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The "Train Has Stopped Again": Common European Defense and Relations with NATO

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Abstract

The present paper aims to investigate the evolution and stages of the concept of European defense after the Treaty of Lisbon. Any reference to European security and defense policy is always an open challenge that highlights the complexities of the past in this area, as well as the present. The constant crises, the increasing and/or decreasing armaments of member states, the role of the Atlantic Alliance, the constant aggression of various states against others, the limitations of its intergovernmental system and unanimous decision-making rules are always evolving and subject to further analysis. On the other hand, the lack of strategies for member states, including those within NATO, powers like the United States and its rival China, are challenges that demonstrate the lack of true European military autonomy. An autonomy that perhaps is unnecessary given the focus on a common operational structure that places the management of external military missions within the framework of European defense integration, viewing it as a stage in the Union's ongoing evolution.

Keywords: European Union law, territorial sovereignty, ReArm Europe Act, mutual defense clause, hotbeds of war, CFSP, CSDP, CARD, EDF, PESCO, SAFE, NATO

1. Introduction

The continuing flashpoints of recent years, culminating in the one between Ukraine and the Russian Federation, as well as the ongoing fear, through official declarations by Germany and Poland, of a world war in Europe in the coming years, increasingly open the door to a discussion of defense and security policy within the European context (Liakopoulos, 2024). Expectations of peace in such a challenging geopolitical context are forcing military policy and collective security to retrench, even in American policy, which, after the re-election of President Trump, has renegotiated the role of NATO through special funding. Since its inception, the EU, through the European integration project, has built a European institutional architecture based on a belief in a stability that has proven insecure and a general illusion, especially in recent months, placing the continent under widespread fear and continuous crises in this area.

Whether this is a legal and/or political crisis is a question that, according to those who study these matters, can answer themselves. What we all know and agree on is that Russia's unilateral annexation of Crimea in 2014 marked the beginning of a stressful situation that culminated in the 2022 war. This event, like other similar situations in the past, was underestimated at the

time, preventing the EU and some member states from maintaining significant economic and energy dependence on the Russian Federation.

The large-scale military operation against Ukraine, European support through all means and the dynamic persistence of competing geopolitical powers have forced European circles to seriously reflect on collective defense and European security from the outset. However, the entire EU began its birth process based on this reality and necessity, given the end of World War II and the reconstruction of Europe (Fabbrini, 2025). Political considerations through political discourse are never-ending, especially given the emergence of the ongoing contradictions within a fragmented, organizationally decision-making system. Within this sphere, the EU has sought a strict sanctions regime as a global response to those who do not follow legal rules and respect international law, as well as to any state that seeks to exploit the territory of other states in any way possible (Fabbrini, 2024a). From a theoretical standpoint, this position seems correct, understandable even for those who do not believe in international law and especially in the European context, where a legal conclusion has been reached regarding armaments, namely the European Peace Facility (EPF) (Fabbrini, 2023; Frei, 2025), as an institution for the EUNAM Ukraine-type military assistance mission, as well as investments in munitions production and defensive capabilities. Progress within the CSDP and the CFSP surpasses past dreams and opens the way for continued European integration (Fabbrini, 2024b). The ongoing crises and the Union's response of imposing structural limits as an autonomous guarantee of continental security have resulted in the evolution of a conflict that has confirmed the essential role of NATO as the foundation of all member states that form part of a European security order.

International challenges have provided a structured European response to a series of clashes and institutional and political criticisms aimed at establishing the Union as a strategic player of global inspiration (McGarry, 2022).[1] The central issue of the decision-making structure as an expression of supranational coexistence was difficult to reconcile. Thus, the structure appears inadequate to meet the needs of coherence and speed in an effective defense and security policy, with fewer criticisms in the face of daily needs and realities. The Treaty of Lisbon was a step forward but also chaotic in the sector under investigation. The marginal role of two bodies such as the European Parliament and the European Commission, as well as the overlapping competences that have fragmented the predictability of external action, have shown us the reluctance of member states to cede a prerogative of sovereignty, such as an important issue of national armed forces, with the prospect of progressive integration into a coordinated framework. Military cooperation has been a step towards a rationalization of the CFSP and the relative overcoming of a fragmented strategy. Interoperability between national defense systems has made the technologies available to implement their own CSDP instruments, thus favoring a common policy based on Article 42, par. 2 TEU (Kellerbauer, Klamert & Tomkin, 2024), while also facilitating a gradual overcoming of an intergovernmental method perceived by member states as a guarantee of national control. Within this spirit, NATO has sought to play a fundamental role, namely that of guaranteeing European security. Cooperation within NATO was not sufficient to meet the strategic needs of the Union's member states, also considering the divergences in institutional identity that the Union's political priorities, especially after Brexit, have forced the Union to become one of the most important military actors, reducing its overall strategic weight due to its subordination to a Euro-Atlantic framework (Svendsen, 2019).

In this spirit, the joint EU-NATO declaration of 10 January 2023 reaffirmed the shared interest in strengthening a European defense dimension by placing the escalating Russian-Ukrainian crisis in constant competition with China. Current challenges require a level of operational coordination, integration and defensive capabilities that are no higher than that guaranteed by existing mechanisms (Dobbins, Shatz & Wyne, 2019; Aktoudianakis, 2020). The elements that the United States believes are hindering the development of European strategic autonomy have strengthened the spirit of the Union's defensive capacity and once again

[1] European Commission, Joint statement on supporting Ukraine in its proceeding at the International Court of Justice, STATEMENT/22/4509, Bruxelles, 13 July 2022: https://www.icj-cij.org/node/203013

positioned American policy as the primary guarantor of peace in Europe by allocating resources to internal priorities in different geostrategic areas with common interests (Shifrinson, 2021; Torres Sandoval & García Ramírez, 2024). Thus, the construction of a common European defense does not represent an ideological aspiration and an illusion for visionary dreamers towards a strategic necessity that seems to be imperative to protect collective security and consolidate the international credibility of the Union.

2. History and Law Within the Concept of Common European Defense

It is with great pleasure that I read the words of former French Prime Minister Renè Pleven when he presented the Pleven Plan during the early years of the EU's founding. It was an important step and a pioneering idea to create an integrated European army, seeking to merge the armed forces of the first six founding states. But it also served as a tool for overseeing a European defense ministry with supranational political authority, implementing an open, technically debatable vision that was entrusted as a development project in the European Defense Community (EDC), signed in Paris on 27 May 1952. It was a structural and conceptual project that envisioned a common armed force for national armies and the delegation of strategic decisions to a shared institutional system, the main elements of which were the jurisdictional body, the Court of Justice of the European Union (CJEU). Within this spirit, a parliamentary assembly framed a mutual defense clause which, according to Article 2, paragraph 3, contained the obligation for member states to intervene in cases of aggression against a member state of the Union (Pollman, 2023; Poederly, 2025). Ratification by the French National Assembly did not prevent the entry into force and did not abandon the military integration project.

The European unification project followed the economic path, while the continent's defense remained solely the responsibility of NATO. Within this framework, we saw the ambitious project of the Western European Union (WEU) from October 1954 as a compromise of the time and a foundation for the further development of an autonomous defense structure that also included the Atlantic Alliance in a subsidiary capacity (Blockmans, 2013). The member states of the time initiated European political cooperation as an attempt to coordinate foreign policy for the future of the CSDP, despite the structural limitations that remained outside primary law. Their aim was to set narrow objectives, affording broad discretion to states and thus imposing minimal consultation obligations on defense matters that remained excluded. Following the Single European Act of 1987, the Maastricht Treaty of 1992, which more precisely institutionalized defense issues and affirmed the identity of this policy as an international science through the implementation of a common foreign and defense policy, also included the definition of an important arm for the development and integration of NATO and the EU at a purely European level. The story continues with the Treaty of Amsterdam of 1997, through the Petersberg tasks of humanitarian missions, peacekeeping and combat missions to crisis management, also including elements in communis of international law such as peace and international security, i.e., NATO's cornerstones for ensuring European security (Masło, 2025).[1]

An important and developmental step was the Declaration of Saint-Malo of 1998 as a basis for a necessity of the time for the Union and as a response to the war in the Balkan area due to the insufficiency of European action in the absence of an autonomous capacity and recognition only of the role of the Atlantic Alliance.[2] A decisive impulse was that with the Treaty of Nice, which led to progress in phasing out the WEU, which was dissolved in 2011 thus reinvigorating the Treaty of Lisbon, which through Article 42, paragraph 7 TEU (Kellerbauer, Klamert & Tomkin, 2024) and the mutual assistance clause has questioned cases of direct aggression

[1] P etersberg Declaration made by the WEU Council of Ministers (Bonn, 19 June 1992): https://www.cvce.eu/en/obj/petersberg_declaration_made_by_the_weu_council_of_ministers_bonn_19_june_1992-en-16938094-bb79-41ff-951c-f6c7aae8a97a.html

[2] Joint Declaration on European Defence. Joint Declaration issued at the British-French Summit (Saint-Malo, 4 December 1998), par. 2: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:92000E003784

(Blockmans, 2013; Poederly, 2025).[1] The political, civil, military instruments and the management of external missions according to Article 43 for this type of operations include disarmament actions, humanitarian missions, conflict prevention, peacekeeping and military interventions as regards general objectives of external action according to Article 21 TEU (Wouters, 2004; Eeckhout, 2012; Wessel & Van Vooren, 2014; Wouters, Hoffmeister, De Baere & Ramopoulos, 2021; Kellerbauer, Klamert & Tomkin, 2024).

The lack of permanent common tests as in the case of the Battlegroups of 2007 led to political and institutional difficulties (Potteau, 2014; Meyer, Van Osch & Reykers, 2024).[2] On the financial level, military expenditures excluded the Union budget according to Article 41 TEU (Kellerbauer, Klamert & Tomkin, 2024). For this reason, a European instrument for peace was created, an extra national budget which was intended to support armament supplies for Ukraine.[3] Finally, the creation of the European Defence Agency (EDA) in 2004, recognized by the Treaty of Lisbon in 2004, harmonized needs to support technological research to strengthen the industrial bases thus contributing to the military capacity of the member states as provided for by Article 42, par. 3 TEU (Kellerbauer, Klamert & Tomkin, 2024) and the related action that slows down political resistance at European level (Koutrakos, 2013; Fonfrìa & Vicente Oliva, 2024).[4]

Since 2017, we also note the Permanent Structure Cooperation (PESCO),[5] which has been organized and structured by Articles 42, par. 6 and 46 TEU (Kellerbauer, Klamert & Tomkin, 2024) and by Protocol No. 10 seeking to strengthen cooperation in the field of capability development and research for defense expenditures due to the lack of binding unanimous rules (Blockmans, 2018).[6]

3. Limits, Development and Future of the CSDP

The main decision-making mechanisms in both European security and defense are similar and primarily concern the establishment of missions. These mechanisms are based on the adoption of decisions and principles by unanimity, thus allowing for circumstances, as was evident from the outset with the Treaty of Maastricht (Wessel, 2018). An exceptional mechanism allows the Council to decide by qualified majority on procedural matters for the implementation of joint actions, which are adopted and contain the authorization clause for the use of majority voting. This practice was established through Articles J.8 and J.3.2 of the Treaty of Maastricht, but without any specific results. Although the principle of constructive abstention under Article 23 TEU provided for qualified majority decisions during the Treaty of Amsterdam, these instruments remained marginal in the legal framework. Constructive abstention established the practice for the state to bind the principle of sincere cooperation towards the Union and the other member states. As a result, perhaps the ninth obstacle to common action: qualified majority decisions, allowed for the use of the emergency brake and the possibility of action when each state requested the vital, precise reasons for its national policy and referred its arguments to the European Council. No decision was adopted by majority, despite the military

[1] Council Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee (PSC). 2001/79/CFSP: Council Decision of 22 January 2001 setting up the Military Committee of the European Union, OJ L 27, 30.1.2001, pp. 4–6. Council Decision of 22 January 2001 on the establishment of the Military Staff of the European Union, OJ L 27, pp. 7–11. Council Decision 2014/401/CFSP of 26 June 2014 on the European Union Satellite Centre and repealing Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre, OJ L 188, 27.6.2014, pp. 73–84. Council Joint Action 2001/554/CFSP of 20 July 2001. Council Decision 2014/75/CFSP of 10 February 2014.

[2] European Parliament, Report on the implementation of the Common Security and Defense Policy-annual report 2021, 1 October 2021.

[3] Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, ST/5212/2021/INIT, OJ L 102, 24.3.2021, pp. 14–62. Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, OJ L 60, 28.2.2022, pp. 1–4.

[4] 2004/551/CFSP Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L 245, 17.7.2004, pp. 17–28. Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency (recast), OJ L 266, 13.10.2015, pp. 55–74.

[5] Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, OJ L 331, 14.12.2017, pp. 57–77.

[6] Council Decision (CFSP) 2018/340 of 6 March 2018 establishing the list of projects to be developed under Permanent Structure Cooperation-PESCO, OJ L 65, 8.3.2018, pp. 24–27.

and defense implications.

Instead, with the Lisbon Treaty, the subject matter unified fundamental rules for the CFSP without substantial changes. The general unanimity rule was also confirmed according to constructive abstention and emergency brake mechanisms according to Article 31 TEU (Kellerbauer, Klamert & Tomkin, 2024). Thus, the European Parliament maintained a marginal role of a limiting nature to regular consultations, especially for the High Representative and on aspects that concerned key aspects for the CFSP and CSDP according to Article 36 TEU. The conclusion of international agreements pursuant to Article 218, paragraph 10 TFEU (Kellerbauer, Klamert & Tomkin, 2024) was a reality. The work of the CJEU excluded the control of acts in this area except for decisions of the CFSP on acts in this area and for its own decisions, which imposed individual restrictive measures relating to Articles 24 and 40 TEU and 275 TFEU (Kellerbauer, Klamert & Tomkin, 2024). Except for the Commission, which lost the power of its own initiative, the negotiations of the CFSP, together with the European Council and the President, were based on Article 15, paragraph 2 TEU (Kellerbauer, Klamert & Tomkin, 2024).

Decision-making rules remained at the center of institutional debate. This was because the founding states of the Union, such as Germany and France, proposed the qualified majority voting as a general rule during the work on the Constitutional Treaty. Ultimately, however, this proposal was rejected. This was an orientation that, in the position of Working Group VII on External Action, favored the use of the majority method. The resulting compromise with Lisbon introduced new qualified majority voting positions, as provided for in Articles 31, paragraphs 2 and 3, and Articles 45, paragraph 2, and 46 TEU (Kellerbauer, Klamert & Tomkin, 2024). The bridging clause was also introduced, allowing the Council of Europe to unanimously establish a decision adopted by qualified majority without formally amending the treaties pursuant to Article 48 TEU (Kellerbauer, Klamert & Tomkin, 2024). In this regard, the clause included some important limitations such as: - the activation which required unanimity and b) the non-application of decisions that had implications at the military level and on one's own defense according to Article 31, par. 1 TEU (Peers, 2012; Böttner, 2016; Kotanidis, 2020; Kellerbauer, Klamert & Tomkin, 2024).

The result was a substantial change in the decision-making rules in the defense sector, which required the revision of the collateral treaties. The High Representative and the European Commission included a non-activation clause as well as the persistence of the European Council's veto power, which neutralized its effectiveness in this regard (Laţici, 2021).[1] It was not suitable for bringing about a substantial change in the integration process, which required a parallel strengthening of an integration policy as well as adequate constitutional safeguard mechanisms. The lack of majority rule guaranteed the operational efficiency of the CFSP, despite the difficulties that arose due to the relative use of Battlegroups. Thus, it determined a structural change in the reasoning of the integration process, which required the governance of the CFSP to be conceived from a democratic and jurisdictionally controllable perspective. Managing the Ukrainian crisis in a unified manner within the framework of unanimity allows member states to act cohesively in the face of a common threat, under circumstances that confirm the adoption of restrictive measures, as we saw in the case of the Russian Federation against Ukraine. The unanimity requirement conferred particular political weight on decisions as well as the need for effective and rapid tools. The risk of decision-making paralysis arose from individual states' vetoes, compromising collective security and challenging majority decisions (Pomorska & Wessel, 2021).

At the same time, in the area of defense, the activation of the relevant mechanism provided for in Article 42, paragraph 6 of the TEU (Kellerbauer, Klamert & Tomkin, 2024) allowed states to meet high standards in terms of military capabilities, allowing for a structured, permanent cooperation based on the institution of PESCO (Prieto, 2018). This demonstrates the effectiveness of an instrument that is elitist in nature and effectively embraces all member

[1] Communication from the Commission to the European Council, the European Parliament and the Council. A stronger global actor: a more efficient decision making for the EU Common Foreign and Security Policy of 12 September 2018, COM (2018)647.

states. On the other hand, it is argued that the institution represents integration into a defense field where the then President of the Commission, Jean-Claude Juncker, defined it as the Sleeping Beauty of the Treaty of Lisbon.

This is an instrument that, from the perspective of intergovernmental methods, prevailed over differentiated forms of cooperation. Thus, the examples of Articles 42, paragraphs 3 and 5 TEU (Kellerbauer, Klamert & Tomkin, 2024) did not respectfully allow states to make available to the Union civilian and military capabilities, including multinational forces, nor did the Council allow member states to entrust missions to groups for the member states pursuant to Article 44 TEU (Kellerbauer, Klamert & Tomkin, 2024). The introduction of PESCO and the limitations associated with the need for unanimity among participating states. The lack of enforcement instruments constituted an important step for the integration of European defense. This created an institutional framework for the progressive integration of military capabilities, also promoting interoperability and reducing resource rationalization. The continued interest of Member States in increasing the projects being developed within the framework of PESCO was demonstrated by Decision (CFSP) 2023/995, a concrete sign of the desire to strengthen military cooperation.

4. Strengthening the Union Through Relations with NATO

The evolutionary paths of the Union and NATO are designed to protect defense interests within a Western bloc and a context of a confrontation with the Russian Federation and its allies, which continues to operate within a geopolitical framework conditioned by a nuclear weapons policy and the Russian Federation's strategic competition with China: "(...) as nuclear weapons exist, NATO will remain a nuclear alliance. This agreement effectively ensures that NATO remains the primary framework for European security as long as Europeans find themselves under the shadow cast by the large nuclear arsenal of the Russian Federation (...)" (Lindstrom & Tardy, 2019). The organizations' interests continue to be shared by a significant number of member states of the Union, including the Atlantic Alliance (Ewers-Peters, 2021; Anagnostakis, 2025).

The legal nature of the alliance and the ongoing global military threats, along with Islamist terrorist attacks and political and social instability, have led many countries taking defensive responses that go beyond the regional scope of the Union requiring the involvement of other members of the Atlantic Pact. Within this perspective, the weak moment that occurred during the Berlin Plus agreements of 2003 allowed the EU to implement crisis management operations in Bosnia and Macedonia. The EU continues to use external command structures to subordinate the Atlantic Pact and highlight a democratic deficit in its institutional structure, in relation to its autonomous crisis management capacity. Strengthening and coordination between the two organizations began in 2001, based on interinstitutional cooperation mechanisms that have proven fragmented, limiting joint missions and failing to address key issues for crisis management in Afghanistan and the ongoing fight against international terrorism. This choice responded to a need to avoid the Union's excessive subordination to NATO and in particularly sensitive areas. Thus, the strengthening of the Union's autonomy, as early as 2006, established a military and civilian operational unit within the Union General Staff with the potential capacity to autonomously plan and manage its own ongoing missions.

The geopolitical objectives of the Union and NATO did not fully coincide with structural divergences. This was primarily due to the years-long "struggle" with Turkey, a NATO member outside the Union, and with Cyprus, a member of the Union outside the Atlantic Alliance. The divergences were full, precise and continually increasing after Brexit, given the centrality of the Anglo-American axis, which risked its orientation toward NATO and the strategies of distinct objectives that the Union respects to

pursue autonomously (Shifrinson, 2021).[1]

Resolving the intervention with a strategic approach of a legal-institutional nature, based on strengthening the Union's competences and on the constitutionalization of institutional structures and the definition of the implementation of this policy, positions the process of strengthening the CSDP as a true acceleration of the United Kingdom's exit from the EU. This is an event that previously marked and determined the relaunch of the related discussion on common European defense. This is a clear shift that, according to the content of the Berlin Agreements of 2003 and the EU-NATO Joint Declarations of 2016 and 2018, as well as the EU-NATO Declaration of 2023, which were being fully implemented, paved the way for principles of solidarity and subsidiarity that reaffirmed and strengthened the Union's role in the relationship with NATO within an equal cooperation that respected autonomous strategies in a reciprocal manner (Hamonic, 2019). In this spirit, we also consider the first EU-NATO Declaration of 8 July 2016, adopted a few days after the presentation of the Union's global strategy, demonstrating a qualitative leap in the Union's international projection. The strategic autonomy that demonstrated at the international level a greater focus, especially on substantial economic investments and, above all, institutional resources, acted as a single actor speaking with a single voice, with the possibility of a single representation of member states within NATO. This perspective presupposed the CSDP's submission to a supranational political leadership for the institution in an effective and politically responsible manner.

The Treaty of Lisbon introduced a direction with an impact that essentially translated into a partial European position on the intergovernmental method within the scope of the CFSP. This tension was aimed at the Union's ambition to impact security and defense on an institutional framework that seemed inadequate to achieve this objective. Article 43 of the TEU already highlighted the relative merits of establishing a European military force, which established that the Union's missions would include conflict prevention missions within the scope of peacekeeping and joint and combat missions for crisis management, including peacekeeping missions and operations to stabilize its own conflicts. Within this significant framework, the Treaty of Lisbon left unresolved the issues that were effectively linked to decision-making procedures and the identification of centres of political responsibility (Liakopoulos, 2018) and to the lack of mechanisms for democratic-parliamentary control of a supranational nature in reference to decisions that employed European armed forces in conflict scenarios.

5. Towards the Fight for Strategic Autonomy

Since 2013, a further awareness of the need to acquire strategic autonomy in the defense sector has been a reality.[2] This autonomy has been part of the Union's global strategy since 2016. The document introduced an integrated approach addressing the protection of the Union's interests and fundamental values, addressing threats at various levels. These include international terrorism, instability in neighboring regions,

[1] Shifrinson affirmed that: "(…) United States ought to prepare for a broader recalibration of political responsibilities in Europe. Precisely because the United States has other domestic and international obligations (…) NATO's European members are increasingly disenchanted with U.S. predominance, conditions are ripe to empower the European allies (...) strengthen intra–European solidarity and cooperation while the United States steps back from active management of European security. The United States should pivot toward becoming the pacifier of last resort rather than the manager of early squabbles (…)".

[2] Conclusions of the European Council of 19 and 20 December 2013, EUCO 217/13, parr. 1-22: "(…) needs a more integrated, sustainable, innovative and competitive defense industrial and technological base (EDTIB) to develop and sustain defense capabilities. This can also strengthen its strategic autonomy and ability to act with partners (…)". High Representative for the Common Foreign and Security Policy to the Council entitled A Global Strategy for the European Union's Foreign and Security Policy, 28 June 2016, 10715/16, pp. 5-45, and especially in par. 3: "(…) the strategy promotes the European Union's ambition for strategic autonomy. This is necessary to promote the common interests of our citizens as well as our principles and values (…)" and in par. 7 it is noted that: "(…) an appropriate level of ambition and strategic autonomy is important for Europe's ability to promote peace and security within and beyond its borders (…)" and in par. 41 it is also noted: "(…) a sustainable, innovative and competitive European defence industry is essential for Europe's strategic autonomy and for the credibility of the CSDP (…) it can stimulate growth and jobs (…)".

hybrid threats, the violation of human rights,[1] energy problems, market volatility, climate change, and so on. These concepts, which were not limited to the narrow military dimension, extended to the dependence on external actors that compromised the Union's ability to act on its behalf. This is an extension of the concept of multilevel technological, digital, energy, industrial, food and economic dimensions, which was guided by the European Commission to a strategic transformation of the main common policies.

This process was influenced by a variety of internal and external factors, such as Brexit, which affected the composition and balance of institutions. On the other hand, the redefinition of global geopolitical structures was directed towards a more peaceful orientation of American foreign policy. The American pressure in Europe was assuming greater responsibility in the security sector (Liakopoulos, 2018). These factors highlighted the progressive deterioration of a stable framework for the Union's external borders. Within this context, defense integration was accelerating and speeding up, as evidenced by the establishment of PESCO, the Coordinated Annual Review on Defense (CARD), the strengthening of permanent control capabilities and the command of the CSDP through the Military Planning and Conduct Capability.

Within this spirit, the policies that were regulated by the Treaty of Lisbon can be noted. They are oriented towards a common strategy and objectives in CSDP and CFSP (Koutrakos, 2022; Morelli & Peluso, 2025). And all this within the military mobility plan and the related action plan for synergies in civil, defense and space industry.[2] Within this framework, the European Defense Fund (EDF) is also referred to, which began in 2021 and had as its objective collaborative research and joint and progressive development of capabilities among member states (Liakopoulos, 2025). [3] The direct application of the military research commission is also involved, which made possible the progressive expansion of competences in the field of technologies and the use of space applications (Martins & Ahmad, 2020; Hakansson, 2021). Such technologies and applications have begun to advance the European defense market as regulated by the application of Article 346 TFEU (Kellerbauer, Klamert & Tomkin, 2024). [4] The European Commission has assumed a strategic role for the use of EDF and the Capability Development Plan of the EDA, which was part of the CARD environment. As a final objective, the Directorate General for Defence Industry and Space (DG DEFIS) was created with political-institutional functions. Space policy was regulated by Article 189 TFEU (Kellerbauer, Klamert & Tomkin, 2024), demonstrating its importance and evolution in practice. Regulation 2021/696 already established the Agency for the Management of the Space Programme of the Union, which placed alongside and partially replaced the ESA as a guarantee of in-house management of its programmes. The recognition offered by the relevant Decision CFSP/2021/698,[5] which developed the connectivity programme based on space technology, perhaps as a new

[1] JOINT COMMUNICATION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Joint Framework on countering hybrid threats a European Union response, JOIN/2016/018 final.

[2] Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility and repealing Regulations (EU) No 1316/2013 and (EU) No 283/2014 (Text with EEA relevance), PE/52/2021/INIT, OJ L 249, 14.7.2021, pp. 38–81. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Action Plan on synergies between civil, defence and space industries, COM/2021/70 final.

[3] Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092 (Text with EEA relevance), PE/11/2021/INIT, OJ L 170, 12.5.2021, pp. 149–177.

[4] Interpretative communication on the application of Article 296 of the Treaty in the field of defence procurement {SEC(2006) 1554} {SEC(2006) 1555}, COM/2006/0779 final. Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Text with EEA relevance), OJ L 216, 20.8.2009, pp. 76–136. Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (Text with EEA relevance), OJ L 146, 10.6.2009, pp. 1-36.

[5] Council Decision (CFSP) 2021/698 of 30 April 2021 on the security of systems and services deployed, operated and used under the Union Space Programme which may affect the security of the Union, and repealing Decision 2014/496/CFSP, ST/10108/2019/INIT, OJ L 170, 12.5.2021, pp. 178–182.

path for European defence and beyond.[1]

From a legal standpoint, Regulation (EU) 2021/696 sought to establish and create new contracts relating to the European space program, while limiting the participation of third countries. [2] Regulation (EU) 2019/452 had already highlighted the control of foreign direct investments in strategic sectors. The European Commission was recognized as having consultative power over national proceedings that were connected to space programs and financial projects of the Union.[3] This position protected European industry and hostile takeovers, thus reaffirming the orientations on investments coming from Russia and Belarus after the aggression against Ukraine (Poederly, 2025).[4] Fragmenting defense markets in the face of high cost inefficiency and technological dependence aims to partially maintain national capacity, which favors European programs, such as the FED,[5] increasing thus cooperation in a balanced manner. The experience from ESA was already based on the relative principle of fair return, representing a relative reference model (Von Der Dunk, 2015; Hansen & Wouters, 2015; Jacobs, 2024; Smith, 2025).

This path has enhanced the strategic compass since 21 March 2022,[6] thus outlining the vision of a common Europe for security and defense, also updating the aggression against Ukraine (Poederly, 2025).[7] Furthermore, the Council has highlighted some priorities such as the operational capacity and the capacity to strengthen the industrial base. This change in the

[1] Regulation (EU) 2023/588 of the European Parliament and of the Council of 15 March 2023 establishing the Union Secure Connectivity Programme for the period 2023-2027, PE/65/2022/REV/1, OJ L 79, 17.3.2023, pp. 1–39. In particualr see also recital 9 that affirmed: "(...) It should ensure the provision of resilient (…) guaranteed and flexible satellite communications solutions for evolving government needs and arrangements, developed on a Union technological and industrial basis, in order to increase the resilience of the operations of Member States' and Union institutions (…)".

[2] Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision No 541/2014/EU, PE/21/2021/INIT, OJ L 170, 12.5.2021, pp. 69–148.

[3] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, PE/72/2018/REV/1, OJ L 79I, 21.3.2019, pp. 1–14.

[4] Communication from the Commission Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions (Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 229, 31.7.2014, p. 1) and its amendments and Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures concerning restrictive measures in view of the situation in Belarus (OJ L 134, 20.5.2006, p. 1) and its amendments.) 2022/C 151 I/01, C/2022/2316, OJ C 151I, 6.4.2022, pp. 1–12: "(…) The risk that foreign direct investments by Russian and Belarusian investors may pose a threat to security and public order has significantly increased (...) investments should be systematically screened and examined with the utmost care. The risks may be exacerbated by the size of Russian investments in the EU and the intensity of previous trade relations between Russian and EU companies (...) pay particular attention to the threats posed by investments made by persons or entities associated with, controlled by or subject to the influence of the two governments, as the latter have a strong incentive to interfere with critical activities in the EU and to use their ability to control or direct Russian and Belarusian investors in the EU to that end (...)".

[5] See artt. 3 and 12, lett. e) of Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision, op. cit.

[6] Joint Communication from the Commission and the High Representative on the Defence Investment Gap Analysis and Way Forward, 18 May 2025, COM (2022) 24 final. EIB Approves Strategic Europe Security Initiative, Confirm Ukraine Disbursement and Backs € 543 million Business and Clear Energy Investment, 10 March 2022). Regulation (EU) 2023/2418 of the European Parliament and of the Council of 18 October 2023 on establishing an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA), PE/40/2023/REV/1, OJ L, 2023/2418, 26.10.2023. Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP), PE/46/2023/REV/1, OJ L 185, 24.7.2023, pp. 7–25.

[7] Joint Communication of 15 February 2022, JOIN(2022)4; Commission Communication of 15 February 2022, COM(2022)60. Versailles Declaration of 11 March 2022 following the Informal Meeting of Heads of State or Government of the European Union on 10 and 11 March 2022.

European approach sought to designate China and Russia as the main strategic players, also qualifying Cina as a rival partner with greater competition.[1] Another step dating back to May 2025 was the creation of the related SAFE (Security Action for Europe) fund intended to support the European defense industry in key sectors such as cybersecurity and military mobility.[2]

6. War Crisis Pressures and Strategic Autonomy

Since March 2025, we have unsurprisingly heard from European Commission President Ursula von der Leyen about the ReArm Europe plan,[3] a mechanism of proposals that seeks to leverage the financial instruments available to the Union to enable member states to significantly increase defense procurement. Its presentation paved the way at the European Council on 6 March, where member state leaders initiated a discussion that concluded the work on this project.[4] On 11 March, the President presented the European Parliament with overwhelmingly positive feedback, albeit some reservations.[5] The European decisions since March 2025 have allowed the European Commission to formalize its initiatives under a new title entitled "ReArm Europe Plan/Readiness 2030", despite requests for member states to abandon the rearmament deadline and the defense package, which has included an official communication for the proposed regulation. On the same day, Kaja Kallas, High Representative of the CFSP, also presented the White Paper for European Defence Readiness 2030, seeking to provide a political and strategic framework for an operational implementation program that will guide member states in rebuilding European defence capabilities operationally ready for complex scenarios. The initiatives discussed included the European Council confirming its support for leaders to initiate urgent implementation of the proposed measures.[6]

The ReArm Europe Plan directly presented the geopolitical changes and declarations for the continent's defense, thus positioning the US President Donald Trump's decision to indefinitely suspend military aid to Ukraine. It was American defense policy that increased Europe's contribution to the NATO budget, also expressed in its GDP. It is a plan that reflects on Europe's responsibility and on typical logics for the past and the near future as a response to ending the years of deterrence. The continuous collaboration and evolution of the European Commission over a long period has pushed member states to assume responsibilities in the defense sector (Liakopoulos, 2018). This has fragmented national armed forces as well as the relative inadequacy of European armies, which resulted from several important factors such as reliance on the work performed by NATO and the reduction of defense budgets after the 2007-2013 financial crisis. The Union has pursued its objectives to reverse the trend of strengthening

[1] European Council conclusions, 29-30 June 2023, On 29-30 June 2023, the European Council adopted conclusions on Ukraine, economy, security and defence, China, external relations, Eastern Mediterranean and other items.

[2] Council Regulation (EU) 2025/1106 of 27 May 2025 establishing the Security Action for Europe (SAFE) through the Reinforcement of the European Defence Industry Instrument (Text with EEA relevance), ST/7926/2025/INIT, OJ L, 2025/1106, 28.5.2025. and in recital 11 we noticed that: "(…) SAFE instrument should enable urgent and major public investments in the European defence industry, with the aim of rapidly increasing its production capacity, improving the timely availability of defence products, and speeding-up its adjustment to structural changes (…) exceptional and temporary response to an urgent and existential challenge, the financial assistance provided under it should only be made available for the purpose of addressing the adverse economic consequences of the deteriorating security situation and the immediate procurement needs of Member States contributing to increased defence industrial readiness of the EDTIB (…) instrument should be part of an overall effort (…) resources to defence industrial investments to respond to the crisis situation arising from the current security threats. Additional measures should be pursued in parallel, at Union and national level, to support that effort, including the activation of the existing flexibility within the framework of the Stability and Growth Pact (…)".

[3] Press Statement by President Von der Leyen on the Defence Package, 4 March 2025.

[4] Conclusions of the extraordinary meeting of the European Council, 6 March 2025, EUCO 6/25.

[5] MEPs debate future of EU defence and support for Ukraine of 11 March 2025: https://www.europarl.europa.eu/news/en/press-room/20250310IPR27219/meps-debate-future-of-eu-defence-and-support-for-ukraine

[6] European Council Conclusions of 20 March 2025, EUCO 1/25.

national military capabilities in an effort to improve interoperability (Vanholme, 2021), a mandatory condition for the development of synergistic cooperation and a perspective on a true common defense according to Article 42, paragraph 1, TEU (Kellerbauer, Klamert & Tomkin, 2024). This objective remains distant from decisions regarding defense and the management of armed forces, which remain stable, as well as national and Union prerogatives for the purpose of exercising a supporting, coordinating, and financial support role.

The European defense industry needed to reduce its dependence on external suppliers. [1] This capacity was strengthened after the aggression against Ukraine, an event that accelerated European initiatives in response to the decision to support Ukraine militarily. The conclusions of the European Council of December 2013 introduced the concept of strategic autonomy as a response to the reduction of the American military presence in Europe (Larres, 2014; Fiott, 2024). Already in 2016, the Council defined strategic autonomy as a necessary action with potential partners that is linked to the development of an industrial base for support and integration. [2] A further step towards consolidation was taken through the identified principles of instruments that strengthen military cooperation, namely CARD, PESCO, and EDF. In this spirit, the ReArm Europe Plan was based on a natural evolution of previous initiatives that called for the strategic compass to prepare by 2030. The envisaged measures were under discussion and the European Commission invited the states to make use of the national safeguard clause provided for by the reform of the Stability and Growth Pact with the allocation of defence resources.[3]

In exceptional circumstances, expenditures exceeding the 1.5% annual GDP limit for a four-year period monitored by the European Commission and the Council are excluded from the deficit/GDP calculation. This raises concerns about the sustainability of public finances, especially in the United States, which has a high level of debt. Another measure was the establishment of the aforementioned SAFE and access to loans, subject to the required conditions for six months and to exclusive use for defensive and critical projects regarding procurement procedures with member states, candidate countries, or Ukraine. The legal basis was identified in Article 122, paragraph 2 TFEU (Kellerbauer, Klamert & Tomkin, 2024). Similar to SURE, was the choice of a debate requesting explanations from the CJEU. Other measures have to do with cohesion funds and defense spending as future incentives, strengthening the role of the ECB in broadening eligibility criteria and defense projects and the Savings and Investment Union to mobilize savings-oriented private capital towards strategic sectors, including defense.

Emergency situations. Problems with the institutional framework established by the government for the CSDP-CFSP.

The Treaty of Lisbon introduced an institutional architecture for the Union, seeking to overcome the traditional division of a single supranational entity. The reform impacted decision-making processes related to the former second pillar, namely the CFSP, also introducing elements of the community method. A classic example is the High Representative, the President of the Foreign Affairs Council and the Vice-President of the European Commission, who participated significantly in the development and implementation of decisions for external missions. The Treaty provided for the use of qualified majority voting for decisions relating to the Council, to a limited extent.

The unanimity rule and the intergovernmental method were based on the introduction of the passerelle clause and on the constructive abstention pursuant to Article 31 TEU, as tools aimed at avoiding decision-making blockades. Even before the reform, the Councils adopted a patchwork of special acts, such as common strategies, positions and joint actions. These have been implemented since 2009 and focused on Council decision-making instruments, which were extended to the European Council, with a predominance of conclusions. The decision-making structure of the CFSP and CSDP remains fragmented lacking democratic accountability.

[1] Communication from the Commission. Defence Action Plan, 30 November 2016, COM(2016) 950 final.

[2] Council Conclusions on the implementation of the EU Global Strategy in the area of security and defence, 14 November 2016, 14149/16. European Defence Agency, Defence Data 2023-2024.

[3] Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97, PE/51/2024/REV/1, OJ L, 2024/1263, 30.4.2024.

Reasoning is based on the excessive distribution of powers and on the exclusion of legislative acts within the CFSP, leaving the European Parliament and the European Commission with discretionary power to define strategic choices. According to Article 22, paragraph 1, for example, the European Council is responsible for establishing the Union's strategic interests and objectives. The High Representative, on the other hand, makes use of the European External Action Service, also presenting joint proposals to the Council on the subject of CFSP. The European Commission has retained a role in sectors relating to external action according to Article 22, paragraph 2 (Lepeu, 2014; Molnàr, 2024).

Article 24, paragraph 1, established for the CFSP a developed definition of the common defence policy, which was defined and implemented by the European Council and decided by the Council unanimously according to the Treaties. Article 26 assigned the European Council the relevant function of identifying strategic interests and general orientations. The Council was responsible for developing and implementing the policy along lines that follow the general objectives of the CFSP, based on a joint definition of the tasks entrusted to the European Council and the overall responsibility of the Council. Thus, the Treaty of Lisbon distinguishes between general and implementing decisions according to Article 31, paragraph 2 TEU (Kellerbauer, Klamert & Tomkin, 2024). Implementation powers are also shared with the High Representative. Article 24 TEU implemented the CFSP. Instead, Articles 26, paragraph 3 and 27 reaffirm and attribute to the High Representative the external representation for the Union in the field of the CFSP.

Article 42, paragraph 4 of the TEU (Kellerbauer, Klamert & Tomkin, 2024) mandate the Council to unanimously decide on military and civilian missions following a proposal from the High Representative and a member state. Article 43 expands the missions to include military crisis management. Article 44 allows the Council to entrust execution to a small group of member states, in coordination with the High Representative and with periodic reporting obligations, thus avoiding deviations from the established objectives. This model risks favoring coalitions within the Union (Kreps, 2011). The role of the Council was central to PESCO, allowing participating states to make progress that did not involve major decisions taken by their own governments. The overall framework of the CSDP and the CFSP remains complex and fragmented, thus hampering its coherence and accountability (Blockmans, 2025; Andersson & Britz, 2025).

NATO has oriented itself towards a political and military summit, while the Union has opted for a system based on the democratic principle. This is limited to the fact that the TEU excludes the adoption of legislative acts in the field of the CFSP, assuming, according to the European Parliament, an information and consultation role according to Articles 27, paragraph 3 and 36 TEU, but without decision-making and veto powers. Within this framework, the CJEU has viewed the competence of Article 275, paragraph 2 TFEU in a restrictive manner (Kellerbauer, Klamert & Tomkin, 2024) and the compliance control which, according to Article 40 TEU, included restrictive measures aimed at natural and/or legal persons (Garbagnati Ketvel, 2006; Van Elsuwege, 2017; Schmidt, 2020). In this way, it highlights for member states a jurisdictional scrutiny and a jurisprudence that allows for the possibility of expansion based on Article 19 TEU (Schmidt, 2020). Accordingly, CFSP-CSDP appears as an asymmetric structure of a strategy that remains exempt from effective democratic and jurisdictional control, also highlighting the tensions between regulatory architecture and decision-making practice. Lastly, Article 21 TEU calls for respect for democratic principles and for external action aimed at legitimizing the policy of one's own choices.

The role of the High Representative as a national figure within supranational logics also faces structural limitations that are not inherent in the plurality of roles such as the European Commission and the Foreign Affairs Council. Just as the Minister of Foreign Affairs of the Union has not actually had a true common defense portfolio. Article 42, paragraph 4 TEU (Kellerbauer, Klamert & Tomkin, 2024) thus entrusts the High Representative with proposal and coordination functions within the European Commission without granting operational autonomy (Piris, 2010; Schmid, 2012). The High Representative does not have a unitary political mandate but also risks entering into conflicts of competence. On the other hand, we have the Secretary General of NATO, who enjoys autonomy and precise functions (Hendrickson, 2014; Sperling & Webber, 2025). Title V thus highlights the scope and limits of the capacity for

strategic direction. And this is how the management of the CFSP missions consolidates and highlights the configuration of a two-headed decision-making structure model between the High Representative and the President of the European Council, with the related overlaps and fragmentations of the institutions that thus effectively weaken the external action of the Union.

7. Conclusions

From the previous paragraphs, we have understood that the CFSP and CSDP policies present elements of positive and negative evaluation. What is still missing is full implementation in this sector. The relative coexistence of all national armies and the expression of state sovereignty for governments establishing a common defense imply a compression of national military competences. For some states, there is a distinction between regimes, such as Denmark, which, according to Protocol No. 22 annexed to the treaties, declares non-participation in the development of its own decisions and the reports of the Union, which ultimately highlight its defense policy (Butler, 2020). For other states, such as Finland, Austria, Ireland, Malta and Sweden, policies of neutrality are evident, with specific limitations. This is a paradox of a strategic bond that unites member states of the Union, especially the United States. Washington has always guaranteed collective security, which strengthened the relative European dependence of states that also tend not to increase their development towards true strategic autonomy. In times of international stability, states are oriented towards the protection that comes from NATO, effectively renouncing an independent strategy on the political and operational level.

The ongoing tensions are necessary for a political and strategic understanding between Germany and France, the two powers capable of influencing the European balance of power. France, in particular, has nuclear weapons, as well as a permanent seat with veto power on the UN Security Council. The debate over overcoming the unanimity rule and decisions regarding defense remains heated. Nowadays, each government is granted the power of veto, which favors collective interests and reinforces the prohibition simultaneously expressed in Article 48, paragraph 7 TEU (Kellerbauer, Klamert & Tomkin, 2024) as an impediment to the use of a bridging mechanism for these types of areas.

Qualified majority voting transforms the decision-making process into a reform that requires fundamental institutional changes capable of strengthening governance, thereby guaranteeing the Union's industrial and technological autonomy, especially in the conventional sector. This creates a balance of neutral states' positions that respects their choices and compromises the overall effectiveness of a common policy. The height of the Ukrainian war has made us all understand the need for rapid decisions (Koncewicz, 2022), as well as the inadequacy of solutions based on one-size-fits-all compromises, thus improving coordination between national armies (Blockmans, 2021). The challenges lie in overcoming particular interests to prioritize common strategic choices. In an evolutionary and integrative manner, the stages of the treaties have distinguished a gradual definition of defense policy and the creation of a true common defense, which thus constitutes a further step towards a unanimous decision by the European Council, which has ratified a national level according to internal constitutional provisions, as provided for in Article 42, paragraph 1. 2 TEU (Kellerbauer, Klamert & Tomkin, 2024). This is a univocal definition of common defense that requires member states to determine the modalities and theoretical content of creating a European army under a cooperative and coordinated military framework that respects current instruments, such as the missions based on the former Article 43 TEU (Kellerbauer, Klamert & Tomkin, 2024).

Another important scenario that always raises questions is the replacement and integration of national armed forces for the institutional bodies responsible for decision-making rules for armaments that are under the responsibility of the Union according to Article 346 TFEU (Kellerbauer, Klamert & Tomkin, 2024). This relevant issue also concerns territorial defense, external operations, the use of armed forces and internal defense. This is a step towards common defense that overcomes many ambiguities in this regard, also making territorial protection compatible with an integration process already underway according to Article 21, letter a) TEU (Kellerbauer, Klamert & Tomkin, 2024), which allows the Union to protect its security, independence and integrity. The relative defense of the territories of the member states is formally included in the main objectives of the Union,

which decides to establish a common defense. There are many legal bases that directly affects the security of the Union. As well as the treaties that allow for joint protection of national security through joint instruments. The common strategy is that of a common defense, which remains and presupposes institutional as well as political quality. This is obviously very difficult. The strategy of a horizontal defense remains distant and presupposes a large measure for national budgets, as implemented by a political consensus of public opinion. The European Commission's ongoing initiatives are adopted quickly, but discussions remain open requiring further clarification on the implementation of a predetermined and precise practice.

Finally, the White Paper for European Defence Readiness 2030 updated and included the provisions of the ReArm Europe Act 2025, a strategic operational framework to strengthen Europe's deterrent capacity. A distinction is made between short-term interventions aimed at supporting Ukraine, as well as medium-to long-term initiatives. This creates an autonomous capacity. The goal of building a European defence system for member states that retain individual responsibility leads to an additional level of collective action that exploits the opportunity for the single market established and implemented pursuant to Article 42, paragraph 2 TEU (Kellerbauer, Klamert & Tomkin, 2024), that is an important step towards defence integration.

Still unresolved issues include the related issues regarding relations with NATO, especially in times of crisis and the foundation of collective defense in Europe. Each European initiative, complementary to the Atlantic Alliance, lays the foundation for a perspective that reaffirms the American administration's commitment emphasizing the relative need for a fair distribution of financial burdens among members. The implementation of its adoption over the coming years demonstrates the ongoing developments toward significant steps in the evolution and integration of a European balance and contribution through NATO. This paves the way for a partial replacement of a capability and responsibility primarily on the part of the Union and the security it can offer its member states through its choices.

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Land, Livelihoods, and Human Rights: A Legal Analysis of the Balaalo Situation in Northern Uganda Under Trespass to Land Law

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Abstract

The study examines the Balaalo pastoralist situation in Northern Uganda, focusing on the legal and human rights implications of land disputes under the law of trespass to land. The presence of Balaalo communities has generated tensions over land rights, communal ownership, and individual property interests, challenging both Ugandan customary and statutory legal frameworks as well as national and international human rights standards (Green, 2008). The study aims to analyze the Balaalo situation within the context of Ugandan trespass law, assess the human rights implications for affected communities, and identify legal and policy gaps that exacerbate land-related conflicts. Employing a qualitative case study design, the research utilizes interviews with local authorities, review of legal documents and court cases, and thematic analysis of the collected data. Findings reveal that conflicts largely arise from the intersection of customary land tenure and statutory law, with significant gaps in the enforcement of property rights, inconsistent legal and institutional responses, and human rights concerns related to evictions and restrictions on pastoralist mobility. The study concludes that harmonizing trespass law with human rights standards is essential and recommends policy reforms to enhance legal clarity, the establishment of inclusive adjudication mechanisms, promotion of community mediation efforts, and the development of improved cadastral systems to mitigate conflict while protecting the livelihoods and rights of all stakeholders.

1. Introduction

The Balaalo situation in Northern Uganda exemplifies a complex intersection between traditional nomadic practices and contemporary land-rights paradigms. This study seeks to illuminate the multifaceted and often legally contested landscape, shaped by statutory frameworks, customary land tenure, and human rights considerations. Uganda's legal system, rooted in the 1995 Constitution, statutory law, and customary practices (Enemark & McLaren, 2018), provides the backdrop against which these tensions unfold.

This chapter lays the foundation for the study by contextualizing the core problem and outlining its significance. It examines the challenges faced by the Balaalo community in securing land rights, sustaining livelihoods, and protecting human rights within the framework of trespass to land law (Green, 2008). The chapter further

presents the study objectives, research questions, and scope, while highlighting the theoretical and legal frameworks that guide the analysis. By establishing this context, the chapter demonstrates the relevance of the study to both legal scholarship and practical interventions in land disputes.

1.1 Context and Background

Since the early 2000s, the Balaalo pastoralists have frequently migrated from the western regions of Uganda to the northern areas like Acholi, Lango, and West Nile (Green, 2008). This movement often occurs in pursuit of fertile grazing lands, driven by periodic droughts and pasture scarcity in their traditional homelands (Kaimba et al., 2011). The Balaalo's lifestyle is inextricably linked to pastoral mobility, a necessity for sustainable cattle rearing (Turner & Schlecht, 2019). However, this mobility often leads to the encroachment of communal lands traditionally used for agriculture, precipitating conflict with sedentary, agrarian communities (Green, 2008).

Uganda's land tenure system is characterized by a duality of traditional and statutory practices. The 1995 Constitution of Uganda, specifically Articles 237 and 26, provides the constitutional foundation for land governance. Article 237 (3) recognizes customary tenure, which entails communal ownership without formal documentation. Customary land tenure is predominant in Northern Uganda and operates through family and clan-based systems, where land is often allocated based on lineage rather than individual ownership (Muhindo, 2018).

In contrast, statutory systems such as freehold, leasehold, and Mailo tenure involve registered and legally recognized land ownership (Muhindo, 2018). Tensions arise when statutory land reforms, often imposed without consideration of customary practices, disrupt traditional land use patterns (Muhindo, 2018). The Penal Code Act, Cap 128, especially its provisions on trespass, further complicates these scenarios by introducing legal repercussions for unauthorized land use, often affecting pastoral groups like the Balaalo (Asad et al., 2024).

The historical context of land disputes in Uganda is deeply rooted in colonial legacies and subsequent legal reforms (Asad et al., 2024). The introduction of Mailo land by the British colonial administration monetized and individualized land ownership, a stark departure from Uganda's communal land traditions (Asad et al., 2024). Post-independence reforms meant to integrate these systems have often faltered, leaving a legacy of unresolved land disputes (Asad et al., 2024).

Government interventions, such as the eviction orders executed under Presidential directives in the 2010s and 2020s, underscore the state's efforts to mediate these conflicts. However, such interventions often exacerbate tensions due to the lack of compensation for displaced pastoralists and the unilateral imposition of statutory law over customary rights, as seen in landmark cases such as Attorney General v. Patrick Muwanga and subsequent rulings addressing land occupation and rights (Oloka-Onyango, 2017).

1.1.1 Problem Statement

Conflicts typically arise where Balaalo settlements intersect with host community lands. Issues of trespass, crop destruction, and evictions are frequent, prompting legal battles that pit statutory law against customary practices. The tension is particularly evident when Balaalo pastoralists are accused of occupying land without formal titles, a scenario that disregards the historical use and occupation by these groups under customary tenure (Nakayi & Kirya, 2017).

The legal tension extends to human rights issues. The enforcement of statutory laws often fails to consider the pastoral community's rights to livelihood and movement, conflicting with Article 22 of the Constitution, which guarantees protection against arbitrary eviction. The eviction cases, such as those decided by the High Court in the wake of Executive Orders against nomadic settlers, highlight the disconnect between legal enforcement and human rights protection, compounding the grievances of both pastoralists and indigenous communities (Nakayi, 2023).

The challenges inherent in balancing enforcement of land laws with human rights protections are emblematic of larger systemic issues within Uganda's legal framework. Customary laws, which protect communal rights and traditional land use, often clash with statutory provisions that emphasize individually registered land rights. Consequently, the legal ambiguities and inconsistent enforcement contribute to the perpetuation of disputes, creating an urgent need for comprehensive policy reforms and adjudication mechanisms that respect both legal traditions and human rights obligations.

By and large, the Balaalo conundrum in Northern Uganda encapsulates the broader struggle between adherence to statutory law, respect for customary practices, and the safeguarding of human rights. Addressing these conflicts requires nuanced understanding and strategic reforms that harmonize diverse land tenure systems, ensuring equitable solutions for all stakeholders. Incorporating perspectives from legal authorities, policymakers, and affected communities is crucial in crafting frameworks that reflect Uganda's unique socio-legal landscape and promote sustainable peace in regions fraught with historical and emergent land conflicts.

1.2 Purpose of the Study

The purpose of this study is to critically examine how Ugandan law, specifically trespass to land, property law, and constitutional human rights protections, responds to land-related disputes involving Balaalo pastoralists and host communities in Northern Uganda. By situating these disputes within both statutory and customary legal frameworks, the study seeks to evaluate whether existing legal and institutional mechanisms adequately balance land rights, livelihood protection, and human rights obligations.

1.3 Research Objectives

The study is guided by the following objectives:

1) To examine the legal frameworks governing trespass to land in Uganda, with particular attention to their application within customary land tenure systems.
2) To assess the human rights implications of land disputes for Balaalo pastoralists and host communities, including impacts on livelihoods, freedom of movement, and property rights.
3) To analyze institutional and administrative responses to land disputes, including the roles of local authorities, courts, and central government interventions.
4) To identify gaps and inconsistencies in law, policy, and enforcement that exacerbate land-related tensions and undermine effective conflict resolution.

1.4 Significance of the Study

This study makes an important contribution to scholarship and practice in several respects. Academically, it bridges legal and human rights literature by offering an integrated analysis of statutory law, customary land tenure, and rights-based frameworks in the context of pastoralist land conflicts. From a policy perspective, the study provides evidence-based insights to inform legal reform, human rights protection strategies, and community-level mediation initiatives aimed at reducing land-related conflicts. Adopting a rights-based perspective, the study foregrounds the protection of livelihoods, freedom of movement, and equitable access to land as central to sustainable conflict resolution.

1.5 Scope and Limitations of the Study

The study is geographically confined to Northern Uganda, with particular focus on the Acholi, Lango, and West Nile sub-regions, where Balaalo-related land disputes have been most pronounced. The population of interest includes Balaalo pastoralists, host community landowners, local government officials, and relevant legal authorities. Thematically, the study is limited to land disputes arising under trespass law, their interaction with customary land tenure systems, associated human rights concerns, and institutional responses. While the findings provide valuable legal and policy insights, they may not fully capture the dynamics of pastoralist land conflicts in other regions or under different socio-political contexts.

2. Methodology

This study employed a **qualitative methodological framework** that combines doctrinal legal analysis with an empirical case study approach to investigate the Balaalo pastoralist situation in Northern Uganda, focusing on trespass to land law, its enforcement, and human rights implications. The methodology was designed to ensure that legal norms, institutional practices, and lived experiences are examined in an integrated and contextually grounded manner. Drawing on established qualitative research principles (Creswell & Poth, 2017), this chapter describes the research design, population, and sampling strategy, data collection and analysis procedures, ethical safeguards, and limitations. Emphasis is placed on methodological rigor, reliability, validity, and adherence to human rights standards, in line with international research ethics frameworks.

2.1 Research Design

The research adopted a qualitative case study design, appropriate for capturing complex, context-dependent phenomena where law, customary practices, and social dynamics intersect. Qualitative case study methodology allows in-depth exploration of legal phenomena in their real-world settings, particularly where multiple sources of evidence are available (Yin, 2018).

A doctrinal legal analysis formed the first component of the research design. This involved a systematic examination of statutory and constitutional provisions, including the *Constitution of the Republic of Uganda (1995, as amended)*, the *Penal Code Act (Cap. 128)*, and principles of the law of torts relating to trespass to land. Judicial decisions from Uganda and comparative jurisdictions were analyzed to identify legal norms, interpretive trends, and gaps affecting pastoralist land rights. This doctrinal component was informed by internationally recognized legal research standards.

The second component, the case study approach, contextualized doctrinal findings within lived experience by engaging directly with stakeholders affected by land conflicts. Case studies enable examination of the dynamic interaction between law, policy, and community practices**,** a mode of inquiry recommended in pastoralism and land governance research (AU *Framework on Land Policy in Africa*; FAO *Voluntary Guidelines on the Responsible Governance of Tenure*) ("Framework and Guidelines on Land Policy in Africa," 2011). By integrating doctrinal analysis with empirical data, the design ensured that research findings reflect both *legal prescriptions* and *law in action*.

This combined approach allowed the study to address its core objectives: (1) examining the legal framework governing trespass to land; (2) assessing human rights implications for pastoralists and host communities; (3) analyzing institutional responses to land disputes; and (4) identifying gaps in law and policy that exacerbate conflict.

2.2 Target Population and Sampling

The study's target population comprised eighteen participants, purposively selected to capture a diverse range of perspectives on Balaalo-related land disputes in Northern Uganda. Participants were drawn from four key stakeholder groups: Local Authorities, Community Leaders, Legal Practitioners, and Balaalo Pastoralists. This selection ensured representation across administrative, customary, legal, and lived-experience perspectives, allowing the study to triangulate data and produce robust, contextually grounded findings (Creswell & Poth, 2017; Miles et al., 2014).

Local Authorities included district officials, sub-county representatives, and local council leaders responsible for implementing land laws and managing disputes at the grassroots level. Their inclusion aligns with Uganda's statutory framework for local governance under the Local Government Act, Cap. 243, which vests administrative responsibility for land management in local councils and officials (Republic of Uganda, 1997). These participants were purposively selected to provide insights into the enforcement of statutory provisions, including the Land Act (Cap. 236) and trespass law, accounting for 27.8% of the total sample.

Community Leaders were drawn from elders and leaders of host communities who manage or represent customary land interests. They provided perspectives on communal land management, customary tenure systems, and local conflict resolution mechanisms, also representing 27.8% of the participants. Their inclusion reflects the dual legal system in Uganda, where customary land tenure coexists with statutory land law and where local leaders play a critical role in mediating disputes (Anying & Gausset, 2017).

Legal Practitioners, including lawyers, magistrates, and legal officers, offered expert interpretations of statutory law, judicial precedents, and human rights standards. This group constituted 22.2% of the total sample. They ensured that the study incorporated formal legal perspectives, referencing instruments such as the 1995 Constitution of the Republic of Uganda (as amended), the Penal Code Act (Cap. 128), and relevant principles of tort law relating to trespass (Dennison, 2017; Nanima, 2016).

Balaalo Pastoralists were included to provide firsthand accounts of mobility restrictions, access to land, and evictions, representing 22.2% of the participants. Their experiences highlighted the practical and social consequences of land disputes, aligning with research on pastoralist livelihoods in Africa and Uganda, which underscores the vulnerability of nomadic groups to land tenure conflicts and human rights

violations (Andy, 2013; Sakamoto, 2016; Homewood et al., 2009).

Participants were recruited through official channels, including district offices, community associations, and legal networks, and participation was voluntary. Purposive sampling, a widely accepted non-probability technique in qualitative research, was employed to identify individuals with direct involvement or expert knowledge of Balaalo land issues (Creswell & Poth, 2017). Inclusion criteria required participants to have substantial experience with land disputes, pastoralist mobility, or customary land governance, while individuals lacking this experience were excluded. This approach emphasizes depth and contextual richness rather than statistical generalization, aligning with the goals of qualitative research (Patton, 2014).

The composition of participants and sampling strategy is summarized in Table 1:

Table 1. Study Participants by Category, Number, Role, and Sampling Technique

Category	Sub-Category / Role	Number of Participants (n)	Percentage of Total Sample (%)	Rationale for Selection	Sampling Technique
Local Authorities	District officials, sub-county leaders	5	27.80%	Responsible for statutory enforcement of land laws; provide administrative perspectives	Purposive
Community Leaders	Elders and customary land leaders	5	27.80%	Represent customary tenure systems and local conflict resolution mechanisms	Purposive
Legal Practitioners	Lawyers, magistrates, legal officers	4	22.20%	Offer expert interpretation of statutory law, case precedents, and judicial trends	Purposive
Balaalo Pastoralists	Pastoralist community members	4	22.20%	Provide firsthand experiences of mobility constraints, evictions, and land access	Purposive
Total		18	100%		

Source: Primary Data, 2026.

Explanation of the Table:

This table provides a clear overview of participant composition, the sampling technique, and the rationale for inclusion. Percentages indicate the proportional representation of each group, allowing readers to understand how perspectives were balanced across stakeholders.

- Local Authorities (27.8%) contributed administrative and institutional insights on the enforcement of land laws and conflict resolution practices.
- Community Leaders (27.8%) provided insights on customary land tenure, community management, and local conflict resolution, reflecting Uganda's dual legal system (The Land Act, Cap. 236; Anying & Gausset, 2017).
- Legal Practitioners (22.2%) offered expert interpretations of statutory provisions, judicial precedents, and human rights frameworks, grounding the study in formal law (Constitution of

Uganda, 1995, as amended; Nakayi & Kirya, 2017).

- Balaalo Pastoralists (22.2%) highlighted the human and social dimensions of land disputes, providing critical context for understanding mobility, access, and livelihoods (Andy, 2013; Sakamoto, 2016; Homewood et al., 2009).

By combining purposive selection with careful stakeholder representation, the study ensured comprehensive and triangulated data collection across institutional, legal, customary, and lived-experience perspectives. This sampling strategy enhances the credibility, reliability, and depth of the findings, providing a nuanced understanding of land disputes, human rights issues, and pastoralist livelihoods in Northern Uganda.

2.3 Data Collection Procedures

Data were collected using four complementary qualitative methods to capture legal norms, institutional practices, and lived experiences:

- **Semi-structured interviews** were conducted with representatives from all stakeholder groups. Interviews were designed to elicit nuanced information on trespass law enforcement, land access, dispute resolution mechanisms, and human rights implications. Each interview lasted approximately 30–60 minutes, conducted in English or relevant local languages with translation support where necessary.
- **Focus Group Discussions (FGDs)** supplemented individual interviews by capturing collective perceptions and shared experiences. Separate FGDs were held with host community members and with pastoralist groups to encourage open discussion and cross-validation of views.
- **Document Review** involved systematic examination of legal texts, constitutional provisions, government policy documents, directives, and media reports to establish the formal legal and policy framework governing land and human rights. This review was guided by the protocol recommended in legal and policy research methodologies (Dalglish et al., 2020).
- **Legal Case Analysis** engaged publicly reported cases involving land trespass and human rights claims to assess judicial reasoning, remedies, and consistency in legal interpretation. Analysis considered both Ugandan case law and relevant comparative jurisprudence.

Instrument pre-testing was conducted with select legal practitioners and community representatives to refine interview and discussion guides for clarity and relevance.

All data were digitally recorded, securely stored, and encrypted. Transcripts were anonymized to protect participant identities. Data access was restricted to the research team in accordance with ethical standards outlined by internationally recognized guidelines (Berkowitz & Delacour, 2022; Wilms et al., 2018).

2.4 Data Analysis

Data analysis was conducted through a complementary thematic and doctrinal analytical process. Empirical data from interviews and FGDs were transcribed verbatim and analyzed thematically to identify recurring patterns, narratives, and concerns related to land use, conflict dynamics, and rights violations. Coding was facilitated using NVivo 12 software, consistent with qualitative research practice (Miles et al., 2014).

Doctrinal legal analysis involved the interpretation of statutes, judicial decisions, and policy texts to elucidate legal principles governing trespass and human rights protections. Findings from thematic and doctrinal analyses were triangulated to reconcile discrepancies between legal prescriptions and lived realities, enhancing internal validity.

Trustworthiness was strengthened through member checking, in which participants reviewed preliminary interpretations for accuracy, and peer debriefing with academic and legal experts. An audit trail was maintained, documenting data collection and analytical decisions.

2.5 Ethical Considerations

Ethical integrity was central to the study. Before fieldwork, ethical approval was obtained from an institutional review board, ensuring compliance with formal research ethics protocols. Informed consent was obtained from all participants following a clear explanation of the study's purpose, procedures, potential risks, and benefits. Confidentiality was maintained through

anonymization and secure data storage. Measures were taken to minimize harm, stress, or social repercussions, particularly for vulnerable pastoralist participants. Research procedures were aligned with national law and international human rights standards, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (Gostin, 2001).

Potential conflicts of interest were disclosed and managed transparently, and researchers maintained neutrality in data collection and interpretation.

2.6 Limitations of the Methodology

While the methodology was rigorous, limitations are acknowledged. The purposively selected sample and non-randomized design limit statistical generalizability. Participants may have underreported experiences due to recall limitations or social desirability bias. The doctrinal focus may not fully capture unwritten customary norms outside formal legal texts. These limitations are mitigated through triangulation and trustworthiness measures, and they are consistent with the epistemological foundations of qualitative inquiry.

2.7 Presentation of Findings

Findings were presented thematically, structured around the study's core objectives. Verbatim quotations were used to illustrate lived experiences, while legal texts and judicial decisions provided authoritative grounding. This thematic presentation facilitated integration of normative legal standards with empirical observations, enabling readers to understand the interplay between statutory law, customary practices, and everyday realities of pastoralist and host communities.

3. Literature Review

This literature review interrogates the intersection of trespass to land law, customary land tenure, human rights, and institutional governance in Uganda, with specific reference to the Balaalo pastoralist situation in Northern Uganda. Anchored in the study's objectives, the review strategically synthesizes legal doctrine, human rights theory, and empirical scholarship to establish both the scholarly consensus and the unresolved tensions that necessitate the present study. The purpose is to identify gaps in knowledge, establish the conceptual foundation for the study, and justify the research questions and methodology employed.

3.1 Legal Frameworks Governing Trespass to Land Within Customary Tenure Systems

Trespass to land occupies a central position in Ugandan property law, functioning as a legal mechanism for protecting possession and maintaining public order. Under Ugandan law, trespass is recognized both as a civil wrong under the law of torts and as a criminal offence under the Penal Code Act, Cap. 128, particularly sections dealing with unlawful entry and interference with property. Doctrinally, trespass emphasizes the protection of possession rather than ownership, requiring no proof of damage once unlawful entry is established (Penal Code Act, Cap. 128).

However, this doctrinal clarity becomes legally fragile when applied within customary land tenure systems, which dominate landholding in Northern Uganda. Article 237 of the 1995 Constitution of Uganda (Uganda, 1995) vests land ownership in the citizens of Uganda and explicitly recognizes customary tenure as a lawful form of landholding. Article 237(3)(a) (Uganda, 1995) further affirms that land under customary tenure shall be governed by customs, traditions, and practices of the communities concerned. This constitutional recognition fundamentally alters the context in which land-related law must be interpreted, creating tensions between customary and written law, and reshaping dispute resolution (Mujuzi, 2020; Anying & Gausset, 2017).

Comparative legal scholarship reveals a shared concern: statutory trespass regimes, rooted in individualistic notions of exclusive possession, often fail to accommodate communal landholding and negotiated access arrangements characteristic of customary tenure systems (Wily, 2011, 2018). This incompatibility is particularly pronounced in pastoralist contexts, where land use is seasonal, mobile, and socially regulated rather than fixed by surveyed boundaries. The literature thus converges on the view that rigid application of trespass law, without constitutional contextualization, risks undermining the very customary systems the Constitution seeks to protect.

3.2 Human Rights Implications of Land Disputes for Pastoralists and Host Communities

Land disputes involving pastoralist communities implicate a broad spectrum of human rights protected under both domestic and international

law. The 1995 Constitution of Uganda, under Articles 20 and 21, guarantees the inherent dignity and equality of all persons (Mujuzi, 2023), while Article 26 protects the right to property and prohibits deprivation except in accordance with the law and upon prompt, fair compensation (Kaalund, 2023). These provisions are reinforced by Uganda's obligations under international and regional instruments such as the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights, which recognize property, livelihood, freedom of movement, and cultural rights (Ahimbisibwe, 2017).

Peer-reviewed studies consistently demonstrate that land-related conflicts disproportionately affect pastoralist livelihoods, food security, and cultural survival (Homewood et al., 2009; Kaalund, M., 2023; Andy, 2013; Letai & Lind, 2013). For the Balaalo, mobility is not merely an economic strategy but a cultural and ecological necessity. Yet statutory enforcement of trespass laws frequently criminalizes pastoral movement, framing it as an unlawful intrusion rather than a legitimate land-use practice rooted in customary norms (Michael & Pablo, 2022).

While there is broad agreement that both pastoralists and host communities possess legitimate rights and interests, the literature reveals a normative tension. One strand prioritizes sedentary agricultural property rights as essential for food security and investment, while another emphasizes the collective and livelihood rights of pastoralists as protected minorities. Human rights scholars argue that failure to balance these interests through proportional and participatory mechanisms results in violations of Articles 20, 21, and 36 of the Constitution (Kameri-Mbote, P., 2013), the latter specifically safeguarding minority rights (Ashukem, 2019). This unresolved tension underscores the need for a rights-based legal framework capable of mediating competing land claims.

3.3 Institutional and Administrative Responses to Land Disputes

Institutional responses to land disputes in Uganda have attracted sustained scholarly criticism. Local government authorities, traditional leaders, courts, and central government agencies all play roles in land governance, yet their mandates frequently overlap or conflict. Empirical studies indicate that local authorities often lack technical capacity and legal clarity to adjudicate complex customary land disputes, while customary institutions are increasingly marginalized despite constitutional recognition (Nuwagaba et al., 2024).

Courts, though constitutionally empowered under Article 126 to administer justice in conformity with law and equity, face structural barriers including evidentiary challenges in proving customary ownership, high litigation costs, and procedural delays. As a result, administrative and executive interventions, such as eviction orders and security-led enforcement, have become common responses to pastoralist land conflicts.

The literature strongly critiques these approaches for bypassing due process and undermining judicial authority. Legal commentators argue that executive actions that disregard Articles 26 and 28 of the Constitution (Michael, O., & Pablo, M., 2022), protecting property rights and the right to a fair hearing, risk rendering land governance arbitrary and politicized (Fenster, 2006). Comparative studies from Kenya and Tanzania reinforce this critique, demonstrating that coercive administrative responses tend to entrench grievances rather than resolve disputes (Demarest, 2014; Boone, 2014).

3.4 Gaps, Inconsistencies, and Enforcement Failures

Despite extensive scholarship on land conflicts, pastoralism, and customary tenure, there remains a striking absence of integrated legal-human rights analysis focused specifically on trespass to land. Much of the existing literature treats statutory law, customary systems, and human rights as parallel rather than intersecting regimes. This fragmentation obscures how constitutional guarantees, penal provisions, and administrative practices interact in practice.

Moreover, enforcement inconsistencies are well-documented but insufficiently theorized. Scholars note that similar acts of land occupation may be treated as lawful in one context and criminal in another, depending on political influence, ethnicity, or economic interests (Jenss, 2018). Policy reforms have largely failed to address these enforcement gaps, focusing instead on legislative amendments without strengthening institutional coordination or accountability.

This gap is particularly acute in Northern Uganda, where post-conflict land restitution,

weak documentation, and pastoral mobility converge to produce heightened vulnerability. The absence of coherent jurisprudence harmonizing trespass law with customary tenure and human rights norms continues to exacerbate land-related tensions.

3.5 Connecting the Literature to the Present Study

Against this scholarly backdrop, the present study positions itself as a necessary and timely intervention. By systematically examining trespass to land law through the lenses of constitutional supremacy, customary tenure, and human rights obligations, the study bridges doctrinal legal analysis with lived realities. It responds directly to calls within the literature for context-sensitive, rights-based approaches to land governance.

This research advances knowledge by interrogating not only what the law states, but how it is enforced, contested, and experienced by Balaalo pastoralists and host communities. In doing so, it contributes a legally grounded, human rights-centered framework capable of informing judicial reasoning, policy reform, and sustainable conflict resolution in Uganda and comparable jurisdictions.

4. Findings, Analysis, and Discussion

This chapter presents the study's empirical and doctrinal findings, interprets their significance, and situates them within broader legal, social, and human rights contexts. By integrating analysis with discussion, the chapter provides a holistic understanding of the challenges faced by the Balaalo community in Northern Uganda regarding land rights, livelihoods, and human rights under the legal framework of trespass to land law.

4.1 Trespass Conflicts and Eviction Orders

The results of the present study support the hypothesis that land-related conflicts involving Balaalo pastoralists in Northern Uganda are fundamentally driven by the misapplication and over-criminalization of trespass law within landscapes predominantly governed by customary land tenure systems. Empirical evidence demonstrates that disputes frequently emerge when pastoral mobility intersects with communally held land, where ownership is collective, boundaries are fluid, and access is traditionally negotiated through social norms rather than formal demarcation. These findings are consistent with prior scholarship indicating that formal legal provisions are routinely invoked to resolve disputes that are essentially civil, customary, and relational in nature (Wily, 2018; Boone, 2014).

Trespass conflicts and eviction orders emerged as the most visible and recurrent manifestation of these disputes. Host communities commonly relied on statutory notions of exclusive possession embedded in the Land Act, Cap. 227 (Gay, 2016), particularly provisions criminalizing unlawful entry onto land, to justify the removal of pastoralists. In contrast, Balaalo respondents grounded their claims in customary practices of seasonal access, negotiated grazing arrangements, and historical mobility patterns, none of which are explicitly accommodated within Uganda's formal trespass regime. This legal dissonance mirrors broader national trends identified in earlier studies on land conflict escalation in Uganda, where statutory enforcement collides with customary tenure realities (Rugadya, 2008; Wily, 2018).

Our analysis highlights a significant correlation between administratively issued eviction orders and the escalation rather than resolution of land conflicts. In practice, Local Council I (LC1) leaders, Resident District Commissioners (RDCs), and district security committees frequently issued eviction directives without judicial oversight or procedural safeguards. This occurs notwithstanding Article 28 of the Constitution of the Republic of Uganda (1995) (Uganda, 1995), which guarantees the right to a fair hearing. This pattern suggests that executive-led enforcement, rather than court-sanctioned adjudication, plays a pivotal role in perpetuating unlawful evictions, community resentment, and retaliatory violence. Jurisprudence such as Justine E. M. N. Lutaaya v. Stirling Civil Engineering Co. Ltd (2002) affirms that trespass is primarily a civil wrong grounded in possession, not criminal liability; however, the study reveals that this doctrinal clarity remains poorly internalized at the local administrative level.

In interpreting these results, it is evident that the conflation of civil trespass with criminal culpability has normalized extra-judicial remedies. The data provide compelling evidence of systemic due process violations, thereby challenging prior assumptions that administrative evictions are effective instruments for maintaining public order. A key implication of these findings is that persistent reliance on

executive action, in place of judicial determination, undermines the rule of law and erodes public confidence in land governance institutions.

4.2 Human Rights Implications: Freedom of Movement and Livelihood Security

The study further establishes that Balaalo-related land disputes generate profound and far-reaching human rights implications for both pastoralists and host communities. The results of the present study support the hypothesis that forced evictions and movement restrictions disproportionately infringe upon constitutionally protected rights, particularly freedom of movement under Article 29 (Uganda, 1995) and the right to property under Article 26 of the Constitution of Uganda (1995) (Uganda, 1995). These findings are consistent with a substantial body of literature demonstrating that pastoralist livelihoods are especially vulnerable to land governance regimes that privilege sedentary land use over mobile production systems (Andy, 2013; Sakamoto, 2016; Smith, 2021).

The study uncovered compelling evidence of human rights violations across all research sites, including forced evictions, destruction of livelihoods, loss of livestock, and restrictions on seasonal grazing mobility. These outcomes align with earlier studies showing that weakly regulated land administration systems disproportionately harm vulnerable populations, particularly pastoralists whose livelihoods depend on mobility and access to shared resources (Kameri-Mbote, 2013; Robinson & Flintan, 2022). Such practices raise serious constitutional concerns not only under Article 26 on property rights but also under Article 45 (Nuwagaba, I. et al., 2024), which preserves inherent rights derived from human dignity.

Our analysis highlights a significant correlation between eviction practices and livelihood insecurity, manifesting through disrupted grazing cycles, livestock mortality, food insecurity, and deepened poverty. This pattern suggests that mobility plays a pivotal role in pastoralist survival strategies and should be recognized as an essential component of livelihood protection rather than construed as a security threat. At the same time, the findings demonstrate that host communities experience parallel rights violations, including crop destruction, environmental degradation, and threats to personal safety. This duality complicates simplistic narratives that frame the conflict as a unidirectional violation and underscores the need for balanced, rights-sensitive interventions.

Contrary to expectations, the analysis reveals that human rights violations are frequently facilitated by state institutions acting beyond their legal mandate. Taken together, the results implicate weak human rights mainstreaming within land administration, security enforcement, and local governance as a critical factor sustaining land-related conflict. These outcomes underscore the need for further inquiry into rights-based land governance frameworks capable of accommodating both pastoral mobility and community land protection.

4.3 Institutional Responses: Local Authorities, Courts, and Central Government

The findings demonstrate that institutional responses to Balaalo-related land disputes are fragmented, inconsistent, and frequently contradictory. The results of the present study support the hypothesis that informal institutions act swiftly but unlawfully, while formal judicial institutions act lawfully but remain largely inaccessible to affected populations. These findings align with existing literature on legal pluralism, which cautions that poorly coordinated institutional arrangements often deepen enforcement gaps and exacerbate conflict rather than resolve it (Thamari-odhiambo, 2021; Valkonen, 2020).

Local Council I (LC1) courts routinely issued eviction orders without clear jurisdiction, written decisions, or procedural safeguards, while formal courts and administrative directives from central government institutions occasionally contradicted these local determinations (Kerrigan et al., 2012; Mujuzi, 2020).

Our analysis highlights a significant correlation between reliance on local administrative mechanisms and procedural irregularities, including the absence of mediation, lack of legal representation, and disregard for jurisdictional limits prescribed under the Local Council Courts Act. This pattern suggests that institutional expediency plays a pivotal role in undermining constitutional safeguards, particularly Article 126 of the Constitution (Uganda & Uganda, 1995), which mandates that justice be administered in conformity with the law and in a manner that promotes substantive justice.

Contrary to expectations, the analysis reveals that central government interventions, such as presidential eviction directives, often intensify legal uncertainty by bypassing both customary dispute resolution mechanisms and formal courts. The data provide compelling evidence of institutional overreach, challenging prior assumptions that executive intervention necessarily restores order. A key implication of these findings is the urgent need to recalibrate institutional roles and restore judicial primacy in land dispute resolution.

4.4 Statutory–Customary Law Disconnect and Legal Gaps

The study reveals a persistent and structural disconnect between statutory land law and customary land governance. The results of the present study support the hypothesis that Uganda's legal framework inadequately reconciles customary tenure, recognized under the Land Act, Cap. 236, with penal sanctions for trespass that remain individualistic and rigid. These findings are consistent with previous literature indicating that unresolved legal pluralism fuels land insecurity in post-colonial states (Thamari-odhiambo, 2021).

Our analysis highlights a significant correlation between the absence of legally recognized grazing corridors and discretionary enforcement by state actors. This pattern suggests that legal ambiguity plays a pivotal role in enabling the selective application of trespass laws, often to the detriment of marginalized pastoral communities. In interpreting these results, it is evident that statutory silence on pastoral mobility has created enforcement vacuums that are filled by coercive administrative practices rather than rights-based solutions.

4.5 Interpretation and Broader Implications

Taken together, the results implicate legal fragmentation and institutional inconsistency as critical drivers of the persistence of Balaalo-related land conflicts. The data provide compelling evidence for the need to reconceptualize trespass law within a broader human rights and livelihood protection framework, thereby challenging prior assumptions that criminal enforcement alone can secure land order. A key implication of these findings is that sustainable conflict resolution requires deliberate harmonization of statutory law, customary norms, and constitutional human rights guarantees.

These outcomes underscore the need for further investigation into integrated land governance models that prioritize mediation, legal clarity, and access to justice. Absent comprehensive reforms aligning land law enforcement with human rights standards, the tension between statutory authority and lived realities will continue to undermine social cohesion and the legitimacy of Uganda's land governance regime.

5. Conclusions and Recommendations

The final chapter synthesizes the study's key insights, drawing conclusions about the legal, social, and human rights dimensions of land trespass affecting the Balaalo community. It offers practical recommendations for policymakers, legal practitioners, and community leaders to address land disputes, protect livelihoods, and uphold human rights. The chapter also identifies avenues for future research, emphasizing the need for continuous monitoring of land conflicts and the integration of customary and statutory legal frameworks to promote justice and sustainable land use.

5.1 Conclusions

This study concludes that land disputes involving Balaalo pastoralists in Northern Uganda are not merely episodic conflicts over land use, but manifestations of deeper structural weaknesses within Uganda's land governance and legal enforcement framework. The findings demonstrate that the persistent invocation of trespass law in contexts dominated by customary tenure exposes fundamental legal ambiguities that undermine both conflict resolution and human rights protection. Rather than functioning as a neutral legal instrument, trespass law is frequently deployed as a coercive administrative tool, detached from its civil law foundations and constitutional safeguards.

The study further establishes that constitutional protections, customary land norms, and statutory trespass law intersect in complex and often contradictory ways. While the Constitution of Uganda (1995) guarantees property rights, freedom of movement, due process, and human dignity (Kaalund, 2023; Mujuzi, 2023), these guarantees are routinely subordinated to executive enforcement practices that prioritize expediency over legality. Customary land governance, which continues to regulate access and use for large segments of Northern Uganda, remains inadequately integrated into statutory enforcement mechanisms, creating a legal

vacuum in which both pastoralists and host communities are rendered insecure. This disjuncture reflects a broader failure to operationalize legal pluralism in a manner that is coherent, rights-based, and context-responsive.

Moreover, the study concludes that existing institutional responses are fragmented and inconsistent, producing uneven outcomes and deepening vulnerability among affected populations. Local administrative authorities act swiftly but frequently without jurisdiction or procedural safeguards, while formal judicial institutions—though constitutionally mandated—remain inaccessible due to cost, distance, and procedural complexity. Central government interventions, rather than resolving disputes, often compound uncertainty by bypassing established legal processes. Taken together, these institutional deficiencies reveal a governance architecture that struggles to reconcile legality, legitimacy, and human rights in the management of land disputes.

Ultimately, the findings underscore that Balaalo-related land conflicts are symptomatic of a broader crisis of land governance in which law, policy, and practice operate in silos. Without deliberate reform, the continued reliance on coercive enforcement mechanisms will not only perpetuate conflict but also erode constitutionalism, weaken public trust in legal institutions, and entrench cycles of dispossession and resistance.

5.2 Recommendations

Drawing from the empirical findings and legal analysis, the study advances the following interrelated and evidence-based recommendations.

5.2.1 Policy and Legal Reforms

There is an urgent need to clarify and recalibrate Uganda's trespass law to reflect the realities of customary land tenure and pastoral mobility. Statutory reform should explicitly distinguish civil trespass from criminal liability and limit the use of penal sanctions in disputes that are fundamentally civil or customary in nature. Harmonization of the Penal Code, the Land Act, and relevant local government legislation is essential to eliminate contradictory mandates and prevent discretionary abuse by administrative authorities.

Equally important is the integration of explicit human rights safeguards into land governance frameworks. Eviction procedures must be subjected to strict due process requirements, including judicial authorization, consultation, proportionality, and access to remedies, in line with constitutional guarantees and international human rights standards. Institutional actors should be legally required to demonstrate compliance with Articles 26, 28, 29, and 45 of the Constitution before undertaking enforcement actions affecting land and livelihoods.

5.2.2 Community-Level and Institutional Interventions

At the community level, the study recommends the institutionalization of mediation-based dispute resolution mechanisms that draw upon both customary norms and constitutional principles. Community mediation forums, supported by trained mediators and legal officers, can provide accessible and culturally legitimate platforms for resolving disputes before they escalate into coercive evictions.

In parallel, sustained awareness campaigns and community education initiatives should be implemented to enhance understanding of land rights, responsibilities, and legal processes among pastoralists, host communities, and local leaders. Strengthening legal literacy can reduce misinformation, curb opportunistic manipulation of the law, and foster cooperative land-use arrangements grounded in mutual recognition of rights and obligations.

Capacity-building for LC1 courts, district officials, and security actors is also critical. Training programs should emphasize jurisdictional limits, human rights standards, and alternative dispute resolution techniques to reduce procedural irregularities and institutional overreach.

5.2.3 Directions for Future Research

The study identifies several avenues for further research to deepen understanding and inform policy reform. Comparative studies across East African jurisdictions would provide valuable insights into how other countries have addressed pastoralist mobility, customary land tenure, and statutory enforcement. Governance-focused research examining the political economy of land administration could further illuminate the incentives and power dynamics shaping enforcement practices.

Additionally, empirical studies assessing the effectiveness of institutional responses,

particularly mediation, judicial intervention, and administrative coordination, would help identify best practices and scalable models for rights-based land governance. Such research is essential for moving beyond reactive enforcement toward sustainable, inclusive, and legally coherent solutions.

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Autonomy Under Pressure: Fraud, Nullity, and Regulatory Compliance in English Documentary Credit Law

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Abstract

The documentary credit has long been regarded as the lifeblood of international commerce, but it is now facing two distinct and growing structural pressures. Within private law, there are institutional blind spots in the provisions on payment exceptions in the framework of English private law. The fraud exception, as construed in *United City Merchants*, leaves banks institutionally exposed to third-party fraud by requiring beneficiary complicity, while the judicial refusal to recognise a nullity exception in *Montrod* compels banks to honour instruments devoid of legal existence. On the financial regulatory front, the rapid expansion of financial crime regulation, represented by economic sanctions and anti-money laundering, requires banks to undertake the obligation to investigate underlying transactions at the precise point when the principle of autonomy strictly limits the obligations of banks to the facial examination of documents. In view of the fragmented and unprincipled manner in which the English judicial practice has responded to this double pressure, this article proposes a two-way reform path. First, regard legal nullities as the front threshold for compliance review, and establish more objective fraud identification standards; secondly, build a structured regulatory intervention framework to ensure that banks cannot abuse sanctions or anti-money laundering reasons, and their refusal decisions must be based on objective evidence and subject to judicial review. This structured approach seeks to restore commercial certainty to cross-border trade finance by reconciling the mandatory obligations of public regulatory compliance with the foundational trust of private commercial instruments.

Keywords: documentary credits, autonomy principle, fraud exception, nullity exception, financial sanctions, anti-money laundering compliance

1. Introduction

Described in the academic and judicial literature as the lifeblood of international commerce,[1] the documentary credit has for over a century served as the principal institutional mechanism for financing cross-border trade. Its legal

[1] *R.D. Harbottle (Mercantile) Ltd. v National Westminster Bank Ltd.* [1978] Q.B. 146.

architecture rests upon two interlocking doctrines. The autonomy principle, confirmed in *Hamzeh Malas & Sons v British Imex Industries Ltd*,[1] insulates the bank's payment obligation from disputes under the underlying sales contract. The strict compliance rule, encapsulated in Viscount Sumner's formulation in *Equitable Trust Co of New York v Dawson Partners Ltd* that "there is no room for documents which are almost the same, or which will do just as well,"[2] conditions that obligation on documentary precision. Historically, it is these principles that jointly establish the commercial value of letters of credit, making it a core tool to ensure the certainty of transactions and realise the predictable distribution of risks.

This system is now facing pressure from two very different aspects. The first pressure comes from the field of private law. As the House of Lords held in *United City Merchants*,[3] the fraud exception stipulates that the bank can only dishonour a presentation if the document contains a material misrepresentation submitted by the beneficiary knowing that it exists. The strict requirement of English law for beneficiary complicity renders the system institutionally vulnerable to complex third-party fraud. In addition, as the judgement of the Court of Appeal in *Montrod* showed, the bank was forced to fall into a commercially absurd situation to recognise forged documents in order to maintain formal certainty due to its doctrinal unwillingness to recognise nullity exceptions.[4]

The second pressure is different in nature. The rapid expansion of financial crime regulation, especially the sanctions system implemented under the Sanctions and Anti-Money Laundering Act 2018 and the anti-money laundering obligations arising from the Proceeds of Crime Act 2002, forces banks to investigate the substance of the underlying transaction under the condition that the principle of autonomy limits its investigation to the surface content of the document.[5] English courts dealt with this regulatory disruption in a fragmented and ad hoc manner, revolving sanctions disputes through illegality, frustration, and strict contractual construction, and resolving the issue of AML suspensions through implied clauses that allow delays. This has caused a direct structural contradiction: although the principle of autonomy clearly prohibits banks from investigating basic transactions, modern public law forces them to do so, otherwise they will face serious criminal liability.

While existing academic research has explored these pressures in considerable depth, such investigations have largely been conducted in isolation. Fraud and nullity at the private law level, as well as sanctions and anti-money laundering obligations at the public law level, have attracted in-depth analysis. At present, the academic community has not established a comprehensive analytical framework to combine these two pressures for systematic discussion. Although they are different in nature, they are actually closely connected, jointly triggering a systemic crisis against the principle of autonomy. This article aims to fill this gap. It argues that the current challenges facing the English documentary credit framework stem from two structurally completely different sources, namely the restrictions on private law theory and the structural damage caused by regulatory intervention, and each challenge needs to be treated differently.

The structure of the article is as follows. Chapter II introduces the basic principles of autonomy and strict compliance and discusses the commercial pressures that affect its operation. Chapter III compares and analyses the theoretical response to document fraud in English, American, and Singaporean law. Chapter IV discusses the impact of financial sanctions and AML regulation on banks' payment obligations under English law. In response to the above-mentioned double pressures, Chapter V puts forward a two-way reform path: internally, reshape the nullity exception under the framework of strict compliance principles, and establish objective and transaction-centred fraud review standards; externally, build a structured regulatory framework for illegality, so as to embed public law intervention into a transparent and litigable legal system on the basis of maintaining the autonomy principle.

[1] *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 Q.B. 127.

[2] *Equitable Trust Co of New York v Dawson Partners Ltd.* (1927) 27 Ll. L. Rep. 49 (HL) at 52.

[3] *United City Merchants (Investments) Ltd. v Royal Bank of Canada* [1983] 1 A.C. 168 HL at 183.

[4] *Montrod Ltd. v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954; [2002] 1 W.L.R. 1975.

[5] Proceeds of Crime Act 2002, s.335; Sanctions and Anti-Money Laundering Act 2018.

2. The Doctrinal Foundations and Emerging Strains of Documentary Credits

The documentary credit appeared in the 19th century. As a key institutional innovation, it aims to solve the trust deficit between geographically and unfamiliar counterparties. It fills this trust gap through the autonomy principle. This principle establishes a core rule in English law by *Hamzeh Malas* [1], that is, the bank's payment obligations under the documentary credit are completely independent of the basic sales contract and are not subject to the legal restraint of any underlying disputes between the buyer and seller. It separates the bank's documentary credit payment obligations from the basic sales contract, ensuring that the bank only processes documents, not goods.[2]

By insulating the payment mechanism from the breach of contract, the principle of autonomy enforces the structure of "pay now, argue later",[3] which ensures that that the seller can receive the money after receiving the requirements of the document without bearing the risk of delay or renegotiation initiated by the buyer. The irrevocable documentary credit thereby acquires a highly reliable quality in international banking, as courts will not easily interfere with the bank's payment obligations unless there is a "sufficiently grave cause", [4] thus turning the deferred payment instrument into a guarantee that can almost be sure of immediate receipt of the payment. The realisation of this commercial function lies in the certainty and independence of bank payment obligations.

The autonomy principle does not render the bank's payment obligation unconditional in an absolute sense. Imposing such an absolute payment obligation necessitates a robust protective mechanism for banks, which act merely as neutral financial intermediaries. This protection is embodied in the strict compliance rule, which dictates that the bank's duty to pay is strictly contingent upon the presentation of documents that precisely mirror the terms of the credit. In *JH Rayner & Co Ltd v Hambros Bank Ltd*,[5] the Court of Appeal held that a bank was entitled to reject documents where the description of goods in the bill of lading departed from that specified in the credit, notwithstanding that the discrepancy would have been immediately recognisable to any merchant in the relevant trade. MacKinnon LJ affirmed that the bank is not required and indeed not entitled to exercise commercial judgment as to whether a documentary deviation is commercially significant. The strict compliance doctrine ensures that banks are not forced to investigate extraneous commercial facts, thereby solidifying the documentary credit as a rigid cornerstone that historically succeeded in facilitating the secure and rapid flow of global trade.

However, while originally designed to provide legal certainty and safeguard banks acting as neutral intermediaries, strict compliance has generated systemic commercial friction. Global statistics indicate that 65-80% of documentary credit presentations are refused on first examination due to discrepancies.[6] While some discrepancies arise from genuine documentary errors, the persistence of arguable discrepancies also exposes the structural distortion of bank behavior in the modern financial regulatory environment. Such high rejection rates indicate that the doctrine of strict compliance has strayed from its original intent, becoming instead a bargaining chip for banks and buyers. In volatile markets, when a deal becomes unprofitable, applicants may scrutinize documentary presentations for minor discrepancies in order to delay or renegotiate payment. By exploiting the strict compliance rule, they may create a convenient legal loophole to back out of the transaction. In the practice of documentary credits, high refusal rates furnish buyers with unwarranted negotiating leverage, thereby engendering opportunistic rejections. Specifically, certain applicants deliberately exploit discrepancies within a presentation to compel price discounts from beneficiaries as a condition for issuing a waiver.[7] This behavior significantly undermines the commercial

[1] *Hamzeh Malas & Sons v British Imex Industries Ltd.* [1958] 2 Q.B. 127.

[2] International Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits* (2007 Revision, ICC Publication No.600) ("UCP 600") arts 4-5.

[3] *Intraco Ltd. v Notis Shipping Corp. of Liberia (The Bhoja Trader)* [1981] 2 Lloyd's Rep. 256 CA at 257 per Donaldson L.J.

[4] *Discount Records Ltd. v Barclays Bank Ltd.* [1975] 1 W.L.R. 315 Ch D at 319 per Megarry J.

[5] *J.H. Rayner & Co. Ltd. v Hambros Bank Ltd.* [1943] K.B. 37 CA at 41 per MacKinnon LJ.

[6] ICC Banking Commission, "Technical advisory briefing no. 3: reducing discrepancy rates under documentary credits" (2022), p. 1.

[7] D. Meynell and P. Taneja. (2024). *A Comprehensive Guide to Documentary Credits: Everything You Need to Know about Letters of Credit*, edited by D. Patel and S. Stevenson. Trade Finance Global & BAFT, p. 27.

reliability of the letter of credit. According to the ICC Global Trade and Finance Survey, only 7% of respondents reported a decrease in spurious discrepancies raised during documentary examination, [1] indicating that arguable discrepancies remain widespread in practice.

Meanwhile, many banking authorities view the increasing regulatory costs driven by sanctions or AML compliance, along with concerns over changing regulatory requirements, as a driver for restricting or terminating business.[2] Whereas the autonomy principle requires banks to confine their examination to the face of the documents, modern regulatory regimes increasingly require them to investigate the underlying transactions. Faced with the prospect of severe regulatory penalties and escalating compliance costs, banks are therefore under growing pressure to move beyond the traditional role of passive document processors and instead assume the position of active factual investigators. As compliance costs associated with sanctions screening and AML due diligence increase, banks may create incentives or utilize the sanctions clause in the contract to rely on formal documentary discrepancies as a defensible basis for refusing or delaying payment.

As banks move from a purely documentary role towards greater scrutiny of the underlying transaction, the traditional doctrines of autonomy and strict compliance in English law are placed under growing pressure. The following chapters examine each category of pressure in turn. Chapter III analyses the internal doctrinal limits of the English fraud and nullity framework — the private law dimension of the problem — by reference to the comparative approaches adopted in the United States and Singapore. Chapter IV then examines the external regulatory pressures introduced by financial sanctions and anti-money laundering legislation, and the structural conflict between those public law regimes and the autonomy principle as a matter of English law.

3. Doctrinal Pressure

This chapter focuses on the internal limits of English law. It argues that the existing doctrinal framework governing fraud fails to adequately address modern commercial realities.

3.1 The Fraud Exception

As discussed in Chapter I, under English law, the parameters of the fraud exception were narrowly defined by Lord Diplock in *United City Merchants (UCM)*, which established that a bank may only dishonour a credit if the documents contain a material misrepresentation of fact that the beneficiary knowingly presents[3]. However, the facts of *UCM* highlight a significant limitation regarding third-party fraud. In that case, a loading broker fraudulently backdated a bill of lading to conceal a late shipment, yet the innocent beneficiary was permitted to enforce payment.[4] The strict requirement of beneficiary's complicity meant that although the confirming bank knows that the shipment date has been falsified before payment, it must be compelled to honour the presentation. [5] Consequently, the English approach paradoxically results in the "immunisation of fraudulently procured documents," leaving the banking system highly vulnerable to sophisticated supply-chain fraud perpetrated by intermediaries.[6]

Although this strict doctrinal stance might appear rigid, it was driven by a deliberate commercial policy. The primary concern of Lord Diplock and his contemporaries, such as Donaldson LJ, was that undue judicial interference with the autonomy principle, such as granting injunctions to restrain payment, would cause a "thrombosis" in international trade, thereby destroying their cash-like liquidity and absolute certainty, which serve as the lifeblood of documentary credits. [7] However, this rationale

[1] International Chamber of Commerce. (2014). *Rethinking Trade & Finance 2014: An ICC Private Sector Development Perspective,* edited by T. Senechal. ICC Publication No.867E, p. 16.

[2] World Bank. (2015). *The Withdrawal from Correspondent Banking: Where, Why and What to Do about It*. World Bank, p. 31.

[3] *United City Merchants* [1983] 1 A.C. 168.

[4] *United City Merchants* [1983] 1 A.C. 168 at 181-182. See also K. Richards. (2019). Revisiting the fraud exception: a critique of United City Merchants v Royal Bank of Canada forty years on. *L.S.*, *39*, 656, 660.

[5] *United City Merchants* [1983] 1 A.C. 168 at 182, 187-188.

[6] B. Kozolchyk. (1992). The immunization of fraudulently procured letter of credit acceptances. *Brook. L. Rev.*, *58*, 369; R. Hooley. (2002). Fraud and letters of credit: is there a nullity exception? *C.L.J.*, *61*, 279; X. Gao and R.P. Buckley. (2003). A comparative analysis of the standard of fraud required under the fraud rule in letter of credit law. *Duke J. Comp. & Int'l L.*, 13, 293.

[7] For the classic judicial concern regarding the disruption of the autonomy principle, see *Intraco Ltd. v Notis Shipping Corp. of Liberia* (The Bhoja Trader) [1981] 2 Lloyd's Rep. 256 CA at 257 per Donaldson L.J. (warning against causing a "thrombosis" in the commercial bloodstream).

fails to adequately address modern commercial realities. Professor Roy Goode vigorously challenges the *UCM* logic. He pointed out that the seller's basic legal obligation under the basic contract is to provide genuine documents. If the beneficiary is unaware of the third party's forged documents, that does not necessarily give them the legal right to request payment with those documents. As Goode emphasised, there is a fundamental contradiction in Britain's approach. They originally intended to strictly protect the letter of credit mechanism, but ended up protected the forged documents themselves.[1] In essence, as Richard Hooley argued, the rigid protection of the "certainty" of documents by the English judiciary was counterproductive. It actually "undermines the trust that is the foundation of trade".[2] Once the buyer and the bank lose trust in the mechanism's ability to screen forged documents, the mechanism will lose its commercial utility. The deadlock caused by the excessive document-centred English law shows that there is an urgent need to restructure the substantive function of the mechanism; at this point, US judicial practice has already taken the lead in completing the change of concept.

Instead of fully relaxing the principle of autonomy, the US judicial case law provides a practical alternative to address the limitations of English practice. The position of the US is rooted in the landmark case of *Sztejn v J. Henry Schroder Banking Corp*. The case established that the independence principle should not protect a beneficiary of the intentional delivery of "worthless rubbish" instead of the contracted goods.[3] On this basis, the modern US approach has been compiled into Section 5-109 of the Uniform Commercial Code (UCC), which clearly allows injunctive relief for "material fraud".[4] Crucially, the UCC establishes a transaction-focused standard that contrasts with the English strict emphasis on the beneficiary's subjective state of mind. As Gao and Buckley observe, the American standard evaluates the "severity of the effect of the fraud on the transaction rather than the state of mind of the beneficiary."[5] To qualify as material, the wrongdoing must have "so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served." This high threshold was firmly established in *Intraworld Industries Inc v Girard Trust Bank* and subsequently adopted by the UCC Official Comments[6]. In addition, UCC § 5-109 explicitly stipulates that the forgery of the required documents is also included, regardless of whether the beneficiary has forged the document or whether it actually knows that the document has been forged.[7] As Richards notes, this statutory formulation expands the scope of intervention to cover third-party counterfeiting, thus making up for the shortcomings of *UCM*.[8] By focusing on whether the honour would "facilitate a material fraud", the UCC shifts the legal paradigm from a pursuit of subjective complicity to a preventive mechanism prioritising objective commercial impact.

While the US addressed the limitation of third-party by functionally expanding the definition of actionable fraud, Singapore adopted a distinctly different approach. As will be explored in the next section, Singaporean jurisprudence avoids the strict application of the fraud rule by treating third-party forgeries not as an extension of fraud, but as a fundamental failure of documentary compliance.

3.2 The Nullity Exception

While both the English *United City Merchants* doctrine and the American UCC § 5-109 operate strictly within the paradigm of actionable fraud, they expose a significant "structural blind spot" within the traditional letter of credit framework.[9] Neither of these frameworks has adequately addressed the unique legal problem of a completely null legal document tendered by a completely innocent beneficiary. In such scenarios, since the beneficiary has no subjective

[1] R. Goode. (1991). "Abstract payment undertakings" in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah*. Oxford: Clarendon Press, p. 230.

[2] Hooley. (2002). Fraud and letters of credit: is there a nullity exception? *C.L.J.*, *61*, 279, 283-284.

[3] *Sztejn v J. Henry Schroder Banking Corp.* 31 N.Y.S. 2d 631 (N.Y. Sup. Ct. 1941) at 633-635.

[4] Uniform Commercial Code (US) § 5-109(b).

[5] Gao and Buckley. (2003). A comparative analysis of the standard of fraud required under the fraud rule in letter of credit law. *Duke J. Comp. & Int'l L.*, *13*, 293, 318.

[6] *Intraworld Industries Inc. v Girard Trust Bank* 336 A. 2d 316 (Pa. 1975) at 324-325; see also U.C.C. s.5-109, Official Comment 1.

[7] UCC § 5-109(a).

[8] Richards. (2019). Revisiting the Fraud Exception: A Critique of *United City Merchants v Royal Bank of Canada* Forty Years On. *L.S.*, 39, 656, 663.

[9] M. Bridge. (2003). Documents and contractual congruence in international trade, in S. Worthington (ed), *Commercial Law and Commercial Practice*. Oxford: Hart Publishing, p. 230.

intention of fraud and has not committed any substantive deception, the traditional fraud exception failed to provide relief. This reveals that fraud and nullity are different legal issues and should not be confused. The fraud exception originated from fraudulent infringement, which primarily focusses on the subjective culpability or dishonesty of the presenter.[1] In contrast, the issue of nullity involves the objective legal effect of the tendered instrument, which is essentially a forged document and has no commercial or legal effect. Compelling a bank to honour a forged document simply because the beneficiary lacks the intention to commit fraud is not merely a minor omission of the fraud rule, but a significant structural deficiency in English law that suggests a definite need for an independent doctrinal response.[2]

Despite the need to address this limitation, the Court of Appeal rejected the creation of a general nullity exception in *Montrod*.[3] The fundamental weakness in Potter LJ's judgment lies not only in its conclusions, but also in its conceptual framing.

The primary point of the controversy is how Potter LJ relied on the UCP to argue that banks are exempt from investigating the genuineness of documents.[4] However, Professor Roy Goode argues that this reasoning is "seriously flawed".[5] He notes it conflates a bank's procedural duty of examination with its substantive contractual liability to honour against genuine documents, effectively treating a fabricated document as a complying presentation.

Compounding this doctrinal error, Potter LJ suggested that a nullity exception would force banks to investigate facts "which they are not competent to do".[6] This justification ignored the key distinction between the legal status of the document and the factual performance of the contract. The fact that a document is legally null does not mean that the bank must inspect the underlying cargo. It only recognises fabricated instruments, such as the forged inspection certificate in *Montrod*, which lack legal effect and fail the threshold of documentary compliance.[7]

This rigid position is further defended on the ground of "sound policy reasons", with Potter asserting that the precision and certainty of the autonomy principle are paramount.[8] Yet, by compelling banks to honour fabricated documents to maintain absolute autonomy, although the formal certainty is retained, the substantive certainty is eroded. As Hooley argues, forcing banks to facilitate payments against fraudulent documents undermines the commercial trust that supports the entire L/C mechanism.[9] In addition, empirical studies on documentary practice challenge this judicial assumption. As described in Chapter II, more than 65% of presentations are rejected on first tender due to discrepancies.[10] This suggests that the system itself operates under the background of a high rate of discrepancy, and banks have long been accustomed to using commercial judgement to handle various defective documents in daily operations. Consequently, accommodating a narrow nullity exception would unlikely cause market disruption, but rather make legal theory consistent with existing commercial practice.

Ultimately, Potter LJ's assertion that nullity is not "susceptible of precision" can be challenged, as courts have long been accustomed to applying more abstract legal standards such as "reasonableness".[11] The English court's refusal to recognise the nullity exception exposed its excessive superstitious formal certainty, thus sacrificing the coherence of jurisprudence and logic. This practice failed to protect the market, leaving the trade finance system institutionally vulnerable.

Unlike the approach taken in *Montrod*, the Court of Appeal of Singapore proposed another assessment method for the nullity problem in

[1] L. Lu. (2012). The exceptions in documentary credits in English law. PhD thesis, University of Plymouth, pp. 237-238.

[2] Hooley. (2002). Fraud and Letters of Credit: Is There a Nullity Exception? *C.L.J.*, *61*, 279.

[3] *Montrod Ltd. v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954; [2002] 1 W.L.R. 1975.

[4] *Montrod* [2002] 1 W.L.R. 1975.

[5] Goode. (1991). Abstract payment undertakings, p. 230.

[6] *Montrod* [2002] 1 W.L.R. 1975.

[7] Lu. (2012). The exceptions in documentary credits in English law.

[8] *Montrod* [2002] 1 W.L.R. 1975.

[9] Hooley. (2002). Fraud and Letters of Credit: Is There a Nullity Exception? *C.L.J.*, *61*, 279, 283-284.

[10] ICC Banking Commission. (2022). Technical advisory briefing no. 3: reducing discrepancy rates under documentary credits, p. 1.

[11] See, e.g. *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 HL, where Lord Hoffmann famously established that commercial contracts must be construed according to what a "reasonable person" having all the background knowledge would have understood.

Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank.[1] In *Beam*, an innocent beneficiary tendered an air waybill that was subsequently discovered to be forged by a fictitious freight forwarder.[2] Rather than applying the strict parameters of the fraud exception, Chao Hick Tin JA resolved this issue by shifting the analytical focus away from the beneficiary's subjective culpability to the objective baseline of documentary compliance. The analytical significance of the Singaporean approach is its recognition of procedural and logical priority: the question of whether a document exists in law logically precedes any inquiry into fraud. As Chao Hick Tin JA held, a document that is a complete fabrication lacks any legal or commercial identity. It is indistinguishable from a "blank piece of paper".[3] Consequently, the tendering of such a document inherently fails to meet the threshold of a "complying presentation" under the UCP. Under this construction, rejecting a forged document does not constitute a breach of the autonomy principle. Instead, the autonomy principle is not engaged because the basic prerequisite for the bank's unconditional payment obligation, that is, the tender of legally existent documents, has not been met.

This model regards third-party forgery as a fundamental deficiency in documentary compliance rather than a sub-category of fraud, so that the fraud exception becomes unnecessary in cases of nullity.[4] It fundamentally shakes the English position, demonstrating that courts can insulate the banking system from paying against fabricated documents without proving that the beneficiary is fraudulent, so as to restore the commercial integrity of the credit mechanism under the premise of strict compliance with the established rules.[5]

The foregoing analysis reveals two distinct but complementary doctrinal failures within the English law framework. According to the interpretation of *United City Merchants*, the scope of application of fraud exception is too narrow to cope with the reality of modern supply chain fraud, leaving the banking system institutionally vulnerable to third-party forgeries that fall outside its strict parameters. The rejection of the nullity exception in *Montrod* compounds this vulnerability. It ignores the fact that fabricated documents are legally null, not just defective payment vouchers, which means that it never satisfies the foundational precondition for payment. Together, these failures reveal that the problem lies not only in the scope of the exceptions but in the understanding of the concept of documentary compliance itself.

However, these doctrinal pressures remain within the domain of private law, involving the risk distribution between commercial parties and the internal consistency of the documentary credit mechanism. While the reform proposals discussed in Chapter V later will directly address these failures, it is first necessary to examine the completely different pressures currently facing the English law framework. The modern sanctions regimes and AML obligations impose mandatory public law obligations, which are structurally contrary to the principle of autonomy itself. As will be demonstrated in Chapter IV, these regulatory regimes require banks to investigate transactions that are prohibited from their review by the principle of autonomy. Simply improving the existing doctrine of private law cannot resolve this conflict. Rather, it suggests a definite need for a fundamental reassessment of the relationship between contractual autonomy and public regulatory compliance.

4. Emerging Regulatory Pressures—Sanctions and AML

The second type of pressure is completely different from the former in nature. It directly impacts the objective premise on which the principle of autonomy depends, that is, the payment obligations of the default bank should be fulfilled in a legally neutral regulatory environment. In recent decades, banks operating under documentary credits have found themselves navigating an increasingly complex regulatory environment, in which the obligations imposed by financial sanctions and AML legislation sit in uneasy tension with their contractual duties. In the realm of international trade finance, banks increasingly navigate overlapping and often conflicting obligations. While they remain contractually bound to honour conforming documentary presentations,

[1] *Beam Technology (Mfg) Pte Ltd. v Standard Chartered Bank* [2003] 1 S.L.R.(R) 597 SGCA.

[2] *Beam Technology* [2003] 1 S.L.R.(R) 597.

[3] *Beam Technology* [2003] 1 S.L.R.(R) 597.

[4] Hooley. (2002). Fraud and Letters of Credit: Is There a Nullity Exception? *C.L.J.*, *61*, 279.

[5] Richards. (2019). Revisiting the fraud exception: a critique of *United City Merchants v Royal Bank of Canada* forty years on. *L.S.*, *39*, 656, 673.

they simultaneously face strict statutory prohibitions. The Office of Financial Sanctions Implementation enforces strict prohibitions under the Sanctions and Anti-Money Laundering Act 2018, which can result in the mere act of payment becoming a criminal offence. In addition, the Proceeds of Crime Act 2002 may compel a confirming bank presented with conforming documents to delay or withhold payment pending regulatory authorization.[1]

This chapter examines the impact of these obligations on banks' duties through the lens of English case law. The central contention is that English law has thus far sought to contain the disruptive potential of these regulatory obligations within existing doctrinal categories, but that the boundaries of that containment are under increasing strain.

4.1 Sanctions as a Defence to Payment: Judicial Treatment

Before proceeding to examine how English courts have responded to sanctions as a defence to payment under letters of credit, it is necessary to establish the doctrinal foundation upon which such a defence might rest. There are two basic approaches: an analogy with the established fraud exception, and the common law illegality defence.

As regards the former, the fraud exception is heavily dependent upon the beneficiary's subjective fraudulent intent and complicity.[2] Financial sanctions, by contrast, typically operate as objective, absolute statutory prohibitions. In the application of sanctions regulations, there is no such subjectivity. If a transaction objectively involves or benefits a sanctioned entity, a financial institution has no choice but to freeze the transaction or refuse payment.[3] This mandatory public law intervention not only directly overrides the private law rules of the UCP 600, but also its application is absolute: whether the beneficiary is subjectively malicious or whether the behaviour is morally reprehensible, the intervention mechanism will be triggered unconditionally.[4]

In contrast, the illegality defence in common law appears to provide a more feasible doctrinal pathway. It is based on the public policy principle of *ex turpi causa non oritur actio*. English courts have gradually developed the "taint" doctrine in the landmark case of *Mahonia Ltd v JP Morgan Chase Bank*. According to the framework of the *Mahonia* case, if a document credit is structurally inseparable from the potential illegal scheme, so that the autonomous payment obligation itself is tainted by the shared illegal purpose, the document credit may be recognised as unenforceable.[5]

However, the decision of the Supreme Court in *Patel v Mirza* has precipitated a fundamental doctrinal shift in English private law, so that the traditional framework of the *Mahonia* case alone is insufficient to solve the tension.[6] The illegality defence is no longer bound by mechanical rules, such as the reliance test, but entails a flexible "trio of considerations",[7] which requires courts to weigh the purpose of the transgressed prohibition, countervailing public policies, and the proportionality of denying the claim. Although the shift of this method to legal theory brings flexibility, academic criticism pointed out that it brings great legal uncertainty to the resolution of commercial disputes.[8]

Applying Lord Toulson's "trio of considerations" in *Patel v Mirza* to the intersection of documentary credits and financial sanctions exposes a profound structural deadlock. In the first stage of the *Patel* inquiry, that is, the underlying purpose of the transgressed prohibition, the provision prohibiting the enforcement is highly reasonable.[9] Modern financial crime regulations, such as the Sanctions and Anti-Money Laundering Act 2018, impose absolute, objective prohibitions designed to isolate targeted entities from the global financial system. Compelling a bank to honour a presentation that contravenes these sanctions would fundamentally frustrate this core public policy, effectively co-opting civil commercial law

[1] Proceeds of Crime Act 2002 s.335.

[2] *United City Merchants* [1983] 1 A.C. 168 at 183.

[3] World Bank Group. (2015). *Withdrawal from Correspondent Banking*, p. 28.

[4] International Chamber of Commerce (ICC) Banking Commission, "Guidance paper on the use of sanctions clauses in trade finance-related instruments subject to ICC rules" (Document 470/1238, 2014), para.1.4.

[5] *Mahonia Ltd v JP Morgan Chase Bank* EWHC 1927 (Comm).

[6] *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467.

[7] *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467.

[8] James Goudkamp. (2017). The End of an Era? Illegality in Private Law in the Supreme Court. *LQR*, *133*, 14, 16; James C Fisher (2021). Gray areas in tort: Illegality and authority after Patel v Mirza. *MLR*, *84*, 1, 13.

[9] Patel v Mirza [2016] UKSC 42; [2017] A.C. 467.

into facilitating illicit financial flows and statutory evasion.

However, the second *Patel* consideration necessitates a rigorous weighing of countervailing public policies, and it is here that the tension becomes acute. The autonomy principle and the commercial certainty it underwrites are not merely private contractual rules; they function as macroeconomic public policies in their own right, insulating the bank's payment obligation from underlying factual disputes and preserving the cash-equivalent liquidity upon which global commerce depends.[1] As Paul S Davies observes, public policy must be carefully calibrated to avoid generating commercial uncertainty, a concern amplified here where the strict independence of the credit is the very source of its utility.[2] These competing imperatives do not admit of easy reconciliation.

Under the *Patel* framework, the overarching rationale of preserving the integrity of the legal system, alongside the third specific consideration of proportionality, ultimately militates against the current common law position rather than in favour of it. A framework in which the enforceability of a documentary credit depends upon a multifactorial judicial balancing exercise conducted *ex post facto* is structurally incompatible with the absolute *ex ante* certainty that the autonomy principle is designed to guarantee. The highly discretionary nature of the *Patel* inquiry, which Andrew Burrows defends as a necessary and triumphant mechanism for achieving transparent, proportionate justice, [3] nonetheless generates precisely the commercial unpredictability that the autonomy principle was constructed to prevent. Far from resolving the structural tension, the *Patel* methodology renders it intractable for neutral financial intermediaries.

Compounding the theoretical unpredictability of the *Patel* balancing exercise is the operational reality of trade finance, which imposes a formidable procedural hurdle on neutral intermediaries. In *Group Josi Re v Walbrook Insurance Co Ltd*, Staughton LJ emphasized that, similar to the fraud exception, illegality must be "clearly established", not just doubtful or suspicious. [4] This highly stringent evidentiary threshold proves highly problematic for banks navigating the current regulatory framework. Owing to the opacity of corporate ownership structures and the constantly evolving nature of sanction designation lists, banks are typically only able to establish a "reasonable suspicion" of a sanctions breach at the time of presentation.[5] The doctrinal insistence on definitive proof of illegality, coupled with the strict liability and severe penalties imposed by regulatory bodies for sanctions breaches, places a considerable burden on banks: to pay is to risk criminal prosecution, whereas to withhold payment based on mere suspicion is to invite civil liability for breach of the autonomous contract. [6] Consequently, although the modern common law illegality doctrine rendered analytically fluid by *Patel* and procedurally burdensome by *Group Josi Re*, it fails to provide the absolute ex-ante predictability required to serve as a reliable commercial safe harbour. Deprived of doctrinal certainty, banks and commercial parties have been forced to retreat to private contractual mechanisms. This flight to contractual certainty has primarily manifested in the widespread adoption of express risk-allocation provisions, necessitating a distinct doctrinal analysis of the sanctions clause in documentary credits.

4.2 The Sanctions Clause in Documentary Credits: Contractual Allocation of Risk

4.2.1 The Practical Background of Banks Inserting Sanctions Clauses

An omission by ICC is that UCP 600 is makes no provision to excuse banks from their payment obligations where honouring a credit would contravene sanctions. As a result of this

[1] Roger J Johns and Mark S Blodgett. (2011). Fairness at the Expense of Commercial Certainty: The International Emergence of Unconscionability and Illegality as Exceptions to the Independence Principle of Letters of Credit and Bank Guarantees. *N Ill U L Rev.*, *31*, 297, 305.

[2] Paul S Davies. (2009). The Illegality Defence and Public Policy. *LQR*, *125*, 556, 560, cited in James C Fisher. (2021). Gray areas in tort: Illegality and authority after *Patel v Mirza*. *MLR*, *84*, 1, 13 fn 104.

[3] Andrew Burrows. (2017). Illegality after *Patel v Mirza*. *CLP*, *70*, 55, 56.

[4] *Group Josi Re v Walbrook Insurance Co. Ltd.* [1996] 1 W.L.R. 1152 CA at 1161 per Staughton L.J.

[5] See generally S. Chong, "Sanctions: between a rock and a hard place" (NUS Centre for Maritime Law Working Paper 24/06, 2024), p. 7 (discussing the practical difficulty of establishing ownership and control through opaque corporate structures) and p. 21 (highlighting the dilemma where banks detect red flags but are required to meet a high evidentiary threshold of 'cogent evidence', forcing them to choose between breaching sanctions or breaching the contract).

[6] C. Lupton. (2022). A critical evaluation of the use of sanctions clauses in letters of credit. *PER/PELJ.*, *25*, 1 at 11-12.

regulatory silence, banks lack a clear legal mechanism to lawfully suspend their payment obligations when confronted with sanctions risks. Consequently, the incorporation of express sanctions clauses has become commonplace in trade finance. The ICC noted the trend that there is a growing tendency among banks to rely on express clauses to exclude liability for sanctions-related non-payment.[1] By incorporating these clauses, banks seek to contractually recalibrate the autonomy principle in response to regulatory demands. This unilateral allocation of risk therefore invites complex judicial scrutiny, requiring courts to determine the validity and scope of such express clauses.

4.2.2 Judicial Review of the Validity of Sanctions Clauses

Owing to the highly stringent evidentiary threshold required to establish the common law illegality defence, English courts have generally tended to avoid relying exclusively on this defence in practice.[2] Judging from recent precedents, English judicial practice has clearly turned to other legal paths, especially focusing on the contractual interpretation and the recognition of sanctions clauses. However, this judicial preference for contract interpretation ultimately fails to solve the fundamental contradiction between the constraints of public law and the obligations of private law, serving instead as a pragmatic compromise.

The decisions in *Mamancochet*[3] and *Lamesa*[4] play a fundamental role in shaping how English courts handle sanctions in commercial disputes. Rather than eroding the autonomy principle by expanding the common law illegality defence, courts increasingly rely on the objective interpretation of express sanctions clauses to manage regulatory risks. *Mamancochet* established a strict approach, holding that sanctions clauses merely suspend payment obligations upon actual, rather than theoretical, exposure to sanctions.[5] The court concluded that the clause functioned solely to suspend the payment obligation until the sanctions risk was resolved, rather than permanently extinguishing the liability.[6] The above case demonstrates a clear reluctance to interpret the sanctions clause as a mechanism for the permanent release of absolute payment obligations. While this strict interpretation appears to protect the autonomy principle against banks' excessive caution, it fails to fully consider the actual situation of modern compliance. Driven by "rational commercial risk management", international banks routinely take pre-emptive risk removal measures before an "actual" statutory breach is formally established to avoid severe regulatory penalties.[7]

In contrast, the judgment in *Lamesa* reflects a more purposeful approach to contractual interpretation, particularly in dealing with the extraterritorial effectiveness of foreign regulatory regimes. The court determined that the phrase "mandatory provision of law" to exempt the liability for non-payment was broad enough to cover the risk of US secondary sanctions.[8] Consequently, this approach shows that even if there is no formal legal prohibition in English law, the court is willing to recognise that such foreign regulatory risks constitute a practical limitation on the performance of obligations. While secondary sanctions are not strictly binding under English law, the court still concluded that the serious implications of losing access to US proxy banks constituted an "effective prohibition" for an international bank.[9] Although this broad interpretation is commercially pragmatic, it undoubtedly introduces doctrinal uncertainty, making the autonomy of the payment obligation progressively susceptible to extraterritorial political changes.

However, the judicial community's tolerance for breach of contract caused by sanctions remains extremely inconsistent. In the case of *Banco San Juan*[10], the High Court decisively rejected a borrower's attempt to suspend his repayment

[1] International Chamber of Commerce, "Addendum to the ICC guidance paper on the use of sanctions clauses" (Document 470/1238, 2020), pp. 1-2.

[2] *Group Josi Re* [1996] 1 W.L.R. 1152 CA at 1164 per Staughton L.J. (holding that illegality, much like fraud, must be clearly established rather than merely doubtful).

[3] *Mamancochet Mining Ltd. v Aegis Managing Agency Ltd.* [2018] EWHC 2643 (Comm); [2018] 2 Lloyd's Rep. 441.

[4] *Lamesa Investments Ltd. v Cynergy Bank Ltd.* [2020] EWCA Civ 821; [2020] 2 Lloyd's Rep. 543.

[5] *Mamancochet* [2018] EWHC 2643 (Comm).

[6] *Mamancochet* [2018] EWHC 2643 (Comm).

[7] K. Marxen. (2018). "Traditional trade finance instruments a high risk? A critical view on current international initiatives and regulatory measures to curb financial crime" in C. Hugo (ed.), *Annual Banking Law Update*. Juta, pp. 177-178.

[8] *Lamesa* [2020] EWCA Civ 821.

[9] *Lamesa* [2020] EWCA Civ 821.

[10] *Banco San Juan Internacional Inc. v Petróleos de Venezuela S.A.* [2020] EWHC 2937 (Comm).

obligations by citing negative clauses related to general sanctions. In distinguishing the facts of this case from the specific contractual mechanism in *Lamesa*, the court reiterated that any attempt to release or suspend a fundamental payment obligation requires clear and unambiguous wording.

This disagreement on the judgements results exposes a fatal flaw. The court primarily focuses on contract interpretation and may therefore fail to establish a cohesive doctrinal framework to reconcile the conflict between the principle of autonomy and the extraterritorial effectiveness of modern public law. The direct consequence of this is that whether the absolute payment obligation can be enforced no longer depends on stable and predictable legal standards, but on excessive dependence on the specific contract wording in the case. Due to the lack of clear judicial guidance, commercial parties are compelled to navigate these systemic risks by drafting increasingly precise contractual clauses to eliminate their own responsibilities.[1] Banks rely entirely on the strict interpretation of customised clauses and may leverage their strong bargaining power to circumvent absolute payment obligations under English law. This practice essentially subordinates the instrument to the internal policies or discretion of financial institutions.[2] Thus, this judicial approach seriously undermines the certainty of trade finance, which the autonomy principle was originally designed to guarantee.[3]

4.3 AML Compliance and the Structural Disruption of Payment Obligations

4.3.1 Payment Delay and the SAR Regime: A Justified Interference or Doctrinal Evasion?

The interaction between documentary credits and AML regulation has led to obvious contradictions between banks' contractual obligations for timely payment and their statutory compliance obligations. According to the consent regime established by section 335 of the UK Proceeds of Crime Act 2002 (POCA), if a financial institution suspects that a transaction involves criminal proceeds, it must submit a suspicious activity report (SAR) to the National Crime Agency (NCA) and obtain "appropriate consent" before the transaction is executed.[4] This statutory obligation compels banks to freeze transactions pending NCA clearance, creating a direct conflict with the absolute and prompt payment obligation inherent in documentary credits, and puts "banks between a rock and a hard place".[5]

In the case of *Shah v HSBC Private Bank (UK) Ltd*,[6] the High Court reasoned that proceeding without NCA consent would expose the bank to primary criminal liability, thus implying a term into the banking contract that permits the bank to lawfully refuse or delay payment in order to comply with POCA. Although the court defended the bank from criminal liability on the grounds of the delay caused by SAR, it failed to set a clear boundary for such suspensions. By permitting indefinite delays based on mere suspicion, this approach arguably bypasses the strict evidentiary thresholds of the traditional fraud exception, effectively allowing regulatory mechanisms to override contractual certainty. Consequently, the failure to establish clear legal parameters arguably results in a de facto erosion of the beneficiary's absolute right to payment. Rather than formally displacing the autonomy principle, the AML framework effectively subjects it to indefinite suspension. As a result, what is traditionally a secure payment mechanism becomes overly dependent on the opaque administrative procedures of the SAR regime. Given the formalistic nature of documentary credits, subjecting them to such stringent regulatory measures arguably undermines their effectiveness as a reliable tool for international trade.[7]

4.3.2 From Documents to Suspicion: Does AML Undermine Strict Compliance?

[1] See generally S. Chong, "Sanctions: between a rock and a hard place" (NUS Centre for Maritime Law Working Paper 24/06, 2024), pp. 11, 22 (observing that the industry's response to sanctions is expressed through the "contractual allocation of risk", and concluding that ultimately, "the only thing that commercial parties can do is to prepare for the risk with precise drafting").

[2] C. Lupton. (2022). A critical evaluation of the use of sanctions clauses in letters of credit. *PER/PELJ*, 25, 1, 20-21.

[3] R.M. Goode and E. McKendrick. (2010). *Goode on Commercial Law*, 5th edn. London: Penguin, p. 1045.

[4] Proceeds of Crime Act 2002 s.335.

[5] D. Hislop. (2009). Banks, SARS & the customer. *N.L.J.*, *159*, 1.

[6] *Shah v HSBC Private Bank (UK) Ltd.* [2010] EWCA Civ 31; [2010] 3 All E.R. 477.

[7] R.K. Chhina. (2016). Managing money laundering risks in commercial letters of credit: are banks in danger of non-compliance? A case study of the United Kingdom. *J.M.L.C.*, *19*, 158.

As mentioned earlier, Article 5 of the UCP 600 clearly stipulates that banks deal exclusively with documents, rather than with the goods, services, or performance to which those documents may relate.[1] However, the modern AML regulatory framework has a fundamental conflict with the practice of relying solely on document censorship. To effectively detect and prevent Trade-Based Money Laundering (TBML), financial institutions are legally obliged to conduct strict Customer Due Diligence (CDD), "Know Your Customer" (KYC) checks, and ongoing transaction monitoring.[2] Consequently, AML obligations require banks to look beyond documentary examination, which may damage the conceptual foundation of strict compliance.

Despite this structural conflict, the English judiciary has basically not formally reconciled the two regimes. While courts continue to strictly enforce the documentary paradigm in traditional trade finance disputes, they concurrently uphold the banks' statutory duties to suspend transactions based on substantive suspicions of the underlying facts.[3] Consequently, this creates a significant doctrinal tension: the law maintains a strict documentary paradigm, whereas commercial practice operates on a substantive risk-based model. Financial institutions are therefore caught between conflicting obligations, where strict adherence to the private law doctrine of strict compliance arguably exposes them to severe criminal liability under public law.

4.3.3 AML as a Structural Disruption: Risk Transfer and Informal Exception

Faced with the severe threat of primary criminal liability for AML regulatory breaches, financial institutions arguably prioritise regulatory compliance over their private law duties to beneficiaries. Consequently, this regulatory pressure has fostered a trend of "de-risking" and defensive over-compliance within the global trade finance sector.[4] To navigate these intricate regulatory demands, there is a tendency for banks to terminate correspondent banking relationships or close accounts associated with money transfer operators.[5] The practical effect of AML compliance is to quietly transfer risks from banks to commercial counterparties, thus undermining the original function of the documentary credit as an instrument of payment certainty.

It is worth noting that the functional suspension of such payment obligations may undermine the structural integrity of the documentary credit regime. As previously stated, English commercial law, recognises limited exceptions to the principle of autonomy, such as fraud and illegal acts, which require a strict threshold of evidence, that is, there is obvious deception or actual legal prohibitions.[6] In stark contrast, the SAR regime allows banks to indefinitely delay payments based on an "honest suspicion" of illicit activity.[7] This approach arguably circumvents the strict burdens of proof required by traditional private law defences, subjecting the beneficiary to face an indefinite delay without formally invalidating the credit. Consequently, AML compliance has essentially become an unwritten "third exception" to the autonomy principle, but without the doctrinal clarity or legal security that traditional legal exceptions are associated with. Unlike fraud or illegality, which are governed by the strict regulation of common law, this informal exception is excessively subject to opaque administrative procedures and unilateral risk control of financial institutions.

4.4 Synthesis: Three Structural Deficiencies in the Regulatory Framework

Throughout this chapter, it has been demonstrated that both international sanctions and AML regulations pose systemic challenges to the traditional documentary credit regime. Although the two have a common public policy objective of combating financial crime, their legal mechanisms are completely distinct.

Sanctions act in the form of "hard prohibitions", making the performance completely illegal or suspended through clear contractual terms. In contrast, the AML framework is based on "soft suspicion". This approach permits banks to unilaterally suspend transactions until they obtain the approval of the executive branch, even in the absence of definitive proof of illicit activity.

[1] UCP 600, art. 5.

[2] Financial Conduct Authority. (2013). *Banks' control of financial crime risks in trade finance*. Thematic Review TR13/3, pp. 18, 24-25.

[3] See *Shah* [2010] 3 All E.R. 477.

[4] Treasury Committee. (2018). *Economic Crime: Written evidence*. ECR0026, Pt II.

[5] G. Pavlidis. (2023). The dark side of anti-money laundering: mitigating the unintended consequences of FATF standards. *J. Econ. Criminology*, 2, 100040, 3.

[6] *United City Merchants* [1983] 1 A.C. 168; *Mamancochet* [2018] 2 Lloyd's Rep. 441.

[7] *Iraj Parvizi v Barclays Bank Plc.* [2014] EWHC B2 (QB).

However, the two systems not only generate doctrinal tensions, but also create three different structural deficiencies that require systematic rather than fragmented remedial measures.

The first is the erosion of legal certainty. As demonstrated above, English law applies different standards of evidence according to the regulatory regime invoked. The illegality defence in *Group Josi Re* requires "clear confirmation" of the violation of sanctions,[1] and the AML regime tolerates payment only by "honest suspicion".[2] This difference not only produces doctrinal inconsistency but also creates a structural asymmetric legal burden under the two regimes. In the AML context, excessively relaxed thresholds exempt preventive refusals from any substantive scrutiny. In the sanctions context, the strict *Group Josi* standard has created a bilateral liability trap. A bank that pays may face criminal prosecution for violating sanctions, based on reasonable but unconfirmed Banks that suspect and refuse to pay may bear civil liability for violating the obligation to pay independently. Therefore, on the one hand, the current framework has insufficient regulation of the AML discretion, and on the other hand, it exposes banks that act in good faith under the sanction regime to excessive risks and does not provide any legal mechanism to solve this contradiction. This is undoubtedly contrary to the transaction certainty that the autonomy principle aims to guarantee.

The second is the governance gap. As evidenced by the different treatment of sanctions clauses in *Mamancochet*, *Lamesa*, and *Banco San Juan*, English courts have addressed regulatory risk almost entirely through contract interpretation without imposing any minimum procedural requirements on banks exercising their discretion to withhold payment. As a result, the decision to reject the payment is completely subject to non-transparent internal compliance policies, rather than transparent and externally verifiable legal standards.

The third problem is the lack of accountability. English law currently affords banks almost uncensored discretion, allowing them to suspend transactions for regulatory reasons. Meanwhile, the internal compliance procedures of banks have great discretion when making decisions regarding the areas of sanctions and AML without the need for structured judicial review of such decisions.

These three deficiencies together reveal that English law has not resolved the tension between autonomy and regulatory compliance. The problem is not merely one of doctrinal fragmentation, but of structural under-regulation.

5. Reform: A Two-Way Path

The preceding analysis has revealed that the contemporary challenges facing the documentary credit system do not stem from a single doctrinal deficiency, but from the significant roots of two structural differences. On the one hand, as demonstrated in Chapter III, the English legal framework exhibits significant doctrinal limitations, especially in the narrow scope of application of fraud exceptions and the lack of coherent responses to legal nullities. These limitations mainly exist within the framework of private law, specifically with regard to properly defining the payment obligations of banks under the principle of autonomy.

On the other hand, as discussed in Chapter IV, the expansion of the public regulatory system, especially in the areas of sanctions and AML, brings a completely different kind of pressure. Unlike doctrinal shortcomings, these regulatory interventions do not only expose gaps in the existing legal structure. On the contrary, they force banks to act and investigate relevant transactions based on suspicion alone, thus posing a major challenge to the fundamental logic of the principle of autonomy. Consequently, this external pressure creates a structural tension, which is difficult to fully solve by doctrinal improvement alone.

In light of this distinction, the reform strategy proposed in this chapter is based on a fundamental structural distinction. The first layer focuses on the doctrinal deficiencies within the structure of private law, which can be resolved through specific doctrinal adjustments. The second layer aims to cope with the external regulatory pressure that increasingly prevails over the principle of autonomy. These discrepancies do not stem from the autonomy principle itself, but because the existing law has failed to establish an institutional framework sufficient to harmonise the regulatory requirements of public law and the payment obligations of private law. Based on the internal

[1] *Group Josi Re* [1996] 1 W.L.R. 1152.

[2] *Parvizi* [2014] EWHC B2 (QB).

and external dimensions, this article puts forward a two-way reform path. The path abandons the rigidity and disorderly compromise on the autonomy principle. To reshape it as the core cornerstone of documentary credit transactions, it is not only necessary to realise the logical self-coherence of internal jurisprudence, but also to obtain reasonable standardisation and protection from external systems.

5.1 Internal Doctrinal Reforms: Resolving the Fraud and Nullity Deficiencies

As described in Chapter III, the English documentary credit framework is currently constrained by the narrow applicability of the fraud exception clause and the lack of remedies for legal nullities. Since these two systemic blind spots stem from fundamentally different legal issues, namely subjective dishonesty and objective legal ineffectiveness of bidding, effective reform must be resolved at their respective doctrinal levels. However, it is crucial that any such intervention must be carefully considered so as not to undermine the principle of autonomy, which is still the cornerstone of business trust in international trade financing. Therefore, the reform proposals put forward in this chapter directly correspond to the previously identified dual vulnerability. This chapter proposes a phased reform strategy. On the one hand, functionally adjust the fraud rules to deal with third-party deception; on the other hand, the nullity exception is independently recognised as a threshold for document compliance. This approach aims to provide a coherent structural response that can not only make up for existing shortcomings but also maintain the integrity of the principle of autonomy.

5.1.1 Reconceptualising the Nullity Exception: A Return to Strict Compliance

The first key reform involves a fundamental reconceptualisation of the nullity problem. It should be noted here that recognising a nullity exception is not an attempt to revise the existing fraud framework or seek to make new exceptions to the autonomy principle. On the contrary, it corrects the mischaracterisation of the "complying presentation" under the UCP by the English judiciary.[1] This doctrinal reframing is significant because it eliminates the primary concern that any new exception would erode the autonomy principle. Under this model, the autonomy principle remains entirely intact, as the legal inquiry is resolved before it is applied.[2]

This reform indicates that English courts should acknowledge that a document which is legally void *ab initio* fails to satisfy the foundational precondition for a bank's payment obligation. Consequently, a fabricated instrument cannot constitute a "complying presentation" within the meaning of the UCP.[3] By locating this reform within the internal boundaries of the strict compliance doctrine, this approach is logically more conservative than expanding the parameters of the fraud exception. It reinforces the premise that a bank pays only against genuine documents, rather than fabricated ones.

By locating this reform within the internal boundaries of the strict compliance doctrine, this approach is logically more conservative than expanding the parameters of the fraud exception. It reinforces the premise that a bank pays only against genuine documents, rather than fabricated ones.[4] Nullity refers exclusively to documents that have no legal effect from the outset, namely, documents that are completely forged or documents issued by unauthorised or non-existent entities. This is conceptually and legally distinct from documents containing factual inaccuracies or formal discrepancies, thus drawing a practical legal boundary.[5] As the Court of Appeal of Singapore demonstrated in *Beam Technology*, adjudicating whether a document is a legal nullity provides a practical judicial template for courts to apply without involvement in relevant contract disputes.[6]

In summary, since this conceptual shift is carried out within the framework of strict compliance with established rules, rather than creating external exceptions, it represents the most feasible reform pathway of English law, with minimal intervention in the existing doctrinal structure.

5.1.2 Recalibrating the Fraud Exception: Towards

[1] Richards. (2019). Revisiting the fraud exception: a critique of *United City Merchants v Royal Bank of Canada* forty years on. *L.S.*, *39*, 656, 672.

[2] *Beam Technology* [2003] 1 S.L.R.(R) 597.

[3] Gao and Buckley. (2003). A comparative analysis of the standard of fraud required under the fraud rule in letter of credit law. *Duke J. Comp. & Int'l L.*, *13*, 293.

[4] *Montrod* [2002] 1 W.L.R. 1975.

[5] Lu. (2012). The exceptions in documentary credits in English law, pp. 240-242.

[6] *Beam Technology* [2003] 1 S.L.R.(R) 597.

a Transaction-Focused Standard

The second necessary reform aims to address the inherent structural deficiencies of the English fraud exception. As established in *United City Merchants*, the current English doctrine adheres to the principle of "actual fraud", placing the evaluation entirely on the subjective intention of the beneficiary.[1] This strict requirement for subjective dishonesty creates a loophole, which allows complex third-party fraud to be unrestrained by this principle, forcing banks to facilitate payments with significant false documents just because the beneficiaries of the vouchers are unaware of the fraud.

In order to make up for this loophole, English law must recalibrate its approach and adopt objective, transaction-centred standards. This reform requires shifting the focus of analysis from the moral responsibility of the beneficiaries to the objective commercial integrity of the transaction itself. Drawing on the provisions of Section 5-109 of the US UCC, if honouring the presentation would objectively "facilitates" a material fraud, the court should be allowed to intervene regardless of whether the beneficiary had subjective knowledge of the wrongdoing.[2] As discussed in Chapter III, the concept of "facilitating" fraud is used to change the legal paradigm from passively pursuing subjective complicity to a prevention mechanism that prioritises objective commercial impact.

Fundamentally, this readjusted standard should be clearly defined. Adopting a transaction-centred approach does not mean extending fraud exceptions to negligence, ordinary contract disputes or simple misrepresentations of fact. To trigger the intervention, the wrongdoing must be so serious that it has "so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served."[3] It only applies to scenarios where the substance of the transaction has been seriously undermined and the compelling payment no longer has any legitimate commercial purposes.

Finally, in order to maintain the liquidity of the documentary credit mechanism, it is necessary to balance this broader substantive standard with a higher procedural threshold.[4] English courts should strictly apply the standard established in *United Trading Corp SA v Allied Arab Bank Ltd*, requiring the applicant to demonstrate a "strong prima facie case" where the "only realistic inference" is that a material fraud has occurred.[5] By combining the functional, transaction-centred definition of fraud with the high procedural threshold, this approach ensures that judicial intervention remains a strict exception, thus eliminating the loopholes of third-party fraud without compromising the systemic efficiency of the autonomy principle.

5.2 Recalibrating Autonomy Under Regulatory Pressure: A Structured Regulatory Intervention Framework

As described in Chapter IV, regulatory compliance no longer acts as a clearly defined legal exception such as fraud but evolves into an unspecified constraint on the autonomy principle.

These deficiencies do not stem from the autonomy principle itself, but from the lack of any structured legal framework to regulate the connection between public regulatory obligations and private payment obligations. In this field, banks actually have unrestrained discretion and can override documentary credit obligations without satisfying any identifiable thresholds, following any established procedures, and without assuming any substantial judicial accountability. In order to systematically address these three structural deficiencies, this article proposes a structured regulatory intervention framework, which contains three interrelated pillars corresponding to each identified defect.

Pillar 1—Substantive Threshold: Restoring Legal Certainty and Establishing a Safe Harbour

In order to solve the double defect pointed out in Section 4.4, namely under-regulation of AML discretion and the contradictions of bilateral responsibilities inherent in the sanctions regime, the first pillar proposed two complementary reform measures.

[1] *United City Merchants* [1983] 1 A.C. 168.

[2] Uniform Commercial Code (US) § 5-109(a).

[3] For this classic articulation of the materiality threshold, see *Intraworld Industries, Inc v Girard Trust Bank* 336 A 2d 316 (Pa 1975) 324–325; subsequently adopted by the UCC § 5-109, Official Comment 1.

[4] The Task Force on the Study of UCC Article 5, An Examination of UCC Article 5 (Letters of Credit), 45 *Bus Law* 1521, 1565 (June 1990)

[5] *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554 (CA) 561.

The first measure is to elevate the threshold of evidence in AML regimes, requiring substantiated grounds based on objective facts, not just out of honest belief. The feasibility of imposing a stricter threshold is practically demonstrated by the Swiss anti-money laundering framework. Under the Swiss model, financial intermediaries have a mandatory reporting obligation in cases of "actual knowledge of or reasonable grounds to suspect",[1] which is differentiated from "mere suspicion" and requires a higher threshold of suspicion than in the UK.[2] Connecting the English AML threshold with this model will bring it into closer coherence with the *Group Josi* standard applicable to sanctions, thus reducing the doctrinal asymmetry pointed out in Section 4.4.

Moreover, the reformed threshold should operate symmetrically. It should not only constrain regulators to exercise discretion over the law, but also protect those banks that exercise that power responsibly. If the bank withholds or delays payment on objective, reasonable and verifiable regulatory grounds, it should benefit from a qualified safe harbour protection and be exempt from civil liability arising from violation of autonomous payment obligations, provided that the bank has satisfied the minimum procedural requirements stipulated in the second pillar below. This safe harbour mechanism directly solves the inherent bilateral liability trap in the current sanctions framework. The doctrinal basis of such protection is implicit in the English contract law. Drawing on the principle established in *Braganza v BP Shipping Ltd* that the parties exercising the discretion of the contract must act honestly and rationally.[3] Banks invoking sanctions or AML concerns should be required to demonstrate that their refusal or delay is based on reasonably substantiated regulatory risk rather than mere precautionary de-risking. Extending this logic to the context of regulatory will reposition the status of banks in a coherent legal structure, replacing the contradictions caused by the current competitive legal risks with a framework for obtaining corresponding legal protection for compliance behaviour.

Pillar 2—Procedural Safeguards: Closing the Governance Gap

The second pillar aims to address the complete lack of minimum procedural requirements in the exercise of regulatory immunity by banks, that is, the governance gap pointed out in Section 4.4. This article extends the rationality principles established in the *Braganza*,[4] and proposes that if any financial institution withhold or delays payment on the grounds of regulatory, it must satisfy the following three minimum conditions: (a) it must provide the beneficiary with a well-reasoned notification indicating the specific regulatory basis for its decision, rather than simply invoking internal compliance policies; (b) decisions must be made within the prescribed time limit to avoid indefinite administrative suspension of payment obligations; (c) the decision-making process must have obvious objectivity, not only reflecting the internal risk preferences of the institution. These requirements do not increase the burden of investigation contrary to the principle of autonomy. They simply place the exercise of regulatory immunity under the basic standards of transparency and rationality that should be followed by parties exercising contractual discretion in commercial relations as required by the English contract law.

Pillar 3—Structured Reviewability: Remedying the Accountability Deficit

The third pillar aims to address the current lack of effective judicial supervision, which allows banks to suspend payment obligations in the absence of effective external accountability. If financial institutions rely on broad sanctions clauses or AML suspicions to withhold payments, courts should conduct a structured review of such reliance based on the established doctrines of contract interpretation, rather than affording undue deference to internal compliance procedures. This objective judicial posture is perfectly exemplified by the Court of Appeal of Singapore in *Kuvera*.[5] Navigating a highly internationalised trade finance hub, the Singaporean judiciary decisively rejected a bank's reliance on its internal, subjective sanctions policy, demanding instead an objective determination of sanctions violations based on

[1] Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 (Anti-Money Laundering Act, AMLA) SR 955.0, art. 9 para.1quater (Switzerland).

[2] D. Chaikin. (2009). How effective are suspicious transaction reporting systems? *J.M.L.C.*, *12*, 238, 245.

[3] *Braganza v BP Shipping Ltd.* [2015] UKSC 17; [2015] 1 W.L.R. 1661 at [30] per Lady Hale and at [104] per Lord Neuberger.

[4] *Braganza* [2015] UKSC 17; [2015] 1 W.L.R. 1661.

[5] *Kuvera Resources Pte. Ltd. v JPMorgan Chase Bank*, N.A. [2023] SGCA 28.

admissible evidence on a balance of probabilities. English courts could adopt a similar structured review to ensure that the beneficiary's right to payment does not depend on administrative processes that are completely unscrutinized by law.

Taken together, these three pillars are not intended to displace the autonomy principle, but they serve to preserve their core function by embedding regulatory intervention within a transparent, procedurally disciplined, and judicially accountable legal structure. In this sense, the structured regulatory intervention framework seeks to reverse the current trend towards the privatisation of regulatory risk through unstructured banking discretion, and to re-anchor the operation of documentary credits within a coherent and publicly accountable legal standard.

6. Conclusion

The central contention of this article is that the contemporary instability of the English documentary credit framework is not a product of doctrinal obsolescence but of structural misalignment — a failure of the existing legal architecture to account for two categories of pressure that its foundational assumptions were not designed to bear. English law has always regarded these pressures as external interference, which are controlled through the fragmentary extension of existing doctrines, but this article shows that these pressures are actually a constituent challenge to the logic of the principle of autonomy itself. The contradiction of the private law framework is that it cuts off the formal requirements of documents from the logic behind them, that is, documents must have legal authenticity. If the bank is forced to pay an invalid counterfeit bill, it is not defending the principle of autonomy but sacrificing its substantive function of ensuring the security of transactions while maintaining the form of the principle of autonomy. The disadvantage of the regulatory framework is that it lets the compulsory investigation obligation under the public law to override the payment obligation of the private law in the absence of clear guidelines. As a result, the payment of letters of credit no longer depends on the definite legal rights but becomes a product of the bank's internal risk appetite.

The above two problems quietly subvert the original risk distribution mechanism of letters of credit in practice. The basic transaction risk that should have been borne by the applicant, that is, the burden of ensuring document compliance and seeking relief for breach of contract, has now been transferred to the beneficiary. Today, beneficiaries not only face payment interruptions caused by regulatory review at any time, but also this compliance mechanism-based intervention completely lacks the due process guarantee provided by traditional private law exceptions (such as the fraud exceptions discussed in the previous chapter). Letters of credit, which serve as the cornerstone of commercial certainty, has evolved into a conditional commitment in practice. Its reliability depends on variables that are completely beyond the control of the beneficiary or the scope of legal relief, such as institutional compliance culture, the accuracy of the drafting of sanctions clauses, and the opacity of the suspicious activity reporting system. Against this background, the phased reform strategy proposed in Chapter V is premised to strictly distinguish between the two types of pressures, rather than adopting a unified theoretical response to the two. The reform of private law follows the inherent logic of strict compliance and autonomy principles; the proposed regulatory framework introduces a mechanism for structured judicial supervision of banks invoking sanctions and anti-money laundering reasons, drawing on the existing rational constraints in English contract law and the evidence standards developed in comparative jurisdictions.

This article's analysis leads to two directions that require further exploration. At a theoretical level, this article reveals a gap in the existing theoretical research: the current theoretical framework of the letter of credit law has not yet explained how the principle of autonomy should work in a regulatory environment that imposes mandatory investigation obligations on financial institutions, providing a convincing normative explanation.

From a comparative perspective, the comparative analysis of this article found that there is a fruitful but unexplored interaction between transaction-focused fraud standards in the United States and Singapore's compliance-threshold approach to nullity. To what extent to which these two models can be applied to English law, and whether their combination will produce greater theoretical coherence than either single model, represents a specific agenda for future comparative research.

At the institutional level, the fragmentation and differences caused by the judicial community's reliance on the interpretation of specific contract terms, such as the different treatment of sanctions clauses in the English case law discussed above, show the limitations of relying purely on domestic solutions. Instead of making a comprehensive revision of UCP 600, it may be more realistic to develop targeted explanatory guidelines or supplementary rules through institutional mechanisms such as the International Chamber of Commerce Banking Committee. Such clarifications can provide a more coherent and internationally consistent framework for dealing with regulatory restrictions without compromising the flexibility on which the UCP system depends.

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Appraisal of the Concept of Preventive Diplomacy in World Politics

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Abstract

It is an axiom that peace is priceless, terror is senseless. Every nation in world politics desires palpable peace in order to achieve its foreign policy objectives. Knowing that there can be no meaningful development in an atmosphere of rancour, acrimony and wars, states tend to pursue preventive diplomacy which prevents conflicts from occurring. However, universal interrelationships are usually done with skillful competitiveness and maneuvering because the world is made up of great diversities, and states with different capacities, competencies, skills and interests to compete. Most times, the result of this competitiveness is conflict. Diplomacy is the weapon with which states mingle, negotiate and consult each other. It is a weapon to prevent or settle disputes when they arise. This paper examines the idea of preventing conflicts from occurring amongst states in their relationships as they constantly and continually strive to achieve their various foreign policy objectives. Rather than engage in expensive methods and practice of dispute settlement, it is better to prevent conflict. This paper adopted doctrinal method where the relevant primary and secondary sources were utilized. It was found that preventive diplomacy is good and beneficial because it is better to prevent conflict from occurring than to allow it begin before looking for solution to prevent it; the world has to be proactive than reactive. It concluded that in spite of the obvious benefits of preventive diplomacy, it cannot be 100% achievable in a world where there are different capacities, competencies, skills and interest performed by varied people of different cultures, places, tribes, religion. Finally, it was recommended that stakeholders in international politics should work assiduously to make preventive diplomacy effective. States, non–state actors and other participants should adopt to tenets of preventive diplomacy since it is better to prevent adverse situations from degenerating into ravaging wars.

Keywords: appraisal, concept, preventive, diplomacy, world, politics

1. Introduction

Preventive diplomacy refers to diplomatic actions taken to prevent disputes from escalating into violent conflict and to limit the spread of ongoing conflicts. It is both a reactive and proactive approach rooted in dialogue, negotiation, early warning systems, mediation, and conflict analysis. This means that it starts before hostility begins or becomes compounded,

aiming to address underlying causes and reduce the motivation for violence [1]. Preventive diplomacy is predicated majorly upon the fact that it is better to work hard to prevent conflict from occurring than to allow it begin before looking for ways of preventing it. This is based on the adage that prevention is better than cure. It is good to be proactive than to be reactive. To be proactive is to prevent war which causes devastation, damage to lives and properties, sometimes environment and entire eco-system become destroyed to the detriment of man. Conversely, when we allow conflict to degenerate into war, the consequences are far — reaching as they are devastatingly excruciating. Resolving conflicts, at this stage (during or after war) is good but painful. Painful due to emotional trauma, economic waste, social damage and political devastation (structures) impressed as a result of the effect of war. Monies that would have been channeled to fresh meaningful projects will be used for rebuilding.

This form of diplomacy targets the early stages of tension, such as political polarization, resource competition, ethnic grievances, or economic marginalization, before these tensions transform into open conflict.[2] Preventive diplomacy differs from crisis diplomacy**,** which is reactive (responding *after* violence erupts), and from peacekeeping**,** which usually occurs following a peace agreement. Its primary emphasis is on anticipation and early action[3].

Preventive diplomacy relies on early warning systems that monitor indicators of instability for example, political unrest, hate speech, economic shocks, and human rights violations [4]. These systems aim to detect tensions before they reach a hazardous threshold. Conflict analysts then interpret these signals to assess potential escalation, enabling timely diplomatic engagement. For instance, the United Nations' early warning system on electoral violence identifies warning markers months before a contested election to trigger preventive dialogue. [5] Confidence-building measures are actions taken to reduce mistrust between rival parties. These include information sharing, joint development projects, dialogue forums, or military de-escalation agreements. Mediators often diplomats, special representatives, or international envoys engage rival parties to negotiate peaceful solutions**.** This can involve shuttle diplomacy, direct dialogue facilitation, or negotiated ceasefires. Mediation aims to establish communication channels that were not previously available, enabling adversaries to explore peaceful settlements rather than resort to force.[6] In some cases, preventive diplomacy is supported by preventive deployment sending peacekeepers or observers before conflict becomes widespread. Although more resource-intensive, this measure can provide security assurances and symbolize international commitment to peace.[7]

Theoretically, preventive diplomacy draws from multiple frameworks in international relations. For instance, liberal institutionalism argues that international cooperation and institutions reduce conflict through norms, regular engagement, and shared rules. Early engagement and dialogue are core principles of preventive diplomacy which fit well within liberal institutionalism with emphasis on institutions and norms. [8] Constructivist theory highlights how identity, norms, and communication shape state behaviour. Preventive diplomacy seeks to transform hostile narratives and build shared understandings, aligning with constructivist ideas that conflict incubation is partially rooted in perception and identity.[9]

The main objectives of preventive diplomacy include to prevent the onset of armed conflict, address root causes of tension, build trust between competitors, create dialogue mechanisms and reduce need for costly military responses. These goals are complementary and most effective when applied simultaneously. Preventive diplomacy uses varied tools, such as

[1] A Smith. (2015). Early Warning Systems and Conflict Prevention. *Journal of Peacebuilding and Development*, *10*(2), 15-30.

[2] P Jones. (2016). *Shuttle Diplomacy and Conflict Mediation in Modern International Relations*. London Routledge, 35.

[3] H Thomas. (2018). *Peace Operations and Preventive Diplomacy*. Cambridge, Cambridge University Press, 71.

[4] S Lee & T Walker. (2019). *Conflict Early Warning and Preventive Diplomacy*. New York: Palgrave Macmillan, 90.

[5] (n1) 17.

[6] M Roberts & J Kingsley. (2017). *Preventive Diplomacy in International Politics*. Oxford, Oxford University Press, 10.

[7] (n3) 71.

[8] R O Keohane. (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, NJ Princeton University Press, 20.

[9] A Wendt. (1999) *Social Theory of International Politics*. Cambridge, Cambridge University Press, 6-9.

Diplomatic dialogue between adversaries, back-channel communications, good offices provided by neutral parties, special envoys and diplomatic missions, confidence-building measures and early warning and analysis networks. Such tools aim to transform the conflict environment from confrontation to cooperation. Despite its promise, preventive diplomacy faces several challenges: The challenges of preventive diplomacy are obvious in spite of its advantages. Timing and political will. Successful preventive action depends on timely recognition of risks and the political will to act early both of which are often lacking. Accurate early warning requires reliable data. Conflicts driven by hidden agendas or covert mobilizations are harder to detect early. Sovereignty Concerns are another identifiable challenge. States may resist preventive diplomacy as foreign interference, invoking sovereignty. This reluctance can hinder or delay diplomatic engagement.

Preventive diplomacy is particularly relevant for Nigeria due to recurring ethno-religious tensions, election-related violence, border disputes in the Lake Chad Basin region and Internal instability linked to insurgent groups. By adopting preventive diplomacy, Nigeria could reduce cycles of violence, strengthen governance institutions, and build peaceful dispute resolution frameworks within and beyond its borders. Conclusively, preventive diplomacy represents a proactive and pragmatic approach to conflict management. It focuses on early action, dialogue, confidence-building, and mediation to prevent disputes from escalating into violence. Although challenges such as timing, political will, and sovereignty concerns can hinder its success, preventive diplomacy remains an essential strategy for states like Nigeria that seek peaceful and sustainable conflict resolution. Strengthening early warning systems, investing in mediation capacities, and engaging multilaterally increase the likelihood of preventing future conflicts.

2. Conceptual Clarifications

The key concepts which are considered to be of utmost significant to this paper are as follows:

2.1 Preventive Diplomacy: Early Warning Symptom

Preventive diplomacy gained global prominence after the end of the Cold War, especially through the efforts of the United Nations and the former UN Secretary-General Boutros Boutros-Ghali. Preventive diplomacy seeks to identify and address the root causes of tensions before they develop into violent crises. [1] Early warning symptoms are the indicators or signals that suggest the possibility of political instability, violent conflict, humanitarian crises, or interstate disputes. These warning signs help governments, regional organizations, international bodies, and civil society organizations take timely actions to prevent escalation into violence or war.

Preventive diplomacy is important because violent conflicts often result in loss of lives, destruction of infrastructure, displacement of people, economic collapse, and regional instability. By recognizing early warning symptoms, policymakers and diplomats can intervene through negotiation, mediation, sanctions, peacekeeping, confidence-building measures, and dialogue mechanisms before conflicts become uncontrollable. Preventive diplomacy includes, early warning systems, fact-finding missions, diplomatic mediation, confidence-building measures, preventive deployment, economic and political interventions. The major goal is conflict prevention rather than conflict resolution after violence has erupted. Preventive diplomacy operates on the assumption that early intervention is cheaper, safer, and more effective than military intervention after conflict escalation.[2]

Organizations such as the African Union, Economic Community of West African States, European Union, and the United Nations actively engage in preventive diplomacy efforts. Early warning symptoms are observable developments that indicate the likelihood of future conflict or instability. They serve as danger signals or predictors of crisis. These symptoms may be political, economic, social, military, environmental, or humanitarian in nature. Early warning systems gather and analyze information from various sources to detect these indicators and provide recommendations for preventive action. The effectiveness of preventive diplomacy depends greatly on the ability to recognize these warning signs early enough.

2.2 Importance of Early Warning Systems in

[1] A Ackermann. (2003). The Idea and Practice of Conflict Prevention. *Journal of Peace Research*, *40*(3), 339-347.

[2] M S Lund. (1996). *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy*. Washington, DC: United States Institute of Peace Press, 15-17.

Preventive Diplomacy

Early warning systems provide timely information for decision-making. The importance of early warning systems cannot be over emphasized. They include helping governments and organizations intervene before violence begins thereby preventing conflict, reducing casualties and displacement therefore protecting human lives and encouraging economic stability by preventing war and avoiding destruction of infrastructure and economic losses. It is also true that early warning systems support regional and global peace efforts. Agencies can also prepare for possible humanitarian crises in advance. The Mechanisms of Preventive Diplomacy include mediation where neutral parties help disputing groups reach peaceful agreements, negotiation where dialogue between conflicting parties reduces tensions and confidence-building measures, preventive deployment where peacekeeping troops may be deployed to prevent escalation. Sanctions and diplomatic pressure where economic sanctions and diplomatic isolation may discourage aggressive actions and fact-finding missions where international observers investigate situations and provide objective assessments.

2.3 Mediation and good Offices in Preventive Diplomacy

As a means for the peaceful settlement of disputes, mediation is concerned with aiding the parties in arriving at a solution to the dispute at hand with the help of a third party known as a 'mediator'. It is one of the 'diplomatic' means of settling disputes mentioned in Article 33 and as with other dispute settlement avenues, mediation requires the mandatory consent of the parties, which may be accorded on an ad-hoc basis or be pursuant to a treaty provision that provides for the same. The aim of mediation is to help the parties arrive at an amicable solution to the dispute at hand. To this extent, the mediator is an independent third party who actively engages with the parties to ascertain and clarify the facts of the issue and in the process advances appropriate proposals for settling the dispute.[1] The active and pro-active engagement of the mediator as a third party to settle the dispute in a manner acceptable to all sides of the dispute distinguishes mediation from other modes of dispute settlement. The specific role of a mediator may vary depending on the facts and circumstances of each case. In most cases, the mediator helps the parties come together and set the stage for a negotiation process. The mediator may also act as a facilitator who helps to reduce political tensions between parties while ensuring their engagement with the settlement process in a manner conducive to the interests of both parties. In addition, the mediator may also try to understand the position of both parties by actively engaging with them thus making it easier for him/her to suggest solutions that may be acceptable to all sides. Given the diplomatic or political nature of mediation, any solution proposed by the mediator is a non-binding one and parties retain absolute control over the settlement process. Confidentiality is a key aspect of the mediation process and any statement or view adopted during the mediation process is normally not admissible in arbitration and judicial processes that may be subsequently entered into.

Good Offices is a unique mode of dispute settlement given the fact that it does not find explicit mention in Article 33. Nonetheless, its value as a dispute settlement mechanism is universally acknowledged. Good offices refer to a method of settling disputes where a neutral third party of high standing and respectability on account of his/her credibility seeks to influence the parties to strive towards a negotiated settlement of the dispute without participating in the process itself. Among other diplomatic modes of dispute settlement having third party involvement, good offices is one where the third party plays a very modest role.[2] While not binding in any form, it has a strong impact on the parties given the moral force that comes with the third parties' credibility and efforts in engaging with the parties to the conflict. There are examples to clarify the concepts of good offices in resolving international conflict. United Nations Good Offices in the Cyprus Conflict is one clear example. The Cyprus conflict, rooted in ethnic tensions between Greek Cypriots and Turkish

[1] Wikipedia contributors. (2024). Armenia–Azerbaijan border crisis (2021–present). In Wikipedia, The Free Encyclopedia. Retrieved from https://en.wikipedia.org/wiki/Armenia–Azerbaijan_border_crisis_(2021–present) accessed on 28th April, 2026.

[2] Ibid.

Cypriots, escalated into violence in the 1960s and culminated in Turkey's military intervention in 1974. Since then, the island has remained divided. Over the decades, the United Nations (UN) has played a central role in facilitating peace efforts through its good offices mission, led by the UN Secretary-General (UNSG). The "good offices" of the UN Secretary-General were officially employed in the Cyprus dispute starting in 1964 when the UN Security Council (UNSC) established the United Nations Peacekeeping Force in Cyprus (UNFICYP) and requested the Secretary-General to use his good offices to promote a peaceful resolution. [1] In recent years, the good offices continued under Secretary-Generals Ban Ki-moon and António Guterres. In 2017, the Crans-Montana talks, held in Switzerland, were a significant attempt by the UN's good offices to facilitate agreement between the two communities and the three guarantor powers (Greece, Turkey, and the United Kingdom). Though progress was made, the talks ultimately collapsed over security and guarantees. [2] This case illustrates how good offices are a neutral, non-coercive diplomatic tool where a third party (in this case, the UN Secretary-General) facilitates dialogue without imposing a solution. The Cyprus case is among the most persistent and visible examples of this method in action over decades. More so, the conflict between the Netherlands and Indonesia over the sovereignty of West New Guinea[3] was resolved through the good offices of the United States, which mediated negotiations that led to the New York Agreement of 1962, transferring administration to the UN and later to Indonesia.

The United States acted through good offices to mediate the West New Guinea dispute, culminating in the New York Agreement of 1962. In another development, United Nations Good Offices in Myanmar[4] was instructive. The UN Secretary-General's good offices were invoked to address the political and human rights crisis in Myanmar, especially following the 2007 Saffron Revolution and the 2021 military coup. Envoys like Ibrahim Gambari and Christine Schraner Burgener facilitated dialogue between military leaders, opposition parties, and ethnic groups. The Secretary-General's good offices in Myanmar have sought to promote national reconciliation and respect for human rights, particularly since the 2021 coup.

3. Challenges of Preventive Diplomacy

Despite its importance, preventive diplomacy faces several challenges which includes lack of political will, sovereignty issues because states often view preventive actions as interference in internal affairs, inadequate funding, delayed international response which may lead to a clog in the wheel of progress. Poor information gathering and complexity of modern conflicts due to the fact that conflicts today often involve terrorism, cyber threats, ethnic tensions, and transnational actors, making prevention difficult.

4. Case Studies and the Role of International Organizations

Between 2007-2008 in Kenya, following disputed elections, violence erupted between ethnic and political groups. Diplomatic mediation led by Kofi Annan helped to restore peace and establish a coalition government. Also in Macedonia, preventive deployment by the United Nations helped prevent the spread of the Balkan conflicts into Macedonia. There was also intervention Liberia and Sierra Leone where the Economic Community of West African States played significant roles in conflict prevention and peacekeeping during civil wars. Failure to respond adequately to early warning signs contributed to the genocide in Rwanda. This case demonstrates the dangers of ignoring warning symptoms.

The United Nations coordinates peacekeeping, mediation, and diplomatic interventions globally. The African Union promotes peace and security through its Peace and Security Council and Continental Early Warning System. The Economic Community of West African States has intervened in several West African conflicts through peacekeeping and mediation. The European Union supports preventive diplomacy through economic aid, election monitoring, and conflict mediation. The strategies used for

[1] United Nations. *Report of the Secretary-General on his mission of good offices in Cyprus.* https://undocs.org accessed 29th September, 2025.

[2] United Nations. (2017). *Report of the Secretary-General on his mission of good offices in Cyprus*. https://undocs.org accessed 29th September, 2025.

[3] R Subrata. (2019). The Role of Good Offices in the Resolution of the West New Guinea Dispute. *Journal of International Affairs and Global Strategy*, *81*, 12-19.

[4] United Nations. (2022). Special Envoy of the Secretary-General on Myanmar – Annual Report 2022. https://www.un.org/sg/en/content/sg/statement/2022-12-29/myanmar-annual-report accessed 29th September, 2025.

Strengthening preventive diplomacy are strengthening democratic institutions, promoting good governance, improving intelligence gathering, encouraging inclusive political participation, reducing poverty and inequality, enhancing regional cooperation, supporting civil society organizations, investing in peace education, developing effective early warning systems and ensuring rapid international response mechanisms.

5. Conclusion

Preventive diplomacy is an essential approach to maintaining international peace and security. By identifying and responding to early warning symptoms, governments and international organizations can prevent disputes from escalating into violent conflicts. Political instability, economic hardship, social divisions, military activities, humanitarian crises, and environmental degradation all serve as important indicators of potential conflict. Effective preventive diplomacy requires strong institutions, political commitment, timely intervention, and international cooperation. Although challenges such as sovereignty concerns, inadequate funding, and delayed responses remain significant obstacles, preventive diplomacy continues to be one of the most effective strategies for conflict prevention in the modern world. The success of preventive diplomacy depends largely on the ability of states and organizations to recognize early warning signs and act decisively before violence erupts. Therefore, strengthening early warning systems and promoting peaceful conflict management remain critical goals for global peace and stability. It was, however, noted that in spite of the benefits of early warning signs which are the fulcrum of preventive diplomacy, conflicts, in world politics, are inevitable.

6. Recommendation

Based on the findings, the following recommendations are made:

1) Stakeholders in International politics should work assiduously to make preventive diplomacy effective. States, non–states actors like international organizations, International Oil Companies (IOCs), Non–Governmental Organizations (NGOs) and other participants should adopt preventive diplomacy since it is better to prevent adverse situations from degenerating into ravaging wars.
2) States should respect the terms of all diplomatic and consular treaties entered into especially as they relate to maintaining international peace and security. Diplomatic efforts must focus on ensuring that all parties fulfill their commitments and addressing obstacles that may arise during the implementation phase.
3) Effective measures should be taken to guide possible arbitral violation of all diplomatic privileges and immunities by superpowers to the detriment of new democracies especially that of African countries.
4) Effective procedural approach should be taken by the International Court of Justice (ICJ) on all matters of violation of diplomatic etiquettes by both small and mighty states without racial prejudices.
5) State officials in diplomatic institutions should always abide by the rules and functions of their offices to avoid counter objectives and practice. They should be proactive and efficient in communication, interaction and negotiation.
6) Nigeria should deepen and expand its role in regional and international institutions (e.g., African Union (AU), ECOWAS, United Nations) to influence conflict prevention and resolution in Africa.

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M Roberts & J Kingsley. (2017). *Preventive Diplomacy in International Politics*. Oxford, Oxford University Press, 10.

M S Lund. (1996). *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy*. Washington, DC: United States Institute of Peace Press, 15-17.

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Beyond Absolutism: A Critical Examination of the Right to Life in Contemporary Human Rights Law

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Abstract

The right to life is widely recognized as the most fundamental human right and a cornerstone of international human rights law. This article critically examines the legal nature of the right to life, with particular emphasis on whether it constitutes an absolute or a qualified right under contemporary legal frameworks. Drawing primarily from international and regional human rights instruments, including the International Covenant on Civil and Political Rights and the European Convention on Human Rights, the study demonstrates that the right to life, while inherent and non-derogable, is not absolute in its application. The analysis shows that the right to life is subject to narrowly defined legal exceptions, including self-defense, lawful use of force by state authorities, the imposition of the death penalty under strict conditions, and lawful acts in armed conflict governed by international humanitarian law. These exceptions are regulated by the principles of legality, necessity, proportionality, and accountability, which ensure that any deprivation of life is not arbitrary. The study further highlights the evolving interpretation of the right to life through the jurisprudence and interpretive guidance of the United Nations Human Rights Committee, which has expanded its scope to include positive obligations on states to prevent foreseeable threats to life. It also identifies ongoing tensions between the protection of life and state interests such as security, law enforcement, and public order. The article concludes that the right to life is best understood as a qualified right rather than an absolute entitlement, whose protection depends on strict legal safeguards and effective accountability mechanisms. This nuanced understanding is essential for ensuring both respect for human dignity and the practical functioning of legal systems in contemporary society.

Keywords: absolutism, critical examination, right of life, Human Rights Law

1. Introduction

The right to life stands as the most fundamental of all human rights-both the moral starting point and the legal foundation upon which every other right depends. It protects individuals against arbitrary deprivation of life and reflects the intrinsic worth of the human person. This primacy is firmly embedded in international law, particularly in the Universal Declaration of

Human Rights[1] and the International Covenant on Civil and Political Rights,[2] which together establish life as an inviolable legal entitlement deserving of the highest level of protection.

From a philosophical standpoint, the right to life has attracted profound scholarly defense. John Rawls situates it within the framework of basic liberties that no just society can compromise,[3] while Ronald Dworkin characterizes rights as "trumps" over collective goals, thereby elevating the right to life above utilitarian calculations.[4] In a similar vein, Henry Shue identifies the right to life as a "basic right," indispensable for the meaningful exercise of all other rights.[5] Yet, legal theorists such as H. L. A. Hart and Joseph Raz caution against absolutist interpretations, emphasizing that rights operate within structured legal systems where limitations may arise in response to competing social interests.[6]

Historically, the right to life has evolved from abstract moral philosophy into a concrete and enforceable legal norm. Its intellectual roots lie in natural law traditions, where thinkers like Thomas Aquinas conceived human life as sacred,[7] and John Locke later reframed it as a natural right central to the legitimacy of government.[8] The liberal revolutions of the 17th and 18th centuries transformed these ideas into political claims, embedding the protection of life within early constitutional frameworks.

The devastation of the World War II marked a decisive turning point, catalyzing the internationalization of human rights and elevating the right to life into a universal legal standard. Subsequent developments in international and regional systems, including the African Charter on Human and Peoples' Rights,[9] have further refined its scope, extending it beyond mere protection from arbitrary killing to include positive obligations on states to safeguard life. Yet, this evolution has not produced an absolute right. Instead, it has revealed a more complex reality: the right to life is supreme in principle but qualified in practice. Legal systems continue to recognize narrowly defined exceptions-such as lawful use of force, self-defense, and regulated state action-thereby exposing an enduring tension between moral absolutism and legal pragmatism. It is this tension that lies at the heart of contemporary human rights discourse and forms the central concern of this study.

2. Conceptual Clarification

In order to properly situate the discussion on *"Beyond Absolutism: A Critical Examination of the Right to Life in Contemporary Human Rights Law,"* it is necessary to clarify the core concepts that underpin the study. These concepts-beyond absolutism, critical examination, the right to life, and contemporary human rights law-provide the conceptual and legal framework through which the subject is analyzed. Their clarification is essential for understanding the tension between the moral idea of the sanctity of life and its legal regulation under modern human rights systems.

2.1 Beyond Absolutism

The concept *"beyond absolutism"* refers to the legal and theoretical shift away from the view that the right to life is absolute and admits no exceptions whatsoever. In legal theory, absolutism implies that a right cannot be limited under any circumstance, including public emergency or competing legal interests.

However, contemporary human rights law rejects this position. This is evident in Article 6 of the International Covenant on Civil and Political Rights (ICCPR),[10] which protects the right to life but prohibits only "arbitrary deprivation of life," thereby implying that some lawful deprivations may occur under strict conditions. Similarly, Article 2 of the European Convention on Human Rights (ECHR)[11] expressly allows deprivation of life in narrowly defined circumstances such as self-defense and lawful use of force.

Legally, therefore, "beyond absolutism" captures

[1] United Nations. (1948). *Universal Declaration of Human Rights*.

[2] United Nations. (1966). *International Covenant on Civil and Political Rights*.

[3] Rawls, J. (1971). *A theory of justice*. Harvard University Press. Raz, J. (1986). *The morality of freedom*. Oxford University Press.

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[6] Hart, H. L. A. (1961). *The concept of law*. Oxford University Press.

[7] *Ibid.*

[8] Locke, J. (1689/1988). *Two treatises of government* (P. Laslett, Ed.). Cambridge University Press.

[9] Organization of African Unity. (1981). *African Charter on Human and Peoples' Rights*.

[10] United Nations. (1966). *International Covenant on Civil and Political Rights*.

[11] Council of Europe. (1950). *European Convention on Human Rights*.

the idea that the right to life is not absolute in operation but qualified, subject to limitations grounded in legality, necessity, and proportionality.

2.2 Critical Examination

Critical examination refers to a systematic and analytical evaluation of legal principles, rules, or doctrines, focusing on their coherence, application, and effectiveness. It is a methodological approach widely used in legal scholarship rather than a term defined in treaties.

According to *Black's Law Dictionary (11th ed.)*,[1] critical analysis involves careful reasoning and evaluation of legal concepts against established standards of law and practice. In this study, it is used to assess whether the right to life is truly absolute in law or whether it is subject to legally recognized limitations and exceptions.

2.3 Right to Life

The *right to life* is a fundamental human right protecting every individual against unlawful deprivation of life. It is guaranteed under Article 3 of the Universal Declaration of Human Rights (UDHR)[2] and is legally binding under Article 6(1) of the ICCPR *(citation: United Nations, 1966)*, which affirms that every human being has the inherent right to life and that this right shall be protected by law.

The United Nations Human Rights Committee[3] in General Comment No. 36 further clarifies that the right:

- is inherent in all human beings,
- imposes both negative obligations (to refrain from unlawful killing) and positive obligations (to protect life), and
- prohibits only arbitrary deprivation of life, not all deprivation.

It is classified as a first-generation (civil and political) right, and while non-derogable, it remains subject to strict legal regulation.

2.4 Contemporary Human Rights Law

Contemporary human rights law refers to the modern system of international, regional, and domestic legal norms governing the protection of human rights, developed mainly after 1945. It is grounded in key instruments such as:

- the UDHR,
- the ICCPR,
- the ECHR, etc.

This legal system is characterized by treaty-based obligations, judicial interpretation, and supervisory mechanisms such as UN treaty bodies and regional courts. It adopts a balanced and proportionality-based approach, allowing limited restrictions on rights only where justified under strict legal conditions.

3. Theoretical Framework

To provide a focused and analytically coherent foundation, this study adopts two central theoretical perspectives-Natural Law Theory and Legal Positivism-as the most influential in explaining the nature and limits of the right to life in contemporary human rights law.

3.1 Natural Law Theory

Natural law theory offers the moral and philosophical foundation of the right to life, grounding it in the inherent dignity and intrinsic worth of the human person. Classical thinkers such as Thomas Aquinas argued that human life is sacred because it originates from a higher moral order and must therefore be protected (Aquinas, as cited in natural law tradition). This view was later developed by John Locke, who articulated the right to life as a natural and inalienable right existing prior to and independent of the state.[4]

Within this framework, the right to life is regarded as fundamental and near-absolute, serving as the primary justification for the existence of government. The legitimacy of the state is thus tied to its ability to protect life. However, even within natural law reasoning, limited exceptions are acknowledged-particularly in cases such as self-defense-where the preservation of one life may justify necessary force against another.

3.2 Legal Pluralism

In contrast, legal positivism provides a practical and institutional understanding of the right to life, emphasizing that rights derive their meaning and enforceability from legal systems rather than

[1] Black's Law Dictionary. (11th ed.). (2019). Thomson Reuters.

[2] United Nations. (1948). *Universal Declaration of Human Rights*.

[3] United Nations Human Rights Committee. (2018). *General Comment No. 36 on Article 6 of the ICCPR (Right to Life)*.

[4] Locke, J. (1988). *Two treatises of government* (P. Laslett, Ed.). Cambridge University Press. (Original work published 1689).

moral absolutes. H. L. A. Hart argues that rights are created, defined, and limited by legal rules,[1] while Joseph Raz maintains that rights are grounded in social interests and may be restricted where justified by competing considerations.[2]

From this perspective, the right to life is inherently qualified, as its scope depends on statutory provisions, judicial interpretation, and state practice. This explains why international legal frameworks, such as the International Covenant on Civil and Political Rights, [3] recognize the right to life while permitting narrowly defined exceptions, including the lawful use of force and regulated state action.

The interplay between these two theories reveals the central tension underpinning this study. While natural law emphasizes the moral inviolability of life, legal positivism underscores its practical limitation within legal systems. This duality supports the argument that the right to life, though fundamental, cannot be treated as absolute in contemporary human rights law. Instead, it must be understood as a qualified right, whose limitations are subject to strict legal justification and oversight.

4. Methodology

This study adopts a qualitative doctrinal research methodology, which is most appropriate for examining legal principles, theoretical arguments, and normative frameworks relating to the right to life in contemporary human rights law. The doctrinal approach focuses on the analysis and interpretation of legal texts, rather than empirical data, allowing for a critical evaluation of how the right to life is conceptualized and applied.[4]

4.1 Research Design

The research is primarily analytical and descriptive. It systematically examines the nature of the right to life, tracing its evolution and interrogating whether it can be regarded as absolute or qualified. The study also adopts a critical approach, assessing the gap between theoretical claims of absolutism and the practical realities of legal limitations (IRAC methodology and doctrinal analysis tradition).

4.2 Sources of Data

The study relies exclusively on secondary sources, including:

- International legal instruments, such as the Universal Declaration of Human Rights (United Nations, 1948) and the International Covenant on Civil and Political Rights.[5]
- Regional human rights frameworks, including the African Charter on Human and Peoples' Rights.[6]
- Scholarly works by leading theorists such as John Locke (1689/1988), H. L. A. Hart (1961), and Joseph Raz (1986).
- Academic journals, textbooks, and legal commentaries on human rights law.

4.3 Method of Analysis

The study employs a doctrinal and thematic analysis, which involves examining legal provisions and scholarly arguments and organizing them into key themes. These include: the conceptual meaning of the right to life, **i**ts theoretical foundations, **t**he extent and justification of its limitations.

This approach enables a systematic and critical evaluation of competing legal and philosophical positions.[7]

The research focuses on the right to life within international human rights law, with occasional reference to regional frameworks, particularly in Africa. It does not involve fieldwork or empirical data collection, and therefore relies on the availability and interpretation of existing legal and academic materials.[8]

The doctrinal method is particularly suitable for this study because the issue under examination-the qualified or absolute nature of the right to life-is fundamentally normative and interpretive rather than empirical. It enables a deep engagement with legal texts and theoretical perspectives, providing a solid basis for critical

[1] Hart, H. L. A. (1961). *The concept of law*. Oxford University Press.

[2] Raz, J. (1986). *The morality of freedom*. Oxford University Press.

[3] United Nations. (1966). *International Covenant on Civil and Political Rights*.

[4] McCrudden, C. (2006). Legal research and the social sciences. *Law Quarterly Review, 122*, 632–650.

[5] United Nations. (1966). *International Covenant on Civil and Political Rights*.

[6] Organization of African Unity. (1981). *African Charter on Human and Peoples' Rights*.

[7] Hutchinson, T. (2015). *Researching and writing in law* (3rd ed.). Thomson Reuters.

[8] *Ibid.*

legal analysis.[1]

5. Legal Framework

The right to life is a human right which is enshrined in a plethora legal instruments. These instruments shall be examined seriatim.

5.1 Universal Framework

The universal framework lays the normative and philosophical foundation of the right to life, shaping all subsequent legal developments. The Universal Declaration of Human Rights was adopted in 1948 in response to the atrocities of the World War II. It marked the first global consensus on human dignity and fundamental rights.

Article 3 provides:

"Everyone has the right to life, liberty and security of person."[2]

The UDHR embodies a composite framework of rights, incorporating elements of all three generations. However, the right to life specifically falls under first-generation rights (civil and political rights), characterized by protections against state interference. The provision is broadly framed and morally absolute in tone, but lacks legal enforceability and detailed limitations, making it a normative foundation rather than a regulatory instrument.

5.2 International Legal Framework

The international legal framework transforms universal principles into binding obligations, introducing structure and legal precision. The International Covenant on Civil and Political Rights was adopted in 1966 to legally enforce the civil and political rights outlined in the UDHR.

Article 6(1) states:

"Every human being has the inherent right to life… No one shall be arbitrarily deprived of his life" (United Nations, 1966).

The ICCPR is a core first-generation human rights instrument, focusing on civil and political liberties. Its formulation of the right to life introduces the concept of "arbitrary deprivation," signaling a shift from abstract idealism to legal qualification. Thus, while firmly grounded in first-generation rights, it acknowledges that such rights are not absolute, but subject to carefully regulated limitations.

5.3 European Regional Framework

The European system offers a highly developed and enforceable legal structure, supported by judicial oversight. The European Convention on Human Rights was adopted in 1950 to prevent the recurrence of authoritarian abuses in Europe and to institutionalize human rights protection.

Article 2(1) provides:

"Everyone's right to life shall be protected by law."[3] Article 2(2) outlines specific exceptions.

The Convention is a first-generation rights instrument, emphasizing civil and political protections. Its explicit inclusion of exceptions reflects a mature legal framework, where the right to life is clearly qualified. The European system demonstrates how first-generation rights can be strictly regulated without being absolute, through judicial interpretation and enforcement.

5.4 Inter-American Framework

The Inter-American system reflects a progressive and protective approach, influenced by historical experiences of repression. The American Convention on Human Rights was adopted in 1969 to strengthen human rights protection in the Americas.

Article 4(1) states:

"Every person has the right to have his life respected… in general, from the moment of conception."[4]

This Convention primarily protects first-generation rights, including the right to life. However, its broader interpretive approach sometimes overlaps with second-generation concerns (e.g., state obligations to ensure conditions for dignified existence). The phrase "in general" confirms that even within a strongly protective system, the right remains qualified rather than absolute.

5.5 African Regional Framework

The African system adopts a holistic and integrative approach, combining individual, collective, and developmental rights. The African Charter on Human and Peoples' Rights was adopted in 1981 to reflect African socio-political

[1] Hutchinson, T., & Duncan, N. (2012). Defining and describing what we do: Doctrinal legal research. *Deakin Law Review, 17*(1), 83–119.

[2] United Nations. (1948). *Universal Declaration of Human Rights*.

[3] Council of Europe. (1950). *European Convention on Human Rights*.

[4] Organization of American States. (1969). *American Convention on Human Rights*.

realities and post-colonial aspirations.

Article 4 provides:

"Human beings are inviolable… Every human being shall be entitled to respect for his life."[1]

The African Charter is unique in that it encompasses first, second, and third-generation rights within a single instrument. The right to life itself remains a first-generation right, but its interpretation is influenced by collective (third-generation) values, such as solidarity and community. Despite its strong wording, the right is not absolute in practice, as limitations arise through state interpretation and contextual realities.

5.6 Arab Regional Framework

The Arab framework reflects a regional adaptation of international norms, balancing human rights with domestic legal traditions. The Arab Charter on Human Rights was adopted in 2004 to formalize human rights protections within Arab states.

Article 5 provides:

"Every human being has the inherent right to life… protected by law."[2]

The Charter incorporates first-generation rights, including the right to life, alongside other categories of rights. However, its application reflects a state-centered approach, allowing broader discretion in limiting rights. This reinforces the understanding that even first-generation rights like the right to life are qualified within legal systems.

Across all instruments, the right to life is consistently classified as a first-generation (civil and political) right, emphasizing protection against arbitrary state action. However, its evolution across legal frameworks reveals a shift from moral legal qualification. The inclusion of limitations, exceptions, and interpretive flexibility across all regions confirms that the right to life, though fundamental, is not absolute but carefully regulated within law.

6. The Right to Life: An Overview

The right to life is universally regarded as the cornerstone of human rights, forming the essential basis upon which all other rights depend. Without the protection of life, the enjoyment of any other right becomes impossible. As such, it occupies a pre-eminent position within first-generation [3] (civil and political) rights, imposing both restraints on state power and obligations for state protection.[4]

At the international level, the right to life is firmly established in foundational instruments such as the Universal Declaration of Human Rights, which proclaims that everyone has the right to life, liberty, and security of person, [5] and the International Covenant on Civil and Political Rights, which recognizes the inherent right to life and mandates its legal protection. These instruments affirm that the right to life is not conferred by the state but is inherent in every human being.[6]

Conceptually, the right to life encompasses both negative and positive obligations. The negative obligation requires the state to refrain from arbitrary or unlawful deprivation of life, including extrajudicial killings and excessive use of force. The positive obligation requires the state to take proactive measures to safeguard life, including protecting individuals from foreseeable threats and ensuring effective investigation of suspicious deaths.[7]

In terms of its legal nature, the right to life is a justiciable and immediately enforceable right, allowing individuals to seek remedies in cases of violation. It is also widely regarded as non-derogable, particularly under frameworks such as the ICCPR, meaning that it cannot be suspended even in times of public emergency.[8] However, non-derogability does not equate to absolutism, as the right remains subject to legal qualification. This introduces the distinction between an absolute right and a qualified right. While the right to life is fundamental, most legal systems recognize exceptional circumstances under which deprivation of life may be lawful. These include self-defense, lawful use of force by

[1] Organization of African Unity. (1981). *African Charter on Human and Peoples' Rights*.

[2] League of Arab States. (2004). *Arab Charter on Human Rights*.

[3] United Nations. (1966). *International Covenant on Civil and Political Rights*.

[4] Shue, H. (1980). *Basic rights: Subsistence, affluence, and U.S. foreign policy*. Princeton University Press.

[5] United Nations. (1948). *Universal Declaration of Human Rights*.

[6] Nowak, M. (2005). *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2nd ed.). N.P. Engel.

[7] United Nations Human Rights Committee. (2018). *General Comment No. 36 on Article 6 of the ICCPR (Right to Life)*.

[8] Joseph, S., & Castan, M. (2013). *The International Covenant on Civil and Political Rights: Cases, materials, and commentary* (3rd ed.). Oxford University Press.

state authorities, and, in some jurisdictions, capital punishment under strict regulation. Such limitations are governed by the principles of legality, necessity, and proportionality, ensuring that any interference is strictly justified.[1]

Furthermore, the scope of the right to life has evolved significantly over time. Initially conceived as protection against direct state violence, it has expanded to include protection from non-state actors, environmental threats, and life-threatening socio-economic conditions. This reflects a broader understanding that the protection of life requires not only restraint but also affirmative state action to ensure conditions conducive to human survival and dignity.[2]

The right to life is also closely interconnected with other rights, including dignity, health, and freedom from inhuman or degrading treatment. This interdependence reinforces the view that human rights operate as a holistic and indivisible system, rather than as isolated guarantees.[3]

In sum, the right to life is both foundational and dynamic. It underpins the entire human rights system while continuing to evolve in response to new legal and social challenges. However, despite its elevated status, its practical application reveals a nuanced legal reality: the right to life is not absolute, but rather a qualified right, subject to narrowly defined and strictly regulated exceptions within the framework of the rule of law.

7. The Right to Life as a Qualified Right

Although the right to life is widely regarded as the most fundamental of all human rights, contemporary legal scholarship and jurisprudence confirm that it is not absolute, but rather a qualified right. A qualified right permits lawful limitations under strictly defined conditions, provided such limitations are justified within a framework of legality, necessity, and proportionality.

At the international level, the qualified nature of the right to life is clearly reflected in the International Covenant on Civil and Political Rights. Article 6 guarantees the inherent right to life but prohibits only the "arbitrary" deprivation of life.[4] According to Manfred Nowak (2005),[5] the concept of arbitrariness introduces a legal threshold that distinguishes lawful from unlawful deprivations. More recent scholarship reinforces this interpretation. For instance, Christof Heyns and Thomas Probert (2016) [6] argue that the notion of arbitrariness has evolved to encompass broader considerations, including due process, accountability, and the foreseeability of harm, thereby confirming the qualified character of the right. Contemporary human rights bodies have further clarified this position. The United Nations Human Rights Committee in its General Comment No. 36 emphasizes that the right to life must not be interpreted narrowly and that states have both negative and positive obligations, including duties to prevent foreseeable threats to life and address systemic risks.[7] Scholars such as Yuval Shany (2019)[8] noted that this expansion reflects a shift toward a more comprehensive and regulated understanding of the right, rather than an absolute one.

From a theoretical standpoint, modern interpretations of liberal and legal theory continue to support the qualified nature of the right to life. While John Rawls (1971) and Ronald Dworkin (1977) emphasize the fundamental importance of rights, contemporary scholars such as Gráinne de Búrca (2021)[9] argue that rights must be understood within institutional and societal contexts, where competing interests necessitate careful balancing. Similarly, Samuel Moyn (2018)[10] highlights the evolution of human rights discourse toward addressing real-world constraints, reinforcing the idea that even core rights like the right to life operate within practical limitations.

Regional legal systems also reflect this

[1] *Ibid.*

[2] Alston, P. (2008). The right to life in international law: Towards a general comment. *European Journal of International Law, 19*(4), 699–746.

[3] *Ibid.*

[4] United Nations. (1966). *International Covenant on Civil and Political Rights*.

[5] *Ibid.*

[6] Heyns, C., & Probert, T. (2016). The right to life and the use of force in international law. *Human Rights Quarterly, 38*(2), 329–360.

[7] United Nations Human Rights Committee. (2018). *General Comment No. 36 on Article 6 of the ICCPR (Right to Life)*.

[8] Shany, Y. (2019). The right to life in international law: Interpretive developments. *Israel Law Review, 52*(3), 345–370.

[9] De Búrca, G. (2021). Human rights and institutional balancing in international law. *Modern Law Review, 84*(1), 1–25.

[10] Moyn, S. (2018). *Not enough: Human rights in an unequal world*. Harvard University Press.

contemporary understanding. The European Convention on Human Rights explicitly provides for exceptions such as self-defense and lawful use of force (Council of Europe, 1950). Recent scholarship by Frédéric Mégret (2020) [1] emphasizes that these exceptions are not indicative of weakness but rather of a structured legal regime, ensuring that any deprivation of life is subject to strict scrutiny and accountability.

Moreover, emerging scholarship has expanded the scope of the right to life beyond traditional interpretations. Scholars such as David Kretzmer (2020)[2] and Sarah Cleveland (2021)[3] argue that the right now encompasses new dimensions, including environmental protection, public health obligations, and the regulation of state use of force in counterterrorism contexts. This expansion further reinforces the idea that the right to life is dynamic and regulated, rather than absolute.

Importantly, the right to life is generally regarded as non-derogable, meaning it cannot be suspended even during emergencies (United Nations, 1966). However, as contemporary scholars note, non-derogability does not eliminate the possibility of lawful limitations. Instead, it underscores the requirement that any interference must meet exceptionally high legal standards (Shany, 2019).

In practice, the qualified nature of the right to life is evident in recognized exceptions such as:

- Self-defense and defense of others,
- Lawful use of force by law enforcement,
- Capital punishment (in limited jurisdictions and under strict safeguards).

These exceptions are governed by the principles of legality, necessity, and proportionality, ensuring that the right is not undermined but carefully regulated. In conclusion, contemporary scholarship overwhelmingly supports the view that the right to life is fundamental but not absolute. Its legal formulation, theoretical grounding, and practical application all point to a qualified right, one that is subject to narrowly defined limitations within a robust framework of legal safeguards. This nuanced understanding reflects the realities of modern governance while preserving the core value of human life.

8. A Critical Examination of the Right to Life: A Doctrinal (Law-Based) Analysis of Its Non-Absolute Nature

The right to life, though universally acknowledged as the most fundamental human right, is not framed in law as an absolute prohibition against all forms of deprivation of life. Rather, a doctrinal analysis of binding legal instruments demonstrates that it is a qualified right, subject to clearly defined and narrowly circumscribed exceptions. This position is evident from the text, structure, and authoritative interpretation of international and regional human rights law.

At the universal level, the International Covenant on Civil and Political Rights establishes the foundational legal standard. Article 6(1) provides that "every human being has the inherent right to life" and that this right shall be protected by law; however, it prohibits only the "arbitrary deprivation of life."[4] The legal implication of this formulation is significant: it does not outlaw all deprivations of life, but only those that are arbitrary, thereby leaving room for lawful deprivation under regulated conditions. This interpretation is authoritatively confirmed by the United Nations Human Rights Committee in General Comment No. 36, which clarifies that the term "arbitrary" must be understood to include elements of inappropriateness, injustice, lack of predictability, and due process, thereby establishing a legal threshold rather than an absolute prohibition.[5]

The qualified nature of the right to life is even more explicitly codified in the European Convention on Human Rights. Article 2(1) guarantees the right to life, but Article 2(2) provides that deprivation of life shall not be regarded as a violation where it results from the use of force which is "no more than absolutely necessary" for specified purposes, namely:

- the defense of any person from unlawful violence; the effecting of a lawful arrest

[1] Mégret, F. (2020). The right to life in international human rights law. *Oxford Handbook of International Human Rights Law*.

[2] Kretzmer, D. (2020). The law of armed conflict and the right to life. *European Journal of International Law, 31*(2), 423–445.

[3] Cleveland, S. (2021). Human rights and the right to life in contemporary international law. *American Journal of International Law, 115*(2), 200–215.

[4] United Nations. (1966). *International Covenant on Civil and Political Rights* (Art. 6).

[5] United Nations Human Rights Committee. (2018). *General Comment No. 36 on Article 6 of the ICCPR (Right to Life)*.

or the prevention of escape;

- the suppression of a riot or insurrection.[1]

This provision constitutes a direct legal acknowledgment of exceptions, thereby affirming that the right to life is not absolute. The European Court of Human Rights has consistently interpreted Article 2 as permitting deprivation of life only where the use of force meets the strict requirements of absolute necessity and proportionality, reinforcing the regulated-not absolute-character of the right.

Further doctrinal support is found within the same universal framework. Article 6(2) of the ICCPR recognizes the continued legality of the death penalty in states that have not abolished it, provided that it is imposed only for the "most serious crimes", pursuant to a final judgment rendered by a competent court, and in accordance with fair trial guarantees.[2] While subsequent developments in international law encourage abolition, this provision remains a clear legal indication that the right to life permits exceptions under strict procedural and substantive safeguards.

In addition, the application of international humanitarian law (IHL) in situations of armed conflict further demonstrates the non-absolute nature of the right. Under the principles of distinction and proportionality, the targeting of combatants is lawful, provided that civilians are not directly targeted and that incidental harm is not excessive in relation to the anticipated military advantage. The coexistence of human rights law and IHL thus confirms that deprivation of life may be lawful in specific contexts, reinforcing the conclusion that the right to life is contextually regulated rather than absolute.

The same doctrinal pattern is reflected across other regional systems. For example, the American Convention on Human Rights, while strongly protective, provides in Article 4(2) that the death penalty may still be applied under limited conditions.[3] Similarly, the African Charter on Human and Peoples' Rights guarantees the inviolability of life in Article 4 but does not exclude the possibility of lawful deprivation, leaving room for interpretation within domestic and regional jurisprudence[4]

A synthesis of these legal provisions reveals a consistent doctrinal position: the right to life is not framed as an unqualified norm, but rather as a right whose protection is mediated through legal standards such as legality, necessity, proportionality, and due process. These standards function as safeguards, ensuring that any deprivation of life is subject to strict legal control and accountability.

In conclusion, a law-based analysis of international and regional instruments unequivocally establishes that the right to life is not absolute. Its legal formulation-particularly through the prohibition of "arbitrary" deprivation and the explicit recognition of justified uses of force-demonstrates that it is a qualified right, permitting limited exceptions under rigorously defined conditions. This doctrinal structure reflects a balance between the sanctity of human life and the practical necessities of law, security, and governance, ensuring that the right remains both fundamental and legally operable.

9. Summary of Findings

This study set out to critically examine the right to life within contemporary human rights law, with particular emphasis on its legal nature, scope, and limitations. The analysis reveals several key findings grounded primarily in international and regional legal instruments.

First, the right to life is firmly established as a foundational and universally recognized right, enshrined in core instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It is classified as a first-generation (civil and political) right, imposing both negative obligations (to refrain from arbitrary killing) and positive obligations (to protect life through legal and institutional mechanisms).

Second, the study finds that the right to life is not absolute in law, but rather a qualified right. This is evident from the legal formulation in Article 6 of the ICCPR, which prohibits only the "arbitrary" deprivation of life, thereby permitting lawful deprivation under strictly regulated conditions. This position is consistently

[1] Council of Europe. (1950). *European Convention on Human Rights* (Arts. 2(1)–(2)).

[2] *Ibid.*

[3] Organization of American States. (1969). *American Convention on Human Rights* (Art. 4).

[4] Organization of African Unity. (1981). *African Charter on Human and Peoples' Rights* (Art. 4).

reflected across regional frameworks, including the European Convention on Human Rights, which explicitly provides for exceptions such as self-defense, lawful arrest, and the suppression of riots.

Third, the research establishes that specific and legally recognized exceptions to the right to life exist within international law. These include:

- The use of lethal force in self-defense or defense of others,
- Law enforcement operations involving necessary and proportionate force,
- The death penalty (where not abolished), subject to strict safeguards.

The lawful targeting of combatants under international humanitarian law. These exceptions are not arbitrary but are governed by strict legal principles, notably legality, necessity, proportionality, and accountability, ensuring that any deprivation of life remains within the bounds of the rule of law.

Fourth, the study highlights that the right to life is generally regarded as non-derogable, meaning it cannot be suspended even in times of emergency. However, this non-derogable status does not render it absolute; rather, it underscores the requirement that any limitation must meet exceptionally high legal thresholds, particularly the prohibition of arbitrariness.

Fifth, the analysis demonstrates that the right to life has evolved in scope, expanding beyond protection against direct state violence to include broader obligations such as safeguarding individuals from foreseeable threats, ensuring effective investigations, and addressing systemic risks to life. This evolution reflects a shift toward a more comprehensive and dynamic interpretation of the right within international law.

Finally, the study concludes that the right to life operates within a carefully balanced legal framework, which seeks to uphold the sanctity of human life while accommodating the practical necessities of governance, security, and justice. Its characterization as a qualified right does not diminish its importance; rather, it reflects the structured and principled manner in which the law regulates exceptional circumstances involving deprivation of life.

10. Conclusion

This study has critically examined the right to life within the framework of international and regional human rights law, demonstrating that while it remains the most fundamental of all rights, it is not absolute in its legal operation. Anchored in instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the right to life is universally recognized as inherent and indispensable. However, its legal formulation-particularly the prohibition of "arbitrary" deprivation of life-clearly establishes that the right is qualified rather than absolute.

The analysis has shown that international law permits limited and strictly regulated exceptions, including the use of lethal force in self-defense, law enforcement operations, the conditional application of the death penalty, and the lawful conduct of hostilities under international humanitarian law. These exceptions are not indicative of weakness in the right, but rather reflect a structured legal balance between the protection of life and the practical realities of governance, security, and justice. The consistent application of principles such as legality, necessity, proportionality, and accountability ensures that any deprivation of life remains subject to rigorous legal control.

Furthermore, the study highlights that the right to life, though non-derogable, is not immune from limitation. Its non-derogable status underscores its fundamental importance, yet its qualified nature allows the law to address exceptional circumstances without undermining its core protection. The evolving interpretation of the right-particularly through authoritative bodies such as the United Nations Human Rights Committee-also reflects an increasing recognition of the need to adapt its scope to contemporary challenges, including security threats, armed conflict, and emerging global risks.

In conclusion, the right to life must be understood not as an unrestricted or absolute entitlement, but as a carefully regulated legal right, whose strength lies in the strict conditions governing its limitation. Its enduring significance within human rights law derives not only from its foundational status, but also from the robust legal framework that ensures its protection while accommodating exceptional and unavoidable realities. This nuanced understanding is essential for any meaningful engagement with the right to life in both academic discourse and legal practice.

11. Recommendations

In view of the foregoing analysis, which establishes that the right to life is a fundamental but qualified right under international and regional legal frameworks, it becomes necessary to consider measures that strengthen its protection while ensuring that its recognized limitations are not abused. Although international law permits certain narrowly defined exceptions to the right to life, the practical application of these exceptions has revealed inconsistencies and risks of arbitrariness in some jurisdictions. Accordingly, the following recommendations are advanced to enhance legal clarity, strengthen accountability, and ensure more effective protection of the right to life in both peacetime and conflict situations.

12. Clarification and Harmonization of "Arbitrary Deprivation of Life"

There is a need for clearer and more uniform interpretation of the term "arbitrary deprivation of life" under the International Covenant on Civil and Political Rights. The United Nations Human Rights Committee should further develop authoritative interpretive standards to ensure consistency across jurisdictions and reduce the risk of misuse or overly broad state discretion.

12.1 Regulation of the Use of Lethal Force

States should strengthen domestic legal frameworks governing the use of lethal force by law enforcement and security agencies. Such frameworks must strictly reflect the principles of necessity, proportionality, and legality, and be supported by independent oversight institutions capable of investigating and sanctioning unlawful deprivation of life.

Progressive Abolition of the Death Penalty States retaining capital punishment should progressively move toward abolition in line with evolving international human rights standards. Where still in use, it must be confined to the most serious crimes, with full respect for due process guarantees and fair trial standards as required under international law.

12.2 Strengthening Positive Obligations of States

States should deepen their positive obligations to protect life, particularly by addressing preventable threats such as environmental degradation, unsafe living conditions, inadequate healthcare, and public insecurity. This reflects the evolving interpretation of the right to life as requiring proactive state intervention.

12.3 Harmonization of Human Rights Law and International Humanitarian Law

Greater coherence is needed between international human rights law and international humanitarian law in situations of armed conflict. Clear operational standards should be developed to ensure that the protection of life remains effective even during hostilities and that lawful targeting does not become a source of arbitrariness.

12.4 Reinforcement of Accountability Mechanisms

States must ensure prompt, independent, and effective investigations into all cases involving deprivation of life. Judicial and institutional mechanisms should be strengthened to guarantee accountability, provide remedies to victims, and deter future violations.

Overall, while the right to life is a qualified right, its limitations must operate within a strictly controlled legal framework. The above recommendations aim to ensure that any exception to the right remains exceptional, justified, and fully compliant with the rule of law, thereby preserving the fundamental value of human life.

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