https://respondmigration.com/blog-1/what-is-frontex-doing-about-illegal-pushbacks-in-evros.

42 Amnesty International, «Greece: Violence, lies and pushbacks», zugegriffen 20. August 2025, https://web.archive.org/web/20220501205355/https://www.amnesty.ch/de/laender/europa-zentralasien/griechenland/dok/2021/illegale-push-backs-von-menschen-auf-der-flucht/greece-violence-lies-and-pushbacks.pdf.

43 Neben dem Verwaltungsrat, dem*der Exekutivdirektor*in und den stellvertretenden Exekutivdirektor*innen umfasst die Verwaltungs- und Leitungsstruktur von Frontex eine*n Grundrechtsbeauftragte*n (Art. 99 EGKW-VO). Mit der neuen Verordnung wurde auch ein Beschwerdeverfahren eingeführt, «mit dem die Achtung der Grundrechte bei allen Tätigkeiten der Agentur gewährleistet werden soll.» (Erwägung (104) EGKW-VO).

44 Frontex Annual Report Fundamental Rights Officer 2020, 11.

45 Frontex Annual Implementation Report 2020, 39–39.

46 WOZ, Lorenz Naegeli, «Die Pushback-Agentur», zugegriffen 1. Mai 2024, https://web.archive.org/web/20240415130531/https://www.woz.ch/2047/frontex-in-der-aegaeis/die-pushback-agentur.

47 Amnesty International, «Greece: Violence, lies and pushbacks».

48 Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU*, 70.

Frontex-Operationen sehr wahrscheinlich.[49] Das Schweizer Personal darf polizeilichen Zwang und polizeiliche Massnahmen anwenden (Art. 91a Abs. 1 ZG) und demnach exekutive Funktionen ausüben. Es handelt sich um Staatsorgane, die hoheitliche Gewalt ausüben können. Doch handelt es sich dabei um die hoheitliche Gewalt der Schweiz, die die Schweizer*innen in diesen Fällen ausführen?

Unter der Annahme, dass das Schweizer Personal während der RBI Evros 2020 von griechischen Beamt*innen gemäss Einsatzplan so angewiesen wurde,[50] dass ihre Handlungen in Menschenrechtsverstössen resultierten, wird dieses Verhalten Griechenland zugerechnet (gemäss Art. 6 DASR). Es handelte sich bei den Schweizer*innen um entsendete Staatsorgane. Dabei unterlagen diese der operativen Führung von Griechenland und handelten nicht im Namen der Schweiz. Resultiert ihr tatsächliches Verhalten in Pushbacks und damit in der Verletzung des Non-Refoulement-Prinzips, wird die völkerrechtliche Verantwortlichkeit dafür Griechenland zugerechnet.

Die erfolgten Ausführungen machten deutlich, dass Pushbacks aus dem Zusammenwirken von mehreren Staaten resultieren – unabhängig davon, dass der Einsatzmitgliedstaat Griechenland die Anweisungen erteilt. Unter Anwendung von Art. 16 DASR kommt einem unterstützenden Staat wie der Schweiz ebenso eine Verantwortung zu, wenn (1) sie Kenntnis von den Umständen der völkerrechtswidrigen Handlung durch Griechenland hat; (2) die betroffene Handlung auch völkerrechtswidrig wäre, würde die Schweiz sie ausführen; und (3) die Unterstützung durch die Schweiz das Eintreten der Völkerrechtsverletzung durch Griechenland erleichtert.

Die Informationslage über die Situation in der Region Evros und über das Risiko für Menschenrechtsverletzungen scheint eindeutig: Der Grundrechtsbeauftragte wies offen darauf hin. Das zweite Kriterium ist ebenfalls erfüllt, da die Schweiz an das Non-Refoulement-Gebot gebunden ist. Inwiefern Pushbacks während der RBI Evros 2020 durch das Verhalten der Schweizer*innen erleichtert wurde, kann nicht abschliessend beurteilt werden. Wenn diese Bedingung ebenfalls erfüllt ist, handelt es sich bei der Schweizer Beteiligung an Frontex um Hilfe oder Unterstützung im Sinne von Art. 16 DASR bei der Begehung eines völkerrechtswidrigen Verhaltens (Pushbacks) durch Griechenland, wofür die Schweiz verantwortlich ist.

49 Melanie Fink, *Frontex and human rights: responsibility in «multi-actor situations» under the ECHR and EU public liability law*, Oxford studies in European law (Oxford/New York: Oxford University Press, 2018), 115.

50 Frontex unterstützt die Mitgliedstaaten bei Grenzsicherungsmassnahmen in Notfallsituationen an den Aussengrenzen, bei Such- und Rettungsoperationen von Menschen in Seenot, sowie bei der Organisation, Koordination und Durchführung von Rückkehraktionen und -einsätzen. Während diesen Einsätzen erteilt der Einsatzmitgliedstaat gemäss dem verbindlichen Einsatzplan Anweisungen (Art. 43 Abs. 1 EGKW-VO). Gemäss EGKW-VO bestimmt Frontex zusammen mit dem Einsatzmitgliedstaat über diesen Einsatzplan.

Die Analyse der Verantwortlichkeit anhand der DASR zeigt, dass die rechtliche Untersuchung auf das Verhaltens der Schweizer*innen im Frontex-Einsatz beschränkt ist. Dafür kann der Schweiz eine *abgeleitete* Verantwortlichkeit für die Hilfe oder Unterstützung bei der Begehung von Pushbacks zugerechnet werden. Sie ist jedoch nicht direkt verantwortlich, da es sich bei den Schweizer*innen im Frontex-Einsatz um geliehene Organe im Sinne von Art. 6 DASR handelt. Die Verantwortlichkeit für ihr Verhalten wird Griechenland zugerechnet.

Ethische Verantwortung der Schweiz

Die rechtliche Verantwortlichkeit richtet den Fokus auf die personelle Beteiligung durch Schweizer*innen an Frontex-Einsätzen. Dabei wird ihr Verhalten im Einsatz in das Zentrum der Frage der Zurechnung der Verantwortlichkeit gestellt. Mittels der Diskussion ethischer Gesichtspunkte kann die Verantwortung für die Beteiligung an Frontex im Allgemeinen beleuchtet werden. Diese Ausweitung ist aufgrund der ethischen Implikationen von Pushbacks und angesichts der Rolle der Schweiz, die sich auf ihre humanitäre Tradition stützt und als Förderin der Menschenrechte auftritt, angezeigt.

Zu diesem Zweck nimmt dieses Kapitel zuerst eine einleitende Klärung der individualistischen und der kollektivistischen Sichtweise vor. Dieser Artikel baut auf einem kollektivistischen Verständnis auf und untersucht die Verantwortung des Kollektivs Schweiz. Dafür wird geprüft, ob die Schweiz über Handlungsalternativen verfügt, über die möglichen Konsequenzen informiert ist und Einfluss auf deren Verlauf nehmen kann. Ziel dieser Herangehensweise ist es, die ethische Verantwortung der Schweiz für ihre Beteiligung an Frontex zu bestimmen.

Einzelne Schweizer*innen – ausgenommen diejenigen, die sich direkt an Frontex-Einsätzen beteiligen – tragen kaum direkt zum schädlichen Ereignis der Pushbacks bei. Gemäss einem individualistischen Verständnis des Begriffs der Verantwortung handelt es sich beim Subjekt, welches für seine Handlungen zur Rechenschaft gezogen wird, um eine (erwachsene) Einzelperson. Demnach könne ein Kollektiv nicht über seine Mitglieder hinaus zur Verantwortung gezogen werden. Begründet wird diese Sichtweise damit, dass Gruppen nicht dazu in der Lage seien, Absichten zu entwickeln, Entscheidungen zu treffen oder Überzeugungen zu vertreten, wie dies Einzelpersonen können.[51]

51 Christian List, «Group Responsibility», in *Oxford Handbook of Moral Responsibility*, hg. von Dana Kay Nelkin und Derk Pereboom (New York: Oxford University Press, 2022), 133.

Wenn kollektiven Akteur*innen, wie der Schweiz, keine Verantwortung zugerechnet werden kann, entstehen daraus Verantwortlichkeitslücken: Nicht jeder entstandene Schaden kann direkt und eindeutig einem einzelnen Individuum zugeschrieben werden. List führt aus, dass es möglich ist, dass die meisten oder sogar alle einzelnen Mitglieder eines Kollektivs in einer Weise gehandelt haben, die angesichts ihrer Umstände vernünftig war. Sie sind daher individuell nicht oder nur in geringem Masse verantwortlich. Gleichwohl haben ihre individuellen Beiträge gemeinsam ein äusserst schädliches Ergebnis hervorgebracht.[52] Müsste also nicht ein Kollektiv, zum Beispiel ein Unternehmen, eine Organisation oder eine Regierung, für dieses schädliche Ergebnis verantwortlich gemacht werden?

Aussagen wie «Russland ist verantwortlich für die Bombardierung Kyivs» verdeutlichen diesen Punkt. Es handelt sich um eine Aussage, die von der Allgemeinheit getätigt und verstanden wird.[53] Dabei stellt sich die Frage, wer mit «Russland» gemeint ist: Das Regime von Putin? Sein Parlament, welches den Angriff stützt? Die Bevölkerung Russlands? Das Militär? Die Beschreibung der Handlungen des Staates Russland lässt sich nicht auf die Handlungen seiner einzelnen Mitglieder reduzieren, was die Lücken der individuellen Verantwortung offenlegt.[54] Demnach scheint sie den immer komplexeren gesellschaftlichen Strukturen nicht gerecht zu werden. Schliesslich ist die wichtige Rolle, die kollektiven Akteur*innen in modernen Gesellschaften zukommt, unbestritten: Sie sind zentral, wenn es darum geht, Entscheidungen zu fällen, durchzusetzen und mit anderen kollektiven Akteur*innen in Beziehung zu treten. Die Frage der kollektiven Verantwortung erscheint deshalb nicht nur komplexer, sondern auch dringlicher.[55] Der Bedarf nach einer kollektiven Sichtweise auf den Begriff der Verantwortung wird auch in diesem Artikel untersuchten Fall der Frontex-Einsätze ersichtlich.

Voraussetzung für die kollektive Verantwortung der Schweiz ist, dass ihre Beteiligung an Frontex auf einer freien, absichtlichen Entscheidung beruht – das heisst, dass sie über Handlungsalternativen verfügt. Weiter muss sie über die möglichen Konsequenzen informiert sein und Einfluss auf deren Verlauf nehmen können.[56]

52 Ebd.

53 Bernd Carsten Stahl, «Das kollektive Subjekt der Verantwortung», *Zeitschrift für Wirtschafts- und Unternehmensethik* 1, Nr. 2 (2000): 229.

54 Toni Erskine, «Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States», *Ethics & International Affairs* 15, Nr. 2 (September 2001): 74.

55 List, «Group Responsibility», 131.

56 Die hier angewendeten Kriterien gehen insbesondere auf Heidbrink und List zurück. Vgl. Ludger Heidbrink, «Definitionen und Voraussetzungen der Verantwortung», in *Handbuch Verantwortung*, hg. von Ludger Heidbrink, Claus Langbehn, und Janina Sombetzki (Wiesbaden: Springer Fachmedien Wiesbaden, 2016), 22; List, «Group Responsibility», 142.

Trotz internationaler Verpflichtungen und geopolitischer Abhängigkeiten kann von einer autonomen, bewussten Entscheidung zur Beteiligung der Schweiz an Frontex ausgegangen werden: Die Schweiz ist nicht Mitglied der Europäischen Union, betont ihre Neutralität[57] und stimmte dem Frontex-Ausbau 2022 in einer Volksabstimmung deutlich zu.[58] Damit es sich wirklich um eine freie Entscheidung handeln kann, muss die Schweiz Handlungsalternativen zur Beteiligung haben.

Die Schweiz könnte Gelder oder Personal zurückhalten, bis Frontex glaubwürdig darlegen kann, mit welchen Massnahmen in Zukunft Pushbacks an den EU-Aussengrenzen verhindert werden sollen; die Schweiz könnte sich innerhalb der Agentur stärker für die Einhaltung der Grundrechte einsetzen – ein Anliegen, das sie laut den Abstimmungsunterlagen von 2022 ausdrücklich verfolgt.[59] Darüber hinaus stünden der Schweiz diplomatische Kanäle offen, ebenso wie eine verstärkte Nutzung ihrer Rolle im Konsultationsforum oder im Rahmen des Europarats, um auf die Achtung menschenrechtlicher Standards hinzuwirken.[60]

Weiter könnte die Schweiz versuchen, das Verhalten der Schweizer Beamt*innen stärker zu beeinflussen. Dies kann beispielsweise durch die Entscheidung erfolgen mehr in die Ausbildung und Sensibilisierung des Personals zu investieren. Für Schweizer*innen, die sich an Frontex-Operationen beteiligen, sind spezielle Aus- und Weiterbildungen vorgesehen. Diese befassen sich insbesondere mit dem Zugang zu internationalem Schutz, der Identifizierung von um Schutz ersuchenden Personen und deren Zuführung zu den entsprechenden Verfahren.[61] Diese Massnahme ist in der Verordnung über den Vollzug der Weg- und Ausweisung sowie der Landesverweisung von ausländischen Personen[62] festgehalten, welche vom Bundesrat gestützt auf dem Ausländer- und Integrationsgesetz,[63] dem Asylgesetz[64] und dem Regierungs- und Verwaltungsorganisationsgesetz[65] verabschiedet wurde. Diese resultieren wiederum aus den demokratischen und gesetzgeberischen Prozessen der Schweiz. Bei der Entscheidung zur

57 Eidgenössisches Departement für auswärtige Angelegenheiten, «Neutralität», zugegriffen 22. August 2025, https://web.archive.org/web/20240717105257/https://www.eda.admin.ch/eda/de/home/aussenpolitik/voelkerrecht/neutralitaet.html.
58 Eidgenössisches Finanzdepartement, «Übernahme der EU-Verordnung über die Europäische Grenz- und Küstenwache (Beteiligung der Schweiz am Ausbau von Frontex)», zugegriffen 3. Juni 2024, https://web.archive.org/web/20240603143135/https://www.efd.admin.ch/efd/de/home/das-efd/abstimmungen/frontex.html.
59 Erläuterungen des Bundesrates – Volksabstimmung vom 15. Mai 2022, 45.
60 Botschaft zur Übernahme und Umsetzung der EGKW-VO, 7157.
61 Botschaft zur Übernahme und Umsetzung der EGKW-VO, 7148.
62 Verordnung über den Vollzug der Weg- und Ausweisung sowie der Landesverweisung von ausländischen Personen vom 11. August 1999 (VVWAL), SR 142.281.
63 Bundesgesetz über die Ausländerinnen und Ausländer und über die Integration vom 16. Dezember 2005 (Ausländer- und Integrationsgesetz, AIG), SR 142.20.
64 Asylgesetz vom 26. Juni 1998 (AsylG), SR 142.31.
65 Regierungs- und Verwaltungsorganisationsgesetz vom 21. März 1997 (RVOG), SR 172.010.

speziellen Ausbildung dieses Personals handelt es sich also um eine beabsichtigte Entscheidung der Schweiz, die aus ihren Entscheidungsstrukturen hervorgeht.

Weiter könnte auch die Bestrafung der Beteiligten an Pushbacks eine entsprechende Wirkung haben. Was passiert, wenn bekannt wird, dass sich Schweizer*innen an einem Pushback beteiligt haben? Resultiert dies in einer Strafe? Die Beteiligung an sowie die Nicht-Meldung von Pushbacks müsste für das Schweizer Personal Konsequenzen haben. Deren Absenz könnte als Anreiz verstanden werden, solche Fälle zu ignorieren oder bewusst zu verschleiern. Ständerat Mathias Zopfi fordert den Bundesrat im Postulat 22.3857 zur Prüfung der Lücken im Strafgesetzbuch und im Militärstrafgesetz bezüglich der «Strafbarkeit von vorsätzlichen Verstössen gegen zwingendes Völkerrecht» auf. [66] Während das Militärstrafgesetz[67] und das Strafgesetzbuch[68] verschiedene Tatbestände für Verbrechen gegen die Menschlichkeit und Kriegsverbrechen enthalten, fehlt der Tatbestand der Beteiligung an Pushbacks. In seiner Stellungnahme hält der Bundesrat fest, dass die «schwersten, durch das Völkerrecht verbotenen Verbrechen auch in der Schweiz strafbar und mit angemessenen Strafen bedroht sein müssen».[69] Er verweist gleichwohl darauf, dass sich das zwingende Völkerrecht in erster Linie an Staaten richtet und nicht an Einzelpersonen. Es sei zudem nicht abschliessend geregelt und ständiger Weiterentwicklung unterworfen. Die dadurch aufgeworfenen Fragen wolle der Bundesrat prüfen, weshalb er die Annahme des Postulats beantragte. Auch in diesem Beispiel wird die Entscheidungsstruktur der Schweiz ersichtlich: Der vom Stimmvolk gewählte Ständerat Zopfi nutzt ein parlamentarisches Instrument, welches in einer gesetzlichen Anpassung resultieren könnte, die wiederum das Verhalten der Schweizer Beamt*innen in Frontex-Einsätzen beeinflussen würde.

Damit die Schweiz als Kollektiv verantwortlich gemacht werden kann, müssen, wie bereits erwähnt, drei Voraussetzungen erfüllt sein. Erstens muss sie über Handlungsalternativen verfügen. Zweitens muss sie Einfluss auf den Verlauf nehmen können. Und drittens muss sie über die möglichen Konsequenzen informiert sein. Nach der Erläuterung der Handlungsalternativen stellt sich nun die Frage ob, wenn die Schweiz anders handeln würde, das Zustandekommen von Pushbacks tatsächlich beeinflussen würde. Obwohl die beschriebenen Handlungsalternativen nicht immer direkt ausreichen würden, um Pushbacks zu verhindern, kann angenommen werden, dass diese grundsätzlich zur Verhinderung beitragen würden. In Anbetracht

66 22.3857 Postulat – Strafbarkeit von vorsätzlichen Verstössen gegen zwingendes Völkerrecht (Mathias Zopfi).
67 Militärstrafgesetz vom 13. Juni 1927 (MStG), SR 321.0.
68 Schweizerisches Strafgesetzbuch vom 21. Dezember 1937 (StGB), SR 311.0.
69 22.3857 Postulat – Strafbarkeit von vorsätzlichen Verstössen gegen zwingendes Völkerrecht (Mathias Zopfi).

der Menschenrechtsverletzungen und unter Berücksichtigung der komplexen kausalen Zusammenhänge, zahlreichen Einflussfaktoren und Entscheidungsstrukturen sollte ein möglichst breiter und diverser Massnahmenkatalog angestrebt werden, um möglichst effektiv gegen Menschenrechtsverletzungen vorzugehen.

Zuletzt gilt noch zu klären, ob die Schweiz über die Konsequenzen der Beteiligung informiert ist. Die Schweiz ist international gut vernetzt und verfügt über Zugang zu Informationen mit globaler Relevanz.[70] Die Medienlandschaft bildet öffentliche Reaktionen auf politische Entscheidungen ab und beeinflusst zugleich die Meinungsbildung der Bevölkerung, etwa im Vorfeld von Abstimmungen. Wie dieser Beitrag aufzeigt, sind Pushbacks an den EU-Aussengrenzen mehrfach dokumentiert. Die Rolle von Frontex wurde in der Schweiz insbesondere während der Abstimmungskampagne über das Frontex-Referendum ausgiebig diskutiert, insbesondere im Hinblick auf dokumentierte Pushbacks.[71] Sowohl der Stimmbevölkerung als auch den politischen Entscheidungsträger*innen war bekannt, dass mit einem Ja zur Vorlage auch eine Mitverantwortung an umstrittenen Praktiken verbunden sein könnte.

Abschliessend gilt anzumerken, dass die erwähnten Handlungsalternativen gravierende Konsequenzen für die Schweiz mit sich bringen würden. Im einleitenden Kapitel wurde festgehalten, dass die Schweiz über das Schengen-Dublin-System zur Beteiligung an Frontex verpflichtet ist. Die Zurückhaltung von Geldern oder Personal würde einen einseitigen Rückzug bedeuten und könnte dazu führen, dass die EU rechtliche Schritte gegen die Schweiz einleitet. Das Assoziierungsabkommen von Schengen wird als beendet angesehen, wenn die Schweiz eine Schengen-Weiterentwicklung ablehnt – ausser es kommt innert 90 Tagen zur Einigung zwischen der EU-Kommission, allen EU-Staaten und der Schweiz (Art. 7 Abs. 4 SAA). Dies befürchteten auch die Befürworter*innen der Übernahme der EGKW-VO. Der Bund führte aus, dass ein Ende der Zusammenarbeit «schwerwiegende Folgen für die Sicherheit, das Asylwesen, den Grenzverkehr, den Tourismus und für die gesamte Wirtschaft» mit sich bringen würde.[72] Die Konsequenzen einer solchen Massnahme, zum Beispiel für die im Frühling 2024 eröffneten Verhandlungen

70 SWI swissinfo.ch, «Internationale Beziehungen», zugegriffen 20. Mai 2024, https://web.archive.org/web/20240520093333/https://www.swissinfo.ch/ger/politik/internationale-beziehungen/28978920.

71 NZZ, Sacha Batthyany, Katharina Bracher, «Euch will hier niemand!», zugegriffen 11. April 2024, https://web.archive.org/web/20240320145546/https:/www.nzz.ch/gesellschaft/gewalt-an-der-der-eu-aussengrenze-was-weiss-frontex-ld.1815780; SRF, Michael Zollinger, «Frontex in Pushbacks in Ägäis involviert»; Watson, Sarah Serafini, «Carola Rackete zur Frontex-Abstimmung: ‹Die Schweiz kann etwas Wichtiges in Gang bringen›», zugegriffen 5. Juni 2024, https://web.archive.org/web/20240605092742/https://www.watson.ch/schweiz/interview/697506918-carola-rackete-im-interview-zur-frontex-abstimmung.

72 Erläuterungen des Bundesrates – Volksabstimmung vom 15. Mai 2022, 46.

zwischen der Schweiz und der EU zur Weiterentwicklung und Stabilisierung der Beziehungen,[73] dürfen ausserdem nicht unterschätzt werden. Auch ein stärkeres Engagement der Schweiz auf der internationalen Bühne, verbunden mit öffentlichem Druck, würde von der EU und ihren Mitgliedstaaten vermutlich nicht begrüsst. Dies lässt sich auf die Eigenschaft der Schweiz als Nicht-EU-Mitglied sowie als Binnenstaat zurückführen, der nicht in einem hohen Ausmass vom Migrationsdruck betroffen ist.

Zusammenfassend lässt sich festhalten: Die Schweiz wird nicht zur Beteiligung an Frontex gezwungen. Das Kollektiv Schweiz entscheidet sich absichtlich dafür – die Entscheidung zur Beteiligung geht aus dessen Entscheidungsstruktur hervor. Handlungsalternativen bestehen, etwa die Zurückhaltung der personellen und finanziellen Unterstützung oder ein stärkeres Engagement für die Einhaltung der Menschenrechte. Es ist anzunehmen, dass jede dieser Handlungsalternativen auch mit negativen Konsequenzen für die Schweiz verbunden wären.

Gleichwohl sollte die Schweiz eine Beteiligung kombiniert mit einem stärkeren Engagement für den Grundrechtsschutz visieren, um ihre Integrität sicherzustellen. Solange die Schweiz angesichts der dokumentierten Menschenrechtsverletzungen bei Pushbacks an den EU-Aussengrenzen untätig bleibt und sich der vermeintlichen Alternativlosigkeit hingibt, erscheint es nicht angemessen, sich mit der eigenen humanitären Tradition zu rühmen.

Ausblick

Die Verbindung der rechtlichen und ethischen Perspektive offenbart eine Divergenz in ihren Verantwortungskonzeptionen: Die Schweiz ist rechtlich zwar nicht direkt verantwortlich, doch sie trägt eine moralische Verantwortung für die durchgeführten Pushbacks. Die völkerrechtlichen Rahmenbedingungen reichen nicht aus, um die Verantwortung der Schweiz zu fassen, respektive die Richtigkeit staatlichen Handelns zu bewerten. Infolgedessen kann ein umfassendes Verständnis der Rolle der Schweiz erst durch die Kombination der beiden Perspektiven erlangt werden.

Der Einbezug der ethischen Dimension der Verantwortung der Schweiz schliesst die Verantwortungslücke, die durch eine alleinige rechtliche Untersuchung unter Anwendung der DASR entsteht. Die Notwendigkeit, diese Lücke zu schliessen, wird insbesondere im Kontext

73 Eidgenössisches Departement für auswärtige Angelegenheiten, «Schweiz und EU haben die Verhandlungen offiziell eröffnet», zugegriffen 6. Juni 2024, https://web.archive.org/web/20240605141057/https://www.eda.admin.ch/content/eda/de/home/das_eda/aktuell/newsuebersicht/2023/europa.html.

globaler Ungerechtigkeit offenkundig. Auf der einen Seite steht die Schweiz, welche sich selbst eine humanitäre Tradition beimisst. Auf der anderen Seite stehen Migrant*innen auf der Suche nach Schutz, nach einer Perspektive. Es handelt sich dabei meist nicht um ein freiwilliges Unterfangen.[74] Die unkritische Beteiligung an einer Agentur, die diese schutzsuchenden Menschen zurückweist, ohne ihren Schutzanspruch zu prüfen, widerspricht der humanitären Tradition der Schweiz.

Durch eine eindimensionale Untersuchung der Verantwortung, die sich nur mit der rechtlichen Verantwortlichkeit der Schweiz auseinandergesetzt hätte, hätte diese Erkenntnis nicht gewonnen werden können. Diese legte offen, dass der Schweiz für Menschenrechtsverletzungen während Frontex-Einsätzen nicht direkt Verantwortlichkeit zugerechnet werden kann. Eine eindimensionale Untersuchung der ethischen Verantwortung wiederum hätte den völkerrechtlichen Grundlagen der internationalen Zusammenarbeit an den europäischen Aussengrenzen nicht die entsprechende Bedeutung beigemessen.

Darüber hinaus ermöglicht die Kombination der Perspektiven eine Ausweitung des Analyserahmens. Die rechtliche Verantwortlichkeit richtet den Fokus auf die personelle Beteiligung durch Schweizer*innen an Frontex-Einsätzen. Dabei wird ihr Verhalten im Einsatz in das Zentrum der Frage der Zurechnung der Verantwortlichkeit gestellt. Mittels der ethischen Diskussion der Verantwortung können weitere Anknüpfungspunkte in die Betrachtung miteinbezogen werden. Die ethische Betrachtung ermöglicht die Feststellung der Verantwortung für die Beteiligung an Frontex im Allgemeinen.

Im Sinne der humanitären Tradition der Schweiz und ihrer kollektiven Verantwortung kommt dieser Artikel zum Schluss, dass die Schweiz weitergehende Massnahmen ergreifen muss, um Menschenrechtsverletzungen an den europäischen Aussengrenzen zu verhindern. Möglich wäre, dass sich der Bundesrat für die Zurückhaltung von Geldern oder Personal ausspricht, bis nachweislich Verbesserungen im Grundrechtsschutz erzielt werden konnten. Ausserdem könnte er auf der internationalen Bühne dazu beitragen, Menschenrechtsverletzungen während Frontex-Einsätzen einzudämmen oder gar zu verhindern. Weiter könnte der Bundesrat entscheiden, zusätzliche Ressourcen in die Ausbildung und Sensibilisierung des entsendeten Personals zu investieren.

74 Cathryn Costello und Itamar Mann, «Border Justice: Migration and Accountability for Human Rights Violations», *German Law Journal* 21, Nr. 3 (April 2020): 313.

Alternativ könnte sich das Parlament dafür aussprechen, Pushbacks als Straftatbestand im nationalen Recht zu etablieren. Das Ergreifen einer oder mehrerer solcher Massnahmen würde ein wichtiges Signal an die internationale Gemeinschaft senden: Die Schweiz, die auf der internationalen Bühne hohe Glaubwürdigkeit in Sachen Menschenrechten geniesst, toleriert die Menschenrechtsverletzungen an den europäischen Aussengrenzen nicht länger. Ein solches Verhalten würde die Integrität der Schweiz sicherstellen, da es ihrer humanitären Tradition entspräche. Dies wäre deshalb von Bedeutung, weil «[d]er Grat zwischen der Bereitschaft, anderen zu helfen und der Selbstauszeichnung» ein schmaler ist, wie es Jakob Tanner in «Wo liegt die humanitäre Schweiz?» schreibt.[75]

Weiter kommt dieser Beitrag zum Schluss, dass ethische Aspekte vermehrt in politische Entscheidungen und gesetzliche Reformen einbezogen werden sollten – beispielsweise hinsichtlich der Ausbildung des Schweizer Personals, welches zu Frontex-Einsätzen entsendet wird oder der Einführung eines Straftatbestands der Pushbacks. Ein solcher Einbezug würde zum Schutz der Würde und des Eigenwerts der schutzsuchenden Menschen beitragen.

Für zukünftige Untersuchungen würde sich eine praxisorientierte Analyse anhand eines Falls, bei dem die Handlungen der Schweizer*innen im Frontex-Einsatz bekannt sind, empfehlen. Die Untersuchung der Rechtsfolgen von Art. 6 DASR respektive von Art. 16 DASR wäre ausserdem zentral, um allfällige Unterschiede in der direkten respektive der *abgeleiteten* Verantwortlichkeit aufzuzeigen. Darüber hinaus bietet sich eine Ausweitung der Verantwortlichkeitsdiskussion auf Frontex, den Einsatzmitgliedstaat oder andere Mitgliedstaaten und auf die Frage der *geteilten* Verantwortung[76] an. Dies würde der komplexen Ausgangslage der multiplen Akteur*innen in Frontex-Einsätzen besser gerecht werden. Ausserdem wäre eine vertiefte Untersuchung ethischer Prinzipien, die Staaten im Kontext von Grenzschutz leiten, interessant, um weitere Argumente für eine mögliche kollektive Verantwortung der Schweiz herzuleiten und die Argumentation auszuweiten.

Die Diskussion um die Verantwortung der Schweiz für Menschenrechtsverletzungen im Zusammenhang mit Pushbacks zeigt, wie komplex die Frage der Zurechnung von Verantwortung in einer Situation mit zahlreichen involvierten Akteur*innen ist. Gleichwohl gilt es anzumerken, dass die Zurechnungsfrage nicht dazu dienen darf, vom grundsätzlichen Problem abzulenken:

75 Baumeister, Brückner, und Sonnack, *Wo liegt die «humanitäre Schweiz»? – Eine Spurensuche in 10 Episoden*, 219.
76 Vgl. André Nollkaemper, «Shared responsibility for human rights violations: a relational account», in *Human rights and the dark side of globalisation: transnational law enforcement and migration control*, hg. von Thomas Gammeltoft-Hansen und Jens Vedsted-Hansen, Routledge studies in human rights (Abingdon/New York: Routledge, 2017), 27–52.

Pushbacks sind rechtlich und ethisch offensichtlich problematisch. Unter Berücksichtigung der humanitären Tradition der Schweiz erscheint es angezeigt, dass sich diese mit der konstruktiven Frage auseinandersetzt: Was kann die Schweiz tun? Wie kann sie ihre Rolle zu nutzen, um gegen die wiederkehrenden Vorfälle von Grundrechtsverletzungen an den EU-Aussengrenzen vorzugehen? Es kann nicht erwartet werden, dass die Schweiz im Alleingang die Probleme der Agentur löst. Gleichwohl sollte die Schweiz ihr Selbstverständnis und ihre privilegierte Ausgangslage nutzen, die sich unter anderem durch finanzielle Ressourcen und ihre vorteilhafte geographische Lage auszeichnet. Angesichts ihrer humanitären Tradition und der Werte, die sie in der Öffentlichkeit vertritt, sollte die Schweiz die Menschenrechtsverletzungen durch Pushbacks strikt verurteilen und sich zukünftig dafür einsetzen, diese zu verhindern.

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Verordnung über den Vollzug der Weg- und Ausweisung sowie der Landesverweisung von ausländischen Personen vom 11. August 1999 (VVWAL), SR 142.281

Zollgesetz vom 18. März 2005 (ZG), SR 631.0

Abkürzungsverzeichnis

ABl L	Amtsblatt der Europäischen Union – Rechtsvorschriften
Abs.	Absatz
AIG	Bundesgesetz über die Ausländerinnen und Ausländer und über die Integration vom 16. Dezember 2005 (Ausländer- und Integrationsgesetz), SR 142.20
Art.	Artikel
AsylG	Asylgesetz vom 26. Juni 1998, SR 142.31
Aufl.	Auflage
BAZG	Bundesamt für Zoll und Grenzsicherheit
Bbl	Bundesblatt
DAA	Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Gemeinschaft über die Kriterien und Verfahren zur Bestimmung des zuständigen Staates für die Prüfung eines in einem Mitgliedstaat oder in der Schweiz gestellten Asylantrags vom 26. Oktober 2004 (Dublin-Assoziierungsabkommen), SR 0.142.392.68
DASR	Draft Articles on the responsibility of States for internationally wrongful acts
EGKW-VO	Verordnung (EU) Nr. 2019/1896 des Europäischen Parlaments und des Rates vom 13. November 2019 über die Europäische Grenz- und Küstenwache und zur Aufhebung der Verordnungen (EU) Nr. 1052/2013 und (EU) 2016/1624, ABl L 295/1 vom 14. November 2019, S. 1–131
EGMR	Europäischer Gerichtshof für Menschenrechte
EMRK	Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950 (Europäische Menschenrechtskonvention), SR 0.101
EU-Kommission	Europäische Kommission
EUROSUR	Europäisches Grenzkontrollsystem
Frontex	Europäische Agentur für die Grenz- und Küstenwache

Frontex-VO	Verordnung (EG) Nr. 2007/2004 des Rates vom 26. Oktober 2004 zur Errichtung einer Europäischen Agentur für die operative Zusammenarbeit an den Außengrenzen der Mitgliedstaaten der Europäischen Union, ABl L 349 vom 25. November 2004, S. 1–11
GFK	Internationales Abkommen über die Rechtsstellung der Flüchtlinge vom 28. Juli 1951 (Genfer Flüchtlingskonvention), SR 0.142.30
IGH	Internationaler Gerichtshof
MStG	Militärstrafgesetz vom 13. Juni 1927, SR 321.0
Nr.	Nummer
OLAF	Europäisches Amt für Betrugsbekämpfung
RBI	Rapid Border Intervention
RVOG	Regierungs- und Verwaltungsorganisationsgesetz vom 21. März 1997, SR 172.010
SAA	Abkommen zwischen der Schweizerischen Eidgenossenschaft, der Europäischen Union und der Europäischen Gemeinschaft über die Assoziierung dieses Staates bei der Umsetzung, Anwendung und Entwicklung des Schengen-Besitzstands vom 26. Oktober 2004 (Schengen-Assoziierungsabkommen), SR 0.362.31
SR	Systematische Sammlung des (schweizerischen) Bundesrechts
StGB	Schweizerisches Strafgesetzbuch vom 21. Dezember 1937, SR 311.0
u.a.	und andere
UNHCR	United Nations Refugee Agency; Hochkommissar der Vereinten Nationen für Flüchtlinge
vgl.	vergleiche
VVWAL	Verordnung über den Vollzug der Weg- und Ausweisung sowie der Landesverweisung von ausländischen Personen vom 11. August 1999, SR 142.281
ZG	Zollgesetz vom 18. März 2005, SR 631.0

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