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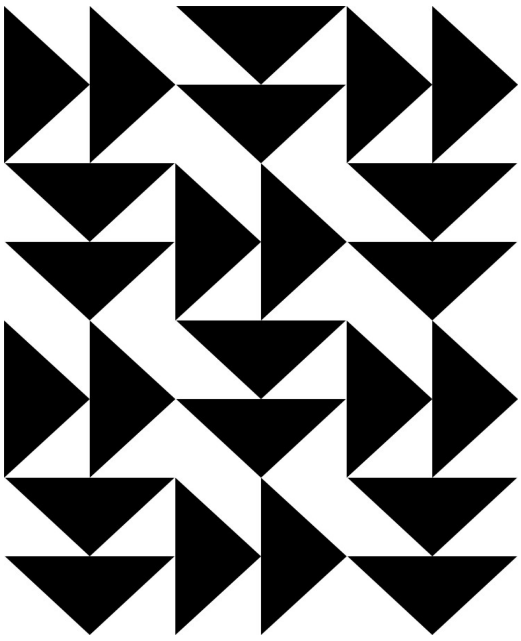

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Corruption in International Law: Illusions of a Grotian Moment

Has there already been a Grotian Moment for corruption? If not, what would it take for new legal rules and doctrines on corruption to crystallise? This article seeks to answer these two questions by reviewing the relevant history of international legal scholarship, the current public international law framework for anticorruption, and recent developments in international legal practice. We conclude that a Grotian Moment may have been reached for a narrow concept of corruption, focused on petty corruption and bribery, with the proliferation of international anticorruption law followin<g the Cold War. However, a Grotian Moment for a broadened understanding of corruption, based on other forms such as institutional, political, and grand corruption, ought to emerge to comprehensively address all forms of corruption. Given the range of challenges, including resistance from political elites and the indeterminacy of criminal liability, a Grotian Moment for a broadened concept of corruption remains improbable.

Keywords

corruption – institutional corruption – UNCAC – human rights system

"Quod monstra generantur propter corruptionem alicujus principii."
(Monsters are begotten on account of the corruption of some principles.)[1]
"You are the Law, and you have never been broken. But is there a free soul alive that does not long to break you, only because you have never been broken?"[2]

Around the world countless people are facing detrimental effects of corruption, being denied fair participation in political processes or, worse, equal access to public services, as necessary resources are syphoned off elsewhere. The United Nations (UN) estimates that the global cost of corruption is as high as USD 2.6 trillion, representing five percent of global gross domestic product (GDP)[3] and every year an estimated USD 500 billion is lost to corruption in the public health sector alone.[4] Redirecting these vast resources to where they are most needed would change the lives of millions of people. Yet, while recent progress in the international and regional legalisation of anticorruption mechanism may indicate the achievement of a Grotian Moment for a narrow concept of corruption focused on issues such as bribery, the widespread manifestation of other forms of corruption, including institutional corruption and other forms with transnational reach, suggests that anticorruption law encompassing a broader concept of corruption ought to be 'ushered in by the urgency of dealing with [this] fundamental change.'[5]

This article begins with a brief overview of some historical perspectives on the concept of corruption and in some greater detail of the norm evolution towards the end of the last century concerning the need for legal anticorruption instruments, reflected in the adoption of a plethora of international and regional anticorruption legislation. To combatting corruption and its negative externalities in all its forms, the following section proceeds with

[1] Edward Coke, *Preface to Reports*, Part Ten (1614), ed. by Steve Shepherd (Indianapolis: Liberty Fund:, 2003), vol.1. p.331
[2] Gregory, the only anarchist among detectives posing as anarchists, at the end of G.K. Chesterton, *The Man Who Was Thursday* (London: J.W. Arrowsmith, 1908).
[3] United Nations, 'Global Cost of Corruption at Least 5 Per Cent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data', (10 September 2018).
[4] M. Wahba, '19th International Anti-Corruption Conference', UNDP, (4 December 2020).
[5] Michael P. Scharf, 'Grotian Moments: The Concept', *Grotiana* 42:2 (2021), 193–211, at p. 209.

a discussion of recently formulated concepts of other forms of corruption, including political and grand corruption, as well as institutional corruption, which is a sub-field of legal studies of corruption that developed from behavioural economics and has seldom been applied to international law before. Demonstrating the urgency of adopting a broadened concept of corruption in the international legal system, this section also illustrates that there is an emerging demand for the adoption of a broader concept of corruption among States and scholars. Next, we offer illustrative examples of the broader concept of corruption and their detrimental effects, highlighting the prevalence of incidents of corruption not captured by 'classic' corruption. The next section will assess the probability and possible features of a Grotian Moment for a broadened concept of corruption from two perspectives: by examining potential avenues for elevating such a concept of corruption to the international legal sphere through both the international human rights system and an international criminal law approach; and by reviewing some potential challenges, such as resistance from political elites and legal procedural issues such as attribution.

The article concludes that based on (a) the rapidity of the international legalisation process of anticorruption mechanisms propelled by a global norm-shift on corruption and culminating in the adoption of a range of international and regional legal anticorruption instruments within less than a decade; and on (b) an interpretation of widespread ratification of treaty law signalling a Grotian Moment; a Grotian Moment may have been achieved for a narrow concept of 'classic' corruption. And while there is an urgency for a Grotian Moment to be ushered in for a broadened concept of corruption, realities of the global political landscape would prove such an evolution of international law illusionary.

A Grotian Moment for 'Classic' Corruption?: a Historical Perspective[6]

Historically, there is broad consensus among political and legal writers that corruption is such an ineradicable part of human nature that its only theoretically plausible cure, totalitarian autocracy, is worse than learning to live with corruption. Some theologians

[6] For definitions of Grotian Moments see Tom Sparks and Mark Somos, 'Grotian Moments: An Introduction', *Grotiana* 42:2 (2021), 179-192.

disagree, but only about a cure being even theoretically available in this life.[7] Since the very origins of humanity, various forms of corruption have been a central feature of legal discourse and ultimately culminated in the proliferation of international anticorruption law at the end of the last century.

Renaissance to Enlightenment

By Machiavelli's time, the maxim that political and moral corruption are akin to the inevitable decay of the human body has become deeply entrenched; few utopian advocates of an incorruptible body politic, able to defy the structural causes of decline diagnosed by Polybius, have been taken seriously. The acceptance of corruptibility as an integral feature of humans individually and collectively is a mainstay of Western legal thought. The topos that laws are only needed because corruption is inescapable is the brightest thread through our discourse, memorably captured from Aristotle to Rousseau and in forensic speeches from Edward Coke to James Madison. In Christian formulations of this theme, the first Grotian Moment is therefore the Fall, when corruption set in, war and crimes began, laws became necessary and a set of customary inter- national laws, such as legal protection for monogamy and the use of explicit oaths to signal binding agreements, were crystallised as soon as Adam and Eve tasted the forbidden fruit.[8] A

[7] Some Manicheans and Anabaptists considered themselves uncorrupted, but they did not leave large coherent bodies of writing behind

[8] E.g. Christian Thomasius, *Institutes of Divine Jurisprudence, with Selections from Foundations of the Law of Nature and Nations* (1688), ed., tr. and intr. by Thomas Ahnert (Indianapolis: Liberty Fund, 2011), I.ii §62, pp. 98–9. *Pacta sunt servanda* necessitated by the 'state of corruption': *Institutes*, II.vi §2, p. 205. The institution of binding oaths 'has only been introduced as a crutch for corrupt nature', as faithfulness cannot be assumed and only verbalised promises can be made enforceable: *Institutes*, II.viii §1, p. 241.

Wars start due to the corruption of human nature: *Institutes*, I.ix §104, p. 277. On the Fall and laws governing the society of nations: *Institutes*, III.i §53, p. 363. Laws governing sexual relations, including proscriptions of polygamy and adultery, also appear in customary international laws rather than divine laws, since God made exceptions to these rules, but they are followed by civilised nations. *Institutes*, III.iii. One must distinguish humanity's corrupt nature from individuals guilty of added corruption in that context: *Institutes*, III.vii §83, p. 526; §110, p. 532.

Heineccius: corruption triggered by the Fall necessitated States: *Elementa Iuris Naturae et Gentium: Methodical System of Universal Law: Or, the Laws of Nature and Nations, with Supplements and a Discourse by George Turnbull,* ed. and intr. by Thomas Ahnert and Peter Schroder (Indianapolis: Liberty Fund, 2008), II.vi.ciii, p. 408.

Machiavelli accepted the already well-established argument that serving in a militia counteracts corruption. Vattel and James Otis, Jr. inverted it and welcomed what they described as customary laws for using standing armies. E.g. Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed. and intr. by Béla Kapossy and Richard Whatmore (1758) (Indianapolis: Liberty Fund, 2008), III.xv, p. 613.

specific understanding of corruption has also emerged in the Islamic world in the eleventh century as a 'state's decay' that can only be halted through legal regulation.[9]

In his 1707 introduction to the first German edition of Grotius's De iure belli ac pacis, Christian Thomasius (1655–1728) gave an historical overview of the evolution of the law of nations as an academic discipline. In his account, the discipline became self-aware with the ancient Greeks at the latest, but immediately entered a spiral of corruption due to ignorance and political ambition that were greatly exacerbated by the rise of Christianity as a state religion and by the professionalisation of theology and divine and canon law.[10] Catholics and Jesuists brought both the practice and study of international law to its most corrupt nadir, while Luther and his followers helped merely to slow down the corruption of international law, until finally God sent Grotius 'to provide it with a new beginning'.[11] Thomasius, and after him Jean Barbeyrac (1674–1744), postulated a Grotian Moment, the defining characteristic of which was that it put an end to international law's corruption. Johann Gottlieb Heineccius (1681–1741) was among many who proposed a Hobbesian Moment in which Hobbes changed the law of nations forever by revealing that corrupt human nature cannot be contained without the ever-present violence of powerful sovereigns, and that the same irreparable and almost incontrollable corruption will thwart any attempt to establish a peaceful union of states.[12] By contrast, Samuel Pufendorf (1632–1694) held that cognitive bias, irrational emotions and self-deceit were such pervasive sources of corruption that no amount of domestic and international law could ever eradicate corruption from human interaction.[13]

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[9] Bo Rothstein and Aiysha Varraich. *Making Sense of Corruption* (Cambridge: Cambridge University Press, 2017), p. 33.

[10] Also see Thomasius' 1701 essay on the crime of sorcery, where he blames self-serving lawyers for inventing and perpetuating a fictitious crime for political gain, and to keep their practice going. Christian Thomasius, *Essays on Church, State, and Politics*, ed., tr. and intr. by Ian Hunter, Thomas Ahnert and Frank Grunert (Indianapolis: Liberty Fund, 2007), pp. 244–245.

[11] Thomasius, 'On the History of Natural Law until Grotius', first published in 1707 as the foreword to the first German translation of Grotius's *De iure belli ac pacis*. In Thomasius, *Essays*, p. 45. Also see Thomasius, *Foundations*, in *Institutes*, p. 1.

[12] Heineccius, *Methodical System*, I.iii.lxxiii, p. 59.

[13] E.g. Pufendorf, *Of the Law of Nature and Nations*, ed. and tr. by George Carew (London: Walthoe, Wilkin, Bonwicke, Birt, Ward and Osborne, 1729), VIII.III.xiv, p. 777.

Since Bernard Bailyn's 1967 Ideological Origins of the American Revolution, the recognition of corruption's pervasive impact in legal history has dominated scholarship on American independence and diplomatic relations. Judges and scholars often remind us that although Louis XIV stayed within the remit of European diplomatic custom when he presented Benjamin Franklin with a portrait surrounded by 408 diamonds in a snuff box in 1785, the King unwittingly triggered a constitutional crisis with enduring consequences in the young United States, where expensive gifts were normally seen as temptations to luxury and dependency. Congress had to approve the gift under a provision that later became Article I, Section 9 of the Constitution: 'No person holding any office of profit or trust under [the United States], shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.' Pivoting around Franklin's snuff box, Zephyr Teachout and Larry Lessig traced the legal discourse of corruption from its Renaissance roots, through its seventeenth-century English and Dutch flowering, to its American fruits until the Supreme Court's 2010 campaign finance decision in Citizens United v fec, described by Teachout and Lessig as an historically ignorant departure from the US anticorruption tradition, which they perceive as extending to conflicts of interest and cognitive biases, and thus far broader than the dominant notions of 'classic' corruption.[14]

A Decade of International Legal Regulation for 'Classic' Corruption

Over the span of just a couple of decades fighting corruption has evolved from a somewhat controversial issue into an international norm, advocated for by strong states and disseminated by non-state actors.[15] Between the mid 1990s and early 2000s, an

[14] Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It* (New York: Twelve, 2011). Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Cambridge: Harvard University Press, 2014). Much of the historical analysis of the discourse on corruption comes from Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967). Not mentioned in this literature is Vattel's countervailing point that by the law of nations, sovereigns must honour the independence of foreign ambassadors by not threatening them even subtly or indirectly, because ambassadors' mental independence is vital for interstate relations. Vattel, *Law of Nations*, IV.vii, p. 706. Vattel also describes the crime of corrupting ambassadors through gifts: *Law of Nations*, IV.vii., pp. 708–709.

[15] For instance, France was sceptical of early efforts to develop anticorruption mechanisms at the oecd. See Barbara C. George and Kathleen A. Lacey, 'A Coalition of Industrialized Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives,' *Cornell International Law Journal*, 33 (2000), 547–592.

acceleration has taken place in the development of international anticorruption law, as it pertains to the narrower understanding of 'classic' corruption defined 'as the abuse of entrusted power for private gain'.[16] Within a short period of seven years, from 1996 to 2003, a plethora of international and regional legal instruments aimed at tackling 'classic' corrup tion have emerged[17] from as many as nine international and regional organisations. This significant period in the internationalisation of anticorruption law was preceded by two inconsequential 'waves' of anticorruption initiatives. The first 'wave' of a potential norm evolution started in the 1970s with debates on corruption emerging in the UN, OECD and among European countries, and the second 'wave' commencing in the late 1980s with renewed efforts in developing anticorruption mechanisms to target corruption conducted by businesses, but neither led to any concrete outcomes in the form of international legal instruments.[18] Lohaus suggests that the third 'wave of agreements appears to reflect a new global consensus against corruption.'[19]

There are a number of explanations for why anticorruption initiatives flourished and that have provided the 'context of fundamental change (…) to serve as an accelerating agent [for international law] to form much more rapidly'[20] in the third wave. A possible explanation is the end of the Cold War, prompting states to reverse their stance on supporting kleptocratic regimes in the absence of East-West confrontations and opening space for international collaboration.[21] Another factor was the spread of democracy and economic globalisation — including the proliferation of transnational corporations and a rise in globalised corruption scandals, with emerging theories on the detriments of corruption on the open market system and on democratic institutions, especially emanating from the World Bank and the International Monetary Fund.[22] This was also

[16] Transparency International, 'What is Corruption?', (2021).
[17] Elitza Katzarova, 'From Global Problems to International Norms: What Does the Social Construction of a Global Corruption Problem Tell us About the Emergence of an International Anti-Corruption Norm', *Crime, Law and Social Change*, 70 (2018), 299–313.
[18] Anja P. Jakobi, 'The Changing Global Norm of Anti-Corruption: From Bad Business to Bad Government,' *Zeitschrift für Vergleichende Politikwissenschaft*, 7 (2013), 243–264.
[19] Mathis Lohaus, *Towards a Global Consensus Against Corruption: International Agreements as Products of Diffusion and Signals of Commitment* (London: Routledge, 2019).
[20] Scharf, 'Grotian Moments', at p. 195.
[21] J. C. Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cambridge: Cambridge University Press, 2017).
[22] Lohaus, 'Global Consensus Against Corruption'; Abbott and Snidal, 'Values and Interests.'

accompanied by a shift in global norms viewing corruption as a major cause for poverty in developing nations[23] and for insecurity as a negative externality of conflict in failed or weak states.[24] Specifically, Alexander Cooley and Jason Sharman find that 'what was new in the 1990s was seeing corruption as an international governance problem, rather than just a domestic matter amendable to local criminal investigative and regulatory solutions.'[25] This observable shift in global norms on corruption in the 1990s 'was essential to the success of the anticorruption movement' and a critical catalyst driving what Abbott and Snidal described as the 'surprising rapidity' of the international legalisation process of anticorruption mechanisms.[26] Indeed, it was this change in normative values that allowed for the re-introduction of the debate on corruption in international fora and accounted for the success in the 'third' wave after the failures endured in the decades before.

Prompted by domestic political developments and corruption scandals during the 1970s, the US played a considerable role in the adoption of international and regional anticorruption law, including the United Nations Convention Against Corruption (UNCAC).[27] Jakobi identifies the US as a 'central norm entrepreneur,'[28] while Lohaus notes that the 'US government was the principal agenda-setter and proponent of banning transnational bribery.'[29]

Some anticorruption instruments originate in the US legal framework. Following the adoption of the Foreign Corrupt Practices Act of 1977, which was the first legal instrument addressing transnational corruption, the US lobbied for the establishment of an

[23] Sharman, 'Despot's Guide to Wealth Management.'
[24] Lohaus, 'Global Consensus Against Corruption.'
[25] Alexander Cooley and J. C. Sharman, 'Transnational Corruption and the Globalized Individual,' *Perspectives on Politics*, 15:3 (2017), 732–753, at p. 733.
[26] Kenneth W. Abbott and Duncan Snidal, 'Values and Interests: International Legalization in the Fight Against Corruption,' *The Journal of Legal Studies*, 31:S1 (2002), 141-177, at pp. 158 and 144.
[27] Sharman, 'Despot's Guide to Wealth Management'; Lohaus, 'Global Consensus Against Corruption'; Jakobi, 'Changing Global Norm of Anti-Corruption'; Abbott and Snidal, 'Values and Interests'; Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, 'The Fight Against Corruption in International Law', *Leuven Centre for Global Governance Studies Working Paper*, 94 (2012). For instance, the US tabled a draft agreement on anticorruption at the UN as early as 1976. See Jakobi, 'Changing Global Norms'. On treaties as potential signals of crystallisation of customary international law in the context of Grotian Moments, see e.g. Sparks and Somos, 'Grotian Moments', at pp. 184–185 and Jutta Brunnée, 'International Environmental Law: Of Sovereignty, Complexity, and Grotian Moments', in this issue.
[28] Jakobi, 'Changing Global Norm of Anti-Corruption,' at p. 245.
[29] Lohaus, 'Global Consensus Against Corruption,' at p. 5.

international legal system aimed at internationalising its domestic regulations for combatting corruption of foreign officials as the Act only regulated US businesses and impacted their competitiveness. Encountering significant resistance at the UN, primarily from developing countries due to the proposed narrow definition of corruption and concerns regarding potential implications for their country's sovereignty, but also from European countries hesitant to impact the competitiveness of European businesses,[30] the US pursued a similar track through the Organization of American States (OAS) and the Organisation for Economic Co-operation and Development (OECD), which proved to be more successful. Despite the role of the US in spearheading these debates, there is no doubt, however, that the US was not the only critical actor in advancing the international legalisation of anticorruption mechanisms. Indeed, in the early 1990s a coalition of actors from developing nations hijacked the forum of an OECD conference to demand actions being taken against corruption.[31] Similarly, European legal instruments were to some extent the result of the publicity given to corruption scandals involving prominent European leaders, while the AU Convention was driven by civil society and donors' concerns over corruption on the continent.[32]

With the adoption of the Inter-American Convention against Corruption in 1996, the OAS adopted the first legally binding international legal instrument aimed at fighting corruption.[33] The OECD's Convention on Combating Bribery of Foreign Public Officials was adopted in 1997. Focusing primarily on a small set of corruption practices and, in particular, on the supply side of bribes rather than also on the role of the bribe taker, the OECD has adopted a fundamentally narrow approach in its anticorruption law. That same year, the EU adopted the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union. The Council of Europe was among the first regional organisations to address some form of corruption in a set of non-binding recommendations in 1981, but it was not until 1998 that it adopted the Criminal Law Convention on Corruption. In other regionalisations of anticorruption law,

[30] Abbott and Snidal, 'Values and Interests'.
[31] Abbott and Snidal, 'Values and Interests'.
[32] Lohaus, 'Global Consensus Against Corruption.'
[33] Jakobi, 'Changing Global Norm of Anti-Corruption.'

the adoption of the African Union Convention on Preventing and Combating Corruption followed in 2003.[34] These regional anticorruption efforts culminated in the adoption of the UNCAC in 2003. Although the UN had initiated debates on anticorruption mechanisms as early as the 1970s, such as in a report on corruption developed by the Economic and Social Council (ECOSO) and in a corruption-related resolution adopted by the General Assembly, anticorruption only re-emerged as a key issue in the 1990s.[35]

A review of these legalised anticorruption mechanisms reveals a strong norm confluence that has influenced their respective provisions, with 'many provisions [being] copied verbatim.'[36] Both the OECD convention and the OAS convention were heavily influenced by the FCPA.[37] Yet, the nature of the international and regional legal instruments discussed above varies, with some benefiting from a broader scope but weak monitoring mechanisms, while others have adopted a narrower scope with stronger enforcement measures.[38] To assess whether these developments in international law represent a Grotian Moment, we proceed with an in-depth examination of UNCAC.

UNCAC: Zenith of a Grotian Moment?

While numerous treaties embody anticorruption norms and commitments relevant to identifying a Grotian Moment in international law, UNCAC is emblematic of UN and regional anticorruption initiatives.[39] In his foreword to UNCAC, then Secretary-General Kofi Anan compared the spread of corruption to a plague ravishing the world, and welcomed UNCAC as the first global and legally binding anticorruption instrument.[40] There are a number of factors that may indicate that the adoption of UNCAC marks the culmination of a Grotian Moment.

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[34] Wouters et al., 'The Fight Against Corruption in International Law.'
[35] Jakobi, 'Changing Global Norm of Anti-Corruption.'
[36] Lohaus, 'Global Consensus Against Corruption,' at p. 16.
[37] George and Lacey, 'Coalition of Industrialized Nations.'
[38] Lohaus, 'Global Consensus Against Corruption.'
[39] For detailed contextualising UNCAC in the universe of other anticorruption agreements see Lohaus, 'Global Consensus against Corruption.'
[40] UNDOC, 'The Secretary-General: Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption', (31 October 2003).

First, UNCAC was adopted by the General Assembly, which is significant in light of Michael P. Scharf's elaboration of a Grotian Moment as counselling 'governments when to seek the path of a U.N. General Assembly resolution as a means of facilitating the formation of customary international law.'[41] Second, the remarkably high number of signatories and ratifications, counting 187 State Parties as of 6 February 2020, including the US and China,[42] with most parties having 'refrained from making reservations that would damage the integrity of the treaty.'[43] And some States that have not ratified the UNCAC, have signed on to other regional anticorruption legislation, indicating that only a very small set of countries is not party to any international or regional anticorruption instrument – clearly signalling the manifestation of an international anticorruption norm.[44] Demonstrating that a high ratification rate is central for the time element in the formation of customary international law, Omri Sender and Sir Michael Wood cite the International Court of Justice (ICJ) in determining that 'even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected'.[45] This understanding of a high ratification rate of a treaty as an indicator of a Grotian Moment was echoed by Dire Tladi.[46]

Third, the definition and norm emanation may represent a potential Grotian Moment. The hope was that improved definitions of elements and mechanisms of corruption will be imported from UNCAC into domestic criminal codes to facilitate reporting and international review of codes of conduct for public officials under UNCAC Art. 8; and that this process over time will create a profound and enduring paradigm shift in anticorruption.[47] Although UNCAC does not define corruption,[48] its Preamble specifies three characteristics:

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[41] Scharf, 'Grotian Moments', at p. 204.
[42] United Nations Convention Against Corruption, Adopted on 9 December 2009.
[43] C. Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: Oxford University Press, 2015), p. 97.
[44] Jacobi 'Changing Global Norm of Anti-Corruption'; Lohaus, 'Global Consensus Against Corruption.'
[45] *North Sea Continental Shelf*, *Judgment, I.C.J. Reports 1969*, at p. 42, para. 73.
[46] Dire Tladi, 'Grotian Moments and Peremptory Norms of General International Law: Friendly Faciliators or Fatal Foes?', *Grotiana* 42:2 (2021), 334–352, at p. 346.
[47] Eds. Cecily Rose, Michael Kubiciel and Oliver Landwehr, *The United Nations Convention Against Corruption: A Commentary* (Oxford, UK: Oxford University Press, 2019), p. 84.
[48] Eds. Rose *et al*, *UNCAC Commentary*, p. 23 on debates during drafting that led to this feature.

corruption threatens social stability, it is linked to other crimes, and it is transnational. UNCAC aims and is understood to aim for impacts that would turn the treaty into a marker of the crystallisation of customary international anticorruption law, partly but not only through domestic incorporations of UNCAC measures.[49] Multiple UNCAC provisions that aim to entrench meritocracy and displace nepotism or comparable undue advantage have been hailed as a panacea.[50] Yet, UNCAC is arguably too 'soft' to generate a Grotian Moment via domestic incorporation: 'due to the liberal use of semi- and non-mandatory articles, as well as qualified provisions, the Convention is for the most part not likely to pose any threat to the sovereignty of States parties in the first place.'[51] Fourth, UNCAC may produce a Grotian Moment by mandating transparency and disclosure. Asset and private interests declarations, comparable to Teachout's anticorruption genealogy in the US context, are provided by UNCAC Art. 8(5), and have given rise to hopes that they will help to extinguish conflicts of interest.[52] In a similar reach for transparency, UNCAC Art. 10 has been described as a unique force for public reporting obligations.[53] Transparency and disclosure are powerful tools against corruption; however, they can be counterproductive under the current UNCAC conceptualisation of corruption, as the transparency mandates can create unrealistic expectations, especially given implementation problems, and the systematic corruption of information that States signatories to UNCAC will undoubtedly generate.[54]

Fifth, and relatedly, a quantitative breakthrough or tipping point ushered in by UNCAC may mark a Grotian Moment for anticorruption. The drafters, signatories, and commentators of

[49] On treaties marking Grotian Moments, see Sparks and Somos, 'Grotian Moments.'
[50] Eds. Rose *et al*, *UNCAC Commentary*, pp. 68, 70.
[51] Eds. Rose *et al*, *UNCAC Commentary*, p. 43. Also see p. 44 on the 'distinct softness' of *UNCAC*'s Implementation Review Mechanism.
[52] Eds. Rose *et al*, *UNCAC Commentary*, p. 88.
[53] Eds. Rose *et al*, *UNCAC Commentary*, pp. 107–108.
[54] On creating false expectations by adding implementation problems to the design of transparency laws, see Richard S. Saver, 'Deciphering the Sunshine Act: Transparency Regulation and Financial Conflicts in Health Care', *American Journal of Law & Medicine*, 43:3 (2017), 303–343. On the systematic corruption of knowledge by misrepresenting scientific data see, Sergio Sismondo, 'Key Opinion Leaders and the Corruption of Medical Knowledge: What the Sunshine Act Will and Won't Cast Light On', *Journal of Law, Medicine and Ethics* 14:3 (2013), 635–643; and by presenting data in ways that non-specialists cannot understand, see Meredith B. Rosenthal and Michelle M. Mello, 'Sunlight as Disinfectant
– New Rules on Disclosure of Industry Payments to Physicians', *New England Journal of Medicine* 368:22 (2013), 2052–2054.

UNCAC hold that it will produce an anticorruption breakthrough by generating transparency and improved knowledge through data collection. Three examples of this highly optimistic formulation are the 2009 Quantitative Approaches to Assess and Describe Corruption and the Role of UNODC in Supporting Countries in Performing Such Assessments: Background Paper Prepared by the Secretariat; the 2019 Working Group on the Prevention of Corruption's 'The use of information and communication technologies for the implementation of UNCAC',[55] and the Oxford Commentary on UNCAC Art. 5(2), Art. 5(4),[56] and Art. 6(3). While it is not implausible that data collection will instil habits that in turn solidify into State-level anticorruption standards and practices, there are reasons to doubt the potential of data collection to create a Grotian Moment, including through the limitations set by national contexts in which data collection is performed and through cognitive biases, which can reinforce other forms of corruption by providing political or legal cover for unmeasured or unmeasurable sources of corruption.[57]

Heeding warnings to be cautious in identifying Grotian Moments where there are none,[58] and recognising the significant shortcomings of UNCAC, we contend that there is persuasive evidence suggesting that a Grotian Moment might potentially have been achieved for 'classic' corruption. Ultimately, this determination hinges on what approach is adopted in identifying a Grotian Moment; whether informed by a more conservative understanding resting on the formation of customary international law,[59] or by a broader conceptualisation of Grotian Moments as signifying a critical moment that leads to the acceleration of international law.[60] To advance our argument, we have adopted the latter approach to identifying a Grotian Moment based on a global norm shift and the rapid legalisation process of international and regional anticorruption mechanisms, as signalled by the sheer number of instruments adopted within a short period of time and the high rate

[55] UN Doc. CAC/COSP/wg.4/2016/2, 3 June 2016.
[56] Eds. Rose *et al*, *UNCAC Commentary*, p. 54.
[57] Eds. Rose *et al*, *UNCAC Commentary*, pp. 55–56.
[58] Michael P. Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change', *Cornell International Law Journal*, 43 (2010), 439–469, at p. 452; Omri Sender and Michael Wood, 'Between "Time Immemorial" and "Instant Custom": The Time Element in Customary International Law', *Grotiana* 42:2 (2021), 229–251.
[59] Scharf, 'Grotian Moments', p. 204.
[60] Tladi, 'Grotian Moments and Peremptory Norms of General International Law', p. 336; Frédéric Mégret, 'The 'Grotian Style' in International Criminal Justice', *Grotiana*, 42:2 (2021), 303–333 (p. 302).

of ratification of these instruments by almost all States representing the international community.

Beyond 'Classic' Corruption: a Grotian Moment for a Broadened Concept of Corruption

Despite these achievements in advancing the anticorruption agenda in the 1990s, the aforementioned international legal instruments have significant shortcomings even in combating 'classic' corruption, but especially in addressing other forms of corruption. While important work remains to be done in improving enforcement mechanisms for existing legal instruments fighting 'classic' corruption, given the prevalence and detrimental effects of other forms of corruption, international law ought to evolve to encompass mechanisms incorporating a broader concept of corruption. We argue that separately and in addition to earlier anticorruption efforts, a Grotian Moment ought to be achieved for a broadened concept of corruption that takes into account the complexities of the global phenomenon of corruption in all its forms.

Conscious that '[t]he search for a robust conceptual definition of corruption is a near Sisyphean task,'[61] we proceed with a review of some proposed definitions for other forms of corruption, namely institutional, political, and grand corruption, to underpin our argument.[62] The term institutional corruption was coined by Dennis Thompson, who defined the concept as a 'political gain or benefit by a public official under conditions that in general tend to promote private interests.'[63] Lessig built upon and expanded the definition as follows:

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[61] Paul M. Heywood and Jonathan Rose, 'Curbing Corruption or Promoting Integrity? Probing the Hidden Conceptual Challenge', in *Debates of Corruption and Integrity*, ed. by Peter Hardi, Paul M. Heywood, and Davide Torsello (London: Palgrave MacMillan, 2015), p. 103.

[62] Scholars at times use the different definitions of corruption interchangeably. For instance, for what we would label as institutional corruption, Peters uses the term grand corruption to describe "what is provocatively termed 'legal corruption': non-transparent election financing and the resulting vested interests of politics and a toleration of the smooth transition of public officials to lucrative jobs in the private sector, in which the insider knowledge gained in office can be put to use in the new company (the 'revolving door' phenomenon)." *See:* Anne Peters, p. 1280.

[63] Dennis Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington, DC: Brookings Institution, 1995).

Institutional corruption is manifest when there is a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness by diverting it from its purpose or weaken ing its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness.[64]

With regard to political corruption, Emanuela Ceva argues that such conduct occurs when 'an institutional role-occupant who makes use of her power of office for the pursuit of an agenda whose rationale may not be publicly vindicated as coherent with the terms of the mandate for which that power was entrusted to her role and for which she is publicly accountable.'[65] Grand corruption is defined by Transparency International as 'the commission of any of the offences in UNCAC Articles 15–25 as part of a scheme that (1) involves a high level public official; and (2) results in or is intended to result in a gross misappropriation of public funds or resources, or gross violations of the human rights of a substantial part of the population or of a vulnerable group.'[66] These different forms of corruption appear on a continuum of individual and institutional corruption and are for the most part interconnected and overlapping. As Thompson notes, 'many instances of corruption are appropriately described as more or less institutional, or more or less individual.'[67] Individual corruption, particularly in developing countries, often takes on a systemic nature and turns into an institutionalised form of corruption.[68] Thus, 'as corrupt practices are iterated over time they become institutionalised and develop their own cultural logics that create a quasi-acceptance of such practices by society at large.'[69]

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[64] Lawrence Lessig, '"Institutional Corruption" Defined', *Journal of Law, Medicine and Ethics*, 41:3 (2013), 553–555 at p. 554.
[65] Emanuela Ceva, 'Political Corruption as a Relational Injustice', *Social Philosophy and Policy*, 35:2 (2018), 118–137 at p. 120.
[66] UN Doc CAC/COSP/2019/ngo/1, 12 December 2019, Statement submitted by Transparency International, a non-governmental organization in consultative status with the Economic and Social Council.
[67] Dennis Thompson, 'Theories of Institutional Corruption', *Annual Review of Political Science*, 21 (2018), 495–513 at p. 503.
[68] Ibid.
[69] Todd Landman and Carl J. W. Schudel, 'Corruption and Human Rights: Empirical Relationships and Policy Advice,' Working Paper (2007).

Not dismissing the existence of different types of corruption and the varying connections between corruption and the political systems, Bo Rothstein and Aiysha Varraich argue in search of a universal core meaning of corruption that 'the underlying current for corruption being condemned in almost all known societies (…) is the equating of corruption with some particular form of injustice.'[70] In the public sphere this is particularly related to injustices in the access to public goods, whereby the State has to practice the 'impartiality principle' of treating all those equally that deserve equality and officials entrusted with the management of public goods distribute them accordingly.[71] The State regulates both the 'input' side of engagement with citizens, whereby access to power is ideally regulated by electoral processes, and the 'output' side where those officials determine access to public goods.[72] Thus, it is crucial to combat corruption in all its forms, especially as a system based on 'fair' mechanisms to determine access to power—including with respect to campaign financing—is expected to produce justice in the access to public goods.[73] Although, Matthew Stephenson cautions that a more nuanced approach is required to analyse the complex interrelations of democracy and corruption. He argues that while, on the whole, levels of democratic governance may have a positive effect on the reduction of corruption, evidence also suggests that the competitive nature of democratic electoral processes may incentivise candidates to engage in what he terms 'instrumentalised political corruption.' An evaluation of cross-country studies reveals a mixed picture but also illustrates a non-linear relation between corruption and democracy, whereby 'long-standing, well-established democracies exhibiting notably lower levels of perceived corruption than other polities.'[74] Similarly, different democratic political systems were found to have led to different forms of corruption.[75]

There are two trends that are indicative of the need for a Grotian Moment for a broadened concept of corruption in international law incorporating elements of institutional, political,

[70] Rothstein and Varraich, 'Making Sense of Corruption,' p. 52.
[71] Bo Rothstein and Jan Teorell, 'What Is Quality of Government: A Theory of Impartial Political Institutions'. *Governance*: *An International Journal of Policy, Administration and Institutions* 21:2 (2008), 165–90.
[72] Rothstein and Varraich, 'Making Sense of Corruption. ' 73 Ibid, p. 140.
[73] Ibid, p. 140.
[74] Matthew C. Stephenson. 'Corruption and Democratic Institutions: A Review and Synthesis', in *Greed, Corruption, and the Modern State. Essays in Political Economy* 92, ed. by Susan Rose-Ackerman and Paul Lagunes (Cheltenham: Edward Elgar Publishing, 2015), p. 126.
[75] Ibid.

and grand. First, there is increasing recognition within the international legal system of the need to address other forms of corruption both among States, particularly developing countries that advocate for the adoption of a broader definitional scope of corruption, and among international lawyers. Second, a world defined by increasing interconnectedness has given rise to incidents of different forms of corruptions that have transnational reach and span several jurisdictions or fall at least partly between the cracks.

States' Demand for a Broadened Concept of Corruption

States' recognition that a broader lens is needed for corruption was signalled by a shift in focus from corruption's market-distorting effects to a broader understanding of its effects on justice and society. States 'were bitterly divided over the definition of corruption,' but in its final text the UNCAC adopted a definition that covered a wider range of corrupt practices than earlier international legal instruments.[76] For instance, in its preamble, the UNCAC takes note of the systemic nature of corruption and its detrimental effects on public institutions and democracy. It specifically calls on States to tackle institutional corruption by enhancing 'transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.'[77] Similarly, the OAS Convention adopted a broadened concept of corruption emphasising its corrosive effects on democracy.[78] The European Civil Law Convention incor porates a concept of corruption that not only includes instances of quid pro quo, but also forms of corruption that distort democratic processes and norms, including the principle of equality.[79] Even so, the existing international legal framework, including UNCAC, has largely adopted a narrow focus on 'classic' corruption. For instance, a key 'weakness in the [OECD] Convention concerns its substantive scope, [namely] the types of bribes that are prohibited,' with critics pointing out the 'exclusion of payments to foreign political parties' and other foreign public officials[80]—matters that may be encompassed by a defi nition incorporating political and institutional corruption. The norms emerging from the international legalisation of anticorruption efforts

[76] Katzarova, 'From Global Problems to International Norms,' p. 309.
[77] UNCAC, Art. 7, para 3.
[78] Wouters et. al., 'The Fight Against Corruption in International Law.'
[79] Lys Kulamadayil, 'When International Law Distracts: Reconsidering Anti-Corruption Law', *ESIL Reflections* 7:3 (2018)
[80] Abbott and Snidal, 'Values and Interests,' p. 169.

from the 1990s on are often also perceived by some critics as representing an overly Western-liberal understanding of corruption that is not necessarily applicable to other contexts, while what constitutes corruption varies greatly in different cultural contexts.[81]

This can be explained by pressure applied by the US, advocating for a narrow legal definition that contrasted the broader understanding preferred by many other States, particularly developing countries. States represented in the G-77 at the General Assembly promoted an understanding of corruption as corporate influence over politics and the interference of such undue influence with the public interest. Already in 1974, States proposed at the UN the regulation of such exchanges between transnational corporations and officials through a binding code, but this was strongly rejected by the US and other countries.[82] During the drafting of the OECD Convention, European countries expressed fierce opposition to provisions seeking to regulate payments to political parties due to concerns over sovereign decision-making on party and campaign financing.[83] Years later during the negotiations on UNCAC, the US objected to a number of preliminary drafts that seemed to criminalise other forms of corruption.[84] Under the Biden administration, even the US may finally embrace a broadened concept of corruption. As presidential candidate, Biden pledged to tackle institutional corruption and to convene a global Summit for Democracy focused on fighting corruption, vowing that '[he] will lead efforts internationally to bring transparency to the global financial system.'[85]

Further evidence that most States see the need for a broadened concept of corruption can be found in the 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law, which states that '[w]e are convinced of the negative impact of corruption, which obstructs economic growth and development, erodes public confidence, legitimacy and transparency and hinders the making of fair and effective laws, (…).'[86] Even more

[81] Rothstein and Varraich, 'Making Sense of Corruption.'
[82] Katzarova, 'From Global Problems to International Norms'.
[83] Abbott and Snidal, 'Values and Interests,'.
[84] Wouters. et. al. 'The Fight Against Corruption in International Law'.
[85] Joe Biden, 'Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump', *Foreign Affairs*, (March/April 2020).
[86] UN Doc. A/RES/67/1, 30 November 2012, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, p. 4, para. 25.

clearly, States pledged in the General Assembly's Agenda 2030 for Sustainable Development under target 16.5 to 'substantially reduce corruption and bribery in all their forms.' These recent developments suggest a possible shift in the conceptualisation of corruption within the international legal system based on the original Senturia-influenced World Bank definition.[87] States have moved beyond their narrow understanding of corruption as merely quid pro quo transactions and promote a broadened concept of corruption.

Rise in Corruption Incidents with Transnational Reach

The need for a Grotian Moment for a broadened concept of corruption in international law is reinforced by the rise in incidents of various forms of corruption—both at the international and domestic level—that have transnational reach and fall outside the jurisdiction of any one State, or affect people in third States who cannot find redress within the jurisdictional State. A review of a number of perception-based indexes on the prevalence of corruption indicates that there has been a clear rise in corruption in the years following 2010.[88] Cooley and Sharman speak of an increasingly globalised network of corruption that is insufficiently captured by the traditionally country-based approach, arguing that 'corruption is increasingly instantiated in transnational networks of intermediaries that link actors, institutions, and processes across developing and developed States.'[89]

Prevalence of various forms of corruption in low-capacity States that are unable to address them, especially when systematic and institutionalised, cause serious negative externalities and represent a transnational challenge. Corruption at the national level may lead to an erosion of trust in public institutions and undermine the functioning of governments, which in turn may impede efforts at maintaining stability and ensuring regional security. In Thieves of State, Sarah Chayes draws linkages between corruption in

[87] Senturia defined political corruption as the misuse of public power for private profit. See Joseph Senturia, 'Corruption, political', *Encyclopedia of the Social Sciences*, 4 (1931), 448– 452 at p. 448.
[88] Jakobi, 'Changing Global Norm of Anti-Corruption,' p. 255.
[89] Cooley and Sharman, 'Transnational Corruption and the Globalized Individual,' p. 732.

fragile States and international security threats. Building on extensive empirical research, she finds that low public trust and dissatisfaction nurtured by systemic corruption and abuse of public power is the main factor driving violent extremism.[90] A survey of Afghanistan's 2010 parliamentary elections has shown a system based on patronage encouraging candidates to favour clientelist strategies during their election campaigns relative to programmatic strategies, which in turn undermined voters' rights to express their preferences through genuine participation in the political process and to hold their public officials accountable.[91] In Kenya, pervasive corruption, especially as it relates to campaign financing, has fuelled post-election violence and political instability. Efforts at regulating campaign financing such as the adoption of the Election Campaign Financing Act in 2013, which was nullified by Kenya's National Assembly, have faced fierce resistance from political elites.

Moreover, institutional and other forms of corruption influencing law-making in one State may affect third States. In addition to undermining demo cratic processes at the national level, law-making shaped by corruption bears negative implications for citizens from other States who are denied remedies for the misconduct of public officials from a third State. For example, institutional corruption in the US influences foreign policy that affects other countries, such as the decision to wage war[92], or the 'revolving door' phenomenon in the US military-industrial complex.[93] The German arms export regime is characterised by secrecy and lack of transparency regarding corporate influence on decision-making, which renders the regime particularly vulnerable to instances of institutional corruption.[94] The transnational nature of institutional corruption has been underscored by the influence that foreign governments wield over domestic policy making through financial contributions to think tanks that serve as an important source of information and guidance for policy-

[90] Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security*, (New York: ww Norton & Co., 2016).
[91] Michael Callen and James D. Long, 'Institutional Corruption and Election Fraud: Evidence from a Field Experiment in Afghanistan', *The American Economic Review*, 105:1 (2015), 354–381.
[92] Simona Ross, 'Who Governs Global Affairs? The Role of Institutional Corruption in U.S. Foreign Policy', *Edmond J. Safra Working Papers*, 49 (2014).
[93] Katherine Carson, 'Tarnished Brass?', *Edmond J. Safra Center for Ethics Blog* (2014).
[94] Kathrin Strobel, 'Arms, Exports, Influence: Institutional Corruption in the German Arms Export Regime,' *Edmond J. Safra Working Papers*, 47 (2014).

makers.[95] Also, laws influenced by institutional corruption that appear to be merely of a domestic nature can have transnational reach. A recent news report found that US gun laws influenced by the National Rifle Association (NRA) as one of the main lobbying groups in the US, with support for 'legislative programs' amounting to USD 83 million in 2016 alone,[96] have led to a proliferation of small arms in Latin America.[97]

Thus, in line with the advocacy role sometimes prescribed to international law as proposed by Sender and Woods citing Judge Altamira's words that even when a rule of customary international law has not been established, 'but is so forcibly suggested by precedents that it would be rendering good service to the cause of justice and law to assist its appearance in a form in which it will have all the force,'[98] we argue that a Grotian Moment for a broadened concept of corruption ought to be achieved.

A Case of Institutional Corruption in the Legal Sphere: Double-Hatting

The pressure to broaden the conceptualisation of corruption is partly a response to a loss of public trust, including in international legal institutions, where misconduct also falls outside the jurisdiction of any State. While conflicts of interest are recognised by the drafters of UNCAC, double-hatting is a powerful illustration of the advantage that an institutional corruption perspective can bring, since it focuses on hard-to-identify cognitive biases arising from institutional design.

It has long been an open secret that judges are not allergic to hefty fees for extracurricular service as arbitrators. There is no rule against it—unless one counts Art. 16(1) of the Statute of the ICJ, stipulating that '[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.' By a November 2017 count, seven of the fifteen serving ICJ judges and thirteen former judges were engaged in investor-state dispute settlements cases, serving in at least 90 such

[95] Brooke Williams, 'Influence Incognito', *Edmond J. Safra Center for Ethics Research Lab Working Papers*, 3 (2013).
[96] Financial Statements of the National Rifle Association of America as of 31 December 2016, (8 March 2017), p. 3.
[97] *The Economist*, 'Guns from the United States are Flooding Latin America', *The Economist*, 23 March 2019.
[98] Referenced by Sender and Wood, 'Between "Time Immemorial" and "Instant Custom"', p. 246.

cases dur ing their tenure at the ICJ. Nathalie Bernasconi-Osterwalder and Martin D. Brauch noted that at the time of writing, Tomka, Greenwood and Crawford earned considerably more from their appointments as arbitrators than from the ICJ, and that they accepted their arbitration roles during their ICJ term.[99] The authors argued that the judges' ICJ duties can suffer from relative inatten tion, as judges have a fixed salary but arbitrators are paid by the hour, and that judges' independence and impartiality may be compromised through allegiance to their investment case paymasters, in cases such as Certain Iranian Assets where arbitral awards have also been rendered, and by the very real probability of encountering fellow ICJ judges on the arbitration circuit.

This is not to say that the judges at the time did anything wrong, at least technically, by 'classic' corruption standards. After all, in 1995 the Court stated that 'occasional appointments as arbitrators' fell outside the scope of Art. 16 of its Statute, and such double-hatting honoured 'a long-standing tradition of the Permanent Court of International Justice [PCIJ] founded in 1922.'[100] Challenged by the Advisory Committee on Administrative and Budgetary Questions, the court repeated in its 1995–96 Annual Report that judges 'acting as arbitrators in inter-State and private international arbitrations' were in the best traditions of the ICJ and the PCIJ, and in fact show appointing parties' 'awareness of the contribution that the Members of the Court may, by this function, make to the development of international law, and of the benefits deriving therefrom for all institutions concerned.'[101]

Judicial corruption is a delicate topic. Twenty years ago, Sands presented a paper on judges' susceptibility to what the institutional corruption literature calls 'dependence' corruption, which in this case covers both appointments and remuneration. Sands and Mackenzie developed those initial thoughts by expanding the range of judicial behaviours that merit close inspection for potentially creating misaligned incentives and opportunities

[99] Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Is "Moonlighting" a Problem? The Role of ICj Judges in ISDS,' International Institute for Sustainable Development (23 November 2017).
[100] UN Doc A/C.5/50/18, 2 November 19965, p. 12, para. 31, cited in Marie Davoise, 'Can't Fight the Moonlight? Actually, You Can: ICj Judges to Stop Acting as Arbitrators in Investor-State Disputes', *EJIL: Talk!* (5 November 2018).
[101] UN Doc A/51/4, 19 September 1996, Report of the International Court of Justice: 1 August 1995 - 31 July 1996, p. 43, para. 199.

for corruption.[102] Sands followed up with a sustained series of criticisms,[103] which became the rhetorical anchor for several high-profile studies on specific problems Mackenzie and Sands identified, including double-hatting and revolving doors.[104] Yet, none of the authors of this burgeoning literature described the deeply problematic practices they identified with the word 'corrupt.' They pointed out that judges and arbitrators technically broke no rules, and occasionally argued that the problem was not the dubious practices themselves, but rather the public perception of such practices as flagrant violations of common-sense ethics.[105] Nevertheless, the pressure within the profession seemed to have reached a new peak by the end of 2018.

On 25 October 2018, Judge Yusuf, then ICJ President announced 'in the spirit of transparency' in his speech to UNGA that members of the Court 'will not normally accept to participate in international arbitration,' 'in particular, they will not participate in investor-state arbitration or in commercial arbitration.'[106] Yusuf cited the Court's 'ever-increasing workload' as the sole reason for this decision, and left the door open to judges acting in commercial arbitra tion 'subject to the strict condition that their judicial activities take absolute precedence.' Some commentators interpreted these provisions as a face-saving exercise by which the ICJ was responding to mounting criticism; while others predicted that judges' moonlighting and double-hatting were on their way out. In December 2020, the Court published decisions concerning judges' external activities that can be read as one step forward and two steps back on the path to eliminate potential biases and conflicts of interest.[107] On the one hand, 'Members of the Court may only participate in inter-State

[102] Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge', *Harvard International Law Journal*, 44:1 (2003), 271–285.
[103] Philippe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel', in *Evolution in Investment Treaty Law and Arbitration*, ed. by Chester Brown and Kate Miles (Cambridge: Cambridge University Press, 2011), 19–41;
[104] E.g. Malcolm Langford, Daniel Behn and Runar Lie, 'The Revolving Door in International Investment Arbitration', *Journal of International Economic Law* 20:2 (2017), 301–32; Id., 'The Ethics and Empirics of Double Hatting,' *ESIL Reflections*, 6:7 (2017); Daniela Cardamone, 'Independence of International Courts', in *Judicial Power in a Globalized World*, ed. by Paolo Pinto de Albuquerque and Krzysztof Wojtyczek (Cham: Springer, 2019), pp. 91–104. Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law', *ICSID Review – Foreign Investment Law Journal* 21:1 (2006), 126–131.
[105] Sands, 'Developments in Geopolitics.'
[106] ICJ, Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly, 25 October 2018.
[107] ICJ, Compilation of Decisions Adopted by the Court Concerning the External Activities of Its Members, Adopted on 2 October 2018.

arbitration cases,' which excludes lucrative roles in investor-state dispute settlement, reversing the Court's 1995 defence of double-hatting as an honourable tradition, and preserving the ICJ judges' expertise for the inter-State arena. On the other hand, the conflict with the ICJ's mandate could not be more direct. Despite the common-sense provision that Members of the Court must however decline to be appointed as arbitra tors by a State that is a party in a case pending before the Court, even if there is no substantial interference between that case and the case submitted to arbitration, the same historically phenomenal recent spike in the Court's caseload and turnaround that President Yusuf invoked in 2018, suggests that judges involved in inter-State arbitration are potentially less able to escape biases and conflicts of interest due to their participation in disputes that are more likely to overlap with pending ICJ cases.[108] Judge Tomka resigned from the ICSID arbitral tribunal in Macro Trading v. China in February 2021.[109]

While Tomka's resignation appears to be a straightforward application of the new ICJ norms that Yusuf announced, arbitrators who are not double-hat ting between private and public international law can also fall foul of the rapid evolution of applicable standards and regulations. An illustration from commercial arbitration is useful for our thesis. Halliburton Co. v Chubb Bermuda Insurance Ltd [2020] UKSC 48 is a much-discussed case on the cutting edge of the falling knife of evolving conflicts of interest standards. After the 2010 explosion on Deepwater Horizon, thousands of civil claims were brought against the rig's owner, Transocean; against BP plc, which leased the rig; and against Halliburton, which built some of the faulty equipment. BP also initiated proceedings against Transocean and Halliburton, both of which held insurance policies with Chubb. Part of the complex litigation led to three concurrent arbitrations: between Halliburton and Chubb; Transocean v Chubb; and Transocean v a third-party insurer. Kenneth Rokison QC was appointed in all three; a fact he initially failed to inform all parties of and eventually culminated in Halliburton requesting the High Court to remove him from Halliburton v Chubb under s. 24(1)(a) Arbitration Act 1996. Despite an offer to withdraw by Rokison, Chubb opposed, and the

[108] Only slightly more tone-deaf were the ICC judges who approved Judge Ozaki's proposal to combine Japanese ambassadorship to Estonia with her continued service on the ICC. See Kevin J. Heller, 'Judge Ozaki Must Resign—Or Be Removed', *Opinio Juris* (29 March 2019).
[109] Damien Charlotin, 'ICJ Judge Resigns from ICSID Case Involving China, Following Controversy Over Arbitral Appointment', *IA Reporter* (9 February 2021).

case eventually reached the Supreme Court (UKSC) after passing through the High Court and the Court of Appeals.

UKSC applied the test for apparent bias established in Porter v Mgill [2000] UKHL 67, reviewed applicable practices and codes of conduct at IBA, GAFTA, ICC, as well as IMAA, ICA, ICIA, CIArb and other fora, and concluded that while an arbitrator accepting, and not disclosing, appointments in multiple arbitrations with identical or overlapping subject matter can give rise to an appearance of bias, on balance a fair-minded and informed observer would not have inferred that a real possibility of unconscious bias existed in this case, rejecting Halliburton's appeal in November 2020.

Numerous commentators have described UKSC's reasoning as confused and lacunose, failing to fully grasp unconscious bias, the risk of contaminating the arbitrator's impartiality due to 'inside information' and informational asymmetries as the three proceedings unfold, the inevitable (even if unconscious) bias in favour of one's paymaster, the parties' and the public's perception created by Rokison's arguable breach of his duty to disclose. These are unfair criticisms. UKSC gave full attention to these issues, took note not only of law but also of scholarly literature, and sought to develop the norms and practices applicable to these arbitrations directly or by analogy, for instance by seeking to distinguish between the impartiality of judges and arbitrators in ways the aforementioned bodies do not.[110] It is a remarkable and pivotal judgment that advances anticorruption norms in commercial arbitration, which appear to be already at a more developed stage of sophistication and efficiency than in public international law, where the ICJ and ICC have barely begun to grapple with forms and risks of corruption. Yet, the institutional corruption literature demonstrates that the scope for corruption that is debated in the Halliburton case cannot be reduced without redesigning the institutional framework for arbitration to address institutional blind spots that create the appearance of corruption, and lead to a loss of trust. The other lesson from the case may be that a Grotian Moment is unlikely, and we should settle in for an open-ended and reiterative process of minor and major adjustments, with no breakthroughs.

[110] See e.g. [2020] UKSC 48, para. 58–60.

UNCAC incorporates—even if insufficiently—some preliminary measures to address challenges related to the phenomena of double-hatting and of 'revolving doors.' UNCAC mandates standards for domestic anticorruption bodies and international experts to strengthen the guardians against corruption, such as in Art. 6 concerning preventive anticorruption bodies 'free from any undue influence' and in Art. 16(1) criminalising active bribery of officials of international organisations. UNCAC Art. 11(1) on judges, for instance, warns about the mind-bending potential of social networking.[111] UNCAC Art. 12(2)(e) defends against 'revolving doors' in ways, as we saw, that the ICJ and otherbodies do not yet live up to.[112] Yet, UNCAC does not address the possibility and fact of judicial corruption under undue dependence. As a commentator notes, '[t]he creation of a specific institution(s) with authority to prevent corruption will be insufficient where there is interference by the political elite.'[113] Similarly problematic is faith placed in the 'both professionalised and de-politicised' experts who work at the UNCAC Implementation Review Mechanism and the Implementation Review Group.[114]

Opportunities and Challenges for a Grotian Moment

The need for an evolution in the international legal framework to tackle all forms of corruption is evident and it is the responsibility of States to tackle global injustices. Anne Peters asserts that all 'types of corrupt conduct by pub lic officials can and should be attributed to the State in accordance with the principles of State responsibility.'[115]

Corruption in International Criminal and Human Rights Law

Even if not yet realised in practice, scholars are increasingly drawing attention to the merits of international criminal law in combatting various forms of cor ruption, including institutional, political and grand corruption. International anticorruption law in its current form is based on the localisation of the conduct to be addressed through domestic law by

[111] Eds. Rose *et al*, *UNCAC Commentary*, p. 123.
[112] Eds. Rose *et al*, *UNCAC Commentary*, p. 134.
[113] Eds. Rose *et al*, *UNCAC Commentary*, p. 61.
[114] Eds. Rose *et al*, *UNCAC Commentary*, p. 13.
[115] Anne Peters, 'Corruption as a Violation of International Human Rights', *European Journal of International Law*, 29:4 (2018), 1251–1287 at p. 1273.

the territorial State where cor ruption occurs, including through the nationalisation of international law.[116] However, in recent years calls for accountability of crimes related to corruption through international criminal law have been growing. Prominent among its advocates is Mark Wolf, who proposes that '[a]n International Anti-Corruption Court, similar to the ICC or as part of it, should now be established to provide a forum for the criminal enforcement of the laws prohibiting grand corruption that exist in virtually every country, and the undertakings that are requirements of various treaties and international organisations.'[117] Some scholars go as far as to suggest that systemic corruption has already been criminalised in international criminal law under Art. 7 of the Rome Statute of the ICC on crimes against humanity.[118] Nyongesa M. Wabwile argues that systemic corruption represents a systematic attack in peacetime '[b]y grabbing public funds, the corrupt political elites commit a systematic attack on the livelihood of the majority of economically vulnerable populations.'[119]

Establishing a link between various forms of corruption and international human rights law, Peters concludes that '[t]he framing of corruption not only as a human rights issue but even as a potential human rights violation can contribute to closing the implementation gap of the international anti-corruption instruments and can usefully complement the predominant criminal law-based approach.'[120] The UN treaty bodies monitoring mechanisms have adopted a normative framework for tackling corruption. The appointment of a UN Special Rapporteur on corruption demonstrates a growing acknowledgement of these linkages. State practice clearly suggests that States support the view that corruption is detrimental for the enjoyment of human rights.[121] In a 2012 judgement, the Supreme Court of India affirmed that 'systematic corruption is a human rights violation in itself.'[122] While there is extensive scholarship on the effects of 'classic'

[116] Kulamadayil, 'When International Law Distracts.'
[117] Mark L. Wolf, 'The Case for an International Anti-Corruption Court', Brookings Institution (2014).
[118] Ilias Bantekas, 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies', *Journal of International Criminal Justice*, 4:3 (2006), 466–484.
[119] Nyongesa M. Wabwile, 'Transnational Corruption, Violations of Human Rights and States' Extraterritorial Responsibility: A Case for International Action Strategies', *African Journal of Legal Studies*, 8 (2015), 87–114, at p. 110.
[120] Peters, 'Corruption as a Violation of International Human Rights.'
[121] M. Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Antwerp: Intersentia, 2012).
[122] As referenced by Peters, 'Corruption as a Violation of International Human Rights', p. 1258.

corruption on economic, social and cultural rights guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), scholars are drawing more and more attention to the effects of other forms of corruption on civil and political rights enshrined in the International Covenant on Civil and Political Rights (ICCPR). With regard to civil and political rights, Mark Warren is concerned with the distorting effects of corruption on representation and the democratic principle of equality. He finds that '[c]orruption reduces the effective domain of public action, and thus the reach of democracy, by reducing public agencies of collective action to instruments of private benefit.'[123] Ceva and Maria P. Ferretti build on this theory, concluding that political and institutional corruption undermine equality and the impartiality of decisions-makers by putting citizens in an asymmetric position, where a small minority has undue influence and is able to determine policy outside the frame of democratic processes. In this sense, corruption 'undermines the very liberal democratic rationale for the public order and the moral acceptability of the terms and conditions of social cooperation.'[124] Thompson posits that '[t]he harm that institutional corruption causes to the legislature and the democratic process is often greater than that caused by individual corruption [as it] is also more systematic and more pervasive than individual corruption.'[125] Corruption in this sense has serious implications by inhibiting the 'role of institutions in guaranteeing citizens' rights and duties over time.'[126]

With regard to social and economic rights, bribery and grand corruption have shown to lead to misallocations of public resources. Warren argues that '[c]orruption creates inefficiencies in deliveries of public services, not only in the form of a tax on public expenditures, but by shifting public activities toward those sectors in which it is possible for those engaged in corrupt exchanges to benefit.'[127] There is a clear recognition that '[w]here

[123] Mark E. Warren, 'What Does Corruption Mean in a Democracy?', *American Journal of Political Science*, 48:2 (2004), 328–343, at p. 328.
[124] Emanuela Ceva and Maria P. Ferretti, 'Liberal Democratic Institutions and the Damages of Political Corruption', *The Ethics Forum*, 9:1 (2014), 126–145.
[125] Thompson, *Ethics in Congress*.
[126] Maria P. Ferretti, 'A Taxonomy of Institutional Corruption', *Social Philosophy and Policy*, 35:2 (2018), 242 – 263 , at p. 249.
[127] Warren, 'What Does Corruption Mean in a Democracy?,' p. 328.

corruption is systemic, it directly affects the poorest sections of the population, as a result of the diversion and siphoning off of public expenditure budgets.'[128]

Special Procedures as an IHRL Remedy to Corruption?

The UN Special Procedures system may have potential in ushering in a Grotian Moment for a broadened anticorruption concept through an international human rights law approach, even if they have an historically chequered record. Many began as fact-finding missions; almost all grew proprio motu into vacuums created and expanded by States' disagreements over political hot topics. The most powerful tool in the modern Special Procedures' kit is their ability to make press statements that carry the weight of the UN's authority.[129] Yet, the legal framework of Special Procedures seems to generate, rather than halt corruption.

With regard to their mandate, Special Procedures benefit from the pervasive vagueness of their mandate,[130] as 'Mandate holders have contributed to the haziness in this area, insisting at times on their absolute independence while keeping the authority that the blue stamp of the United Nations provides to their activities.'[131] Some Special Procedures set up websites, published reports, and issued statements that mimic legal opinions, thereby 'wearing a double hat as being independent from, but simultaneously representing the United Nations, is a legal impossibility that is nonetheless performed by Special Procedures on a regular basis.'[132] In 2000, the Secretary-General had to deny that Jiri Dienstbier, then Special Rapporteur for human rights in the former Yugoslavia, spoke for the UN when he condemned the indictment of Milosevic.[133]

[128] Angela Barkhouse, Hugo Hoyland and Marc Limon, *Corruption: A Human Rights Impact Assessment* (Universal Rights Group and Kroll, 2018) p. 2.
[129] Elvira Domínguez-Redondo, *In Defense of Politicization of Human Rights: The UN Special Procedures* (Oxford: Oxford University Press, 2020).
[130] Domínguez-Redondo, *In Defense*, pp. 135, 170, 174.
[131] Domínguez-Redondo, *In Defense*, p. 179.
[132] Domínguez-Redondo, *In Defense*, p. 158.
[133] UN Doc. SG/SM/7574 (4 November 2000); Domínguez-Redondo, *In Defense*, p. 168.

To contain legal-authority-entrepreneurship, Special Procedures are encouraged by States, UN organs, NGOs and scholars to codify and formalise their practices, for instance by writing codes of conduct. Others argue that such codification generates self-censorship and corrupts the functioning of Special Procedures.[134] The Special Procedures system has scope for reform that would reduce institutional corruption. One area of improvement concerns their appointment. Special Procedures are expected to be wholly impartial and independent individuals, and while they are not supposed to represent their State, their appointment is a highly politicised process. States are unlikely to spend political capital in the horse trading of UN appointments for a fully independent candidate, and to refrain from vetoing other States' candidates, however independent and impartial, when that serves their interests. Another area that classical institutional corruption literature points to is risks arising from funding. Special Procedures are part-time unpaid positions within the UN hierarchy. Many Special Procedures holders must raise their own funds.[135] Due to shortfalls earmarked for Special Procedures budgets, States that are the subject of investigations by Special Procedures are often requested to fund or otherwise support Special Procedures' work, including their country visits, and there is no uniform expected reporting of State contributions.[136]

Political and Legal Obstacles

While there is some potential to address other forms of corruption incorporated in a broadened concept of corruption in the international legal system through the UN human rights system or through an international criminal law approach, several political and legal challenges hinder the achievement of a Grotian Moment for an international legal framework that addresses such a broadened concept of corruption. The most critical obstacle is resistance from political elites to devising accountability mechanisms for misconduct they themselves are most likely to be implicated in. Officials in positions of

[134] Marc Limon and Ted Piccone, *Human Rights Special Procedures: Determinants of Influence* (Brookings Institutions & Universal Rights Group Policy Report, 2014).
[135] Inga T. Winkler and Catarina de Albuquerque, 'Doing It All and Doing It Well? A Mandate's Challenges in Terms of Cooperation, Fundraising and Maintaining Independence', *The United Nations Special Procedures System* ed. by Aoife Nolan, Rosa Freedman, and Thérèse Murphy (Leiden: Brill, 2017).
[136] Domínguez-Redondo, *In Defense*, 172–3. Analysis of 173n32.

power are unlikely to formulate legal frameworks that would tie their own hands, particularly in dictatorships,[137] but also in democracies. As Sharman notes, '[c]orruption is a difficult problem to address in the best of times, but most of all when the State apparatus used to enforce laws is controlled by people dedicated to breaking them.'[138] Thompson elaborates on this point, observing that '[t]he leaders who are in a position to lead political reform benefit from the existing system,' and highlighting that '[t]he potential agents of change are the actual agents of corruption.'[139] Opposition can be expected particularly toward an international criminal law approach, especially the kind proposed by Wolf, as 'those countries truly dominated by corruption would have great difficulty in deciding to join such a court, no matter the incentive or threat.'[140] To highlight how opposition may differ depending on the form of corruption to be addressed by international legal instruments that might lead to a Grotian Moment, it is worth considering how corruption manifests in different settings. Daniel Kaufmann and Pedro C. Vicente suggest that corruption occurs in three distinct ways in different geographical areas. First, a prevalence of illegal corruption, mainly in the form of 'classic' corruption in developing countries. Second, mostly legal corruption in the form of political and institutional corruption in some OECD countries. Third, some countries supposedly do not face the problems of corruption, such as the Nordic States.[141] These patterns are indicative of the political nature of international law making. It is no coincidence that contemporary international legal systems focus primarily on 'classic' corruption and that attempts to regulate political, institutional and grand corruption at all, and even less so at the international level, are stifled.

The notion that some instances, for example, of institutional corruption are legal and part of democratic practices, such as the need for campaign financing, compels some opponents of reform to posit that alternatives ought to be found for these legitimate practices to ensure the functioning of institutions.[142] These arguments are opposed by

[137] P. Gowder, 'Institutional Corruption and the Rule of Law', *The Ethics Forum*, 9:1 (2014), 84–102.
[138] Sharman, 'Despot's Guide to Wealth Management,' p. 22.
[139] Thompson, 'Theories of Institutional Corruption,' p. 508.
[140] Franco Peirone, 'Corruption as a Violation of International Human Rights: A Reply to Anne Peters', *European Journal of International Law*, 29:4 (2018), 1297–1302.
[141] Daniel Kaufmann and Pedro C. Vincente, 'Legal Corruption', *Economics and Politics*, 23:2 (2011), 195–219.
[142] Thompson, 'Theories of Institutional Corruption.'

advocates of campaign financing reform,[143] and alternative models were successfully adopted in countries such as Austria. Moreover, Ferretti highlights that some lawful practices may still fail to uphold public accountability.[144] This view is echoed by Oguzhan Dincer and Michael Johnston, who argue that 'solid majorities see campaign financing as profoundly corrupting.'[145]

Moreover, even if States expressed support for an international accountability mechanism, the complexity of identifying the responsible party for misconduct under a broadened concept of corruption will continue to be a major challenge. Assigning individual responsibility or liability in international criminal law and identifying attribution for violations of international human rights law are inescapable prerequisites. The question of individual liability and attribution arises in particular with regards to institutional corruption, the very concept of which—as proposed by Lessig—assumes that actors engaging in such conduct are merely 'good souls' operating in a bad system.[146] Thompson also proposes that '[t]he individual agents of corruption act in institutional roles and do not have the corrupt motives that characterise agents who participate in quid pro quo exchanges.'[147] Institutional corruption, so the argument goes, is symptomatic of institutional failure and it is often difficult to identify an individual case or to assign clear responsibility for misconduct.

This perspective has been questioned, however, by more recent scholarship. On the more moderate end of the spectrum, Seumas Miller argues with reference to campaign financing that responsibility lies with the collective, but acknowledges that from a disaggregated perspective, individuals are still responsible for their contributions.[148] Even Elinor Amit, Jonathan Koralnik, Ann-Christin Posten, Miriam Muethel, and Lessig acknowledge the systemic problems of institutions that are prone to acts of institutional corruption are ultimately linked to the conduct of individuals, but add that in the current legal system their

[143] Lessig, '"Institutional Corruption" Defined.'
[144] Ferretti, 'A Taxonomy of Institutional Corruption.'
[145] Oguzhan Dincer and Michael Johnston, 'Legal Corruption?', *Public Choice,* 184 (2020), 219–233 at p. 220.
[146] Lessig, '"Institutional Corruption" Defined.'
[147] Thompson, 'Theories of Institutional Corruption,' p. 496.
[148] Seumas Miller, *Institutional Corruption: A Study in Applied Philosophy* (Cambridge: Cambridge University Press, 2017).

acts are neither criminalised nor considered unethical.[149] Thompson affirms that individuals can still be held accountable for not seeking to reform the system and not trying to mitigate against the damaging effects of corruption.[150] Adopting a 'continuity approach,' Ferretti argues that institutional corruption can only be attributed to an institution by starting with the actions of an individual. The function of public officials and in extension of public institutions is based on 'the duty of public accountability,'[151] thus, in the case of institutional corruption, public officials fail to uphold this duty and should be held responsible even if they are operating in an environment of institutional corruption.

Conclusion

With the challenges highlighted above in mind, we are conscious of the poten tial pitfalls that recognition of a Grotian Moment for a broadened concept of corruption may entail. Thus, we are cautious in offering avenues that might accelerate progress toward a Grotian Moment for anticorruption law that addresses all forms of corruption.

Recent developments concerning institutional and other forms of corruption in international law prompt us to frame a new question. What is the best analytical framework for diagnosing and correcting potential problems with new rules, such as those introduced at the ICJ and commercial arbitration? We propose that

- corruption in international legal practice cannot be explained without a notion of corruption that includes institutional and other forms of corruption; and
- once the broadened applicable notion of corruption includes institutional, political, and grand corruption, corruption cannot have a Grotian Moment for reasons that offer insights into both corruption and Grotian Moments.

Applying the institutional, political, and grand corruption literature to the question of a Grotian Moment for anticorruption suggests that the theologians were not wrong: human

[149] Elinor Amit, Jonathan Koralnik, Ann-Christin Posten, Miriam Muethel, and Lawrence Lessig, 'Institutional Corruption Revisited: Exploring Open Questions Within the Institutional Corruption Literature', *Southern California Interdisciplinary Law Journal*, 26:447 (2017) 447–467.
[150] Thompson, 'Theories of Institutional Corruption.'
[151] Ferretti, 'A Taxonomy of Institutional Corruption,' p. 246.

nature is corrupt, if not because of the Fall, then due to cognitive flaws that are not necessarily morally culpable. For instance, identity biases seem to be necessary for in-group formation and maintaining cohesion. Organisations and their rules, including municipal and international laws, can constrain harm from the aggregation of individual corruptibility only to a certain extent, partly because organisations and laws are made by flawed humans, and partly because they must evolve in reaction to events. These two theses, concerning individuals and rule-driven collectives, suggest that eliminating corruption writ large is a never-ending process; even ostensible breakthroughs, for instance through pervasive institutional reform, create downsides and cracks through which corruption will re-enter. Connecting Grotian Moments and institutional, political, and grand corruption is a welcome salutary tale about misplaced expectations. Pufendorf, the first professional international lawyer, might have been right: individual and institutional biases cannot be wholly eliminated through legal instruments alone, and a Grotian Moment for a broadened concept of corruption will always be illusory.

22.8.2022

2

Access to Justice and the Right to an Effective Remedy for Human Rights Violations

The concept of access to justice has many different elements, mostly connected to the right to a fair trial. However, perhaps the main right through which it materializes is the right to an effective remedy. This right is commonly included in international human rights instruments, but perhaps where it has become more important is in the context of the European Convention on Human Rights (ECHR). It is laid down in Article 13 of this instrument, and throughout the years it has gained enormous weight, becoming one of the Convention's cornerstones as a result of the case law of the European Court of Human Rights (ECtHR). Actually, in those exceptional cases in which the ECtHR has ordered states to implement general measures going beyond the case at hand, these measures have mostly consisted in the introduction of effective remedies in the respondent states' legislation. Article 13 ECHR establishes that "[e]veryone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

This implies in a nutshell that those who have arguable complaint about a violation of their human rights must be able to lodge this complaint before national authorities, who must be able to examine the merits of it and issue a legally binding decision. The idea behind this right is to provide individuals with a way of obtaining reparations for human rights violations at the domestic level, without having to initiate a procedure before an

international court. This aim is also reflected in the requirement of admissibility stating that effective domestic remedies need to be exhausted before applying to international human rights bodies. The weight given to the right to an effective remedy by the ECtHR reflects the great importance of the principle of subsidiarity in the European system of human rights protection, giving priority to the domestic level and limiting the ECtHR' interventions to those cases in which the domestic remedy was not available or ineffective.

Although states enjoy a certain margin of appreciation when implementing this right, there are a number of conditions and requirements for domestic remedies to be considered effective under international law. This blogpost will examine the main case law of the ECtHR related to the right to an effective remedy, in order to provide an overview of the main features that such remedies should possess for guaranteeing access to justice. It will explore in this respect the availability of remedies, its legal nature, as well as its effectiveness requirements in general and in particular situations. It is useful for citizens to know in which cases domestic remedies for human rights violations may be considered ineffective, as this would allow them to appear before international human rights bodies without having to previously exhaust such remedies.

The availability of remedies in law and practice

One important element is that domestic remedies for human rights violation cannot depend on the goodwill of the state or other practical arrangements, but instead they need to be laid down and regulated in domestic legislation.[152] This is shown in several cases dealing with domestic remedies against expulsion orders that had no automatic suspensive effect. The states argued in these cases that it was sufficient for remedies to have a suspensive effect "in practice", as the domestic courts decided in almost every case to stay the deportation procedure. However, the ECtHR considered that this arrangement did not comply with Article 13, as there was no guarantee that the authorities would comply with that practice in every case. The Court stated that in accordance with the rule of law, "the

[152] ECtHR, A.C. and others vs Spain, 2014, para. 95; Allanazarova v. Russia, 2017, para. 97.

requirements of Article 13 (…) take the form of a guarantee and not of a mere statement of intent or a practical arrangement".[153]

Similarly, in a case related to the excessive length of judicial proceedings in Bulgaria, the state argued that domestic judges took into account the excessive length of criminal proceedings when sentencing. However, the ECtHR did not consider this to be an effective remedy because "that practice is not based on express statutory language".[154] Thus, as can be observed, legislative incorporation is a necessary element of an effective domestic remedy. However, it is not a sufficient one. The ECtHR has clarified in this regard that remedies must be available "in law and in practice", in the sense that its application cannot be prevented without justification through acts or omissions of the state in question.[155] This availability in practice is usually shown through decisions in similar cases, whereby a single judicial decision is usually no enough, as there needs to be proof of a consolidated case law in this regard.[156]

The nature of remedies: beyond the judiciary

Notably, Article 13 requires effective remedies "before a national authority" instead of a national court. This implies that the authority does not need to be a judicial one, but can also be an administrative authority or even a legislative one, such as a parliamentary commission.[157] However, in the case of non-judicial authorities the ECtHR will carry out a closer review of its independence and of the procedural safeguards in place. In addition, these authorities must have the competence to issue decisions that are legally binding for the state. For example, a body that has only advisory powers cannot be considered an appropriate national authority in the sense of Article 13.[158]

Domestic remedies must be available in order to challenge acts of the administration or the executive. However, Article 13 does not require remedies that allow to challenge

[153] EctHR, Čonka v. Belgium, 2002, para. 83; Gebremedhin [Gaberamadhien] v. France, 2007, para. 66.
[154] ECtHR, Dimitrov vs Bulgaria, para. 118.
[155] ECtHR, A.C and others vs Spain, para. 85.
[156] ECtHR, Sürmeli v. Germany [GC], 2006, para. 113; Abramiuc v. Romania, 2009, para. 128.
[157] As in ECtHR, Klass vs. Germany.
[158] See ECtHR, Chahal v. the United Kingdom, 1996 para. 154; Zazanis v. Greece, 2004 para. 47.

domestic laws for being contrary to the ECHR. The Court has argued in this respect that this would be tantamount to requiring states to incorporate the Convention.[159] Concerning acts of the judiciary, Article 13 does not encompass the right to appeal before a higher instance, this only being recognised by Article 2 of Protocol No. 7 in a limited number of cases. Thus, in general Article 13 is not applicable when the alleged violation has taken place in the context of domestic judicial proceedings.[160] Finally, with respect to the acts of private persons, remedies must apply only for cases in which the state has not taken the necessary preventive measures or otherwise shares responsibility for them.

The effectiveness of remedies

Although states are given discretion in the way of ensuring that its domestic laws effectively guarantee the protection of human rights, there are requirements for the effectiveness of remedies in general and in particular situations. With respect to the general requirements, first the remedy must be able to provide sufficient redress in the concrete situation of the applicant. Therefore, the effectiveness of a remedy is not assessed in abstracto but with respect to the specific complaint submitted by the applicant. In this respect, remedies must be accessible specifically to the alleged victim of the human rights violation. However, it is important to note that effectiveness does not depend on the certainty of a favourable outcome for the applicant. Secondly, the concept of effectiveness comprises the guarantees established in the right to a fair trial. This is a key requirement that shows the close link between these two rights. When a remedy does not comply with the principles and guarantees of a fair trial, such as the principle of equality of arms or the guarantees of promptness, it cannot be considered effective.

Besides the general requirements of effectiveness, there are additional requirements that apply to violations of specific rights or to other concrete situations. For example, remedies related to deportation procedures need to have an automatic suspensive effect, as was explained before. In cases concerning violations of the right to life or the prohibition of torture, the remedy must entail an investigation capable of leading to the identification and

[159] ECtHR, Christine Goodwin v. the United Kingdom [GC], 2002, para. 113.
[160] With the exception of the right to be judged in a reasonable time, as will be explained below.

punishment of those responsible, as well as an award of compensation comprising moral damages as part of the redress. There are in addition specific situations in which the preventive and/or compensatory elements of a remedy are taken into consideration when examining its effectiveness.

The preventive and compensatory elements

A particular situation in this regard concerns remedies related to conditions of detention amounting to ill-treatment. In these cases, the ECtHR has established that prisoners need to have access to remedies both of a preventive and compensatory nature. The Court has argued in this respect that compensatory remedies alone are not sufficient, as this would "legitimise particularly severe suffering in breach of Article 3 and unacceptably weaken the legal obligation on the State to bring its standards of detention into line with the Convention requirements".[161] Thus, remedies for inhuman conditions of detention must be able to ensure the prompt termination of the violation.

The right to trial within a reasonable time is the only field in which the ECtHR has found a violation of the right to an effective remedy in the context of judicial proceedings. Contrary to the remedies for inhuman conditions of detention, in this area remedies will be effective if they are either preventive or compensatory. The effectiveness of remedies related to the excessive length of judicial proceedings thus depend on their capacity to either expedite a decision by the courts or to provide the litigant with adequate redress for the delays. The importance of these preventive and compensatory elements is shown in the fact that orders of the ECtHR to introduce such remedies are mostly related to situations of inhuman conditions of detention and to the excessive length of domestic judicial proceedings, in cases where domestic remedies failed to include the aforementioned elements.

[161] ECtHR, Ananyev and Others v. Russia, 2012, para. 98; Varga and Others v. Hungary, 2015, para. 49.

Conclusion

In sum, it can be observed that domestic remedies need to fulfil an important number of conditions in order to be considered effective. If that is not the case, the ECtHR will most likely find a violation of the right to an effective remedy. It is important to note in this regard that Article 13 ECHR cannot be infringed independently, but always in connection to another right laid down in the Convention. This is because the states only have to provide an effective remedy if there has been a human rights violation in the first place, or at least an arguable complaint in this respect.

Although the ECtHR is the international tribunal that has defined more clearly the contours of the right to an effective remedy and the conditions of effectiveness, this is not a right pertaining exclusively to the European region. An almost identic provision can also be found in Article 25 of the American Convention on Human Rights and a similar one in Article 7 of the African Convention on Human and Peoples' Rights. At the universal level, the general obligations included in Article 2 ICCPR include that to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy". Thus, the interpretation of this right provided by the ECtHR can also be extended to other instruments including it. Citizens can therefore submit a complaint before the regional human rights courts or before the UN Human Rights Committee if their human rights have been violated and no effective domestic remedy is available to redress such violations.

31.8.2022

3

Access to Justice in Environmental Matters

According to international and European human rights law, the concept of access to justice obliges states to guarantee every individual the right to turn to a court - or, in certain circumstances, to an alternative dispute resolution body - to obtain a remedy when it is determined that the individual's rights have been violated. Thus, it is also a right that helps individuals enforce other rights. The general concept of access to justice encompasses several human rights, such as the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights, and the right to an effective remedy under Article 13 of the ECHR and Article 47 of the EU Charter. Access to justice is both a process and a goal, and of critical importance to individuals seeking to benefit from other procedural and substantive rights they have, both at a national and international level. [162]

As for the access to justice in the area of environmental law, it has some particular aspects that distinguish it from other areas of EU law. Although a substantive human right to the environment does not currently exist as such at the international level, the promotion of procedural and participatory rights can be an effective means of securing environmental protection. Access to justice in environmental matters can be defined as a set of guarantees that gives non-governmental organizations and individuals a possibility to

[162] https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf

challenge in court the legality of decisions, acts, or omissions that harm the environment.[163]

In recent decades, there has been a growing recognition that the protection of the environment is a fundamental social need. Environmental protection is a public concern, and environmental degradation and destruction have an impact on the overall quality of life. Consequently, environmental policies and legislation directly affect every individual, group and organization, and environmental interests are collective, diffuse, and highly fragmented.

The European Union is a world leader when it comes to protecting the environment, but despite the large number of laws, environmental benefits often go unrecognized due to poor implementation in member states.

While the ECHR does not guarantee a right to a healthy environment, ECHR rights - such as the right to life under Article 2 and the right to respect for private and family life under Article 8 - may come into play in environmental cases. The former article is closely related to this matter, as it entails that the government must take appropriate measures to protect life by enacting laws to protect people and, in certain circumstances, by taking steps to protect people when their lives are in danger.[164] Similarly, Article 8 of the ECHR recognizes a right to respect one's "private and family life, his home and his correspondence," subject to certain limitations that are "in accordance with law" and "necessary in a democratic society."[165] Again, the relationship to the environment is implicit but clear. [166]

This blog post will examine how access to the courts and the ability to challenge decisions that impact the environment is crucial to achieving the proper implementation of EU law, and how even the best environmental laws become almost meaningless if they are not properly implemented and enforced. In order to do so, it will make reference to some of the

[163] https://eeb.org/wp-content/uploads/2018/11/Challenge-accepted-Report-1.pdf
[164] https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf
[165] https://www.echr.coe.int/documents/convention_eng.pdf
[166] https://www.echr.coe.int/documents/guide_art_8_eng.pdf

main judgments given by the ECtHR and ECJ on the matter and it will highlight the relevant EU and international law that helps citizens of the European union access justice in a rapid and economical way also in this peculiar area of law.

I. Tătar v. Romania and the right to respect for private and family life

Severe pollution can affect individuals' well-being and prevent them from enjoying their homes, negatively impacting their private and family lives. A clear example of this is the case of Tătar v. Romania[167]. In this case, the plaintiffs lived in a residential area near a facility used to extract gold ore for a mine. They filed several complaints about the risks they were exposed to due to a company's use of a technical process involving sodium cyanide. Although the authorities assured the plaintiffs that sufficient safety precautions were in place, in 2000 a large amount of polluted water entered various rivers, crossed several borders and affected the environment in several countries.

Invoking the right to life enshrined in Article 2 of the ECHR, the applicants complained that the technological process used by S.C. Transgold S.A. Baia Mare had put their lives in danger and that the authorities had done nothing despite Vasile Gheorghe Tătar's numerous complaints. In its admissibility decision of July 2007, the Court ruled that the applicants' complaints should be examined under Article 8 of the ECHR, the right to respect for private and family life. Indeed, the Court's final decision was based on the latter Article: it held that environmental pollution can affect a person's private and family life by harming his or her well-being, and that the State has a duty to ensure the protection of its citizens by regulating the authorising, setting-up, operating, safety, and supervision of industrial activities, particularly those that are hazardous to the environment and human health.

The Court found that a preliminary environmental impact assessment carried out in 1993 by the Romanian Ministry of the Environment had shown the risks to the environment and

[167]https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-2615810-2848789&filename=003-2615810-2848789.pdf&TID=thkbhnilzk

human health associated with the activity and that the operating conditions established by the Romanian authorities were insufficient to exclude the possibility of serious harm. The Court concluded that the Romanian authorities had not fulfilled their duty to adequately assess the risks that the company's activity could entail and to take appropriate measures to protect the right of the persons concerned to respect for their private life and home within the meaning of Article 8 and, more specifically, of their right to a healthy and protected environment. In a nutshell, in this case, as in many similar others, one can notice some barriers to accessing justice in environmental law.

II. Barriers to accessing justice

Three main obstacles can be identified that impede access to justice in environmental matters.[168]

First and foremost is the time factor, as court proceedings can be lengthy, and much time can elapse before a final judgment is issued. In addition, it should be noted that the time barrier is also supported by a very strict formalism that is sometimes followed by the courts. This points to a particularly strict interpretation of procedural rules that can deny applicants the right of access to a court.

In cases where there is an urgent need to prevent or stop environmental damage, this may mean that even if the court rules favorably, the environmental damage will not be restored. An example of this is the case of the Białowieska Forest[169]. In this case, Poland had failed to meet its obligations to preserve natural habitats, in particular to protect the Białowieska Forest, and the court ordered the immediate cancelation of the illegal logging permits. The origins of the case date back to March 2016, when the Polish Minister of Environment tripled logging limits and maintained measures to prevent beetle infestations and forest fires, despite warnings from scientists across Europe that this would be very harmful.[170] In July 2017, the case was referred to the Court of Justice, which issued an injunction

[168] https://eeb.org/wp-content/uploads/2018/11/Challenge-accepted-Report-1.pdf
[169]https://curia.europa.eu/juris/document/document.jsf?text=&docid=201150&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6732692

prohibiting logging in the entire Białowieska Forest, except in cases involving public safety.[171] Nevertheless, trees continued to be cut down every day. The final ruling was not issued until April 2018, and in the meantime great damage was done to the Białowieska Forest.

The second factor contributing to the obstruction of access to justice in environmental claims is money, because the financial capacity of plaintiffs can be a major obstacle to achieving justice. In some cases, environmental groups or individuals are asked to pay huge sums of money for legal proceedings. The ECJ has given a very narrow interpretation of Article 11(4) of the Environmental Impact Assessment (EIA) Directive[172], according to which court proceedings must not be excessively expensive. The ECJ noted that this rule applies only to procedural aspects related to the public participation requirements of the EIA Directive, and not to the general need to keep court costs low, which is a matter for each national court to decide. Not only does this rule create uncertainty for an EU-wide standard where national judges must decide whether costs are "prohibitively expensive" but its unpredictability may discourage litigants from filing an environmental claim at all. To address this problem, cost-recovery measures should be introduced in all Member States, preferably at the EU level through a Directive on access to justice in environmental matters, so that there are no cost disparities between Member States that still hinder access to justice. In addition, legal aid should be provided to all persons litigating in the public interest, and Member States should ensure that their laws allow NGOs to recover legal costs if they win a case.

The last factor is that of repercussions, which refers to the use of intimidation and retaliation tactics by companies or investors against NGOs, civil society, or individuals. Strategic Litigation Against Public Participation (SLAPP) is a commonly used term for civil lawsuits brought by companies or investors against individuals who have been openly

[170]https://www.iucn.org/news/world-commission-environmental-law/201805/białowieża-forest-case-judgement-court-justice-eu
[171]https://www.theguardian.com/environment/2017/nov/21/poland-faces-100000-a-day-fines-over-illegal-logging-in-biaowieza-forest
[172] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0092&from=EN

critical of the company's work by, for example, obtaining a court ruling that a project development is illegal, publishing information that damages the company's image, or exposing its involvement in environmentally harmful activities.

While intimidation tactics were once more common in the human rights context, they are now also increasingly used by companies and investors against environmental activists and NGOs in Europe, and the NGO community in general is increasingly vigilant in these cases.

The MEPs' proposal for an anti-SLAPP directive is welcomed. Representatives of the major parties in the European Parliament propose, among other things, a registry of companies that pursue such abusive claims. It is fundamental that no one fears consequences for attempting to protect the environment through free speech or other legal means.

III. The Aarhus Convention

These three barriers to access to justice have been addressed in different ways at both the European and international levels. A clear example is the Aarhus Convention[173], a multilateral environmental agreement that improves citizens' ability to access environmental information while ensuring that it is transparent and reliable. The Convention is widely regarded as the primary legally binding instrument that sets the ground rules for promoting citizen participation in environmental issues.

Indeed, the Convention recognizes that achieving an environment adequate for the health and well-being of present and future generations requires what it calls the "three pillars": access to information, public participation, and access to justice, i.e. the removal of barriers to justice, as mentioned in previous paragraphs. It also addresses the prosecution, punishment, and harassment of persons seeking to exercise these rights.[174]

[173] https://unece.org/DAM/env/pp/documents/cep43e.pdf
[174] James; et al. Revill. *Tools for Compliance and Enforcement from beyond WMD Regimes* (2021).

Therefore, the Convention is a remarkable achievement not only in terms of environmental protection, but also in terms of the promotion and protection of human rights.

The Convention touches on the fundamental values of democracy and the rights of people to protect their well-being. It is, as Mary Robinson describes it, "truly a trailblazer."[175] Some authors emphasize that the adoption of the Aarhus Convention in 1998 was the last important stage in the codification of international environmental law, and the scenario that international environmental law can provide a normative response to global challenges is less and less realistic.

Article 1 of the Convention sets out its objective: “In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."[176]

The seventh and eighth recitals in the preamble reaffirm this goal and complement it with the duty of every person to protect and improve the environment for the benefit of present and future generations. While the Aarhus Convention is not the first international legal instrument to recognize the right to a healthy environment, it appears to be the first hard law text to recognize the rights of future generations.[177]

The Convention does not intend to grant a general and unlimited right of access to all information held by public authorities that has a connection, however minimal, to an environmental factor.[178] Articles 4(3) and (4) provide a number of grounds for refusing requests for access to environmental information. The grounds for refusal are to be interpreted restrictively, taking into account whether the request is “formulated in too general a manner,” and whether the disclosure would adversely affect public security. In

[175] https://unece.org/fileadmin/DAM/env/pp/documents/statements.pdf
[176] https://unece.org/DAM/env/pp/documents/cep43e.pdf
[177] https://unece.org/fileadmin/DAM/env/pp/acig.pdf
[178] Attila Panovics, *The Aarhus Convention Model*, 2016 HUNGARIAN Y.B. INT'L L. &EUR. L. 251 (2016).

case of ambiguity, these provisions should be interpreted in a way that favours transparency and access to information.

The third pillar of the Convention is closely linked to the other two. Access to justice promotes the ability of citizens to assert their right to information and participation. Article 9 requires Parties to ensure access to justice in three areas: in cases of requests for information under Article 4, in cases of specific decisions under Article 6, and in cases of challenging breaches of environmental law in general.

The Aarhus Convention has also been a source of inspiration for the adoption of relevant EU secondary legislation in this area.

IV. Relevant EU Law

EU secondary legislation contains rights of access to justice, and some provisions of the Aarhus Convention can be found in Directive 2003/4/EC[179] (related to the "access to information" pillar), Directive 2003/35/EC[180] (related to the "public participation" pillar and the "access to justice" pillar), and Regulation (EC) No. 1367/2006[181] (which applies the Aarhus Convention to EU institutions and bodies). The rules on access to justice are now found in Article 11 of the EIA Directive, which applies to a wide range of defined public and private projects, and in Article 25 of the Industrial Emissions Directive[182].

One case that illustrates the practical application of the EIA Directive is the "Trianel case."[183] In this case, Trianel was granted a permit to build and operate a coal-fired power plant in Lünen, Germany. The proposed power plant was to be located near five special areas of conservation under the Habitats Directive. An NGO applied for the permit to be annulled on the grounds that it violated the provisions of German law transposing this

[179] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0004&from=EN
[180] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0035&from=EN
[181] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006R1367&from=IT
[182] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0075&from=EN
[183] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CJ0115&from=EN

directive. The German court held that an NGO cannot bring an infringement action under German law because its own rights must be violated in order to bring an action before a court. The court referred a question to the ECJ for a preliminary ruling on whether this undermined the Directive's provisions on access to justice. The ECJ concluded that the Directive precludes legislation that does not allow non-governmental organisations that advocate for environmental protection to have access to justice in cases such as this.

V. Conclusion

In summary, access to justice in environmental matters is still severely limited. This is mainly due to the formalities that must be observed in order to bring a claim before a court in this field. However, thanks to a better implementation of EU law by Member States and to a more frequent use of the Commission's power to initiate infringement proceedings against a state that does not transpose EU law (or does not transpose it correctly), better access to justice can be achieved in a shorter time. Given the current critical environmental situation, EU member states must be more willing to take action, and the Commission will ensure that this happens by using its powers. The goals and priorities that the EU has set for itself in the environmental field cannot be achieved without a comprehensive contribution from all Member States in allowing reasonable and lawful access to justice to individuals and NGOs.

21.9.2022

4

Towards e - Justice: European and National Experiences

Technology can increase the efficiency and transparency of the justice system and make it easier for individuals to access justice. However, it also risks undermining access to justice for some (e.g., those without the Internet) if it completely replaces traditional processes.
The term 'e-justice' encompasses a wide range of initiatives, including the filing of online lawsuits, the provision of online information (including case law), the use of video hearings and conferences, and the ability of judges or other decision-makers to access information electronically. E-justice consists of the use of technology, information, and communications to improve citizens' access to justice and effective judicial action involving the resolution of disputes or the imposition of criminal sanctions.[184]

In recent years, the flag of technological innovation has often been waved as a solution to the many problems plaguing justice administrations. The COVID pandemic has encouraged the use of IT in court proceedings and the discovery of the benefits associated with it[185]. E-filing and integrated e-justice platforms through which data and documents are exchanged, as well as electronically managed court proceedings, are becoming the

[184] For another constructive proposal see https://just-access.de/improving-the-online-complaint-procedure-before-human-rights-council-special-procedures-mandate-holders/
[185]https://opal.latrobe.edu.au/articles/journal_contribution/Courts_in_Victoria_Australia_During_COVID_Will_Digital_Innovation_Stick_/14913000

standard for case processing. The administration of justice is thus being converted from paper to digital media.

Information and Communication Technology (ICT) applications are seen as tools that inherently produce positive results once they are introduced into a justice system. Moreover, increasing pressure requires that these benefits be exploited. As the European Commission stated in relation to the public sector as a whole, “The availability of innovative technologies such as social networks has increased the expectations of citizens in terms of responsiveness when accessing all kinds of services online. (...) There is clearly a need to move towards a more open model of design, production and delivery of online services, taking advantage of the possibility offered by collaboration between citizens, entrepreneurs and civil society. The combination of new technologies, open specifications, innovative architectures and the availability of public sector information can deliver greater value to citizens with fewer resources”[186].

Unfortunately, these positive visions are matched by a much less positive reality. In the judicial system, ICT innovation comprises a complex interplay of technological, institutional, organizational, and normative components, according to recent study[187]. It is becoming apparent that the technological-institutional systems that are developed in the context of e-justice must not only be technically functional, but also institutionally, organizationally, and normatively compatible with judicial processes.

This blog post discusses the development of e-Justice in the EU and its Member States with practical examples of the main tools used so far. It also highlights the problems that have arisen from the use of e-Justice, particularly in relation to human rights such as the right to a fair trial. Finally, some solutions for a better implementation of these innovative systems at the national level are highlighted.

[186] https://digital-strategy.ec.europa.eu/en
[187] https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.211/

I The relation between human rights and e-justice

Under Council of Europe law, the European Convention on Human Rights (ECHR) does not impose specific requirements on e-justice, but the implementation of e-justice initiatives is subject to the rules on access to a court and the right to a fair trial under Article 6 of the ECHR[188].

A clear example of this is the case of Lawyer Partners a.s. v. Slovakia[189], in which the plaintiff, a limited liability company, sought to file more than 70,000 civil lawsuits to collect debts. Given the large number of claims, it recorded them on a DVD and sent them to the court with an explanatory letter. Although domestic law permitted the filing of claims in this manner, the court refused to register them on the grounds that it did not have the necessary equipment. An appeal to the Constitutional Court was dismissed because it had been filed outside the statutory two-month period.

The European Court of Human Rights (EctHR) noted that the company's complaints and supporting documents, if printed, would have filled over 40 million pages. Under these circumstances, the choice of filing method could not be considered unreasonable. Domestic law provides for the electronic filing of lawsuits, and the plaintiff company could not be faulted for availing itself of this option. The court’s refusal to register their actions was a disproportionate restriction on their right of access to the court.

II New tools for e-justice

With the help of technological progress and social change through the information and knowledge society, new tools are emerging in the field of e-justice. However, the judiciary is often seen as a conservative actor, traditionally highly formalized, with rigid roles for legal actors. The judiciary has an aura of formality that does not offer many opportunities to take into account the citizens' point of view. It is usually a field for legal experts, lawyers, prosecutors and academics in law. E-justice is an essential part of e-administration in the

[188] https://www.echr.coe.int › guide_art_6_criminal_eng
[189] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-92959%22]

judiciary to shape a modern public administration of justice, and openness in public service is becoming more and more a key concept.

In the age of knowledge society, a public institution dealing with law needs to promote its judgments, especially through technological channels such as its public website, which may include some useful tools for searching text documents. Courts and many justice agencies around the world have some means of accessing judgments, orders, or jurisdictional declarations so that attorneys and domestic relations staff can read them. In the following sections of this blog post, the main e-justice tools developed by the EU and its member states will be analyzed in order to understand the benefits they offer, the problems they can cause, and some practical solutions.

II.a European e-Justice Portal

The EU's "electronic one-stop shop in the area of justice," the European e-Justice Portal[190], currently allows individuals to file cross-border small claims or payment orders electronically, in accordance with relevant EU secondary legislation. However, that is not the only thing the Portal can do. In general, it helps people, companies, lawyers and judges find answers to legal questions.

A German travelling in Spain needs a lawyer. An Italian entrepreneur wants to search the Hungarian land register. A Finnish judge has a question about the French court system. On the European e-Justice Portal, answers to all of these queries are available in 23 official EU languages. With more than 30,000 pages of content, the portal offers a wealth of information and links to laws and practises in all EU countries.

In accordance with Regulation (EC) No. 861/2007[191], the European e-Justice Portal can also be used to make claims in the European Small Claims Procedure. This procedure aims to improve and simplify procedures in civil and commercial matters involving claims that do not exceed €2,000. It is a written procedure – unless the court deems an oral

[190] https://e-justice.europa.eu/home?action=home&plang=en
[191] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007R0861&from=en

hearing necessary. It sets deadlines for the parties and the court to expedite the process and applies to both monetary and non-monetary claims. A court decision issued under this procedure must be automatically recognised and enforced in another member state.

II.b Evidence by video conference

The development of videoconferencing and hearings, as described in the portal, can also help facilitate justice[192]. For example, the European Supervision Order[193] allows EU Member States to issue surveillance orders releasing suspects or defendants in pre-trial detention for surveillance in their country of residence. Article 12 (4) provides that telephone and video conferencing may be used if the issuing Member State is required by national law to hear the suspect before modifying the surveillance measures or issuing an arrest warrant. The use of videoconferencing for hearings is also encouraged by other EU instruments, as described later in this blog post.

The possibility of taking evidence by videoconference has been enthusiastically promoted by EU Member States and is now legally allowed not only in civil and commercial cases, but also in criminal cases. In this regard, the Council's recommendations on cross-border videoconferencing state:
“Videoconferencing is a useful tool which has great potential not only at national level but also in particular in cross-border situations involving different Member States and even third countries. In cross-border cases smooth communication between the judicial authorities of the Member States is crucial. Videoconferencing is one possible way of simplifying and encouraging such communication.” [194]

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[192] Miguel Torres * (May 2018). Cross-Border Litigation: 'Videotaking' of Evidence within EU Member States. *Dispute Resolution International (IBA), 12,* 71. https://advance-lexis-com.ezp.biblio.unitn.it/api/document?collection=analytical-materials&id=urn:contentItem:5SGN-FXN0-02NC-72V9-00000-00&context=1516831.
[193] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006PC0468&from=EN
[194] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015H0731(01)&from=FR

When trying to use the tool of videoconferencing, various difficulties may arise. For example, there is the problem of finding the right contact point in another Member State, the language problems among the judicial officers organising the videoconference, or the lack of the same technical standards in all Member States. An important source of secondary EU law on this issue is regulation 1206/2001[195], which was recently replaced by regulation 2020/1783[196].

Regulation 1206 does not define "videoconference" or "teleconference." Both qualify as "communications technology", but Regulation 1206 does not mention other types of technologies. However, as we know, there are several messaging applications, such as Whatsapp or other applications that also offer video calls: Skype, for example, offers teleconferencing services with good sound and picture quality. The most appropriate interpretation of Regulation 1206 is that it provides flexibility to ensure an efficient taking of evidence regardless of the means.

The requirements for taking evidence by videoconference or similar technology include certainty about the identity of the persons involved in the taking of evidence, interaction between them, and the preservation of the rights of the parties, which is ensured by the presence of a judge.

In order to facilitate cooperation between judicial authorities in different EU countries and to make full use of videoconferencing for taking evidence in another EU country, the European Judicial Network in Civil and Commercial Matters (EJN civil)[197] has produced a series of fact sheets. These contain practical information on rules, procedures and technical possibilities in various EU countries.

The EJN civil facilitates and supports relations between national judicial authorities through contact points in each Member State, helping to facilitate cross-border cases. This

[195] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02001R1206-20081204&from=EN
[196] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1783&qid=1644510578884
[197]https://e-justice.europa.eu/21/EN/european_judicial_network_in_civil_and_commercial_matters?clang=en

cooperation between authorities aims to assist persons involved in cross-border civil and commercial cases.

In addition to EU secondary legislation, consideration should also be given to initiatives taken by individual European states to support and expand the use of e-Justice at the national level.

II.c Tools in the UK: You be the judge

The UK Ministry of Justice was recognized at the International Visual Communications Awards for an interactive guide to help people understand judgments - "you be the judge."[198] This tool makes justice more accessible by familiarising people with court procedures outside the actual courtroom.
You be the Judge is owned by the Department of Justice and is no longer available. However, the Sentencing Council is considering the possibility of developing a revised version.

You be the Judge is an interactive online sentencing tool that puts you in the judge's chair. You choose from eight real court cases, hear the facts of the case and the aggravating and mitigating factors, and then decide on the sentence. You also get to see how your sentence compares to the judge's sentence in the real case. Finally, you are invited to give your opinion on the sentencing again after the case is closed.

Justice Minister, Jeremy Wright said:
“No two cases are the same and this can make the way criminals are punished difficult for the public to understand. Sentencing is a complicated task and can be a very difficult job. It has to balance a number of issues including the law, the full facts of the case, and the aggravating and mitigating factors”.

[198] https://www.gov.uk/government/news/you-be-the-judge-wins-international-award

“That’s why the ‘You be the Judge’ website is so important, it gives the public a chance to be the judge in real criminal cases, to better understand how sentencing decisions are made and to help people see how punishments are decided”[199]

This tool is also important because of the information it provides. Looking at all of the choices that users of the website made between 2010 and 2012, we find that 39% of all user experiences resulted in the user choosing the same sentence as the judge, 16% resulted in the user choosing a more severe sentence than the judge, and up to 45% resulted in the user choosing a less severe sentence than the judge[200]. This means that users chose three times as many less severe sentences as more severe sentences.

However, there were also some critical observations[201] about this tool archived by the UK Government. For example, while the judges, prosecutors, lawyers, legal advisors, and court clerks depicted in the scenarios are male, female, and of different ethnic backgrounds, all of the defendants are white, male, and under 40.

II.d Tools in England: MCOL

Money Claims Online (MCOL)[202] is a successful online translation of the paper-based process developed in England in recent decades. It consists of an online portal for initiating simple court proceedings. It is an alternative to the traditional method of filing a civil lawsuit, although this has also been simplified in recent years.

If a lawsuit is filed at the very last minute, an online monetary claim can buy valuable additional time. A paper claim form sent to the court with the fee takes time to reach the processing centre by mail. So to be safe, you should mail it before the deadline. Online monetary claims are available 24/7, so a claim can be filed online until the twelth hour on

[199] https://www.gov.uk/government/news/you-be-the-judge--2
[200] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/203006/Analysis_of_complete_You_be_the_Judge_website_experiences__web_.pdf
[201] https://www.lawgazette.co.uk/analysis/you-be-the-judge/56781.article
[202] https://www.gov.uk/government/publications/money-claim-online-user-guide

the last day of the statute of limitations. However, registration is required, which can slow down the process of issuing a claim.

Other limitations influence the proper functioning of MCOL. For example, "statute of limitations" claims generally must be brought before a court before a certain date. As a general rule of thumb (and in all circumstances, you should seek advice on the statute of limitations date for your particular claim), you have six years to file a lawsuit for breach of contract or other claims.

In addition, the "Claim Details" section, which explains what the claim is about and the amount claimed, is limited to a maximum of 24 lines of 45 characters and a total of 1080 characters. This leaves very little space indeed. This often results in short and poorly worded details of the claim being packed into the application. It is better to avoid this, as a lack of detail can affect the prospects of success in court. One tool to which the MCOL is often compared is the Possession Claim Online (PCOL[203]), which was developed in Wales in a similar way to the MCOL.

[203] https://www.gov.uk/possession-claim-online-recover-property

II.e Tools in Wales: PCOL

The PCOL project was launched in 2006 to increase automation and make the processing of possession claims more efficient. Often, individuals need to file a claim against another party to settle a commercial debt, such as rent owed by tenants to a landlord. To ensure that this payment is made, it may be necessary to write a letter to the person you may be making a claim against, setting out all aspects of your potential claim, such as payment dates. The letter will usually state that if payment is not made by a certain date, you will take the case to the district court. Thanks to PCOL, individuals can file a claim against another person through a special website. When you use Possession Claim online, you can initiate the process at a time that is convenient for you, meaning you do not have to go to court to initiate it. You will also be automatically assigned a hearing date in the correct court. This avoids unwanted administrative costs incurred by filing your case in the wrong court.

The designers of Possession Claim Online have used several technological components developed in MCOL. For example, the screen models and the payment engine are the same. Unlike the offline process, the value of the property and the amount of the monetary claim issued must not exceed £100,000. In fact, the online service has some restrictions similar to the ones that apply in MCOL.

The system offers PCOL and MCOL users the possibility to use both the online and offline procedures at any stage of possession and money claim cases. This confirms the commitment of the Judiciary of England and Wales to optimise the accessibility of judicial services. However, viewed from a different angle, this point creates an amazing paradox. On the one hand, policies in the judiciary aim to make procedures faster, simpler, and less expensive through the use of ICT capabilities. On the other hand, the incomplete dissemination of ICT skills and the commitment to accessibility of court services limit a complete transfer of traditional court proceedings to digital media and will continue to do so in the future.

II.f Tools in France: e-Barreau

As in other Member States, France has taken an important step in developing a system for the electronic filing and exchange of documents between lawyers and the ordinary courts in the administration of justice. The system, called e-Barreau[204], is intended as an electronic equivalent to traditional procedures and as a way to do the same things more efficiently using new electronic tools. This system transfers all traditional objects and activities into a digital format. At the beginning, for the actors who promoted the development of the new system, the problems seemed to belong only to the normative and technological spheres. Normative, since the rules of procedure were to allow and regulate the use of the new electronic means instead of the old paper-based means (such as electronic documents and digital signatures). Technological, as it was necessary to find or develop technologies that were suitable to meet the normative requirements.

When Parliament passed legislation allowing the use of electronic tools that mimicked the paper-based process, the only problem seemed to be a "technical" one. However, it soon became apparent that nothing was as simple as it seemed. The real challenge in developing the e-justice system was not in finding, assembling, and producing technological tools, but in creating the governance network of relevant organizational actors needed to successfully support and implement the innovation. The challenge was also to find ways to motivate users to actively participate in the creation of the new service, which could not function without them.

The possibility of making the use of e-Barreau mandatory for appellate courts has been discussed, but this cannot be done until the system has already been legitimized and accepted by a significant number of lawyers. At the same time, not all legitimacy problems have been solved yet. Assuming that electronic filing will also become mandatory in the first instance, this decision raises concerns about equal access to justice and the right to a fair trial, as guaranteed by Article 6(1) of the European Convention on Human Rights, especially when it comes to litigants representing themselves without a lawyer.

[204] https://www.utrechtlawreview.org/articles/10.18352/ulr.153/

The current evolution of the system leads us to foresee a future with further struggles, the search for compromises, and the creation of new governance networks that will perhaps allow for further integration and progress in French e-justice efforts.

II.g Tools in Italy: the Online Civil Trial

Similar to the e-Barreau system in France, the "processo civile telematico"[205] (which translates to "online civil trial" in English) developed by the Italian Ministry of Justice is one of the most important e-government projects in Italy. The main task of the system is to allow interoperability between an enormous number of external users (such as lawyers), and the internal users of the courts (like judges or private parties), through a highly secure infrastructure that guarantees the reliability of transmissions, authenticity, integrity, non-repudiation and confidentiality.

Thanks to this system, lawyers (as defendants) have online access to reliable and up-to-date information managed in the court management system, as well as to legal acts and documents stored in the file system. The same service is also available for applications, so that these types of users can have their own software automatically synchronized with the courts' information and documents. This service makes it possible to significantly reduce access to the courts and save time and personnel for both external users and clerks.
Similar to their attorneys, citizens and private companies can also access the information managed by the court management system and the legal files and documents stored in the file system as stakeholders. In the near future, they will also be able to file legal documents electronically with the relevant court and receive notices and decisions from the courts when required by law.

A particular aspect of the online civil process is the introduction of a certified mail system (PEC, acronym for "Posta Elettronica Certificata"), applicable to all public administrations and citizens. In summary, these rules and specifications provide that postal messages

[205] https://pst.giustizia.it/PST/resources/cms/documents/eJustice_in_Italy_rev_May_2016.pdf

receive an official delivery confirmation in order to obtain certainty about the delivery and its exact time. Both messages and delivery receipts are digitally signed by the sender's provider and the recipient's provider to ensure authenticity, non-repudiation, and integrity.
PEC providers are authorized by the "Agenzia per l'Italia Digitale"[206] (which can be translated as "Agency for Digital Italy"), the supreme authority for ICT in Italy, which also supervises providers to ensure compliance with the rules, particularly with regard to security.

The development of the online civil trial also required a strict integration of the different actors and institutions at the local level: courts, software houses, lawyers and their bar association[207]. The implementation of the architecture also required better integration between the central level (the ICT department of the Ministry of Justice) and the local level (each court system and software house). This complicated web of relationships brings into play a number of independent organizations and technological systems. It also gives 165 local bar associations, which are neither necessarily motivated nor sufficiently wealthy, the key role in connecting internal and external actors. In summary, in this case, as in the others explained above, some contradictions and problems can be found with regard to a uniform adaptation of e-justice tools at the national level.

III. Problems with e-justice

Not everyone can have access to technological developments, so it is necessary that they coexist with traditional systems. The ECJ has confirmed that procedures that are accessible only by "electronic means" may make it impossible for some people to exercise their rights.

For instance, in Rosalba Alassini v. Telecom Italia SpA[208], the ECJ addressed four related references for preliminary rulings from the Giudice di Pace di Ischia, which concerned clauses under which an attempt at out-of-court settlement was a mandatory condition for

[206] https://www.agid.gov.it

[207] https://link.springer.com/content/pdf/10.1007/978-94-007-7525-1.pdf

[208] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62008CJ0317&from=EN

the admissibility of certain disputes before national courts. The clauses had been enacted under the Universal Service Directive[209]. The ECJ examined whether these mandatory references were compatible with the principle of effective judicial protection.

In considering this point, the ECJ also noted that the exercise of the rights conferred by the Universal Service Directive might be impossible or excessively difficult in practice for certain persons - in particular those without Internet access - if the dispute resolution procedure were accessible only by electronic means.

It is possible to identify other critical areas in the use of e-justice[210]. First, there is the standardization of procedures, as there is a need to standardize procedures so that they can be managed by the system, as also highlighted in another blog post on the Just Access website[211]. There is also the issue of digitizing workflows. There is a need to adapt workflows to the benefits and requirements of technology, which is also referred to as re-engineering. In fact, court procedures that work well in a paper-based environment, such as serving a document by certified mail, are pointless if the procedures are digitized. At a minimum, this means being aware of the impact of digitization on all users and, ideally, actively involving users in the development and deployment of the technology. An e-justice platform that is ignored by lawyers who prefer to exchange petitions in the traditional way is worthless.

IV Conclusion

As has been shown in the analysis of the concrete instruments of e-justice in various European states, e-justice promotes the realization of almost all components of the right to a fair trial, such as the fairness of the proceedings, the right to a public hearing, and a reasonable duration of the proceedings. In particular, access to justice improves when it is

[209] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002L0022&from=EN

[210] Reiling, D., & Contini, F. (2022). E-justice platforms: challenges for judicial governance. *International Journal for Court Administration, 13(1),* 1-19. https://heinonline-org.ezp.biblio.unitn.it/HOL/Page?collection=journals&handle=hein.journals/ijca13&id=36&men_tab=srchresults

[211] https://just-access.de/improving-the-online-complaint-procedure-before-human-rights-council-special-procedures-mandate-holders/

possible to file procedural documents to initiate a trial online using electronic resources, the fairness and publicity of the trial are ensured by the possibility of broadcasting court hearings on the Internet, and the reasonable duration of a trial is realised by reducing the time lost in filing, transmitting, and processing evidence and by ensuring the appearance of litigants in court.

However, the development of ICT in the field of justice seems to be more complex than previously thought. Rapid success in the technical and even organisational areas is no guarantee of success. In some countries, the broader normative and institutional context plays a greater role than in others, and the exit from the experimental phase can become a never-ending struggle. Sharing experiences and resources for the development of ICT in the justice sector is the fundamental key to developing systems that are both technologically and organizationally functional, but also normatively and institutionally integrated into the broader network in which justice systems operate.

To solve the problems caused by the new introduction of e-justice, three main solutions should be highlighted[212]. First, a unified and centralized software for case management and distribution in all courts is needed. Second, the population should be gradually introduced to this new system by providing direct support to people who have difficulties accessing justice in this way. Finally, spreading awareness about these new tools is essential for their proper functioning. Although national systems in many ways provide citizens with faster and easier access to justice, these new tools are useless if citizens do not know of their existence. National governments should promote the new e-justice tools that are in line with our human rights and national law in order to create a comprehensive mechanism for access to justice for all.

[212] http://journals.rta.lv/index.php/ACJ/article/view/4358/4343

4.10.2022

5

On Corruption and Some Modern Tools to Tackle It

Victims of corruption often struggle to claim reparation for the harm they have suffered and legal requirements make it difficult for victims to be represented and recognised in enforcement proceedings. The UNCAC Coalition for Victims of Corruption Working Group seeks to facilitate discussions, the exchange of information and joint advocacy among civil society experts around victims' remedies and compensation for damages caused by corruption.[213] On September 20 and 22, 2022, Just Access participated in two meetings of the Working Group for Victims of Corruption, where some important points on current anti-corruption measures were raised.

During the 5th Asia Pacific and Other Regions Victims of Corruption Online Meeting, Sara Brimbeuf presented the role of civil society in repairing the damages caused by corruption. During her presentation, one particular point emerged: the new challenges posed by the globalisation of corruption and how it can be used as a useful tool to fight corruption faster. The damage that corruption does to our economy and institutions is well documented. It distorts markets by eliminating any notion of a level playing field, it undermines the rule of law, and it enables crony capitalists and other unworthy individuals to hoard economic and political power.

Recently, there has been a shift in thinking that has put anti-corruption on the global agenda, along with the work of international bodies and NGOs to raise awareness about corruption. We are seeing an increase in international anti-corruption legislation, such as

[213] https://uncaccoalition.org/victims-of-corruption-working-group/

the United Nations Convention Against Corruption (UNCAC)[214], as well as regional and national laws.

However, while increased international attention has helped advance the anti-corruption agenda, globalisation is responsible for an increasingly sophisticated form of corruption. Therefore, there is an increasing need for intergovernmental cooperation to combat the evolving globalisation of corruption. Thanks to NGOs and other associations, individuals are helped when they face corruption at the international level. For example, NGOs can decide whether to bring an individual before a court in the state where the bribery took place, rather than a court where the bribery originated.

As for the anti-corruption activity in France, it is necessary to make reference to the work of TI (Transparency International) France in combating corruption. The work of this coalition consists in holding the powerful and corrupt into account, by exposing the systems and networks that enable corruption. Further, they advocate for policies and build other coalitions to change the status quo.[215] The vision of a corruption-free world of TI France is not an end in itself. It is the “fight for social and economic justice, human rights, peace and security” [216].

At the 11th Victims of Corruption Working Group Meeting, Tatiana Giannone and Elisa Orlando presented the role of Libera in Italy in the fight against mafia and corruption to protect rights and social justice[217]. Libera is a network of associations and social cooperatives to which Ms. Giannone and Ms. Orlando belong. During the meeting they discussed the importance of using confiscated assets from mafia and corruption for public and social purposes. There are many ways in which these confiscated assets are reintroduced into society. Most of them end up in welfare and social policies, but many are also used to promote culture and sustainable tourism. In addition, the reuse of confiscated assets restores the confidence of the population in institutions and in democracy, and is of

[214] https://www.unodc.org/unodc/en/treaties/CAC/
[215] https://www.u4.no/blog/the-ill-gotten-gains-french-model-for-restitution
[216] https://www.transparency.org/en/what-we-do
[217] https://www.libera.it

economic importance because it creates new opportunities for growth and development at the national level. Confiscated assets represent an extraordinary opportunity for the country and communities: they are a clear sign of change that has active citizens and the third sector as protagonists. This change creates values such as solidarity and opportunity while ensuring prosperity and development in Italy. In addition, Libera has been promoting community-based monitoring since 2016 as an empowering strategy for civil society anti-corruption actions. Indeed, citizen-based monitoring is a tool commonly available to victims of corruption and organised crime.

It is also important to mention the main EU instruments adopted so far on this matter. In 2012 the EU Commission proposed a directive on the freezing and confiscation of instrumentalities and proceeds of crime. The directive, adopted in 2014[218], provides a broad definition of assets that can be frozen or seized and includes documents or legal instruments evidencing title or other rights to those assets.

Another relevant EU project on this topic is "Good(s) Monitoring, Europe!"[219]. The general objective of this project is to promote social inclusion strategies for the most disadvantaged populations through the public and social reuse of assets seized from organised crime in Europe and to activate bottom-up participatory processes for integrated territorial development. The actions foreseen include mapping the practises of public and social reuse of seized assets in Europe and developing a model for monitoring the actual reuse of seized assets by citizens to be implemented in other EU countries.

It was interesting to see how fighting corruption can lead not only to a state where social justice is strengthened, but also to secondary advantages such as the public reuse of seized assets that benefits everyone in society. It is crucial to continue to improve the tools mentioned earlier in order to transform corruption, once visualized and fought, into something useful for the state and society.

[218] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0042&from=EN
[219]https://www.confiscatibene.it/blog/goods-monitoring-europe-importance-cohesion-policies-public-and-social-re-use-criminal-property

19.10.2022

6

Youth Activism and Access to Justice

Across Europe, youth activism programmes are organised to raise awareness of global issues and inspire the young generation of open-minded citizens. Events and organisations such as the United Nations, the YounG7 and the European Youth Parliament (EYP) are some of the most well-known projects today.

As a linguistic high school graduate student, I had the opportunity to take part in many events all over Italy and Europe, where I had to deal with global problems and find solutions in intercultural groups of young students like me. Apart from the opportunity to develop my public speaking and teamwork skills, I was able to learn how the diplomatic world works in concrete terms and understand how some of society's most current problems, such as corruption and climate change, are addressed in practise. I also made some important friends I still keep in touch with. It's incredible how much you can become friends with someone while discussing the most important issues in the world. The need for strong collaboration and working as a group has allowed me to get to know some people I had never met before.

From another perspective, I can say that the existence of these projects is of enormous importance in improving access to justice, as I will try to explain in this blog post. Indeed, making students aware of this issue at an early stage can help to achieve one of the most important goals of access to justice, namely spreading awareness. As I explained in

another blog post on e-justice, there are currently a variety of tools that can facilitate access to justice, but some people may not know this. Spreading awareness of how the most important issues in the world today actually work will also make students more aware of how justice can be achieved in a concrete way. When I entered the world of diplomacy at a very young age, I could immediately understand how access to justice could be improved, for example for victims of corruption or natural disasters. As I will argue in this blog post, events like the ones I participated in should be promoted more and more by the relevant institutions, such as schools, to ensure that students understand at a very young age how the world and access to justice can be concretely improved. Let us not forget that today's young people are tomorrow's world leaders.

The Model UN

Model United Nations is an academic simulation of the United Nations where students take on the role of delegates from different countries and try to solve real world problems with the policies and perspectives of their assigned country. During the Model UN I was able to improve my skills, such as public speaking and the ability to research in depth the position of the country I was representing. Over the past five years, I have had the honour of representing the US, Libya and Australia, dealing with various global issues.

The Model UN that I found most interesting was probably the one on corruption and modern tools to fight it. As Australia's representative, my main task was to propose new ways to fight corruption in the most affected countries. Although in a Model UN the main task of a delegate is to find common solutions and work as a team, this is not always possible. During our committee work, we found that different delegates had different views on how corruption should be tackled. This was, in my opinion, the best case you can find in a model UN: we do not live in a world where all countries have the same view on how a certain problem should be tackled and there is always some disagreement on how to find the right solutions. Therefore, I found myself in a debate that was very similar to a Socratic one, where I tried to put forward arguments and at the same time put forward counter-arguments against countries that had strongly different view than mine. I tried to impose

the Australian model of anti-corruption on all delegations of this committee, and this is exactly what happens in "real life" during a debate of UN. At the end of the debate, some delegates had to agree to a "resolution paper" (i.e. a document containing the common solutions to the problem at hand) with which they were not entirely satisfied. It was a matter of finding compromises and working together with those who had a more similar view to mine, even if it was not the same. In a globalised and pluralistic world like the one we live in, compromises have to be found to make life as harmonious as possible.

Specifically, we could see that the countries where access to justice was more hindered by corruption were in stark contrast to countries like Australia where corruption did not have such a strong impact on society.

Thanks to this model UN I was able to take a closer look at the impact of corruption in the societies of our world. In the committee, we defined corruption as a threat to democratic sustainability. When the institutional framework for building a democratic government is not in place because of corruption, the political stability of a country suffers. A dictatorship can be established, with all its negative consequences for the enjoyment of human rights. The result is a society with low self-esteem and little or no integrity.

In the conclusions that I drafted together with the delegations of the countries that share my view, we stressed that the challenges of corruption must be addressed with due seriousness. Despite earlier remedial measures, corruption is worsening and assuming alarming proportions. It was encouraging to see that countries allied with Australia during the debate have put in place strong anti-corruption mechanisms to tackle the problem at the national level. We therefore called on all other countries to address the issue by making it a priority in their national affairs and proposing better cooperation at the international level to achieve better results. Indeed, during the debate, we found that this problem cannot be solved only through stricter measures at the national level. We have found that a closer international community is needed to fight corruption more effectively.

The YounG7

The YounG7 is a student simulation project of G7 negotiation work that functions very similarly to the Model UN. The YounG7 is also a global awareness project for young students and serves as a training ground for mediation and comparison. It is an international cooperation project in which seven delegations representing the members of the Group of 7 and a representative of the EU Commission and Council discuss world issues

Thanks to this project, students can understand not only the importance and influence that these seven countries have on the world, but also how to address the problems that the G7 discusses in a cooperative way

The YounG7 event that I personally found most interesting was the one where I discussed the management and prevention of natural disasters and where I represented the delegation of Chile together with two other fellow students. It was interesting to see how Chile, which was the only country on the committee that was not part of the G7, was able to contribute to the debate. All discussions had to take into account the special situation of Chile, which does not have the same resources as the G7, mainly for economic and political reasons. Therefore, more teamwork was needed and good solutions were found despite all the obstacles we encountered during the debate

During the discussion, we realised that the importance of "environmental justice" seems to be sufficiently but not fully recognised in the international community today, as I also pointed out in the blog post on access to justice in environmental matters[220]. While disaster-related issues can fall within the scope of environmental law, it does not cover all phases of disasters, and disaster-related cases require specific analysis that is not always common in other environmental matters. For this reason, the focus of YounG7 was on natural disaster management and prevention, as we recognised the importance of addressing this issue at an early stage, before a natural disaster occurs

[220] https://just-access.de/access-to-justice-in-environmental-matters/

Although natural disasters affect some countries more than others, they should never be underestimated, especially in light of the current climate crisis. It is noteworthy that the resolution paper, which was jointly drafted by all delegations, repeatedly refers to the need for cooperation. This has nothing to do with redundancy, but with the fact that we needed to stress the importance of strong international cooperation between the world's largest countries to address a problem that is indeed global.

The European Youth Parliament

The EYP is a peer-to-peer education programme that brings together young people from all over Europe to discuss the pressing issues of our time. The mission of the EYP is to "inspire and empower a young generation of informed, open-minded, responsible, and active citizens that shape society and drive impact"[221]. In my opinion, these words perfectly describe what the EYP does in concrete terms, as I was able to experience in Finland in May 2022. By bringing together young people from different backgrounds, I found myself in an incredibly intercultural context that gave me many important friendships. All participants came from different countries, had a different education and a different perspective on how to solve the problems that were proposed during the event. However, there was one point that we all had in common: Europe. Europe was the central pivot that united me and all the other participants in my committee. Therefore, the solutions we tried to find for the problems proposed to us had to be seen from a European perspective.

In the INGE committee, I was able to reflect and discuss the problems that disinformation causes in the EU. We looked at the issue of disinformation from quite a broad perspective: We looked at the disinformation that originates and is spread within the EU, as well as the disinformation that comes from third countries, which is probably the most dangerous. We found that it is mainly private entities such as companies that spread false information, for instance in cases of greenwashing, in the hope of financial gain and to disguise the true nature of their products or services. This results in EU consumers not fully knowing what they are buying or how the products are made. We also took a closer look at the people

[221] https://eyp.org

who are most vulnerable to fake news, namely the elderly. Although older people are more experienced and therefore usually wiser, ageing can lead to a lack of critical thinking. Older people do not necessarily know how to recognise a reputable source, or they simply do not check the facts

To give our discussion a legal perspective, we have also focused on the relevant human rights that are most affected by fake news in Europe. For example, the COVID -19 pandemic pitted freedom of expression (CFREU Article 11) against the right to health (CFREU Article 35). Another fundamental right affected by fake news is the principle of non-discrimination, as several fake news focus on certain groups in society, especially minorities.

These and other rights and principles are enshrined in various sources that need to be taken into account in the fight against disinformation in Europe. The most important are the constitutions of the member states, the CFREU, the ECHR and the general principles of EU law.

By sharing our different perspectives on what we knew and learned during these three days, the INGE Committee came up with a list of possible solutions, which was very much appreciated by the rest of the General Assembly.

This experience in Finland not only gave me a better understanding of important issues that affect all countries in Europe, but also made me feel more European than ever. I realised that Europe is not defined by geography, but that it is in our culture and in our minds, and that we are all connected by it. I have never felt so welcomed and heard as I did in Finland and I will be forever grateful to EYP for creating such great opportunities for European students.

Conclusion

All the opportunities provided by the mentioned organisations are important in improving access to justice. By raising awareness in such a concrete way, young students from all over Europe can take a closer look at the most important issues currently facing our world and understand how best to tackle them. Raising awareness of the various issues that these organisations focus on is in itself a direct component of access to justice, which includes access to information to express one's opinion.

Knowledge and awareness of access to justice is greatly enhanced by the activities of these organisations alone, regardless of their actual impact on national and international laws. Programmes like the Model UN, YounG7 and EYP should be further promoted in Europe to improve access to justice and raise awareness on how we can concretely enhance it. Furthermore, more attention should be paid to student-authored resolutions and documents at the national and European level. These documents are the result of thorough research by very young people who, even though they may not have the technical skills to find the best possible solutions, can reflect the view of the future generation of Europe, which should be given more importance.

31.10.2022

7

Just Access Position Paper at the Multistakeholder Meeting at the OSCE Documentation Centre in Prague on World Food Security

Many thanks to the Centre for Religion, Human Values, and International Relations; the Irish Council of Churches; CREATE; and PACE for convening this important event, for inviting Just Access, and for the thoughtful and clear discussion paper and concept note on multilateralism and methodology.

Human rights and responsibilities

Faith and international law are a powerful combination, and it is hard to think of a greater wrong that we must seek to right than systemic food insecurity. The Sustainable Development Goals and the rich and actionable tradition of stewardship that we find in all great world religions are not too hard to reconcile. Food is indisputably a human right, enshrined in UDHR Art. 25(1) and ICESCR Art. 11(2), as well as in specialised and human rights treaties, ranging from the Additional Protocol to the American Convention on Human Rights through the Convention on the Rights of the Child to the Arab Charter on Human Rights. Surveying State practice and *opinio iuris*, William Schabas recently demonstrated that the right to food, and the concomitant right to freedom from hunger, are not a matter of abstract principle or hard-nosed treaty compliance, but also a customary human right that

all States must honour regardless of their treaty obligations or reservations.[222] One could plausibly argue that recent efforts to expand the definition of torture to encompass starvation also point the way to a not-too-distant future in which the right to food will be *ius cogens*, a non-negotiable and non-derogable peremptory human rights norm.

Yet how to enforce the human right to food? One path is opened by the hardening of ICESCR. Unlike its counterpart, the ICCPR, the ICESCR was designed to contain the aspirational parts of the UDHR, rights that States, strictly speaking, need not protect unless they have the resources to do so. That view is changing, and economic, social and cultural rights are increasingly binding upon States. The enforcement mechanism in this case would be a series of domestic cases by the starving millions. Such cases can be neither financed nor adjudicated by the relevant domestic courts, which tend to be in failing States to begin with.

A more promising route might be the UN Special Rapporteur on the Right to Food, a mandate created in 2020. Unfortunately, while the special mandates system is in many ways at the apex of global human rights mechanisms, they are not equipped to deal with collective cases. Individuals or families would have to file Special Procedures complaints, ideally both urgent and regular, and flood the Special Rapporteur. One of the most cherished initiatives at Just Access is prompting and supporting the UN special mandates system to enable collective human rights claims.[223] Features from the so-called structural investigations of the European Court of Human Rights, and group action and class action formats in the UK and the US, could help restructure the submission and processing procedures of the UN Special Rapporteur, ideally enabling masses with shared characteristics, such as age, location, cause of starvation and so on, to submit collective complaints. This procedural innovation, which we've been working on for a while, could not be put to better use than with a pilot project on food insecurity.

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[222] William Schabas, *The Customary International Law of Human Rights* (Oxford: Oxford University Press, 2021).

[223] https://just-access.de/improving-the-online-complaint-procedure-before-human-rights-council-special-procedures-mandate-holders/

The human rights approach to food insecurity is fruitful and productive, but also insufficient. The religious traditions of stewardship recognise the responsibility of individuals in looking after the planet and each other. By comparison, the attention to responsibility in International law is in at embryonic stage. Earlier this year the Food and Agriculture Organization estimated food waste to have reached 17% in 2019: ostensibly a perpetratorless crime. The obligation of individuals, not only States, to reduce needless waste as the easiest form of food price control is clearer from a faith-driven than from a human rights perspective.

Climate change and food security

The discussion paper circulated before our meeting also calls attention to climate change as a serious cause of food insecurity. Once more, religious traditions can provide helpful insights. In an academic paper that Just Access' Director co-authored in 2020, we argued that natural resources should be framed not as common, but as public goods.[224]

Common goods are nonexcludable (you cannot stop others from using them) but rivalrous to a certain degree, because in one way or another they are exhaustible. Public goods are equally nonexcludable but also nonrivalrous, because one party using them does not reduce availability to others. Natural resources such as water and air are global commons are rivalrous (exhaustible). In contrast, *sustainably clean* water and *sustainably clean* air are public goods, because sustainable purity or nontoxicity is not rivalrous. From a national or even international perspective, the challenge to reverse human harm to the environment might appear to pose a series of trade-offs, for instance between economic development and environmentally safe industrial processes, or between developing states, which rely on extractive industries, and highly developed states that can import raw materials due to their competitive advantage in higher value-adding sectors. Yet this is to misunderstand the point. The point is that benefiting from natural resources (air, water, livable climate, minerals, and so forth) is necessarily predicated on their sustainable use. The sustainability of their use is a bottom line that should never be undercut in any legal

[224] Mark Somos and Anne Peters, "Christianity, Global Environmental Protection, and Animal Law," in eds. Rafael Domingo Oslé and John Witte, Jr., *Christianity and Global Law* (Routledge, 2020), 365-83.

arrangement concerning elements of nature and is in that sense a nonnegotiable standard. To approach natural resources as exhaustible goods subject to rivalrous treatment is to ignore that sustainability is their defining intrinsic characteristic. In a sense, the challenge is therefore to reframe the global commons as public goods.

The benchmark for our collective tasks is not to establish acceptable trade-offs to regulate the commons, but to institutionally and procedurally embed an understanding of environmentally sustainable practices as a public good. Framing natural resources as common goods is a dead end. Even in the unlikely event that the relevant treaties predicated on the conceptualisation of natural resources as global commons were universally and faithfully observed, mechanisms such as the Kyoto Protocol and the Paris Agreement cannot be more than a means to an end. The end must be to reconceive of environmental sustainability politically, economically, and legally as a nonnegotiable standard. An uncompromisably global perspective, such as Christianity or global law, is essential for stopping sustainable public goods from being misunderstood and misrepresented as global commons.

Geopolitical disruption: non-state actors

Relevantly, Just Access holds that the current general framework of public international law needs considerable revision to tackle food insecurity. To cite one example: the greatest humanitarian crisis today is commonly said to be taking place in Yemen. WFP convoys are stopped and weaponised by the Houthis, who technically qualify under international law as terrorists, or as armed non-state actors at best. However, the Houthis see themselves as the real State, and they regularly try to meet Yemen's international reporting obligations by submitting documents to periodic UN treaty reviews. The Houthis explicitly claim to be held to the standards of State responsibility, but they are technically disqualified from such accountability.[225] To extrapolate from this synecdoche to the overall picture: the dominance of non-state groups tends to correlate with the distribution patterns of food insecurity. With much of the world turning into ungovernable spaces; much of the famine taking place

[225] https://just-access.de/international-legal-responsibility-of-de-facto-authorities-and-terrorist-organisations-in-the-yemeni-conflict/

within such spaces; and an international law taxonomy that was barely fit for purpose after World War II, rethinking the essential building blocks of public international law would be a necessary, albeit insufficient, part of the solution to the geopolitically motivated disruption to food security that the conveners of our meeting have rightly and emphatically drawn attention to.

Intellectual property

Finally, Just Access has been following with great interest the scientific discoveries that hold tremendous promise for alleviating food insecurity. Synthetic biology, in particular, seems to transcend the choice between monocultures and biodiversity, but also carries the risk, present throughout human history, of deepening the divide between haves and have-nots.[226] If the fruits of synthetic biology, such as high-yield land crops with lower water requirements and higher saline toleration, or algae with comprehensive nutritional value, are monopolised by companies and States that invested in their research and development, the gap between traditional subsistence farmers, who bear the brunt of the burden of climate change, and the well-to-do regions and social strata with robust food security will open up even wider. This is why patent commons, ideally, or sovereign patent pooling, at a minimum, must become elements in mechanisms such as the UNFCCC Nationally Determined Contributions, as well as in individual States' humanitarian efforts. Offering the technologies, recently discovered or yet to be discovered, to creating resilient and cheap food sources is a woefully underexplored solution.

[226] Sonia Contera, *Nano Comes to Life: How Nanotechnology Is Transforming Medicine and the Future of Biology* (Princeton: Princeton University Press, 2021). Andrew Hassel and Amy Webb, *The Genesis Machine: Our Quest to Rewrite Life in the Age of Synthetic Biology* (New York: PublicAffairs, 2022).

7.11.2022

8

Just Access at the DCU Meeting on Food Security and Global Diplomacy

Food security exists when “all people, at all times have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and preferences for an active and healthy life”[227]. Today, nearly 800 million people lack adequate access to food, more than 2 billion people suffer from deficiencies of essential micronutrients, and about 60% of people in low-income countries are food insecure[228]. Food insecurity negatively impacts human physical, social, emotional and cognitive development throughout the lifespan and is a major social and environmental disruptor with serious implications for the health of the planet.

On October 26 and 27, 2022, our Legal Intern Luca Brocca had the honour of representing Just Access at the DCU meeting on Food Security and Global Diplomacy, where he joined 21 experts from diverse backgrounds to discuss the importance of food security from different perspectives.

More specifically, attention was drawn to the role of famine, the link between food security and climate change, the importance of religious values in this issue, and the geopolitical influences on food security.

[227]https://www.fao.org/fileadmin/templates/faoitaly/documents/pdf/pdf_Food_Security_Cocept_Note.pdf
[228] Goal 2: Zero Hunger – United Nations Sustainable Developmenthttps://www.un.org › sustainabledevelopment › hunger

He highlighted the importance of the right to food by making reference to its recognition as a human right not only in the UDHR and in various international treaties, but also as customary international law due to its general practice and opinio iuris. Further, he made reference to the possible recognition of the human right to food as part of the ius cogens due to its relation with the prohibition of torture, as it is also pointed out in Just Access' position paper for the meeting[229].

In this blog post, Luca Brocca will develop the main points discussed during the meeting through concrete examples and by proposing some of the solutions that were identified.

Famines

A famine is an acute episode of extreme hunger resulting in a high mortality rate due to starvation or hunger-related diseases[230]. Despite the ambiguities surrounding the correct definition, it is evident that in recent decades the number of major, life-threatening famines has declined significantly compared to previous eras. This is in no way to downplay the very real threat posed by the approximately 800 million people currently living in a state of crisis food insecurity and therefore in need of urgent action.

Nevertheless, the parts of the world that continue to be threatened by famine are much more limited geographically than in previous eras, and the famines that have occurred recently have generally been far less deadly.

During the meeting in Prague, attention was drawn to an entirely preventable famine that struck China in the late 1950s. This famine was linked to the economic and social campaign led by Mao Zedong known as the Great Leap Forward. During and immediately after the Chinese famine, however, it remained "shrouded in mystery" as Chinese authorities and some Western observers insisted that the famine had been averted despite several crop failures. In the post-Mao era of the early 1980s, some official demographic data were republished, allowing the first systematic investigations of the death toll.

[229]https://just-access.de/just-access-position-paper-meeting-at-the-osce-documentation-centre-in-prague-on-world-food-security/
[230]https://ourworldindata.org/famines

The Great Famine remains a taboo in China and is euphemistically referred to as the Three Years of Natural Disasters or the Three Years of difficulty[231]. The famine cost tens of millions of lives, but is barely a footnote in the history books.
There are few publicly available records of an event etched in the memory of those who survived this largely man-made catastrophe.

Another historically important famine mentioned in the meeting is the one caused by the 2008 economic crisis, which had a huge impact worldwide. World food prices rose dramatically in 2007 and the first and second quarters of 2008, creating a global crisis and causing political and economic instability and social unrest in both poor and developed countries[232]. There are signs that the factors that led to these types of problems are the new norm, which means that new price spikes will occur again in the foreseeable future.

Crises can cause people to react in unusual ways and things can escalate quickly, as we could see with the Covid-19 pandemic outbreak. Riots and violent demonstrations erupted in many developing countries, leading to military intervention and political instability. Corruption also hampered national actions to protect the nutritional needs of vulnerable people.

Later in the meeting it was highlighted the impact of famine on vulnerable people, such as children, who suffer tangible long-term consequences. For children, lack of food and nutrients during the developmental stages of life can lead to lifelong setbacks.

Children in hunger crises can suffer from “emaciation,” a condition in which a child’s weight and muscle mass are disproportionate to his or her height as a result of severe malnutrition[233]. Their growth may also be stunted, which in turn affects their physical and cognitive development. For these reasons, they should be paid particular attention.

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[231]_https://www.bbc.com/news/world-asia-china-17987733
[232]https://waterpartnership.org.au/learning-from-the-2008-food-crisis-what-happened-lessons-learned-and-ongoing-consequences/
[233]_https://www.rescue.org/article/why-are-children-so-vulnerable-famine-and-other-hunger-crises

Further decline of famines is by no means certain: their future will depend largely on the nature and frequency of wars and other forms of conflicts, as I will discuss in the next section. As I discussed here, however, the long-term trends that have contributed to the sharp decline in famine mortality rates suggest that it is very unlikely that the kind of catastrophic famines that occurred in the twentieth century will return.

Emergency food aid provided by aid agencies continues to play a critical role in preventing deaths, and the international aid community has recently developed much better monitoring systems, such as the Famine Early Warning System[234] that has allowed for greater preparation and more timely interventions.

Overall, we can see in the rapid decline of famine mortality one of the great achievements of our time, representing technological progress, economic development and the spread of stable democracies. Seen in this light, however, it is also clear how alarming is the persistence of famines, which in the modern world are exclusively caused by man. As mentioned during the meeting, one must realize that famines are not about not having the means to acquire food, but about not having access to it. In the modern world, it can be seen that the democratic form of government, thanks to the values on which it is based, can help to prevent famines.

Geopolitical disruptions

Food insecurity, in particular, represents a policy failure, because global food production has long since exceeded the level needed to feed everyone. Therefore, geopolitics should be given greater prominence in the food security debate to highlight its impact on a number of areas that directly affect food security.

Assessing the prospects for the Zero Hunger Goal, Sustainable Development Goal 2, requires an understanding of food security that goes beyond developmental or humanitarian issues to include linkages with geopolitics. Geopolitical challenges extend to areas such as natural resources, trade, armed conflict, and climate change, where

[234] https://www.fews.net/

unilateralism and zero-sum approaches to security directly impede efforts to end hunger and undermine the enabling environment for these efforts.

During the meeting, in addition to mentioning the impact of climate change on food security, the impact of the war in Ukraine on normal global grain supplies was also highlighted.

An agreement signed on July 22nd to free some 20 million tons of grain stuck in Black Sea ports has provided relative relief to the market, with prices for some grains returning to pre-invasion levels. Despite this optimistic trend, a number of immediate concerns and longer-term complications continue to point to increased levels of risk. Immediate concerns include the fact that while grain trade may alleviate some logistical problems at ports, the outcome is uncertain and there are significant complications inland that could continue to make it difficult to transport grain to customers. For instance, if the roughly 20 million tons of grain at issue were not stored in optimal conditions during the five to six months they were in Ukrainian silos, their quality may have deteriorated and they may be unfit for human consumption.

The conflict in Ukraine is shaking key pillars of the global food system in an already precarious environment. Managing the circumstances and supporting the best possible outcomes may require unequivocal action and collaboration. There is little reason to believe that the global situation will improve anytime soon. A prolonged war between Russia and Ukraine will have lasting effects on local production and grain export infrastructure that will take many months, if not years, to resolve.

In addition to the impact of wars on food security, the importance of governance on food security was also highlighted. Competition among global powers, rising right-wing nationalism, conflict, and the rise of authoritarian states are affecting food systems immeasurably. Democratization processes have been found to accompany improved food security, and the former systematically precedes the latter, creating a temporal

dependency. The inclusiveness of democratic institutions is an important factor in explaining this relationship.

Religion and food security

During the meeting, emphasis was placed on the importance of religious values such as fraternity, which can be used to achieve common goals such as preventing food waste. More specifically it has been pointed out how important it is to consider religious values during the legislative process rather than afterwards. It would be beneficial for all if food security legislation was more focused on religious values, and the dualism between law and religion must be avoided. For example, the obligation of individuals, not just the state, to reduce unnecessary waste, which is the simplest form of food price control, is clearer from a religiously motivated perspective than from a human rights perspective.

Religious groups have an extensive network, and they also have the resources and infrastructure to reach the most remote populations. Faith communities are increasingly dedicated to the contribution that religious actors can make to dialogue and advocacy. This will enable them to find multilateral responses to the major challenges facing all of humanity, such as war, climate change, food insecurity, and other threats. While food insecurity is a global problem, like any other problem, it cannot be addressed with a standard solution. Therefore, religious groups may be able to resolve local food issues by applying a bottom-up approach.

Democracy and polarization

On the second day of the meeting, attention shifted to the issue of democracy and polarization and how it is perceived in the EU. Recently, polarization in the world has increased significantly. The project presented during the meeting aims to create an overview of all actors and institutions dealing with polarization in order to increasingly find ways to fight polarization from the ground.

The speaker pointed out that citizens often do not even realise that their own country is increasingly undergoing a process of polarization. For example, there is not even a proper translation of “polarization” in Arabic. This underscores the importance of raising

awareness through outreach and dialogue in order to address the problem more effectively. The other two solutions focused on in this project are those of narrative intervention and institutional and legal reform. Here, the role of social media and education in addressing polarization at an early stage was highlighted.

A more practical example of the spread of polarization is that of Europe. For instance, although the EU establishes citizenship of the Union in Article 21 TFEU, citizens are still reluctant to identify themselves as Europeans. Most people identify themselves as belonging to their own European country, not as members of a larger union that includes millions of citizens who believe in the same values, apart from being geographically close to each other.

At the political level, polarization makes it increasingly difficult to negotiate between the parties and thus to form governments in the various states. The end of dialogue increases the risk of violence and mutual exclusion and the quality of democracy suffers from this development.

Conclusion

During the meeting, many relevant solutions were raised. First of all, it was suggested to improve education on this specific issue, as also mentioned in the section on democracy and polarization. The importance of dialogue and religious values such as fraternity to achieve food security was also recognised. These religious values need to be taken into account by legislators during the legislative process to avoid the dualism between law and religion.

Furthermore, the role of Africa was highlighted due to its critical situation for what concerns food security. Therefore, it was proposed to focus the solutions in this geographical area.
Finally, the importance of the perspective of experts in this matter has been mentioned. It is necessary to pay more attention to the perspective of food security experts and non-governmental organizations, which can have a great impact on shaping food security policies.

Apart from these practical solutions, participants acknowledged the importance of paying more attention to the issue of food waste as it has a strong impact on food security. As mentioned earlier, the food produced worldwide is enough to feed the entire population and ensure food security. However, due to the enormous amount of food that is wasted every year, this is not possible.

To conclude, one can be proud of the solutions found and of all the topics that were discussed during the meeting. There is still a lot of work to do in order to establish global food security, but thanks to the work of international actors this can be achieved sooner rather than later. The world produces enough food for everyone and the international community has solutions to food insecurity. Now is the time for us as individuals to also act and be part of the solution.

12.12.2022

9

Human Rights Violations in the Uma Oya Project

Victims of corruption often struggle to claim reparation for the harm they have suffered and legal requirements make it difficult for victims to be represented and recognised in enforcement proceedings. The UNCAC Coalition for Victims of Corruption Working Group seeks to facilitate discussions, the exchange of information and joint advocacy among civil society experts around victims' remedies and compensation for damages caused by corruption[235]. On November 25, 2022, Just Access participated in a meeting of the Working Group for Victims of Corruption, where Piumi Madushani and Chathumali from Transparency International Sri Lanka presented the case of the victims of the Uma Oya multi-purpose development project in Sri Lanka.

In this case, civil society has played a significant role in supporting the victims to demand reparation for their collective damage, filing a fundamental rights petition and providing legal clinics where victims can learn about land-related laws, compensation mechanisms and their legal standing.

The Uma Oya case

The Uma Oya Hydropower Complex is an irrigation and hydropower complex currently under construction in the Badulla district of Sri Lanka. Initial assessments of the project

[235] https://uncaccoalition.org/victims-of-corruption-working-group/

date back to 1989, when the first studies were conducted by the country's Central Engineering and Consultancy Bureau.

The project, designed by the Central Engineering Consultancy Bureau in 1991, was rejected by the Asian Development Bank (ADB) because it violated people's water rights and had technical deficiencies[236]. However, in 2008, the Iranian government stepped in and signed an agreement with the government of Sri Lanka to provide 85% of the estimated total cost (US$529 million) as a loan. Still, the actual total cost of the project is unclear and over the years, corruption related to the construction of this complex could be seen.

In 2008, the Sri Lankan government began the project with Iranian funding without obtaining an environmental permit for the project. The Environmental Impact Assessment (EIA) report for the Uma Oya project was prepared by the College of Sri Jayawardhanapura and submitted in November 2010[237]. During the following 30 working days, the EIA was open to the public for review and comment, and the Central Environmental Authority received many letters from environmental organizations stating that the EIA was inadequate. For example, an interesting research paper by Dr. Zanar Tokmechi titled “Land Slide: A Key Problem in Uma Oya Project Risk Controlling” published in 2011 had identified high-risk landslide zones and recommended the best possible locations for the placement of buildings and equipment in the Uma Oya Project[238]. First, it was found that if mobilized incorrectly, the landslide risk is high and that the high-risk landslide zones for the Uma Oya Project accounted for about 30%, while low and no risky zones are about 50% and 20%, respectively. This, however, has been disregarded by the authorities while carrying out the project.

In another paper, the same author identified the flood risk zones in the project area and concluded that if there was going to be a wrong mobilisation, the flood risk would be high.

[236]https://www.dailymirror.lk/article/Uma-Oya-Development-Project-Multi-purpose-or-multi-destructive--121570.html
[237] http://www.mwsip.lk/images/pdf/eia_uec_final_june_2015_report_and_annexures.pdf
[238] http://www.idosi.org/wasj/wasj12(9)/22.pdf

In fact, as a result of the project houses began collapsing, land surfaces cracking, wells drying up, and residents being displaced and losing their traditional livelihood. These are among the causes of fundamental rights violations that the affected population has claimed.

Human rights in the Uma Oya case

On July 16, 2015, the Supreme Court decided to consider the fundamental rights petition against the Uma Oya multipurpose project.

The petition was filed by the Center for Environmental Justice and four individuals who reside in the Bandarawela area and have been harmed by the Uma Oya Multipurpose Project. The petitioners claim that not only have their homes and crops been destroyed by the Uma Oya project, but that they have also lost access to clean drinking water and see this as a violation of their fundamental rights. It is also worth mentioning that most of the people living in the area are engaged in agriculture and it has been difficult for them to do their daily work due to the water scarcity.[239]

Attorney Ravindranath Dabare explained that this fundamental rights petition was filed because the Uma Oya project, which was started without a proper environmental impact assessment, violates the fundamental rights of the people in the region and affects their daily lives, livelihoods and access to clean drinking water. He said they want justice to be served to those affected.[240]

Moreover not all affected people have been adequately compensated. Therefore, this is a violation of the right to adequate compensation after a damage has been caused.
Corruption in the project.

[239] http://ir.kdu.ac.lk/bitstream/handle/345/2594/Law%20new_30.pdf?sequence=1&isAllowed=y
[240]https://www.newsfirst.lk/2015/07/17/supreme-court-examines-fundamental-rights-petition-against-uma-oya-project/

The Rajapaksa regime has been accused of corruption in the project. Critics have accused Rajapaksa of using the project as a cover for the misuse of funds. The cost of the project was increased by US$248 million, which led to the resignation of the Secretary of the Ministry of Irrigation, who refused to sign the agreement, and his successor to undertake the project despite fierce opposition from environmentalists and the people of Uva[241]. By that time, the cost estimate for the project had risen to four times the original estimate prepared by a Canadian company in 2008.[242]

The Uma Oya project was temporarily halted under the Ranil Wikramasinghle government. Due to the delay in the construction of the Uma Oya power plant, the government had to cut off power for four hours a day and sign an agreement to buy electricity from the private sector at a huge cost.

As mentioned earlier, the Uma Oya Multipurpose Development Project was started in 2008 with the support of the Export Development Bank of Iran. However, since sanctions were imposed on Iran, FARAB Energy and Water Project Company, the main contractor in this context, could not bear the costs of the Uma Oya project. This resulted in Iran limiting its disbursement of funds to US$50 million. Therefore, the Government of Sri Lanka was forced to bear the US$464 million cost of the Uma Oya project. While 95% of the development project has been completed, an additional US$12 million is needed to complete the remaining 5%, which means that the project will be further delayed.

The government has so far paid more than 1.5 billion rupees in compensation to those affected by the construction of the Uma Oya multipurpose project.[243]

Badulla district secretary Damayanthi Paranagama told The Sunday Times that while it was paying compensation, it was receiving complaints from people saying that the

[241] http://dailynews.lk/2017/07/01/local/120636/uma-oya-project-estimate-bloated-caffe-executive-director
[242] https://english.newsfirst.lk/2019/4/19/uma-oya-project-in-its-final-phase-80-funded-by-sri-lanka
[243] https://www.sundaytimes.lk/190804/news/uma-oya-project-rs-1-5b-compensation-paid-but-complaints-pour-in-361262.html

compensation was inadequate or that more damages were caused after they received the compensation.

Institutional corruption in Sri Lanka

The corruption that took place during the project is nothing new in Sri Lanka. Corruption is considered a major problem in Sri Lanka at all levels of society, from the highest echelons of political power to the lower levels of employees.

Officials and politicians who have been involved in corruption have either been pardoned by the president or have fled abroad for fear of sanctions. There have been a number of incidents in Sri Lanka's history where individuals involved in some form of corruption have escaped with impunity because of their political connections.

Political parties and politicians in Sri Lanka have often promised to end corruption during election campaigns in order to manipulate the electorate. Corruption in Sri Lanka is considered a serious national problem that is a massive setback to the growth rate of the Sri Lankan economy. Sri Lanka's wide income inequality and increasing poverty are partly due to the prevailing culture of corruption in the country. This is why Transparency international plays such an important role in Sri Lanka, seeking to hold the powerful and corrupt accountable by exposing the systems and networks that enable corruption.

Conclusion

The Uma Oya project has already caused too much damage, ranging from environmental impact to human rights violations. The role of civil society must therefore be enhanced to provide further support to the victims of corruption. Civil society is helping victims of corruption in many ways, for instance through public interest litigation, legal advice through mobile legal clinics and livelihood support. The work that Transparency International Sri Lanka is doing to help the victims of corruption from the Uma Oya project is essential. Victims shall be duly compensated and the corrupt shall be held accountable for the damage they caused.

30.01.2023

10

21st Session of the Assembly of States Parties

Between 5 and 10 December 2022, Just Access e.V. had the pleasure of participating in the 21st. annual session of the Assembly of States Parties (the Assembly/ASP21) to the Rome Statute of the International Criminal Court (ICC), held at the World Forum Convention Center at The Hague. States Parties, Observer States as well as international, regional and non-governmental organizations have attended the Assembly.

What is the Assembly of States Parties of the ICC?

On 17 July 1998 the international community signed the Rome Statute and laid the foundation for the establishment of the International Criminal Court and of a veritable system of international criminal justice. The States that joined the Statute by exercising their sovereign rights have a crucial function to play in this system, particularly through the Assembly of States Parties (the Assembly/ASP). The Assembly of States Parties is composed of one representative from each State Party and serves as a supervising and legislative body for the International Criminal Court (ICC).[244] Each State Party is given one vote under the Rome Statute, albeit every attempt must be made to reach a consensus. States who are not signatories to the Rome Statute are permitted to participate in Assembly proceedings as observers but not as voting members. The Registrar, the Prosecutor, and the President of the Court, or any of their representatives, may also take

[244] Renan Vallacis, 'Working Methods of the Assembly of States Parties to the Rome Statute' (2018) 18 Int'l Crim L Rev 563

part in the Assembly meetings as necessary. The Assembly is entrusted with giving the Presidency, the Prosecutor, and the Registrar management oversight over the Court's operations in accordance with article 112 of the Rome Statute.[245] Once a year, the ASP convenes in a full plenary meeting to discuss issues such as the budget of the Court, the status of contributions, audit reports, as well as the permanent premises of the Court, and decide on issues essential to the Court's functioning.

General Overview of ASP 21

The 21st session of the Assembly of States Parties commenced with Silvia Fernández de Gurmendi, President of the Assembly, outlining the Assembly's work over the previous year. Piotr Hofmanski, the president of the ICC, emphasized that the Court was ending an exceptional year and pointed out that the workload reached unprecedented heights, with new trials as well as new investigations.[246]

Throughout the week, two thematic plenary sessions have been held by the Assembly: one on the Review of the ICC and Rome Statute system and one on cooperation. During the first plenary, the Court and other bodies briefed the Assembly on their activities. Prosecutor Karim Khan highlighted the importance of improving cooperation with major stakeholders, including non-state parties and civil society.

In addition, the Assembly held its General Debate, enhanced by the participation of NGO's, international organizations, as well as ministers. Some of the issues raised during the General Debate concerned the necessity of implementing the Independent Expert Review's recommendations; the Court's ongoing need for political support; the ICC's resource requirements; and the need to elect the most qualified candidates in merit-based elections, including the upcoming elections for the Registrar.

As part of the General Debate's closing remarks, representatives of the civil society also delivered their statements. Deborah Ruiz Verduzco, director of the Coalition's Secretariat,

[245] https://www.icc-cpi.int/asp

[246] https://www.icc-cpi.int/news/21st-session-assembly-states-parties-opens-hague

introduced the civil society section by outlining the Coalition's Secretariat's three primary goals for this ASP session. First, she highlighted the imperative that States Parties support a viable and needs-based ICC budget. Next, she outlined the significance of establishing a long-term vetting process for all ICC and ASP elections in order to select the most qualified candidates through domestic public, transparent, and merit-based mechanisms. Finally, she emphasized the importance of supporting and protecting civil society and human rights defenders (HRDs) who are working to promote cooperation with the ICC.
Following the Coalition for the ICC, the floor was taken by other representatives of the civil society, such as Libyan NGOs, Human Rights Watch, the International Federation for Human Rights, Parliamentarians for Global Action and the Ukrainian Legal Advisory Group, the Palestinian Centre for Human Rights, the Afghanistan Organization for Development of Human Rights, the Ukrainian Legal Advisory Group, and so on.[247]

The ASP 21 closed with the appointment of the six new members of the Committee on Budget and Finance (CBF), namely Urmet Lee (Estonia), Daniel McDonnell (United Kingdom, Klaus Stein (Germany), Pascual Tomas Hernandez (Spain), Ana Patricia Villalobos Arrieta (Costa Rica), Jasleen Chaona Chirembo (Malawi) (Split term with Sierra Leone candidate), Sahr Lahai Jusu (Sierra Leone) (Split term with Malawi candidate).

The Assembly adopted all five ASP 21 resolutions by consensus. After several States expressed their opinions on the adoption of the resolution on budget and approved a programme budget of 173,234,300 euros for the Court in 2023, increasing the budget by 12.2% from its previous year.

Furthermore, the Assembly adopted a recommendation on the Election of the Registrar. States parties suggested that the election of the next Registrar in light of a number of recommendations, including the need to uphold high standards of effectiveness, ability, and integrity, as well as ensuring fair geographic and gender representation. ICC judges will choose the new Registrar prior to March 2023, taking State proposals into consideration.

[247] https://www.coalitionfortheicc.org/asp21-day-2-0

Side Events

Alongside the 21st session of the Assembly of States parties, numerous side events have been planned by the Court, States and civil society, covering important topics.

On Monday, we had the pleasure to assist in the book launch of “Shocking the Conscience of Humanity: From Gravity Theory to Practice” by Judge Professor Margaret deGuzman. The book's normative arguments are centered on endowing the notion of gravity with new meaning in a way that is beneficial for the ICC system. Judge DeGuzman contends that more research should be done on the actual objectives of impacted communities and the guiding principles behind the gravity criterion.

On Tuesday, options for justice in Myanmar were explored with the involvement of Prosecutor Khan, the Executive Director of the Center for Justice and Accountability, Carmen Cheung Ka-Man, Head of the Independent Investigative Mechanism for Myanmar, Nicholas Koumjian, and the President of the Burmese Rohingya Organisation UK, Tun Khin.

On Wednesday a discussion ws held on the Global Crackdown on Human Rights Defenders and Civil Society and on the role for the ICC and States Parties. The event covered the common difficulties that HRDs face globally, the demand for assistance for HRDs who are subjected to more assaults and threats, and the role that the ICC, the ASP, and the international community can play in assisting and defending their efforts to achieve justice.

Figure 1 Al-Haq announced its invitation to its side-event entitled “Countering the Global Crackdown on Human Rights Defenders and Civil Society: What Role for the ICC and States Parties?”

Considering Just Access’ activity on legal representation before UN bodies for Ukrainian victims of human rights violations, on Thursday our organization attended the side-event hosted by Media Initiative for Human Rights, Renaissance International Foundation, Truth

Hounds, Ukraine 5AM Coalition, Ukrainian Legal Advisory Group (ULAG) and Zmina Human Rights Center, entitled “Strengthening International Justice: Challenges and Opportunities in the Case of Ukraine”. According to Roman Avramenko, Head of the NGO Truth Hounds, the magnitude of war crimes committed by Russia in Ukraine is startling: 60,000 cases of war-related crimes have now been reported by Ukrainian prosecutors since the commencement of the full-scale Russian invasion in February 2022, and another 30,000 cases from 2014 have not yet been closed. International assistance is essential for achieving accountability, since the national system is overloaded.

On the same day a side-event was organized concerning the Challenges for the Rome Statute system and the fight against impunity. The main topics covered during the event were amending the provisions on the crime of aggression and reforming national nomination procedures for ICC judicial candidates. The discussion concluded with Olecsandr Kornienko, First Deouty Chairman of the Verkhovna Rada of Ukraine, Halyna Olehivna Mykhailiuk, Maksym Pavliuk and Bohdan Torokhtiy addressing the horrors Ukraine has witnessed since February 2014.

On Friday, several book presentations were held on various relevant topics, including but not limited to the code of professional conduct for counsel, “Code de Conduite Professionnelle des Conseils un Commentaire Article par Article”, hosted by Club des Amis du Droit du Congo (CAD); Reed Brody’s ‘To Catch a Dictator’ – The Trial of Hissène Habré and the search for justice in an age of impunity (co-hosted by Belgium and the International Commission of Jurists); and International Criminal Law as Justice: Foundations and Future Direction, a joint book Launch for Professors Darryl Robinson and Carsten Stahn (hosted by Canada).[248]

Overall, the ASP 21 session was a significant step forward in advancing the work of the ICC and the Rome Statute system. The ASP 21 tackled important issues such as cooperation, the Trust Fund for Victims, and budgetary allocation. It also provided a platform for participants to connect with representatives of State Parties from around the

[248] https://www.coalitionfortheicc.org/asp21-side-events-2

world and discuss matters of common concern. As for our main takeaway from ASP 21, it is clear that the ICC and the Rome Statute system continue to play a crucial role in promoting justice and accountability on a global scale. All in all, we found the experience to be both educational and enjoyable, and we look forward to the next session.

10.02.2023

11

The Issue of Domestic Violence in the Republic of Moldova

The problem of domestic violence is a global concern and a gross violation of human rights and freedoms. As this issue affects society as a whole, with a major impact on women and children, it is necessary for all nations to take steps to prevent family violence, prosecute perpetrators, and protect the victims. The Republic of Moldova has taken steps to enhance protection for victims of domestic violence and broaden their rights. However, despite significant legislative measures to combat this phenomenon, there are still shortcomings and gaps in the practical implementation of certain laws. According to recent statistics, 40% of women have reported experiencing physical and/or sexual violence from a partner or non-partner since the age of 15.[249] This blog post aims to shed light on the problem of domestic violence in the Republic of Moldova, including its various forms, its widespread occurrence, and the relevant legislative developments in this regard.

[249]The Well-being and Safety of Women Study, carried out by the OSCE, Chisinau, 2019 https://egalitatedegen.md/mdocs-posts/studiul-realizat-de-osce-bunastarea-si-siguranta-femeilor/

Types and Forms of Domestic Violence

Domestic violence refers to abusive behavior by one person towards another within the confines of an intimate relationship, such as a marriage, cohabitation, or dating. It encompasses a range of abusive behavior, including physical, emotional, psychological, sexual, as well as economic abuse. Domestic violence is a widespread and complex issue that affects individuals of all genders, ages, races, and socioeconomic backgrounds.

This pattern of behavior used to exert power and control over an intimate partner can take various forms. The following are the most common types of domestic violence:

- Physical violence that involves the use of physical force, such as hitting, kicking, or pushing, to cause injury to the victim
- Sexual violence includes acts such as sexual assault, rape, and sexual harassment.
- Psychological violence encompasses emotional and psychological abuse, including the use of verbal insults, humiliation, and manipulation.
- Economic violence involves the use of financial control and manipulation to restrict the victim's ability to access resources or support systems.
- Stalking consists of persistent and unwanted attention or contact that causes fear or distress to the victim.

The consequences of domestic violence are far-reaching and long-lasting, affecting not only the victims but also their families, communities, and society as a whole. It is a major public health issue that requires a coordinated and comprehensive response from multiple sectors, including law enforcement, healthcare, and social services.

Domestic Violence Statistic in The Republic of Moldova

Domestic violence is a prevalent issue in the Republic of Moldova as well, affecting a significant number of women in the country. Nearly three-quarters of women (76%) consider violence against women to be a widespread problem, with 28% of them viewing it as very frequent. A third of all women surveyed have personally known someone, either

from their family or friends, who has suffered from domestic violence, and a similar number are aware of someone in their community who has experienced violence. While many women are aware of the support services available to victims, few actually seek help. 40% of women have reported experiencing physical and/or sexual violence from their partner or non-partner since the age of 15. The prevalence of violence varies based on the perpetrator, with 37% of women who had a prior partner reporting violence from that partner, compared to 25% of women who experienced violence from their current partner and 17% of women who reported violence from non-partners.[250]

Despite some knowledge and data available, the root causes of domestic violence and the impact of gender inequality, as well as the consequences on the health and well-being of victims, are not fully understood. This issue is compounded by the high levels of poverty, political instability, and weak legal systems in the country.

Women face violence in various forms. A recent study collected information on psychological, economic, physical, and sexual violence.[251] Of the women surveyed, 60% reported experiencing some form of psychological violence, and half reported social isolation and control by their husband, often manifested through demands for whereabouts or anger when speaking to other men. According to the same study, 63.4% of women in the Republic of Moldova have experienced violence from their husband or partner at some point in their lives. The data shows that the likelihood of experiencing partner violence is higher for women living in rural areas, as well as for women who are older. The highest percentage of women who have suffered from partner violence is among those aged 45-54 (70.3%) followed by women aged 55-59 (69.1%) and 60-65 (64.3%). However, the data also reveals that over half of younger women have reported cases of psychological, physical, or sexual violence.[252]

[250]The Well-being and Safety of Women Study, carried out by the OSCE, Chisinau, 2019 https://egalitatedegen.md/mdocs-posts/studiul-realizat-de-osce-bunastarea-si-siguranta-femeilor/
[251]Trust Line for Women Activity Report, International Center for Women Rights Protection and Promotion „La Strada" , Chisinau 2012
[252] ibid

The prevalence of repeated incidents of psychological violence in a woman's lifetime suggests that two thirds of women who experience psychological violence endure it frequently and continuously. Only a small percentage of women reported a single instance of psychological violence. This highlights the cultural and social acceptance of such behavior as a means of controlling women. The effects on a woman's psychological health and well-being must be closely analysed and efforts made to challenge traditional gender norms in order to gain a better understanding of relationships between partners. These findings reinforce the existence of a persistent pattern of psychological and verbal abuse used by a current or previous partner against their spouse or partner.[253]

When considering the specific forms of violence, the results prove that 33% of women were slapped at least once in their lives and that other forms of physical violence, such as being pushed or punched, also occur frequently. Studies have also shown that factors such as income, social class, and compatibility between partners are correlated with experiences of physical violence. On average, every third woman has been slapped, every fourth woman has been pushed or otherwise assaulted, every fifth woman punched or hit, every tenth woman beaten or kicked, and 5% have suffered from strangulation or attempted strangling. Most victims of physical violence have been slapped (87.9%), followed by being pushed or pulled by the hair (59.9%), punched (49.3%), kicked (27.3%), threatened with a weapon (16.1%), and strangled (13.7%). Women aged 55-59 are most likely to be threatened with a weapon, while women aged 45 and over are more likely to be subjected to sudden assaults. The forms of physical violence experienced over a 12-month period were largely similar to those experienced over a lifetime, although women aged 55-59 were more likely to be threatened with a weapon. Physical violence occurs across all age groups, with the exception of women aged 15-24 who did not report any experience of being threatened with a weapon.

Almost every fifth woman aged 15-24 has been hit at least once in the past year and every tenth woman in this group has been pushed, shoved, or punched. This is a concerning issue and highlights the problem of physical violence starting from a young age. Women in

[253] ibid

the 60-65 age group are also at risk, with 92% of female victims in this category reporting that they have been slapped. This highlights an increased vulnerability in older women, which can be linked to their socio-economic status.

Economic and psychological violence is most prevalent when the victim has no source of income. Severe physical violence occurs when the victim has a higher income than average. The aggressor's manipulation causes the victim to overlook their financial contributions to the family and think they can't manage on their own, even if they support the family.[254]

Victim's and Aggressor's Profile

In 2011 a Comprehensive analysis of domestic violence from the perspective of incoming calls to the Trust Line for Women has been conducted by the International Center for Women Rights Protection and Promotion „La Strada", which addressed information on the demographics of callers, the types of violence they face, their needs, the psychological profile and the level of concern from professional groups and the community. The report was followed by a study from 2021 entitled "Evaluating the response of the criminal justice system to domestic violence cases. Criuleni, Soroca, Cimișlia and Comrat regions" which addressed the dynamic of domestic violence cases commencing with 2012 to 2020.

Victims of domestic violence can have a wide range of psychological profiles, but some common characteristics include: low self-esteem, feelings of hopelessness and helplessness, depression, anxiety, shame, guilt, and fear. They may also have experienced trauma or have developed post-traumatic stress disorder (PTSD) as a result of the abuse. They may also experience difficulties seeking help and feel that they are trapped in the abusive relationship. It's important to note that these characteristics are not universal, and some victims may not exhibit any of these symptoms, while others may display different symptoms. Additionally, it's important to recognize that victims are not

[254]Trust Line for Women Activity Report, International Center for Women Rights Protection and Promotion „La Strada" , Chisinau 2012

responsible for the abuse they have experienced and should not be blamed for their situation.

Over the years a rise in the number of domestic violence cases has been reported. The IGP's statistical report shows that in 2020, there were 12,970 reported incidents of family violence, compared to the 11,840 reported cases in 2019 and 11,026 in 2018.

It has been recorded that the 699 calls the Trust Line received from victims of domestic violence came from diverse backgrounds in terms of age, location, origin, and social status, but they all had common reasons for seeking help, such as being a victim themselves or witnessing abuse in their family. The characteristics all the victims had in common were low self-esteem, feeling guilty, being emotionally dependent on the abuser, and being unable to make changes in their life. Lack of resources, support from relatives and authorities, and lack of a home can trap women in a victim role.

Victims aged 18-26 who are in the early stages of a relationship often experience signs of violence but typically view it as something temporary and keep it private. In this age range, 2% of cases involve violence inflicted by parents, boyfriends, and life-partners. Many victims are on maternity leave, which can be a source of frustration for the aggressor due to the focus on caring and educating the children. Women may also turn to alcohol as a coping mechanism, which can lead to increased violence. Additionally, when extended family members take control of the new couple, they may impose their own views, be hostile towards the son-in-law/daughter-in-law, and interfere with the children's education, potentially resulting in further violence.[255]

The psychological profile of the abusive partner can vary and is often complex, but some common traits can include: low self-esteem, a need for control and power, a history of abuse in their own childhood, impulsiveness and poor anger management, substance abuse, and a distorted view of relationships and superiority over their partner. However, it is important to note that not everyone with these traits will become an abusive partner, and

[255] Ibid, 15

many other factors can contribute to abusive behavior. It's important to note that these traits are not exclusive to abusive partners and many individuals may display some of these traits without being abusive. Additionally, abuse is a learned behavior and early exposure to such conduct is not an excuse for abusive behavior.[256]

It has been noted that most of the time, male aggressors in domestic violence situations are aware of their abusive behavior, but they justify it as "natural" and consider themselves the victims. It has been observed that aggressors blame the victims for provoking the conflict through factors such as alcohol consumption, adultery, focusing too much on children, impulsive behavior, or attempting to control the family. Despite being the aggressors, they contact the Trust Line seeking help for their spouse, believing their spouse is the one with problems. If the victims manage to leave the relationship and break the cycle of violence, the aggressors experience intense anger and view themselves as the victims, reaching out to the Trust Line to try to bring their spouse back.[257]

Existing Laws and Legal Perspective

Protecting victims of domestic violence should be a top priority in all domestic violence cases. According to the Istanbul Convention, all relevant authorities, not just the police, are required to assess the risks of violence through a standard procedure and in cooperation with each other. Abusers often threaten their victims with serious acts of violence and have a history of violence. It is crucial that any risk assessment accurately evaluates the situation and considers the possibility of repeat violence, especially if it could lead to the victim's death. Moldova’s national legislation also contains similar provisions. Article 153 of Law No. 45 of 01.03.2007 regarding the prevention and combating of domestic violence requires that measures be taken to protect the victim or potential victim from further harm by the aggressor through prompt and appropriate assessment and management of the risks of repeat violence in the family.[258]

[256]Romero, J. M. P., Manso, J. M. M., Alonso, M. B., & Sánchez, M. E. G. B. (2013). Socialized/subclinical psychopaths in intimate partner relationships: Profile, psychological abuse and risk factors. Papeles del Psicólogo, 34(1), 32-48.
[257]Trust Line for Women Activity Report, International Center for Women Rights Protection and Promotion „La Strada” , Chisinau 2012
[258]Law 45 Chapter II Article 8(5)b.

Law 45 provides a foundation for increased access to justice and safety for domestic violence victims by making all forms of domestic violence a criminal offense under Criminal Code Article 201. The law also allows victims to request ten protective measures from their aggressor, including temporary eviction, stay away orders, no contact, child support, and prohibiting the possession of firearms. The court is required to issue protective orders within 24 hours and they are effective for up to three months with the possibility of extension. This law makes Moldova one of the first countries in the region to address domestic violence with specific legislation and a multi-sectoral response.[259]

The National Referral System (NRS) in Moldova was expanded to include domestic violence victims as potential victims of trafficking. The NRS is a country-wide system of partnerships between local and national authorities, civil society organizations, and multi-disciplinary teams of police, social workers, teachers, and health care professionals. Its purpose is to provide coordinated support to victims of domestic violence and human trafficking. The extension of the NRS is in line with international best practices which suggest that a coordinated response among agencies is the most effective way to address domestic violence.

According to Mary Ellingen of The Advocates for Human Rights' Women's Human Rights Program, 68 interviews were conducted in nine cities and regions with various groups such as police, government officials, NGOs, health care professionals, and lawyers to gather information about domestic violence in Moldova. The interviews indicated that the current domestic violence legislation, Law 45, needs to be reformed to provide better protection for victims. Law 45 only criminalizes violations of protective orders if they occur after a first offense, putting victims at risk of future harm. Additionally, health professionals are required to report all cases of domestic violence to the police, which may deter victims from seeking medical or social assistance. [260]

[259]Trust Line for Women Activity Report, International Center for Women Rights Protection and Promotion „La Strada" , Chisinau 2012; 44
[260]This Expert's Corner, Mary Ellingen;
https://www.stopvaw.org/uploads/domestic_violence_in_moldova.pdf

The number of protective orders issued is low. Nevertheless, in 2020 the police gave out 4,939 restraining orders towards domestic abusers, which was higher than the 4,250 that were issued the year before, showing an increase of 16.21%.[261]

The lack of funding and support is another issue that hinders the effective implementation of reforms, as there is no dedicated funding source for victim services and very few shelters available. NGOs and maternal centers, which provide crucial services to victims, must rely on inadequate governmental support and private donations to fund their efforts.

Victims of domestic violence are often aided by multi-disciplinary teams, but the government response still needs improvement, particularly in police training. Police often dismiss low-level violence and do not enforce protective orders or sanctions for violations. Domestic violence cases are often pursued as administrative offenses, leading to lack of accountability for aggressors and continued vulnerability for victims. The use of fines for aggressors causes victims to refrain from seeking help. It has also been noticed that women often choose not to contact the police due to various reasons, such as lack of trust in law enforcement, belief that police intervention will only worsen the situation, viewing the problem as a personal matter, fear, and shame. There are instances where the aggressor is a police officer or has connections to the police, causing the victim to hesitate. In some cases, the victim only contacts the police for record-keeping purposes.[262]

The study found that both police and prosecutors have been slow to enforce Article 201 of the Criminal Code in cases of low-level injuries, and often exhibit attitudes that blame victims or downplay the severity of the crime, resulting in fewer prosecutions. Prosecutors frequently decline to pursue cases or drop them when victims refuse to testify, even in severe cases. Judges and prosecutors use questionable "settlement" techniques to determine a victim's willingness to reconcile. The judiciary is also a hindrance to domestic violence victims' access to justice. Many judges do not grant protective orders due to

[261]Assessing the Response of the Criminal Justice system to Domestic Violence Cases, Soroca, Criuleni, Cimislia and Comrat Districts, Arina Țurcan, Natalia Vilcu, O. „Centrul de Drept al Femeilor", 2021
[262]Trust Line for Women Activity Report, International Center for Women Rights Protection and Promotion „La Strada" , Chisinau 2012

misconceptions about victims, and some even fail to issue them within the required 24-hour timeframe. Judges also often lack specificity in their protective orders, making victims less secure and allowing aggressors to test the limits of the order. The effectiveness of protective orders is further diminished by judges who do not promptly inform all parties of the order's issuance.[263] At the national level, there has been an increase in the number of denied applications, indicating that the procedure for submitting applications was not adhered to. This suggests that the victims of domestic violence are not in a state of crisis.[264]

Central Issues

Overall, several issues can be highlighted when addressing the problem of domestic violence in the Republic of Moldova. Despite the recognition of domestic violence as a serious issue, many victims still face a multitude of challenges when seeking help. These challenges can range from lack of knowledge about their rights and available resources, to cultural norms and gender biases that prevent them from reporting the abuse. Furthermore, many victims may lack trust in the institutions that are meant to provide them with assistance, further complicating their efforts to find help. In light of these challenges, it is crucial that efforts are made to ensure that all victims of domestic violence have access to legal representation and support services, so that their safety and well-being can be protected.

1. Victims lack access to legal assistance.

It has been noted that victims of domestic violence may be aware that the law criminalizes such acts and that they have the right to ask for protective measures, but they do not realize that they can be represented by a lawyer appointed or provided by the state at no cost, regardless of their income. Without this legal knowledge, they cannot compose official pleadings or petitions in terms of seeking protection from domestic violence. In

[263] This Expert's Corner, Mary Ellingen, https://www.stopvaw.org/uploads/domestic_violence_in_moldova.pdf
[264] ibid

these criminal and misdemeanor proceedings, victims are usually not represented by a lawyer, which compromises the safety of victims and the accountability of the abuser.[265]

Police officers, prosecutors, and judges must be encouraged to request the appointment of a lawyer, who will provide legal assistance to victims. This will ensure that victims have access to legal representation, which is essential in navigating the criminal justice system. It would as well be recommended to expand the network of paralegals, particularly in localities where there are difficulties in accessing legal services. Paralegals can play an important role in providing legal aid to victims, especially in areas where the number of legal professionals is limited.[266]

Next to that, informational materials on how to access family violence victims' services of AJGS offline and online should be developed and made accessible to people with a basic education level, as well as to victims with multiple vulnerabilities, such as those with mental and psychosocial disabilities, sensory disabilities, and illiterates. These materials should be developed with the use of icons and graphic representations, making them accessible to all.[267]

2. Victims lack information on reporting process.

Victims of domestic violence are not given enough information on how to report the violence and access support services. Those who live in urban areas with high levels of education and income tend to have a better understanding of the protective mechanisms and support services available. However, in rural areas, victims often lack legal information and rely on mass media sources. Most victims only report violence to the police as they are not aware of other support services offered by the government or NGOs. Those who

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[265] Assessing the Response of the Criminal Justice system to Domestic Violence Cases, Soroca, Criuleni, Cimislia and Comrat Districts, Arina Țurcan, Natalia Vilcu, O. „Centrul de Drept al Femeilor", 2021

[266] Assessing the Response of the Criminal Justice system to Domestic Violence Cases, Soroca, Criuleni, Cimislia and Comrat Districts, Arina Țurcan, Natalia Vilcu, O. „Centrul de Drept al Femeilor", 2021

[267] Ibid. Also see https://just-access.de/improving-access-to-justice-gender-based-violence-good-practices-and-challenges/

have access to television, radio, or the internet have an easier time obtaining information. On the other hand, those from socially disadvantaged families without electronic means of communication face limited access to information and may not even know of the laws protecting them or how to access services for victims of domestic violence. The findings are backed up by a national study, "Men and Gender Equality," which found that 62.4% of women are aware of laws on violence against women, 9.1% deny their existence, and 28.4% do not know about their existence.[268]

3.Traditions and cultural norms

Traditions, cultural norms, and gender biases cause women to endure domestic violence and refrain from reporting it to the authorities. This issue is particularly pronounced in communities with strong patriarchal values. For instance, in the Soroca district, the interviews revealed that cases of domestic violence reported by Roma women have not been addressed in recent years despite having a significant Roma community. The respondents mentioned the Roma traditions and cultural norms that advocate resolving family conflicts within the Roma community as one of the possible reasons. Similar situations have also been observed in the Comrat region.[269]

Victims of domestic violence are often hesitant to report cases to the authorities due to misconceptions about the issue. Only a small number of women have reported the most severe cases of violence, with half of the women surveyed believing that it should be handled as a private family matter.[270]

The 2019 OSCE report results indicate that half of the women surveyed believe that their friends would agree that a good wife should submit to her husband, even if he doesn't agree. Meanwhile, 55% of women believe that domestic violence is a private matter: this is almost four times higher than the corresponding number in the EU. Additionally, 45% of

[268]Assessing the Response of the Criminal Justice system to Domestic Violence Cases, Soroca, Criuleni, Cimislia and Comrat Districts, Arina Țurcan, Natalia Vilcu, O. „Centrul de Drept al Femeilor", 2021
[269] Ibid
[270]The Well-being and Safety of Women Study, carried out by the OSCE, Chisinau, 2019 https://egalitatedegen.md/mdocs-posts/studiul-realizat-de-osce-bunastarea-si-siguranta-femeilor/

women believe that violence against women is often provoked by the victim, compared to 15% of women in the EU, and 40% believe that allegations of abuse or rape are exaggerated or made up, compared to 20% in the EU.

The research findings revealed that societal expectations for women to fulfill the role of primary caregiver and perform household chores persist. Psychological and sexual violence from an intimate partner are considered normal, with physical violence being the least accepted. This is not the case for Roma women, who reported that physical violence is considered normal in their community and is accepted in intimate partner relationships. Sexual violence in intimate relationships is a taboo subject that is rarely discussed in public, and is supported by the legally defined focus on coercion rather than consent. The study also reported that there is no specific law on domestic violence or gender-based violence in the Transnistrian region, and victims receive little support.[271]

4. Lack of trust in the institutions that should provide assistance

The women who were subjected to violence reported short-term (71%) and long-term (82%) psychological reactions, as well as physical injuries, with one in five women who survived violence from a former partner reporting having suffered a concussion as a result of the violence they endured. Despite these serious consequences and the high prevalence of intimate partner violence against women in the country, nearly three-quarters (73%) of victims of current partner violence did not contact any organization for assistance. The women participating in the 2019 OSCE qualitative research reported that they did not believe that reporting their experiences would offer them protection. The number of women who report current partner violence cases to the police is low (11%), and the feedback is divided, with 42% of respondents being satisfied and 58% being unsatisfied with the contact they had.[272]

The recent amendment to the Code of Civil Procedure stipulates that women be encouraged to utilize mediation services prior to the resolution of a case in court. This

[271] Ibid

[272] Ibid

practice contravenes the provisions of the Istanbul Convention and exposes the victim to the risk of secondary victimization as they are required to engage with the aggressor. Several of the women interviewed expressed their concern that some individuals within the justice system still hold the belief that intimate partner violence is only a result of the victim "provoking" it and that it is unfair for the man, even if he is the aggressor, to be evicted from his home.

Conclusion

In conclusion, the issue of domestic violence in the Republic of Moldova is a complex and multi-faceted problem that requires a comprehensive approach to address. Despite recognition of the issue as serious, many victims still face challenges in seeking help due to lack of knowledge, cultural norms, gender biases, and lack of trust in institutions. It is therefore crucial to increase awareness of the rights and available resources for victims of domestic violence and improve their access to legal representation and support services. The government and NGOs must work together to provide educational materials and expand the network of paralegals to help victims navigate the criminal justice system. Cultural norms and gender biases must also be addressed through increased awareness and public education campaigns to change attitudes towards domestic violence. Only with a concerted effort from all stakeholders can the issue of domestic violence be effectively addressed in the Republic of Moldova.

20.02.2023

12

The Emerging Idea of an International Anti-Corruption Court

Abstract

Grand corruption is a problem which has devastating effects on democracy, the rule of law, and human rights globally. Even though there is an ongoing debate among the international community regarding the best way to tackle this problem, there is an agreement that grand corruption is a serious problem that warrants a more internationally coordinated approach. One idea that has recently gained momentum is the concept of an International Anti-Corruption Court (IACC) whose purpose would be to prosecute kleptocrats and private individuals who assist crimes of corruption. This article is an exploration of the emerging idea of an IACC, how it came about, why the proponents of this idea believe we need another international court, and how it would function in practice.

Keywords

International Anti-Corruption Court – corruption – UNCAC – kleptocrats

“Corruption is a major barrier to the success of the UN [Sustainable] Development Goals. It imperils efforts to [...] protect those who are victims of pandemics and epidemics. Corruption inhibits the promotion of democracy and in some cases threatens the promotion of international peace and security. It inhibits action to counter climate change”. [273]

This was the message delivered by Justice Richard Goldstone [274] at a special event of the UNCAC Coalition's Working Group on Grand Corruption and State Capture on the 17th of November, 2022. [275] During this event, Justice Goldstone, Justice Maria Wilson [276], and Ambassador Allan Rock [277] discussed the latest developments on the International Anti-Corruption Court (IACC). [278] As proponents of the IACC, they outlined the need for such a court, the proposed features of the court, and the political support for the proposal, focusing on Canada’s efforts in advancing this idea. [279]

As a citizen of North Macedonia, a human rights activist, and a legal fellow, the concept of an International Anti-Corruption Court is very intriguing to me. North Macedonia is a country where corruption flourishes, where the public prosecutors’ system has failed again and again in investing and processing grand corruption, particularly in cases where it has been committed by politicians, and where corruption has become normalized in every aspect of life. The devastating effects of grand corruption [280] on democracy, the rule of

[273] UNCAC Coalition, ‘Special Event: New Developments on the International Anti-Corruption Court’ (9 December 2022) <https://www.youtube.com/watch?v=cbrhiERaU6c> accessed 11 February 2023
[274] Justice Richard Goldstone is a former judge of the Constitutional Court of South Africa, former Chief Prosecutor of the United Nations' International Criminal Tribunals for the former Yugoslavia and Rwanda, Chair of the Independent Expert Review of the International Criminal Court, Vice Chair of the Integrity Initiatives International and proponent of the proposal for the establishment of an International Anti-Corruption Court.
[275] UNCAC Coalition, ‘Outlining the Proposal for an International Anti-Corruption Court’ (*Blog*, 5 December 2022) <https://uncaccoalition.org/outlining-the-proposal-for-an-international-anti-corruption-court/> accessed 11 February 2022.
[276] Justice Maria Wilson is Justice of Appeal of the Supreme Court of Trinidad and Tobago, former Trial Lawyer at the International Criminal Court and at the International Criminal Tribunal for Rwanda, and former Assistant Director of Public Prosecution in Trinidad and Tobago.
[277] Ambassador Allan Rock is President Emeritus and Professor of Law at the University of Ottawa, former Minister of Justice and Attorney General of Canada, and former Canadian Ambassador to the United Nations
[278] UNCAC Coalition Blog (n 3).
[279] UNCAC Coalition (n 1).
[280] To read more about grand corruption see Just Access, ‘Corruption in International Law: Illusions of a Grotian Moment’ (Blog, 26 July 2022) <https://just-access.de/corruption-in-international-law-illusions-of-a-

law and human rights are very well known, and there is no debate regarding the need to address this issue, both at a national and international level. Corruption is no longer seen as a domestic problem, but an international governance problem. [281] Therefore, I am very curious as to whether the IACC would be able to effectively address this issue. In my exploration of this emerging idea for an IACC, I was curious about how the idea for the IACC came about, why the proponents of this idea believe we need another international court, and how it would function in practice.

The Idea for the IACC and the Campaign for Its Support

The origin of the idea for an International Anti-Corruption Court can be traced back to the 2014 World Forum on Governance [282] on leveraging private capital and political action in the fight against corruption. During this conference, Judge Mark Wolf presented the concept of an IACC [283], and later developed it further in a paper titled "The Case for an International Anti-Corruption Court". [284] Since then, this idea has gained support from world leaders, individuals, and civil society organizations. In 2016, Colombia became the first country to endorse the IACC. [285] In June 2021, Integrity Initiatives International (III) released a Declaration in Support of the Creation of an International Anti-Corruption Court, which has since been signed by 295 individuals - 46 Current and Former Heads of State

grotian-moment/#_ftn3> accessed 16 February 2023.

281 Just Access (n 8).

282 The World Forum on Governance is a forum which brings together representatives from the private and public sector to discuss the problem of corruption. The First World Forum on Governance took place in November 2011 in Prague, and resulted in the Prague declaration on Governance and Anti-Corruption (March, 2012).

283 Stephen M. Davis, Thomas E. Mann and Norman J. Ornstein, 'Leveraging Private Capital and Political Action in the Fight Against Corruption – 2014 Conference Report from the World Forum on Governance' (*Brookings*, 4 June 2014) <https://www.brookings.edu/research/leveraging-private-capital-and-political-action-in-the-fight-against-corruption-2014-conference-report-from-the-world-forum-on-governance/> accessed 11 February 2023.; Mark L. Wolf, 'The Case for an International Anti-Corruption Court' (Brookings, 23 July 2014) <https://www.brookings.edu/research/the-case-for-an-international-anti-corruption-court/> accessed 15 February 2023.; Mark L. Wolf, Richard Goldstone and Robert I. Rotberg, 'The Progressing Proposal for An International Anti-Corruption Court' (2022) American Academy of Arts and Sciences <https://www.amacad.org/publication/proposal-international-anti-corruption-court> accessed 11 February 2023, 5.

284 Mark L. Wolf, 'The Case for an International Anti-Corruption Court' (2014) Brookings <https://www.brookings.edu/wp-content/uploads/2016/06/AntiCorruptionCourtWolfFinal.pdf> accessed 11 February 2023.

285 Wolf, Goldstone and Rotberg (n 9) 14.

and Government, 30 Nobel Laureates, and 219 Current and Former Government and Intergovernmental Organization Officials and Leaders of Civil Society, Academia, Business, and Faith Communities. [286] In September 2021, the Canadian Liberal and Conservative parties called for establishing the IACC [287], and, in December 2021, Canada's foreign minister was mandated to work with international partners to help establish an International Anti-Corruption Court. [288] In April 2022, the Netherlands made it a part of its foreign policy to create a coalition of countries to establish the IACC. [289] In November 2022, during the UNCAC Coalition's Working Group on Grand Corruption and State Capture, Justice Richard Goldstone and Justice Maria Wilson stated that the III has formed a IACC Treaty Committee whose goal is to create and draft a statute for the IACC. [290] Later that same month, The Netherlands, Canada and Ecuador "hosted a ministerial conference in The Hague on international efforts to combat corruption, including discussion of how an IACC could take shape and to build international support for it". [291] The conference was attended by representatives of over 40 countries, as well as several international organizations and NGOs. [292] When Judge Wolf first proposed the concept of the IACC he was optimistic that it would have strong support from the United States, [293] and in the past, the US had played "a considerable role in the adaptation of international and regional anticorruption law, including the United Nations Convention Against Corruption". [294] However, at the ministerial conference in 2022, the United States has highlighted that it does not support the creation of a new court. [295]

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[286] Integrity Initiatives International, 'Declaration in Support of the Creation of an International Anti-Corruption Court' <http://integrityinitiatives.org/declaration> accessed 11 February 2023.
[287] Wolf, Goldstone and Rotberg (n 9) 14.
[288] Prime Minister of Canada Justin Trudeau, 'Minister of Foreign Affairs Mandate Letter' (16 December 2021) <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-foreign-affairs-mandate-letter> accessed 11 February 2023.
[289] Government of the Netherlands, 'Netherlands says more funding needed for efforts to combat impunity worldwide' (*News*, 11 April 2022) <https://www.government.nl/latest/news/2022/04/11/netherlands-says-more-funding-needed-for-efforts-to-combat-impunity-worldwide> accessed 12 February 2023.
[290] UNCAC Coalition (n 1).
[291] Integrity Initiatives International, 'An International Anti-Corruption Court' <http://integrityinitiatives.org/about-the-iacc> accessed 11 February 2023.
[292] UNCAC Coalition, 'Do we need an International Anti-Corruption Court? – 6 December 2022' (*Newsletter*, 6 December 2022) <https://mailchi.mp/uncaccoalition/06122022?e=[UNIQID> accessed 11 February 2023.
[293] Mark L. Wolf, 'We need an international court to stamp out corruption' (The Washington Post, 22 July 2014) <https://www.washingtonpost.com/opinions/mark-l-wolf-we-need-an-international-court-to-stamp-out-corruption/2014/07/22/a15ecc38-10ff-11e4-9285-4243a40ddc97_story.html> accessed 11 February 2023.
[294] Just Access (n 8).
[295] UNCAC Coalition Newsletter (n 17).

Nevertheless, it is clear that the IACC has political support from other countries, civil society organizations and individuals. In 2022, the proponents of the IACC laid out their arguments in a paper titled “The Progressing Proposal for An International Anti-Corruption Court”. [296] This paper elaborates in detail the continuously developing idea for the creation of the IACC. It outlines the need for the creation of such a court, and how the court is envisaged to function.

Why a New Court?

The proponents of the IACC identify two main reasons for the creation of a new court: (1) grand corruption is a global problem that requires a global solution, and (2) existing anti-corruption laws and authorities are ineffective in preventing and prosecuting grand corruption. The first reason focuses on the consequences of grand corruption. According to Mark L. Wolf, Richard Goldstone and Robert I. Rotberg, grand corruption is not a victimless crime, but one with devastating human consequences. [297] Grand corruption leads to the loss of a significant amount of money to illicit financial flows, it contributes to climate change and prevents efforts to ameliorate it, it causes forced migration of people feeling failed states ruled by kleptocrats and contributes towards the refugee crisis, it poses a danger for international peace and security, and it threatens democracy by repressing independent journalists and civil society organizations. [298] The proponents for the IACC view grand corruption not only as a problem which pollutes the international financial system, but also as a cause for many other international societal issues, and, therefore, requires a global solution. The second reason for the establishment of the IACC focuses on the lack of deterrence from and punishment for engaging in grand corruption. Even though many countries have national laws against corruption and almost all 181 state parties to the United Nations Convention against Corruption (UNCAC) have criminalized bribery, money laundering and misappropriation of national resources, kleptocrats still enjoy impunity in their own countries. [299] Some states are unwilling or unable to prosecute grand corruption, either because the kleptocrats control the police,

296 Wolf, Goldstone and Rotberg (n 9).
297 ibid 2.
298 ibid 2-3.
299 ibid 3-4.

prosecutors and the courts or because the state does not have the necessary resources to conduct such a complex investigation. [300] Therefore, according to the proponents for the IACC, "[t]he absence of risk of punishment, particularly imprisonment, contributes greatly to the pervasiveness and persistence of grand corruption", [301] and demonstrates the need for the creation of an International Anti-Corruption Court.

How is the Court Envisaged to Function?

The International Anti-Corruption Court, if it were to be established, would be similar in its features to the already established international criminal courts and tribunals, such as the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda. In fact, many of the proposed features of the IACC draw inspiration from the Rome Statute, ICC practice and experiences. [302] Even though many of the Court's proposed features are still being debated, there are five fundamental features that have been elaborated in the proposal for the IACC.

1. The Subject to Prosecution before the IACC

"The IACC would have the authority to prosecute Heads of State or Government, certain other high-level public officials (such as those appointed by a Head of State or Government), and anyone who knowingly and intentionally assists one or more of these individuals in the commission of a crime within the IACC's jurisdiction". [303] Therefore, the IACC would also be able to prosecute private individuals who assist crimes of corruption. Moreover, by joining the IACC, a member state would agree that Heads of State or Government and other public officials would not have personal immunity or functional immunity, meaning that officials can be prosecuted for crimes of corruption before the IACC while in or after holding office. [304]

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300 ibid.
301 ibid 4.
302 ibid 5-8, 10.
303 ibid 5.
304 ibid.

2. Which Cases Would the IACC Prosecute?

The IACC would operate on the principle of complementarity, i.e., it would be a court of last resort. The IACC would only investigate or prosecute crimes of corruption in cases where a member state does not have the capacity and resources to do so or if the national authorities are unwilling to prosecute the individual. [305] Therefore, in this aspect, the IACC would function in the same way as the ICC, and it would be guided by the principles in Article 17 of the Rome Statute regarding issues of admissibility. [306]

3. Exercising Jurisdiction over Nationals of Nonmember States

"The IACC would have jurisdiction to prosecute nationals of member states and foreign nationals who commit all or elements of a crime within the jurisdiction of the IACC in the territory of a member state". [307] For the IACC to be effective and serve its purpose, it must be able to prosecute kleptocrats. However, it is very likely that countries ruled by kleptocrats would not be willing to join the IACC. [308] Even so, crimes of corruption, or at least certain elements of those crimes, may be committed in several jurisdictions. For example, if a kleptocrat were to take a bribe in a nonmember state but would launder the money through the financial system of a member state, then the IACC would be able to prosecute that kleptocrat, subject to the principle of complementarity. [309]

4. Crimes Subject to Prosecution before the IACC

The proposal for the IACC states the court would have jurisdiction over the activities which have been established as criminal offenses by the UNCAC [310], particularly bribery, embezzlement of public funds, misappropriation of public property, money laundering, and obstruction of justice [311]. What is important to note here is that the proponents for the

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305 ibid 8.
306 ibid.
307 ibid 6.
308 Just Access (n 8).
309 ibid 6-8.
310 ibid 6.
311 United Nations Convention Against Corruption, Articles 15–17, 23, 25, <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> accessed 12 February 2023.

IACC are not advocating for the creation of new laws or norms criminalizing corruption, but to build on the already existing international and domestic legal framework. [312] They propose that the IACC could be given jurisdiction, "with the consent of the state party concerned, to enforce existing domestic laws, a uniform version of them included in the treaty creating the court, or both". [313]

5. The Benefits for the Victims of Grand Corruption

Last but not least, the proposal for the IACC emphasizes the importance of this court for the victims of grand corruption. The proposal states that the criminal proceeding before the IACC could result in recovery and return or repurposing of stolen assets. Not only would this create a possibility for restitution to the victimized country, but the threat of prosecution before the IACC and imprisonment could provide a powerful deterrent effect. [314]

Conclusion

Whether this proposed court will become a reality remains to be seen. The creation and effectiveness of the IACC is highly dependent on the political will to execute the idea and enable its functioning, as is the case with any international body. However, one thing remains certain, grand corruption is a problem which persistently threatens democracy, the rule of law and human rights globally. Even though there is an ongoing debate among the international community about whether the IACC is the right way to tackle this problem, there is and an agreement that tackling grand corruption warrants a more internationally coordinated approach and "an evolution in the international legal framework". [315]

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312 Wolf, Goldstone and Rotberg (n 9) 6.
313 ibid.
314 ibid 9-10.
315 Just Access (n 8).

06.03.2023

13

Responsibility to Protect & The Rohingya Genocide: The Latest Liberal Failure?

'If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?'

-Kofi Annan, UN General Assembly 2000

Following a grim decade of global powerlessness in which the international community has witnessed a surge in ethnic hatred and genocidal acts, in 2005 the World Summit attempted to finally find an answer to Kofi Annan's aforementioned question. The international community has agreed that there was only one acceptable way to protect international peace and security, which were particularly threatened by mass atrocities in the form of crimes against humanity, war crimes, and ethnic cleansing – the last of which, in some catastrophic cases, culminated in genocide. Trying to strike a balance between humanitarian intervention and the sovereignty of the nations, while protecting populations from mass atrocities in the most effective manner, the world conceded to the genesis of the so-called Responsibility to Protect (R2P) doctrine.[316] This doctrine implies that if a state is unwilling or unable to protect its populations against mass atrocities, even with the help and encouragement of the international community, then the international community must take collective action in order to protect the population of the failing state. Collective action

[316]Evans Gareth, 'R2P: The dream and the reality' (Global R2P, 26 November 2020) <https://www.globalr2p.org/publications/r2p-the-dream-and-the-reality/> accessed 22 February 2022.

can take the form of coercive measures, and, most controversially, military intervention, if authorized by the United Nations (UN) Security Council.[317]

R2P has been a very controversial topic in academia. With a sense of discouragement and defeat in their discourse, some scholars consider it "the latest, if not the last, great liberal idea dedicated to fixing major humanitarian problems in the world".[318] Gruesome atrocities have not stopped happening since R2P has been introduced to the international community, and seventeen years after the world leaders have agreed to the genesis of this doctrine, there has been only one instance in which it has been somewhat successfully invoked – the First Libyan Civil War in 2011. Nonetheless, there is still a dire need to make sure that the promise 'never again' is fulfilled, as for instance the purported current genocide of the Rohingya in Myanmar spotlights. In that regard, the field of critical legal studies has most significantly contributed to the condemnation of the liberal view of international law, challenging its alleged objectivity and effectiveness.[319] As such, this blog post will address the effectiveness of R2P through the lens of critical legal studies as approached by Martti Koskenniemi, one of the most prominent legal scholars in this field.[320] First, a brief historic account of the most notorious humanitarian interventions will be provided, with particular attention being paid to the liberal tenets of international law: the use of force and the doctrine of state sovereignty. Using Koskenniemi's analysis, this blog post aims to explain how these concepts can be curbed under certain circumstances. Thereby, the compatibility between these concepts will be addressed. Then, this essay will analyze the implementation of R2P in the years since its establishment. Lastly, Koskenniemi's criticism of the liberal approach to international law will be applied to R2P with the aim of providing a deeper understanding with respect to a potential implementation of R2P in the case of the Rohingya genocide in Myanmar, currently poorly addressed by the international community. In sum, the thesis of this essay is that the

317 Gärtner Heinz. 'The Responsibility to Protect (R2P) and Libya.' (2011) ÖIIP 8.

318 Naruzzaman Mohammed, 'Revisiting 'Responsibility to Protect' after Libya and Syria' (*E-International Relations,* 8 March 2014) <https://www.e-ir.info/2014/03/08/revisiting-responsibility-to-protect-after-libya-and-syria/> accessed 22 February 2022.

319 Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking* (1st ed, OUP 2016).

320 Koskenniemi, Martti. *The politics of international law*. Bloomsbury Publishing, 2011.

liberal view over international law that shaped the perceptions of the international community in this matter and created R2P is principally responsible for the incapability to adequately respond to the unspeakable crimes that the Rohingya community continues to face in Myanmar. Nonetheless, the urgency to respond to mass atrocities is as present as ever, and humanity as a whole still bears full responsibility to find an appropriate answer to Kofi Annan's question.

Humanitarian Intervention: A Short History

In 1992, famine and internal chaos were characteristic of the situation in Somalia. President Bush sent, at that time, United States military troops on a humanitarian mission. The failed attempt to catch the warlord and his lieutenants resulted in a tremendous number of civilian casualties in Mogadishu. This event is of exceptional importance for the future course of interventions in the world. Fearing the same disastrous results, the United States avoided future interventions as much as possible. As one of the world's superpowers, its decisions influenced also the course of action of the major international organizations, particularly the United Nations and NATO. As a result, there was no intervention in Rwanda, and extremely late commitment of troops in Kosovo and Bosnia, which only took place once gruesome human rights violations were conducted.[321] 9/11 served as a catalyst for reconnecting interventions abroad with the national interest. Following the war on terror, America also re-established its pursuit of humanitarian interventions. This was the case for instance in Libya, where R2P was first applied with the scope of preventing violence from breaking out and spilling over into the region.[322]

Some of the supporters of non-intervention claim that any form of humanitarian intervention is incompatible with the doctrine of state sovereignty, as it implies the use of force against a foreign territory. In the orthodox perception of international law, sovereignty is one of the absolute rights of states. This right includes full jurisdiction over one's own territory and permanent population, the right to self-defense, and also the duty not to

[321] Kaufman, Joyce. *A Concise History of U.S. Foreign Policy*. (4th edition, Rowman & Littlefield, 2017).

[322] Hastedt, Glenn. *American Foreign Policy: Past, Present and Future*. (12th edition, Rowman & Littlefield, 2020).

intervene in the relations of other sovereign states, which is considered to provide stability in the universal legal order.[323] Humanitarian interventions, especially when they involve military action, have been previously assessed as a violation of state sovereignty. Accordingly, the use of armed force is strictly forbidden under customary international law. The UN Charter states in Article 2(4) that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".[324] These purposes of the United Nations have largely been interpreted as the maintenance of international peace and security. In sum, all these considerations have unfortunately led to a doctrine of non-intervention that allowed, for example, for the genocide in Rwanda.[325] A lack of consensus in this matter has led, for instance, to the controversy surrounding the humanitarian intervention in Kosovo, in 1999. There, motivated by the large-scale atrocities, NATO decided to initiate an airstrike without the authorization of the UN Security Council.[326] This intervention has been considered by the Independent International Commission on Kosovo as illegal but legitimate-illegal as it did not have the approval of the Security Council, but legitimate to preserve and protect human lives when no other option was available.[327]

Koskenniemi argues that, despite the importance of territorial sovereignty for the notion of statehood in the dominant liberal understanding of international law, this concept is often curbed in order to balance competing interests whenever conflicts arise. Thus, the claim to objectivity that international law has is tainted by political influences.[328] Although Koskenniemi never addresses the concept of humanitarian intervention, as the concept was not too present in the realm of international law at the time of his publication, his criticism can be expanded to the way international law has denied humanitarian intervention on behalf of the protection of state sovereignty. As important as the

323 Shaw, Malcolm N. *International law*. (8th edition, CUP, 2017).

324 United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Article 2(4).

325 Kassner, Joshua. The Moral Obligation to Intervene in Rwanda. (2014).

326 Naruzzaman (n 3).

327 The Independent International Commission on Kosovo. *The Kosovo Report.* (OUP, 23 October 2000).

328 Koskenniemi (n 5).

sovereignty of a state is, certain conduct can be deemed as so unacceptable that domestic jurisdiction can be overridden since the matter is of concern to all. For this reason, erga omnes obligations have arisen. This means that acts of genocide, slavery, aggression, or racial discrimination are not allowed to occur under any circumstance.[329] As a result, academics have dedicated considerable efforts in order to expand the understanding of state sovereignty, reaching the conclusion that the doctrine of absolute non-interference is not compatible with the observed state behavior. Concomitantly, while humanitarian interventions might alter the orthodox understanding of sovereignty, it is believed that they do not destroy it, and, as such, they are not unreconcilable.[330] This line of reasoning can also be identified in the framing of R2P. The third pillar that allows for military intervention with humanitarian purposes emphasizes that military intervention is a measure of last resort, allowed only when large-scale human suffering is taking place in a foreign country, and if all other non-military options have been exhausted.[331] All in all, despite initial reluctance towards the de-liberalization of international law that came as a result of the alteration of the sovereignty doctrine, the World Summit from 2005 accepted that there is a collective obligation to address atrocities beyond one's own borders.[332]

The First Libyan Civil War: R2P in Action

As Koskenniemi points out, "any legal rule, principle or world order project will only seem acceptable when stated in an abstract and formal fashion".[333] This is well reflected in the case of R2P. Despite general agreement over the importance of R2P, there has been significant disagreement in terms of the implementation of this concept. The 2011 Civil War in Libya is the first and only case where R2P was officially invoked for a military intervention. There, the humanitarian crisis caused by Muammar Gaddafi's threats to the population led to escalating fears of a potential genocide was used as a justification for a quick response on the side of the Security Council. The intervention had the broader scope of preventing violence from breaking out and spilling over into the region.

[329] Evans, Malcolm David, *International law*. (4th edition, OUP, 2014).
[330] Keely, Charles B. *Humanitarian intervention and sovereignty: mit deutscher Zusammenfassung*. (Konrad-Adenauer-Stiftung, 1995).
[331] Gärtner (n 2).
[332] Evans (n 1).
[333] Koskenniemi (n 5) p. 31.

Regardless of the initial good intention to protect the Libyan population, NATO wound up eventually bombing the civilian population. Moreover, post-Gaddafi Libya has been abandoned by the international community and is currently fighting for its survival. The post-Libya global situation was marked by the reluctance to intervene in Syria and Yemen, which posed similar humanitarian concerns. The failure to act appropriately in Libya, as well as non-intervention in other dire circumstances, have endangered the general embracement of the R2P doctrine.[334]

Critiques of R2P argue that R2P was made only to intervene in weak states, as was the case of Libya, while the giants are getting away with the crimes that they commit. The deadlock that the Security Council faced in the decision to apply R2P in Syria, with China and Russia opposing intervention in order to protect their own national interests has reduced the importance of the notion of R2P.[335] Even one of R2P's greatest supporters, Gareth Evans, who was a co-chair of the International Commission on Intervention and State Sovereignty that introduced the concept of R2P concedes to the fact that, despite a global as well as institutional acceptance, the hostility present among the permanent members of the Security Council poses a great challenge to the implementation of this concept, leaving it with a 'work in progress' status.[336] Eleven years since Libya, the international community has not managed to strike a balance between competing interests, despite an impending need to help suffering communities all over the world. Creating R2P as exclusively reliant on the approval of the Security Council in circumstances that would imply a need for military intervention is contradictory to the liberal claim that international law needs to be objective and apolitical. While the idea that international law is made of equal sovereign states submitted to the rule of law is a fundamental precept of the liberal theory of international law, R2P proves that not only that is not reflective of the surrounding reality, as the case of Libya has proven, but it also clearly proves Koskenniemi's argument that social conflict can only be solved through political means.[337] As the tensions in the Security Council show, politics cannot be escaped

[334] Naruzzaman (n 3); Naruzzaman, Mohammed. 'The 'Responsibility to Protect' Doctrine: Revived in Libya, Buried in Syria.' (*Insight Turkey,* 15.2, 2013).
[335] Naruzzaman (n 3).
[336] Evans (n 1).
[337] Koskenniemi (n 5).

in the implementation of international law, even though that comes at the cost of unimaginable loss of human life characteristic for situations that would require the implementation of R2P. Thus, Koskenniemi's case for further de-liberalization of international law still stands.

R2P in Myanmar: Liberalism's Failure?

The deadlock present at the level of the UN Security Council endangers the survival of minorities all over the world. Hence, not much has happened at a collective international since Russia and China vetoed a draft resolution on Myanmar in 2007 on the grounds that the repression of the Rohingya community is not a threat to international peace and security.[338] The Rohingya are a Muslim minority in a state that has a Buddhist majority. The population in Myanmar generally sees the Rohingya as racially distinct, and they can also be considered an ethnic group because their historical development and cultural identity also differ from the general population.[339] Since 1989, there has been ongoing violence against Rohingya, persecuted based on their religious beliefs. Myanmar is accused of extrajudicial killings, torture, arbitrary detention, forced disappearances, intimidation, systemic destruction of mosques, to name just a few. In 2012, the Burmese military confined many Rohingyas in enclosed camps and forbade them to leave without authorization. Since October 2016 the Myanmar military and other Myanmar security forces began widespread and systematic clearance operations, which led to the state being accused of harboring a clear genocidal intent.[340] Despite the recommendations of the Human Rights Council that "the Myanmar military should be investigated and prosecuted in an international criminal tribunal for genocide, crimes against humanity and war crimes",[341] the single most significant effort to address the problem was conducted by The Gambia that launched a case against Myanmar in 2019.[342] Normally, all parties to the

[338] Syeda Naushin Parnini. 'The Crisis of the Rohingya as a Muslim Minority in Myanmar and Bilateral Relations with Bangladesh' (2013) Journal of Muslim Minority Affairs, 33:2.
[339] Human Rights Council, 'Report of the independent international fact-finding mission on Myanmar' (UN, 12 September 2018).
[340] Ibid, p.1.
[341] For more information about the crisis situation in Myanmar, see https://just-access.de/responsible-or-complicit-a-look-at-myanmars-crisis-through-its-business-actors-peoples-resistance-and-the-international-community/.
[342] Evans (n 1).

Genocide Convention have the legal obligation to prevent and punish genocide. The least that the states can do is to issue public statements indicative of their condemnation of the alleged genocide. Aside from The Gambia, clear support for the efforts to protect the Rohingya community has been shown by The Netherlands, Canada, the Republic of Maldives,[343] and, most recently, by the United States[344] and the United Kingdom.[345] Most recently, survivors of the abuses lodged a complaint for the investigation of war crimes and genocide in Germany, due to its laws regarding universal jurisdiction.[346] Nevertheless, the abuses are still ongoing while the rest of the world remains silent.

'Never Again' is overwhelmed by 'History repeats itself'. During the Rwandan genocide, when a reporter asked the U.S. State Department Spokeswomen about whether she has specific guidance not to use the term 'genocide' without prefacing it with 'acts of', she responded that she has definitions and formulations that they "are trying to be consistent in the use of".[347] Saying that genocide is happening to the Rohingya people implies the need to take action. However, as previously explained, there is never consensus regarding what action is best to be taken. As Koskenniemi notes, any legal argument is "constrained by a rigorously formal language" in its attempt to reach objectivity.[348] This liberal desire to protect legal discourse from political discourse, though, comes at the cost of human lives. Aside from the tacit denial of genocide, larger political interests that the big players like USA and China have in Myanmar seem to overthrow any humanitarian concerns. China's growing influence in the region, as well as the internal allegation of genocide against the Uyghurs significantly diminish the chances of implementing an arms embargo or

[343] Global Centre for the Responsibility to Protect. 'Q&A: The Gambia v. Myanmar, Rohingya Genocide at The International Court of Justice, May 2020 Factsheet' (*Global R2P*, 21 May 2020) <https://www.globalr2p.org/publications/myanmarqav2/> accessed 25 February 2022.
[344] BBC News, 'Myanmar Rohingya violence is genocide, US says' (*BBC News,* 21 May 2022) <https://www.bbc.com/news/world-asia-60820215>.
[345] Suwita Hani Randhawa, 'The Rohingya Genocide and Southeast Asian Responses' (*Australian Institute of International Affairs,* 15 December 2022). <https://www.internationalaffairs.org.au/australianoutlook/the-rohingya-genocide-and-southeast-asian-responses/>.
[346] Al Jazeera Staff, 'Myanmar military accused of war crimes, genocide in German suit' (*AlJazeera,* 24 January 2023) <https://www.aljazeera.com/news/2023/1/24/myanmar-military-accused-of-war-crimes-genocide-in-german-suit> accessed 1 March 2023
[347] Barker, Greg, Julia Powell, and Will Lyman. *Ghosts of Rwanda*, 2004. Transcript by FRONTLINE < https://www.pbs.org/wgbh/pages/frontline/shows/ghosts/etc/script.html> accessed 25 February 2022.
[348] Marni Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 American Journal of International Law 351, 354.

sanctioning those responsible for the mass atrocities in Myanmar.[349] Thus, while Evans lists The Gambia's efforts to condemn Myanmar as a success of R2P, there is still a lot that can be done, for instance pressuring the Myanmar government to stop the mass atrocities that they are conducting and urging for the restoration of Rohingya's access to human rights.[350] Nonetheless, what is certain is that the well-established reluctance of the Security Council to act upon the mass atrocities has encouraged the military to take even more drastic action against the Rohingya, increasing their suffering as time goes by.[351]

Whilst those who defend R2P claim that the success of R2P should not be measured by whether or not a military intervention took place,[352] a clear sign of R2P's inadequacy is the number of times a military intervention could have taken place, but it did not out of political reasons. The insufficient response to human suffering that the international community has had up until the present has cleared the path towards effortless abuses conducted against innocent individuals. As difficult as assessing the efficiency of R2P might be due to the complexity of factors involved in the process, the amount of time spent to pursue political debates and protect certain national interests initiates a tacit legitimization of the oppression of ethnic minorities all over the world. While keeping R2P alive for the good intentions that have shaped the concept might seem desirable to certain scholars,[353] the reality today is that the third pillar that formed the basis of this principle has collapsed beyond expeditious repair. Putin's war on Ukraine and China's squeamish response to these events point towards a radical schism in the UN Security Council. Notwithstanding, people in all parts of the world would greatly benefit from adequate and timely responses in times of great emergency, as is the case with genocides, without suffering from the veto power of the mighty world leaders.

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[349] Mennecke, Martin, and Stensrud Ellen. 'The failure of the international community to apply R2P and atrocity prevention in Myanmar.' (2021) 1 Global Responsibility to Protect.
[350] Parnini (n 23).
[351] Mennecke, Strensrud (n 28).a
[352] Russo, Jenna B. 'R2P in Syria and Myanmar: Norm Violation and Advancement.' (2020) 12.2 Global Responsibility to Protect.
[353] Evans (n1).

Conclusion

Using force is always frowned upon in the international community. Nonetheless, it happens every day. State sovereignty, too, has been placed in the center of the orthodox perception of international law. Nonetheless, the rules can always be bent when circumstances allow for it. As objective as international law is trying to remain, politics clearly plays a role in shaping it. International law is not made by equal sovereign states, and it does not apply equally to all, despite the dominant liberal perspective on the matter. Responsibility to Protect has emerged out of the need to reassure the international community that Srebrenica and Rwanda will not happen again. Although R2P seemed to be the answer to Kofi Annan's question posed to the General Assembly of the UN, the last seventeen years since its genesis have proven to be a great unsuccess in protecting vulnerable populations. Not only have genocides have been occurring, as is the case with the Uyghurs and the Rohingya at the moment, but also R2P has been proven ineffective even when applied in its entirety, as was the case in Libya in 2011.

Performing only one intervention in the name of R2P, which ended up having disastrous consequences for the Libyan civilian population, and cherry-picking places to intervene based on how opposed China and Russia have been to the intervention, have ultimately not led to any effective measures that would contribute to fulfilling the 'never again' promise. Crippled by the collapse of its already unstable third pillar, R2P has probably reached its end before it even got to see the light. As such, humanity's last liberal-utopian dream can no longer be deemed as an option to cure the suffering of the Rohingya, as nothing that can be done under R2P is perceived as sufficient to prevent atrocities or protect civilians from these atrocities.[354] The Myanmar military does not only have no incentive to end the oppression, but the current structure of R2P allows them to spread their abuse indefinitely. Overall, Koskenniemi's criticism of the disproportionate liberal nature of international law is more current than ever, as its effects can be felt most intensely by the innocent. Thus, R2P urgently needs to be replaced with a more efficient

[354] Pedersen, Morten B. 'The Rohingya Crisis, Myanmar, and R2P 'Black Holes'.' (2021) 13.2-3 *Global Responsibility to Protect*.

alternative so that the lessons from Rwanda that motivated the creation of R2P are not just observed but also learned.

09.03.2023

14

Reflecting on One Year of Conflict: The Ongoing War in Ukraine

The war in Ukraine began one year ago when Russia launched a massive invasion of Ukraine, marking the biggest conflict in Europe since WWII. The war has had a devastating impact on Ukraine, with thousands killed and over 8 million Ukrainians fleeing abroad. The economic consequences have been significant, affecting energy supplies in Europe and grain prices in Africa. Governments around the world have imposed sanctions on Russia in an effort to end the conflict, but these measures have had limited success so far. Despite the odds, Ukraine's military has managed to reclaim control of large areas of occupied territory and fend off Russian advances in the east.

The war has had a significant impact on Ukraine and the world, with thousands of lives lost, millions displaced, and an economic toll that continues to reverberate globally. It is important to recognize the need for continued international efforts to find a peaceful solution. It is also important to remember the human toll of the conflict, and to ensure that the voices of those affected are heard. The one-year mark of the war in Ukraine provides an opportunity to assess the ongoing conflict's impact and to renew efforts to find a lasting solution.

Background

The 2022 Russian invasion of Ukraine can be traced back to November 2021 when the United States reported an unusual movement of Russian troops near the Ukrainian border. By the end of the month, Ukraine reported a build-up of 92,000 Russian troops. In response, US President Joe Biden warned Russian President Vladimir Putin of "strong economic and other measures" if Russia attacked Ukraine. However, Putin proposed a prohibition on Ukraine joining NATO, which Ukraine rejected.[355] In January 2022, Russian troops began arriving in Belarus for military exercises, and the US gave Ukraine $200 million in security aid. As tensions continued to escalate, Putin ordered Russian forces to enter Ukraine on February 21, 2022, and announced the recognition of two pro-Russian breakaway regions in eastern Ukraine. This announcement led to the first round of economic sanctions from NATO countries the following day. The events leading up to the war in Ukraine demonstrate the complex political and economic tensions between Russia and Ukraine, with international actors playing a significant role in the conflict's escalation.[356]

Timeline

The war in Ukraine over the past year can be categorized into four distinct phases, beginning with the Initial Invasion, followed by the South-eastern front, Ukrainian counteroffensives, and finally the Second Stalemate.

On February 24, 2022, Russian President Vladimir Putin announced the beginning of a “special military operation” in eastern Ukraine, with the aim of demilitarizing and denazifying the country.[357] Shortly after, explosions were reported in several Ukrainian cities and Russian troops were seen entering Ukrainian territory. The US believed that

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[355] "Extracts from Putin's speech on Ukraine". *Reuters*. 21 February 2022. Archived from the original on 27 February 2022. Retrieved 3 March 2022.
[356] "Soldiers, Separatists, Sanctions: A Timeline Of The Russia-Ukraine Crisis". *Agence France-Presse*. NDTV CONVERGENCE LIMITED. Agence France-Presse. 24 February 2022. Archived from the original on 25 February 2022. Retrieved 28 February 2022.
[357] John Haltiwanger (23 February 2022). "Russian President Vladimir Putin announces military assault against Ukraine in surprise speech". *Business Insider*. MSN. Archived from the original on 24 February 2022. Retrieved 24 February 2022.

Russia intended to overthrow the Ukrainian government, while Russian forces were planning a pincer movement to surround Kyiv and envelop Ukraine's forces in the east. Ukrainian President Zelenskyy proclaimed martial law and broke off relations with Russia. Russian missiles targeted Ukrainian infrastructure, and heavy fighting was reported in various parts of the country. However, Russian forces eventually retreat.[358] Neighbouring countries and the EU opened their borders to people fleeing the conflict, but men of conscription age were prevented from leaving Ukraine. In response to the invasion, Western nations imposed sanctions on Russia, including freezing assets of political and business leaders and stopping transactions with Russia's central bank.

In March 2022, heavy fighting between Russian and Ukrainian forces occurred on multiple fronts, resulting in significant casualties and destruction. The Yavoriv International Center for Peacekeeping and Security, a Ukrainian military base, was bombed by Russian forces, killing at least 35 people and wounding 134. Russia established a blockade around Ukraine's Black Sea coastline, stopping its international maritime trade. Ukrainian President Volodymyr Zelenskyy reported that nearly 125,000 civilians had been evacuated.[359] Russian forces took control of Kherson Oblast and shot down drones, while visiting Prime Ministers of the Czech Republic, Slovenia, and Poland showed support for Ukraine. Ukrainian forces began a counter-offensive to repel Russian forces approaching Kyiv, and Russia captured the city of Rubizhne in Eastern Ukraine.[360] UN investigators report that at least 441 Ukrainian civilians have been killed and some killings, such as those in Bucha, may be war crimes. The conflict also led to a global food crisis, and Ukraine banned many agricultural exports, causing world food prices to reach a record high. Russia switched its focus to the Donbas region, where Moscow-backed separatists started a rebellion in 2014.

[358] https://www.politico.eu/article/putin-announces-special-military-operation-in-ukraine/
[359] Gadzo & Najjar 2022, "5 Mar 2022 - 06:49 GMT / Ceasefire to let Mariupol residents evacuate: Russian defence ministry".
[360] https://kyivindependent.com/uncategorized/russian-troops-moving-towards-town-of-nova-kakhovka-in-kherson-oblast/

Commencing with April, the timeline documents the second phase of the 2022 Russian invasion of Ukraine, which occurred from April 8th to September 11th, 2022, with the focus of heavy fighting shifting to the south and east of Ukraine.

April 2022, a missile strike on a train station in Kramatorsk resulted in the death of many civilians, including women, children, and the elderly, who were trying to escape the conflict.[361] Ukrainian President Zelenskyy accused the Russians of targeting civilians because they lacked the strength and courage to face the Ukrainian army on the battlefield. Later in the month, the Ukrainian military sank Russia's flagship vessel, the Moskva, in a symbolic victory. The UN reports that over five million people have now fled Ukraine due to the ongoing conflict, marking the largest refugee crisis in Europe this century.[362]

In May 2022, Finland and Sweden applied to join NATO in response to Russia's invasion of Ukraine. NATO Secretary-General Jens Stoltenberg described this as a "historic moment." Russia continued to capture strategic Ukrainian cities, including Mariupol after a three-month siege. President Zelenskyy called on countries to help set up a fund to rebuild Ukraine at the World Economic Forum in Davos. [363]

In June 2022, Russian missiles struck a shopping mall in Kremenchuk, and the World Bank approved $1.49 billion in additional financing to help pay public sector wages. The EU's decision to partially phase out Russian oil was criticized by Russia. In July 2022, Russian forces completed the conquest of Luhansk province by capturing the city of Lysychansk, and Gazprom announced it would halve gas supplies to Europe through the Nord Stream 1 pipeline.[364]

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[361] Svyridyuk, Yuriy (10 April 2022). Кількість загиблих у Краматорську зросла до 57 [The death toll in Kramatorsk has risen to 57]. *UNN (Українські Національні Новини [Ukrainian National News]* (in Ukrainian). Retrieved 11 April 2022.

[362] *Press conference in Ukraine by President von der Leyen, HRVP Borrell and President Zelensky*. European Commission. 8 April 2022. Archived from the original on 28 September 2022. Retrieved 28 December 2022 – via YouTube.

[363] Jonathan Beale (13 August 2022). "Ukraine war: Predicting Russia's next step in Ukraine". BBC. Retrieved 15 August 2022.

[364] "Russian airstrike hits busy shopping mall in central Ukraine, sparking fears of mass casualties". *CNN.com*. 27 June 2022. Retrieved 28 June 2022.

In July 2022, Russian forces took control of Lysychansk, thereby completing the takeover of Luhansk province in Eastern Ukraine. According to a report by the Office of the United Nations High Commissioner for Human Rights (OHCHR), between July 1 and 24, 2022, there were 1,165 civilian casualties in the ongoing conflict in Ukraine. Of these, 285 were killed, including 83 men, 73 women, 6 girls, 8 boys, and 115 adults whose sex was not determined. Furthermore, 880 people were injured, including 128 men, 137 women, 15 girls, 25 boys, 8 children, and 567 adults whose sex was not determined.[365]

In August 2022, Ukrainian forces initiated a counter-offensive in the south near Kherson, which is the sole land access point to Crimea. The operation targeted Russian supply lines, ammunition depots, and an air base in Crimea. UN Secretary-General Antonio Guterres expressed concern that the risk of nuclear conflict had returned after many years. He criticized the Russian shelling of the Zaporizhzhia facility in Ukraine, describing it as "suicidal."[366]

In September 2022, European gas prices increased up to 30% due to the indefinite closure of one of Russia's main gas supply pipelines. Ukraine launched a counter-offensive in the Kharkiv region, recapturing a key rail hub supplying the Russian frontline. Vladimir Putin ordered the partial mobilization of reservists, leading to an exodus of military-age men attempting to cross borders into neighboring countries.

The third phase spans from September 12, when Ukrainian forces launched successful counteroffensives in the south and east, to November 9, when they regained control of Kherson. During October, Russia launched a series of massive strikes targeting Ukrainian infrastructure, causing extensive damage.[367]

In October 2022, the only bridge connecting Russia to the Crimean Peninsula, which Russia annexed in 2014, was severely damaged by an explosion. In response, Russia

[365] https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-june-28

[366] Graham-Harrison, Emma (18 August 2022). "Russia to stage 'provocation' at nuclear plant, warns Ukrainian military". *the Guardian*. Retrieved 19 August 2022.

[367] https://en.wikipedia.org/wiki/Timeline_of_the_2022_Russian_invasion_of_Ukraine:_phase_3

launched missile strikes on Kyiv, marking the first such attack in months. Subsequently, Ukrainian energy infrastructure was targeted, and the country's energy minister reported that at least 50% of its thermal energy capacity had been affected. A UNICEF report stated that an additional four million children have been pushed into poverty due to the ongoing war, with 2.8 million of them being Russian.[368]

The fourth phase of the 2022 Russian invasion of Ukraine began on November 10, 2022, and continues until the present day. This phase follows the end of Ukrainian counteroffensives in November and is marked by Russia's continued campaign of massive strikes against Ukrainian infrastructure, which began in October and carried over from the previous phase. Despite some advances by Russia, including the capture of Soledar on January 16, 2023, the conflict remains ongoing.[369]

In November 2022, Russia ordered its forces to withdraw from Kherson, the only regional capital they had previously captured. The Kherson region was among the four that Russian President Vladimir Putin had claimed would be a permanent part of Russia. The European Union (EU) was exploring options to increase assistance to Ukraine's energy sector after "cruel and inhumane" attacks caused widespread power outages. The EU's Energy Commissioner, Kadri Simson, criticized Russia's bombing of Ukrainian infrastructure, calling it a strategy to cause human suffering. The Zaporizhzhia nuclear power plant, which was disconnected from the power grid after being damaged by Russian shelling, had its external power restored after two days.[370]

In December 2022, Ukrainian President Zelenskyy visited the United States, becoming the first foreign leader to address the US Congress since the beginning of the war. He emphasized that providing aid to Ukraine was an investment in democracy.[371] On

[368] https://meduza.io/en/news/2022/10/08/large-explosion-reported-at-bridge-connecting-russia-to-crimea

[369] Pavlova, Uliana (5 November 2022). "Putin signs law to mobilize Russian citizens convicted of serious crimes". *CNN*. Retrieved 8 November 2022.

[370] https://www.euronews.com/my-europe/2022/11/24/its-a-bad-joke-energy-ministers-blast-proposed-eu-cap-on-gas-prices

[371] https://www.cnbc.com/2022/12/21/zelenskyy-to-meet-with-biden-address-a-joint-session-of-congress-on-his-first-wartime-trip-to-us.html

Christmas Day, Russian President Vladimir Putin stated that Russia was willing to negotiate regarding Ukraine. However, Ukraine dismissed Moscow's offer, insisting that talks would not be fruitful until all Russian soldiers had left its territory.[372]

In January 2023, Russian forces, reinforced by new recruits, made some gains on the battlefield by capturing the town of Soledar and focusing on the strategic town of Bakhmut. Meanwhile, the Food and Agriculture Organization reports that food prices hit a record high in 2022, rising by 14.3% due to the Russian invasion of Ukraine. The World Bank warned that the global economy could enter a recession in 2023. President Zelenskyy addressed world leaders during the World Economic Forum's Annual Meeting in Davos, saying that the world will overcome Putin's aggression, just as it had overcome other challenges in the past.

Impact of the war on Ukraine

The impact of the 2022 war on Ukraine can be analysed in terms of its economic, humanitarian, and political effects. Economically, the war has caused severe damage to Ukraine's infrastructure, including power generation, digital infrastructure, bridges, and ports, which has disrupted trade and investment. This has led to a contraction in GDP and an increase in inflation. Additionally, the loss of access to the Black Sea has cut off seaborn trade, which accounts for half of Ukraine's exports. The war has also had significant human and economic losses, with estimates indicating that over 8,000 non-armed individuals were killed, and over 12 million people displaced, leading to a significant humanitarian crisis.

In terms of humanitarian impact, the war has led to a severe crisis, with millions of Ukrainians in need of urgent assistance. Nearly six million people have little or no access to safe water, and the conflict has eroded human capital, with children likely to be particularly impacted by malnutrition, stunting, reduced years of schooling, and worsening

[372] https://www.theguardian.com/world/live/2022/dec/25/russia-ukraine-war-live-zelenskiy-says-ukrainians-are-creating-their-own-miracle-in-christmas-eve-address

labour market outcomes. Urgent humanitarian assistance is required, especially for the elderly and infirm who urgently require support.

Politically, the war has exacerbated existing divisions within Ukraine and strained the country's relationship with its neighbours and international partners. The involvement of other countries in the conflict has increased tensions and raised concerns about the stability of the region. Additionally, the war has led to a rise in human rights abuses, including the targeting of civilians and the displacement of vulnerable groups, affecting access to essential services, including healthcare and education.[373]

International response to the war in Ukraine

The international community heavily criticized Russia's invasion of Ukraine, resulting in sanctions and economic consequences for both Russia and the world. The European Union provided military equipment to Ukraine and implemented various economic sanctions, and non-governmental reactions included widespread boycotts of Russia and Belarus in entertainment, media, business, and sport. Protests against the invasion occurred worldwide, including daily protests in Russia, but were met with repression by the Russian authorities, including censorship and imprisonment of opposition figures. There were also reported instances of discrimination against the Russian diaspora and Russian-speaking immigrants. In some parts of Ukraine that were newly occupied by Russian armed forces, protests against the occupiers took place. While many social media users in China, India, Indonesia, Malaysia, Serbia, and the Arab regions showed sympathy for Russian narratives, a poll conducted in Russia by the Levada Center showed that 74% of Russians supported the invasion, with many respondents not wanting to answer pollsters' questions for fear of negative consequences. Pope Francis warned that NATO's "barking" at Russia's door may have caused the invasion and accused Russia of "armed conquest, expansionism, and imperialism in Ukraine."[374]

[373] https://thedocs.worldbank.org/en/doc/5d903e848db1d1b83e0ec8f744e55570-0350012021/related/Implications-of-the-War-in-Ukraine-for-the-Global-Economy.pdf
[374] https://en.wikipedia.org/wiki/Reactions_to_the_2022_Russian_invasion_of_Ukraine

European Union

The EU's response to the war in Ukraine has been characterized by a combination of diplomatic engagement, economic sanctions, and humanitarian aid. The latest response to Russia's continued aggression against Ukraine, adopted on 25 February 2023, was the tenth package of restrictive measures that aimed to increase pressure on Russia to end its military intervention in Ukraine.[375]

The newly agreed package of sanctions included bans on the export of critical technology and industrial goods, imports of asphalt and synthetic rubber, provision of gas storage capacity to Russians, and transit through Russia of EU exported dual-use goods and technology. The EU also suspended the broadcasting licenses of RT Arabic and Sputnik Arabic, restricted the possibility for Russian nationals to hold any position in the governing bodies of EU critical infrastructures and entities, and introduced new reporting obligations to ensure the effectiveness of sanctions. In addition, the EU imposed additional sanctions against 87 individuals and 34 entities, including key decision makers, military leaders, military commanders of the Wagner Group, and drone manufacturers.[376]

These measures demonstrate the EU's determination to hold Russia accountable for its continued aggression against Ukraine and to protect Ukraine's sovereignty and territorial integrity. The sanctions aim to target Russia's economy, military capabilities, and key individuals involved in the conflict. The EU's measures also aim to support Ukraine by providing humanitarian aid and diplomatic support, as well as encouraging dialogue between the parties to the conflict.[377]

[375] https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/
[376] ibid
[377] ibid

United Nations

The military offensive in Ukraine was also condemned by the United Nations as a violation of Ukraine's territorial integrity and sovereignty. Since then, the UN has taken several measures, including appointing a Crisis Coordinator for Ukraine, opening an investigation for war crimes and crimes against humanity, establishing an independent international commission of inquiry, and demanding civilian protection and humanitarian access in Ukraine. The UN also called for the suspension of Russia from the Human Rights Council and requested justification from the five permanent members of the Security Council for the use of veto. The UN has expressed concerns about the ongoing conflict in Ukraine, including sexual violence, trafficking, and the impact of the war on the planet's food, energy, and financial security. The UN welcomed the resumption of Ukrainian grain exports and participated in trilateral meetings with the leaders of Turkey and Ukraine. The UN has also expressed concern about the construction of metal cages in Ukraine, which could be used for human rights abuses.[378]

Since the beginning of the war in Ukraine, the United Nations and its humanitarian partners have launched coordinated emergency appeals totaling $1.7 billion to provide emergency humanitarian assistance to people in Ukraine and refugees in neighboring countries. As of 25 April, the appeal was 70% funded, and on 26 April, the UN doubled its emergency appeal to $2.24 billion due to the worsening crisis in Ukraine. To date, the flash appeal is 86% funded. Humanitarian aid has been critical in providing food, cash assistance, and protection services to over 8.1 million people affected by the conflict, with more than 6.7 million people receiving food aid and almost 1.7 million receiving cash assistance. The UN and its partners are seeking an additional $226 million to prepare for the winter in Ukraine and provide assistance to 1.7 million people before the 2022/2023 winter season. The UN and over 580 humanitarian partners have provided life-critical aid and protection services to 13.3 million people across Ukraine. Humanitarian funding from the European Union is enabling the International Organization for Migration to support over 700,000 Ukrainians with multi-sectoral assistance this winter.[379]

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[378] https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/

[379] https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/

The UN has prioritized the protection of civilians affected by the Russian military offensive in Ukraine and is increasing its humanitarian operations in the region. There have been numerous acts of violence against healthcare centers and at least 972 children have been killed or injured in the conflict. The war has widened gender gaps and increased gender-based violence. People with disabilities trapped in Russian-controlled zones are reportedly being used as "human shields." The UN has warned that direct attacks on civilians are prohibited under international law and may amount to war crimes. The Independent International Commission of Inquiry on Ukraine has concluded that war crimes have been committed by the Russian Federation in Ukraine, with reasonable grounds to believe violations of international human rights and humanitarian law have been committed. The UN High Commissioner for Human Rights has deplored the human cost of the war in Ukraine, which has left at least 8,006 civilians dead and 13,287 injured over the past 12 months.[380]

Challenges and opportunities for Ukraine after one year of war

After one year of war, Ukraine faces both challenges and opportunities. On the positive side, the Organization for Economic Cooperation and Development (OECD) has opened a liaison office in Kyiv to support the country's reconstruction and recovery efforts. This move is supported financially by Poland, Lithuania, Latvia, Romania, and the Slovak Republic.[381]

The focus for Ukraine, however, remains on securing a comprehensive and lasting peace for its people, in line with international law and UN resolutions. The immediate priority is to stop the conflict and to provide humanitarian aid to affected civilians.

Once peace is established, Ukraine can focus on rebuilding its infrastructure and economy. The OECD can play a crucial role in this process by helping Ukraine to plan and prepare for reconstruction efforts in line with the values of a free, open, market-based democracy. The country must work towards becoming a prospective member of the

[380] https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/
[381] https://www.oecd.org/ukraine-hub/en/

OECD, which can provide technical expertise, access to international markets, and support for good governance.[382]

Despite these opportunities, Ukraine also faces significant challenges. The conflict has resulted in the deaths of thousands of people, and many more have been displaced. There is a need for international support to help provide humanitarian aid and rebuild damaged infrastructure. Additionally, Ukraine must address issues such as corruption and political instability, which have hindered its development in the past. These challenges require sustained effort and commitment from the government and the international community.

In summary, the opening of the OECD liaison office in Kyiv is a positive development for Ukraine, providing support for the country's reconstruction and recovery efforts. However, the conflict in the region remains a pressing concern, and the country must address significant challenges to achieve sustainable development and prosperity.[383]

Conclusion

In conclusion, the war in Ukraine marks a significant event in European history since World War II, with severe economic, humanitarian, and political impacts. The one-year anniversary of the conflict provides an opportunity to evaluate the ongoing impact and renew efforts towards a lasting solution. The four distinct phases of the conflict, starting with the initial invasion, followed by the south-eastern front, Ukrainian counteroffensives, and the second stalemate, signify the evolving nature of the conflict. The war has caused significant economic, humanitarian, and political damage to Ukraine, with millions displaced and thousands of lives lost. The future of the conflict remains uncertain, and it is crucial to recognize the need for continued international efforts towards finding a peaceful resolution. The conflict's impact on Ukraine and the world is significant, and it is essential to ensure that the voices of those affected are heard, and their needs are met. It is hoped that the war in Ukraine can eventually come to an end, and Ukraine can rebuild and move towards a brighter future.

[382] ibid
[383] https://www.oecd.org/ukraine-hub/en/

02.05.2023

15

Justice Delayed, Justice Denied: Bias, Opacity and Protracted Case Resolution at the International Criminal Court

This article critically analyzes the activity of the International Criminal Court (ICC), highlighting several areas which are in need of improvement, among which one can count the outreach to civil society and victims, the transparency of the Court's activities and, or the case prioritization strategies. It emphasizes the need for the ICC to address these concerns, advocating for reforms that can enhance the Court's legitimacy, accessibility, fairness and efficiency in advancing international justice and accountability.

In 2002, the Rome Statute established the International Criminal Court (ICC). The ICC investigates and prosecutes individuals responsible for genocide, war crimes, and crimes against humanity. Since then, it has functioned as an independent court of last resort, investigating and prosecuting individuals responsible for the four core crimes of international law: genocide, war crimes, and crimes against humanity. The Rome Statute works under the complementarity principle. This means that domestic courts continue to have the duty to deliver justice. As such, the ICC remains a court of last resort when the domestic courts are unable or unwilling to provide a legitimate judgment. The Court has automatic jurisdiction only for crimes committed on the territory of a state which has ratified the treaty and for crimes committed by citizens of member nations who commit crimes

elsewhere. For suspected criminals who are citizens of a state which has not ratified the Rome Statute, a United Nations Security Council resolution is necessary in order to proceed with the case. The ICC has no police force of its that can conduct investigations and arrests. Instead, it must rely on national police services and state cooperation to make arrests and seek their transfer to The Hague.[384] The ICC has opened investigations into situations in countries like the Democratic Republic of the Congo, Uganda, Central African Republic, Darfur, Sudan, Kenya, Libya, Ivory Coast, Mali, Georgia, and, most recently, Ukraine. Nonetheless, the Court suffered from constant criticism ever since it has been created.

The ICC is regarded as a necessary institution for advancing international justice and accountability. However, criticisms have been leveled against it regarding its limited engagement with civil society, and the transparency of its activity has been defective.[385] On the one hand, the Court is being criticized for not having done enough to raise awareness about its work, because it has not communicated effectively with affected communities, victims, or the general public. Numerous individuals, particularly those living in conflict-affected zones, are uninformed about the ICC's mandate and do not know how to access its services. This lack of awareness and outreach can prevent victims from coming forward to report violations of the Statute, undermining by and large the credibility of the ICC's work.[386] Another issue is the lack of transparency of the ICC's activities. Trials and investigations at the ICC take place behind closed doors, and the public has little access to information about active cases.[387] Due to this lack of openness, the ICC may come under

[384] International Criminal Court, 'How the Court Works', <https://www.icc-cpi.int/about/how-the-court-works> Accessed 24 April 2023.
[385] Lohne Kjerti, 'Global civil society, the ICC, and legitimacy in international criminal justice', *The Legitimacy of International Criminal Tribunals* (CUP, 2017); Regina Rauxloch, 'Good intentions and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC' (2021) 34 LJIL 203.
[386] Redress, 'Victims and the ICC: Still room for improvement Paper' prepared for the 7th Assembly of States Parties The Hague, 14-22 November 2008; International Federation for Human Rights, 'Outreach to Victims, Affected Communities, and Civil Society: an Analysis of Prosecutor Bensouda's Legacy at the ICC', 30 November 2021 <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/outreach-to-victims-affected-communities-and-civil-society-an> Accessed 25 April 2023.
[387] Sigurd D'hondt, 'Why being there mattered: Staged transparency at the International Criminal Court' (2021) 183 JoP 168.

criticism for bias and unfairness which lead to suspicions and mistrust regarding the activity of the institution as a whole.[388]

Two other main areas of criticism faced by the Court concern its high costs and slow pace of justice. The Court is funded by contributions from its member states, and its budget has been criticized for being too high. In addition, the Court's investigations and trials can take years to complete, leading to delays in justice for victims. One critical case in which both of these points of criticism are illustrated relates to the investigations in Afghanistan. In almost 20 years since the prosecutors of the ICC first considered opening an investigation into the crimes that occurred in Afghanistan, there has been little to no action toward bringing justice to Afghan victims. A month after the ICC authorized the Office of the Prosecutor to launch an investigation, the institution had to stop due to a request of the Afghan government to pursue the investigation themselves. Nonetheless, the conflict is of a protracted nature and crimes of an international nature have continued to occur throughout the whole time since the case came under the attention of the ICC.[389] As such, limited by its own mandate and by the resource allocation decided upon by the Court, justice has not yet been delivered to the victims affected by the war in Afghanistan.

Moreover, since 2009, the legitimacy of the institution has been shaken by a gradual African disinterest in the Court, when it issued an arrest warrant for Sudanese President Omar Al Bashir, whose country is not a signatory to the Rome Statute. In 2015, the South African government refused to arrest Mr. Bashir. He traveled to South Africa to attend a meeting of the African Union, and South Africa, as a member of the court, was legally required to arrest him. Yet, the government allowed Mr. Bashir to leave the country, claiming that he had immunity as a head of state during the African Union summit meeting. The ICC has issued a judgment on this case, saying that South Africa was wrong about Al Bashir's immunity. His immunity as a head of state has been superseded by UNSC

[388] Ignaz Stegmiller, 'The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?' (2013) 24 CLF 475.

[389] Elizabeth Evenson, 'International Criminal Court Should Reach Decision on Afghanistan', *Human Rights Watch* <https://www.hrw.org/news/2022/09/12/international-criminal-court-should-reach-decision-afghanistan> Accessed 24 April 2023. For Just Access's interview with Ms. Evenson, see <https://podcast.just-access.de/1928821/11836696-episode-1-introducing-the-work-of-human-rights-watch-hrw> and <https://podcast.just-access.de/1928821/11870184-episode-2-improving-access-to-justice>.

Resolution 1593 (2005) which referred Darfur to the ICC. Concomitantly, sitting heads of state can be held responsible for crimes in their individual capacity, so that Al-Bashir could have been arrested and tried at the ICC. Nonetheless, South Africa and other African states have expressed deep dissatisfaction with what they consider a tool of Western imperialism.[390] As a result, Burundi was the first country to withdraw its membership from the ICC in 2017.[391]

Most recently, following the arrest warrant of Vladimir Putin, issued by the Pre-Trial Chamber II of the ICC, in connection with the deportation and transfer of children as war crimes,[392] and based on the rapid investigations that resulted shortly after the beginning of the war in Ukraine,[393] the Court faces another wave of criticism regarding its practices, particularly due to matters of prioritization and resource allocation. Even though the ICC has opened an investigation into crimes committed during the conflict in Ukraine, it has encountered many challenges, including a lack of access to the conflict zone and scant cooperation from Ukrainian authorities. In order to discuss the significance of holding those responsible for international crimes accountable, justice ministers from all over the world gathered in Ukraine in March 2023 for the Justice Ministers' Conference. Ukraine had a crucial opportunity to emphasize the value of ongoing efforts to prosecute offenders at the conference. However, because Ukraine has not ratified the Rome Statute, its cooperation with the Court has been erratic. Despite these challenges, which are also present in other instances investigated by the Court, the ICC dedicated a significant part of its resources to pursuing this case. Moreover, the Court benefitted from a significant increase in the level of support from its members, which has been unprecedented. This imbalanced support received by the ICC within the past year exacerbated the already existing views about an

[390] Norimitsu Onishi, 'South Africa Reverses Withdrawal From International Criminal Court' (New York Times, 8 March 2017) <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html> Accessed 24 April 2023.
[391] Timothy Jones, 'Burundi becomes first country to leave International Criminal Court' (Deutsche Welle, 27 October 2017) <https://www.dw.com/en/burundi-becomes-first-country-to-leave-international-criminal-court/a-41135062> Accessed 24 April 2023.
[392] ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', Press Release 17 March 2023. <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> Accessed 24 April 2023.
[393] For more information See Just Access, 'Reflecting on One Year of Conflict: The Ongoing War in Ukraine', <https://just-access.de/reflecting-on-one-year-of-conflict-the-ongoing-war-in-ukraine/> Accessed 25 April 2023.

inconsistent application of its mandate, increasing the damaging perception that the Court is biased and politicized.[394]

Despite this criticism, the ICC continues to be a fundamental organization for advancing justice and responsibility for violations of international criminal law. Charles Taylor, a former president of Liberia, and Jean-Pierre Bemba, a previous vice-president of the Democratic Republic of Congo, are two well-known individuals who have been prosecuted by the Court. It is impossible to downplay the importance of the Court's work in looking into the crimes perpetrated in Ukraine. In any case, the ICC ought to react to the criticism brought to its activity if it is to be truly effective. This incorporates addressing perceptions of bias, expanding its jurisdiction to incorporate non-member states, and improving the speed, transparency, and effectiveness of its investigations and trials, while also improving its outreach towards victims, as well as civil society.

[394] Coalition for the ICC, 'Justice Ministers conference on Ukraine is a vital opportunity for consistent and sustained support for all situations under the jurisdiction of the ICC', <https://www.coalitionfortheicc.org/news/20230315/justice-ministers-conference-ukraine-vital-opportunity-consistent-and-sustained> Accessed 24 April 2023.

05.05.2023

16

Unmasking Corruption: The European Union's Sanctions Arsenal

Sanctions are among the most powerful foreign policy tools that governments and international organizations can use to determine individuals, private entities, and even entire regimes to change their behavior. These restrictive measures are usually used in cases where the respective actor violates human rights, wages war, or endangers international peace and security.[395] The European Union (EU) is no exception. Throughout its existence, it has implemented, either on its own initiative, or together with the UN Security Council, a number of sanctions against individuals and entities that went against its objectives and values.[396]

Most of the focus of the EU in terms of applying sanctions has been placed on human-rights-related issues. The best-known instances in which the EU imposed sanctions are related to violations that have occurred in Iran, North Korea, Russia, and Belarus. The restrictive measures which were imposed in these instances range from individual sanctions to economic or diplomatic measures, meant to persuade the governments to comply with their international obligations and discontinue their destructive activities.[397] The EU sanctions are never punitive, and the organization makes a sustained effort not to

[395] Government of the Netherlands, 'Sanctions', <https://www.government.nl/topics/international-peace-and-security/compliance-with-international-sanctions> accessed 3 May 2023; Department of Foreign Affairs, Ireland, 'Restrictive Measures (Sanctions)' <https://www.dfa.ie/our-role-policies/ireland-in-the-eu/eu-restrictive-measures/> accessed 3 May 2023.
[396] European Council, 'How and when the EU adopts sanctions', <https://www.consilium.europa.eu/en/policies/sanctions/different-types/> accessed 3 May 2023.
[397] Ibid.

target entire countries or the civilian population but rather specific policies or activities and those who are responsible for them, with the ultimate goal to achieve a political dialogue.[398] Its measures targeting those who aid and support Russia's aggression launched against Ukraine since the annexation of Crimea in 2014 and up to the war started in 2022 have launched an unprecedented opportunity for the EU to develop a more robust framework for sanctions, including putting in place measures to fight crimes and freezing and confiscating assets of those who are involved in the commission of crimes on but also beyond the EU territory.[399]

One area which necessitates a more specific sanction regime is the realm of grand corruption. Grand corruption refers to high-level corruption which involves the abuse of power by government officials or others in positions of authority. This type of corruption involves large sums of money which are, for instance, laundered, embezzled, used in acts of bribery or in various other illicit activities. As such, this type of corruption significantly impacts the economy and society of the countries affected, going as far as altering the enjoyment of human rights and weakening international cooperation.[400]

One of the most ambitious steps taken in this direction is the establishment of the European Public Prosecutor's Office (EPPO) as an independent body responsible for investigating, prosecuting, and bringing to justice those who have affected the EU's financial interests in fraudulent and corrupt ways.[401] Similarly, the EU has also taken steps to address the issue of non-repatriation of funds of illicit origin. Since 1990, it has adopted six Anti-Money Laundering Directives, which require Member States to implement measures to prevent money laundering, and the financing of terrorism, also mandating banks and other financial institutions to perform due diligence and report any suspicious

[398] The Diplomatic Service of the European Union, 'European Union Sanctions' (7 October 2021) <https://www.eeas.europa.eu/eeas/european-union-sanctions_en> accessed 3 May 2023.
[399] Transparency International EU, 'Guide to Strengthening the EU's asset recovery framework', <https://transparency.eu/wp-content/uploads/2022/12/Asset_recovery_briefing_2022.pdf> accessed 3 May 2023.
[400] United Nations Human Rights Council, 'The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation' (2019) A/HRC/RES/40/4.
[401] EPPO, 'Mission and Tasks' <https://www.eppo.europa.eu/en/mission-and-tasks> accessed 3 May 2023.

transactions to the responsible authorities.[402] However, this is not enough to effectively combat corruption, particularly when it extends beyond the Union's borders. So far, there is no union-wide understanding of how to proceed in terms of freezing and confiscating assets and how to use these assets in the aftermath. Moreover, as the EU does not have any competency in the realm of criminal law, it is entirely dependent on the proactivity of the member states and their willingness to implement anti-corruption measures into their own criminal code.[403] Additionally, certain member states, as is the case of Hungary, constantly refuse to implement the measures agreed upon by the EU and regularly veto key priorities of the organization in order to fight corruption.[404] As a result of the structural issues faced by the EU, there are many missed opportunities for sanctioning states, entities, and individuals who abuse their power. One instance of this kind is the EU's tardy response to Vladimir Plahotniuc's corruption and election interference allegations in Moldova. Only five-and-a-half months after the United States declared its support for countering corruption in the country,[405] has the European Parliament adopted a resolution that called for sanctions against Plahotniuc.[406] Thus, there are many missed opportunities for the EU to contribute to the global fight against corruption.

Going forward, the EU needs to continue to develop and refine its sanctions measures in order to maximize their effectiveness. Problems of grand corruption remain a significant challenge for the international community. Criminals persistently employ sophisticated methods to launder money and evade detection, while many countries still lack the necessary resources and expertise to effectively combat these challenges. Therefore,

[402] Lukas Martin Landerer, 'The Anti-Money-Laundering Directive and the ECJ's Jurisdiction on Data Retention' (2022) 1 eucrim <https://eucrim.eu/articles/the-anti-money-laundering-directive-and-the-ecjs-jurisdiction-on-data-retention/> accessed 3 May 2023.
[403] European Commission, 'How the EU helps Member States fight corruption' <https://home-affairs.ec.europa.eu/policies/internal-security/corruption/how-eu-helps-member-states-fight-corruption_en> accessed 3 May 2023; Global Legal Insights, 'Bribery and Corruption Laws and Regulations 2023 | Germany' <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany> accessed 3 May 2023.
[404] Eszter Zalan, 'EU Commission to keep Hungary's EU funds in limbo' (*euobserver*, 24 November 2022) <https://euobserver.com/rule-of-law/156464> accessed 3 May 2023.
[405] Antony J. Blinken, 'Response to Corruption and Election Interference in Moldova' (*US Department of State,* 26 October 2022) <https://www.state.gov/response-to-corruption-and-election-interference-in-moldova/> accessed 3 May 2023.
[406] IPN Press Agency, 'European Parliament adopts resolution calling for sanctions against Plahotniuc and Șor' (20 April 2023) <https://www.ipn.md/en/european-parliament-adopts-resolution-calling-for-sanctions-against-plahotniuc-a-7965_1096461.html> accessed 3 May 2023.

international cooperation is crucial in sharing information, establishing uniform legal frameworks, and developing effective enforcement mechanisms.[407] Until there is uniformity in the international approaches towards grand corruption, the economic developments of many countries suffer as significant amounts of money are no longer available for local investment in business and infrastructure, impeding sustainable economic growth and affecting the lives of many people by exacerbating poverty. Moreover, the failure to tackle issues of grand corruption undermines the rule of law in the affected countries, as certain individuals or entities circumvent the legal system, and thereby erode the trust in the governments' abilities to effectively tackle situations in which the wealthy and powerful operate outside the boundaries of the law.[408] At the moment, the EU, upon a proposal of the EU Commission, is working on a directive on fighting corruption meant to cover "misappropriation, trading in influence, abuse of functions, as well as obstruction of justice and illicit enrichment related to corruption offences, beyond the more classic bribery offences".[409] Nonetheless, the true effectiveness of this directive in strengthening and changing the existing anti-corruption practices can only be gauged with time. However, there is still room for optimism regarding its potential impact in bettering practices not only in Europe but also beyond its borders.

[407] UNHRC (n 6).
[408] Alina Mungiu-Pippidi, 'The post-truth about corruption in the European Union' (*Verfassungsblog*, 20 December 2022) <https://verfassungsblog.de/the-post-truth-about-corruption-in-the-european-union/> accessed 3 May 2023; Christine Lagarde, 'There's a reason for the lack of trust in government and business: corruption' (*The Guardian*, 4 May 2018) <https://www.theguardian.com/commentisfree/2018/may/04/lack-trust-government-business-corruption-christine-lagarde-imf> accessed 3 May 2023.
[409] European Commission, 'Questions and Answers: Stronger rules to fight corruption in the EU and worldwide' <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_2517> accessed 3 May 2023.

10.05.2023

17

2nd DCU Meeting on Food Security and Global Diplomacy

Food security exists when “all people, at all times have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and preferences for an active and healthy life”[410]. Today, nearly 800 million people lack adequate access to food, more than 2 billion people suffer from deficiencies of essential micronutrients, and about 60% of people in low-income countries are food insecure[411]. Food insecurity negatively impacts human physical, social, emotional and cognitive development throughout the lifespan and is a major social and environmental disruptor with serious implications for the health of the planet.

Two representatives of Just Access, Luca Brocca and Ida Manton attended the second meeting on global diplomacy and food security held by DCU in Dublin on 26-27 April 2023.

The meeting focused on specific food security issues that each working group had elaborated on in the past months. In addition, three guests - Reverend John Godfrey, Larry O'Connell, and John Gilliland - gave presentations on the second day.
Consequently, many interesting ideas were generated, which each working group will work on in preparation for the third and final meeting in Rome in July 2023.

[410] https://www.fao.org/fileadmin/templates/faoitaly/documents/pdf/pdf_Food_Security_Cocept_Note.pdf
[411] https://www.un.org/sustainabledevelopment/hunger/

In this blog post, we present the main points discussed during the meeting by providing concrete examples and describing some of the solutions that were discussed.

Food Security and Human Rights

As part of its work during the past months, Just Access has brought attention to the right to food as a human right, while also identifying its problems and proposing some practical solutions. After two online meetings that were held together with prominent experts in the field of food security and human rights, Just Access came up with a thorough paper which will be discussed in the next paragraphs.

Firstly, the most relevant international instruments which enshrined the right to food were pointed out. It was interesting to notice that, although this right is recognised in many binding and non-binding international agreements and domestic laws, there is still a significant gap between what is decided de iure by States and what instead happens de facto, in reality.

In fact, although many international agreements ensure the right to food, according to a FAO report written in July 2022, around 702 to 828 million people (8.9 and 10.5 % of the world's population) had to face hunger in 2021, and it is estimated that 670 million people will have to deal with food insecurity in 2030.[412]

Therefore, it is more than clear that, although most States in the world recognise the right to food and the importance of guaranteeing its protection for all people, what happens in reality is a whole other story. This is even more critical if we consider that the world is already producing more than the necessary amount to feed and ensure a healthy diet for all people in the world. Food production is indeed necessary, but not sufficient to guarantee food security[413].

[412] https://www.fao.org/publications/home/fao-flagship-publications/the-state-of-food-security-and-nutrition-in-the-world
[413] https://www.sciencedirect.com/science/article/pii/S2468227622004161

For this reason, the paper produced by the Food Insecurity and Human Rights Working Group (FISHR) that Just Access has convened pointed out the need for States to fully implement existing human rights obligations. This can be done by establishing an adequate legislative and judicial framework and improving the existing one. Claimants must not be subjected to retaliation for exercising their rights, and the independent and impartial claim mechanisms they must have access to should be established at a decentralised level, and should be free, accessible, and lacking in excessive formalities and language barriers for ethnic groups.

Next, the FISHR Group pointed out and described the four major drivers of food insecurity identified by the FAO: conflict, climate extremes, economic shocks, and growing inequality[414].

One prominent solution referred to by one of our guests during the online meetings was classifying food as an economic public good.[415] In fact, food is now treated as a commodity, and a solution would be reforming the whole system to give producers support from the government and the industry in the public interest, to establish a system of governance for food production, distribution and access at a global level.

Even though this looks optimal for solving the problem of the current unequal global food distribution, it was pointed out during the meeting in Dublin that it might be too much of an ideal solution, and very difficult to apply in practice. Still, it is not completely impossible, considering that small steps have been taken at the local level to solve unequal food distribution[416].

In the FISHR Group's paper, a great deal of attention was given to corporations and their influence in destabilizing the food system. First, the "corporate capture" of the FAO was mentioned. Around 69% of FAO's 2022-2023 budget came from voluntary contributions,

[414] https://www.fao.org/publications/home/fao-flagship-publications/the-state-of-food-security-and-nutrition-in-the-world
[415] https://philarchive.org/archive/TIMFSA-3
[416] https://lacocinasf.org and https://www.shareable.net/the-shareable-food-movement-meets-the-law/

and donors have the opportunity to set priorities and determine how these resources are used. This is even more critical because of the lack of transparency in this system, since the financial donations are not fully disclosed and there is no way of understanding whether a risk assessment has been carried out.

Thus, the paper proposes the FAO adopts an enhanced transparency framework with detailed information regarding each entity's contributions, the projects it funded, and the diligence assessments conducted.

Corporations can also influence the quality of the ultra-processed food produced by the industrial food industry. In fact, the FISHR Working Group decided to dedicate a section of the paper to explaining that for the right to food to be fulfilled, it is not enough for an individual to have access to food, but rather to good quality food. Therefore, it was proposed that States implement taxes and warning labels to discourage the consumption of junk food. In addition, the paper recommends using the funds raised through these taxes to subsidise the cost of high-quality food.

Food and the Sacred

Another working group focused on the important relation is between food and the sacred and on how we can consider religious values in reaching global food security.

The paper, as it was presented during the meeting in Dublin, pointed out the importance of the nexus of food and values such as celebration, sharing, community, solidarity, interconnectedness, dignity, and appreciation. It is indeed impossible to imagine a faith community in which some members are excluded from the sharing of food.

Also, the importance of non-wasting food in certain religious traditions like the Hindu one was pointed out, since food waste is regarded as intrinsically wrong. This brings into the discussion the question of fasting, which as such is a major feature of world religions. With Islam and Ramadan, we understood that it is associated with a whole range of values

including patience and compassion. In the religious traditions of humanity, food and its production are intertwined with respecting nature and future concerns.

One last thing to mention about the importance of faith communities in relation to food security is their possibility to cross borders and to reach the most marginalized, which are two major obstacles in obtaining food security in the current international and legislative framework.

Agriculture & Farming

The agriculture and farming working group focused on the importance that should be given to individual farmers. In fact, the working group referred to the struggles of many farmers in adapting to change, including their fear of inviting other stakeholders to their farms, the lacking belief that they can sell directly to consumers, and the psychological problems that many suffer. These struggles are highly connected with the increasing phenomenon of polarization, which was the object of discussion of another working group at the Dublin meeting.

The working group noted that polarization can be found in many ways when looking at farms: large and small, conventional and organic, integrated and specialized, family-owned and corporate. Moreover, despite the very ambitious goals set out in Europe with the Green Deal, the Farm to Fork strategy and the Common Agricultural Policy (CAP), farmers are still concerned about those objectives. In fact, it was pointed out that they actually create a divide between the interests of the EU, Member States and individual farmers. For this reason, the role of the individual should be enhanced and given more importance in these projects. The voices of farmers and other key groups should be brought to international processes like the COP28 and the UN Food Systems Summit Global Stocktake.

Global Issues

The Working Group on global issues focused on the importance of the EU, the OSCE, the relation between food security and financial systems, and upcoming international meetings in tackling food security.

As for the role of the EU, attention was drawn to an overview of EU policies and strategic goals in the field of agriculture and their impact on farming. Apart from EU measures that were mentioned in the previous paragraphs, the RepowerEU project was referred to because of the strong impact that energy policies can have in achieving food security.

Moreover, the working group made reference to the issue of overdependence of the EU on certain imports. For instance, the Russian role in producing fertilizers had a strong impact on the EU after the war in Ukraine started and sanctions were imposed on Russia. In fact, the EU was forced to ease some of the sanctions through the 9th sanction package to facilitate Russia's export of fertilizers and agricultural goods. The working group felt a particular need to strengthen localization and help countries fight overdependence on imports of food and agricultural products.

As for the role of the OSCE, the Working Group emphasized its importance in tackling food security. Its strength lies in the inclusiveness and the very high number of participants (47), although the need for consensus is often a deterrent to reaching efficient solutions. Still, it shows a good example of a multilateral regional approach to security which is reached through dialogue and cooperation.

Food security in the last years has gained an increasingly important role in the OSCE agenda. Starting from 2009, when the Ministerial Council in Vilnius adopted a resolution entitled "The Food Crisis and Security in the OSCE Area", many other multilateral meetings have been held to tackle this matter. In other resolutions, the OSCE referred to important ideas concerning sustainability, the need to draw particular attention to agricultural lands and the possibility of increasing targeted financial assistance to increase food production.

Further, a paper regarding the relation between food security and financial systems has been pointed out. Financialization refers to the process by which ordinary practices are increasingly influenced by financial motives, modes, and logic. This process strongly affects the food market, which in turn affects many other spheres of society, such as the environment and politics.

Finally, a few international meetings to which the Working Group should draw particular attention have been pointed out. These meetings include the Food System Summit Stocktaking Moment that will take place in Rome in July 2023, the SDG Summit in New York in September 2023 and the COP 28 in the UAE in December 2023.

Democracy and Polarization

The paper of the working group on democracy and polarization focused on the fact that food insecurity is not caused by a lack of available resources, but rather by systemic inequalities and injustice.

It is necessary that we consider the importance of democracy and the impact that a non-democratic regime has on the access to food for marginalized communities. As defined by Pope Benedict XVI, democracy will be fully implemented only when “every person and each people have access to the primary goods of life, food, water, healthcare, education, work, and certainty of their rights, through an ordering of internal and international relations that guarantees everyone a chance to participate.”[417]

Further, the impact of polarization on food security was mentioned. In fact, it can lead to political instability, economic inequality, and inaction on climate change, which are all components that strongly affect food security. Polarization was given a specific definition by the working group, which described it as a prominent division between major groups marked by severe radicalization between two distinct extreme poles that more or less have equal amounts of power.

[417]https://www.centesimusannus.org/media/1kqxw1350983056.pdf

The solutions proposed include outreach and dialogue as a way of paying more attention to each individual's perspective, and narrative change to enhance the role of faith communities in this process.

Presentations and Initiatives

The second day of the multi-stakeholder meeting featured four inspiring presentations by prominent guests. Each presentation was followed by questions and comments of the participants that allowed us to reflect on the different projects in view of the upcoming meeting.

It was of great importance that the venue was "the "fumbally", a local café that in recent years has more than shown its sensitivity to the issue of food security. It was important for all participants to attend the presentation of Aisling, one of the two founders of this café, who passionately explained the impact of her business and the work she puts into it.

Fumbally's main goal is to create a stronger connection between people and the food they eat. Aisling highlighted the direct connection with the suppliers, the regular visits to the farms, and the fact that they have a circular kitchen where everyone is considered on the same hierarchical level. This, of course, highlighted the role of the individual, which had been mentioned several times during the previous day's meeting. She stressed that we must continue our meetings by considering even the most extreme scenarios and not just the general scheme of food insecurity.

She also pointed out that Fumbally is not a business for the glory of the industry, which she described as broken because of the role that large corporations have taken over in recent decades. The role of prominent corporations was raised several times during the previous day's meeting, and we all reflected on the impact of ultra-processed foods often sold in the marketplace that do not meet the core of the right to food security.

An important comment on this issue came from Ida Manton, another member of Just Access who was also involved in organizing these multi-stakeholder meetings. She referred to the problem of time management found in many families in Western society. Considering the very common situation of two working parents with children, she referred to the difficulty of finding time to go to places like Fumbally, which is a luxury for most families. Nowadays there is a commercial model where everyone is always striving for more, and it is very difficult to resist that and not be one of the people who live a normal western life.

The meeting continued with a presentation by Reverend John Godfrey, who pointed out the work he and the Aughrim & Creagh Unions parishes have been doing at the Aughrim Climate Action Park. This biodiversity park also focused on the importance of connecting with the food we eat, while emphasizing the importance of faith communities to global food security. Local people tend the garden and learn new skills in the process. School children sometimes have lessons in the garden about planting, cycles of nature, biodiversity, and sustainable living.

Reverend John referred to his main inspiration for starting this great project, which was one of the Fridays for future protests that took place in front of Dáil Éireann with more than 10,000 children participating. Luca Brocca pointed out the importance of raising young people's awareness of this sensitive issue and the constitutional right to protest in European countries, which allows young people to speak out on such sensitive issues.

What was most inspiring about the project, even more than the concrete results it achieved among the local population, was the passion that Reverend John tried to share with the participants. He was able to describe his project so passionately that all the participants were able to understand even more the importance of these local initiatives and the need for governments to fund them. “My heart flutters when I’m there”, is one of the expressions that Reverend John used to refer to his strong bond to that land.

Next in the meeting, Larry O'Connell, Director of the National Economic and Social Council (NESC), gave a presentation on climate transition in Irish agriculture. The NESC plays a very important role, advising the Irish Prime Minister on strategic policy issues relating to sustainable economic, social and environmental development in Ireland.

He pointed out the broad scope of the challenge we face as environmental, economic and social issues overlap in the food sector. Therefore, in order to find more effective solutions, it is necessary to work directly with farmers who, for understandable reasons, better understand what are the main difficulties we face. Farmers were given special attention in the Agriculture and Farming working group, which focused on the daily struggles they face due to current national legislation and lack of access to more advanced production methods. Therefore, government funds should be allocated in a more effective way to help sustain farmers and invest in this sector.

The two-day meeting concluded with a presentation by John Gilliland on the transition to delivering multiple public goods as a practitioner. He referred to his very inspiring experience as a practitioner in achieving net-zero agriculture and his current role in helping seven more farms move toward net-zero. He provided us with clear evidence that it is possible to produce healthy, high quality food while reducing the environmental impact of this activity. However, this can lead to financial difficulties, as national governments still do not adequately fund these types of projects.

He pointed out the importance of new precision measurement technology for measuring real change, which is essential for reaching Tier 3 in agricultural sustainability participation. The role of the Aerial LiDAR was highlighted because of its essential role in measuring carbon in trees and hedgerows, and thus in achieving net-zero agriculture. However, this carbon reduction is very expensive, and this is the main problem he and many other companies trying to achieve net-zero agriculture face due to lack of sufficient government support. Achieving net-zero can be done through a public-private partnership in which barriers are mutually recognized and equitably resolved, achieving a "just transition" while also providing other public goods.

This two-day meeting allowed all participants to get a more concrete idea of the work of each working group and how it can be linked to the ideas of the other working groups. The presentations on the second day were essential to understanding the importance of the local initiatives and what priorities we should focus on in the coming months. Just Access is grateful for the invitation and the opportunity to be involved.

26.05.2023

18

Organisations Promoting the Ideology of Fascist Figures in North Macedonia and State Measures Against Them

Just Access welcomes the opportunity to contribute to the Call for input of the Special Rapporteur on contemporary forms of racism for her Report to the 78th session of General Assembly. Just Access would like to inform the Special Rapporteur about the recent developments regarding the establishment of organisations in North Macedonia that carry names and promote the ideology of prominent fascists and collaborators of the Nazi regime during World War II, as well as the measures adopted by the State, the efficacy of the measures and some civil society initiatives to prevent and combat the manifestations of glorifying Nazism and to eliminate racial discrimination.

As will be shown, several organisations that have been founded in recent years in North Macedonia seek to glorify historical figures that are known fascists and collaborators of the Nazi regime. In view of this fact, the Macedonian authorities have adopted legislative and political measures that have been effective in limiting the expansion of such organisations. However, these organisations continue to be supported by the State authorities of Bulgaria, an aspect that is particularly worrying.

This is especially relevant in view of the concerns expressed by of the UN General Assembly with respect to the glorification of “those who fought against the anti-Hitler

coalition, collaborated with the Nazi movement and committed war crimes and crimes against humanity".[418] In this resolution, UNGA also emphasised the recommendation of the Special Rapporteur that "any commemorative celebration of the Nazi regime, its allies and related organizations, whether official or unofficial, should be prohibited" by States.

The establishment of organisations glorifying fascist figures in North Macedonia

This submission will focus on two organisations that have been established in North Macedonia, "Ivan Mihajlov Cultural Centre" and "Tsar Boris the Third".

The association "Ivan Mihajlov Cultural Centre" was registered by the Central Registry of Republic of North Macedonia on 15 March 2019 in Bitola, North Macedonia.[419] The Statute of this Association provides that its mission is to promote the life, ideology, rehabilitation and illumination of the image and work of Ivan (Vancho) Mihailov. This figure is a known collaborator of fascists during World War II, who issued numerous monographies, brochures, and articles in which he denied the existence of the Macedonian people and the specificity of the Macedonian language. Moreover, Mihailov issued numerous arrest and execution warrants against Macedonian intellectuals and members of the revolutionary movement.

On 16 April 2022, the club "Vanco Mihajlov" opened its doors in the centre of Bitola's Jewish neighbourhood, in a house that used to belong to the Jewish family that was deported by the Nazi regime.[420] The organisation timed its opening on a Shabbat that coincided with the first day of Pesach, one of the most significant Jewish holidays. According to the Jewish community and the Holocaust Fund of the Jews of Macedonia, "this act represents an offence to the Jews and a threat to the human rights and freedoms, violation of the democratic character and values of modern Europe"[421] Since its

[418] Resolution 77/204, adopted by the UN General Assembly on 15 December 2022.
[419] https://www.crm.com.mk/mk/otvoreni-podatotsi/osnoven-profil-na-registriran-subjekt?s=%D0%98%D0%B2%D0%B0%D0%BD%25%D0%9C%D0%B8%D1%85%D0%B0%D1%98%D0%BB%D0%BE%D0%B2&embs=7341580
[420] https://sdk.mk/index.php/dopisna-mrezha/se-istrazhuva-dali-bila-evrejska-kukata-vo-koja-e-bugarskiot-klub-vo-bitolskoto-evrejsko-maalo/
[421] Opinion of the Commission on Discrimination.

establishment, the association's Facebook page has been continuously publishing posts that deny the uniqueness of the Macedonian people and language, and the role of the fighters in the anti-fascist national liberation war (1941-1945) in the creation of the independent Macedonian state. The organisation calls on citizens of North Macedonia to identify as Bulgarians. These posts propagate a distorted view of Ivan Mihajlov, and incite hatred and discrimination against the heirs, admirers and continuers of the works of the Union of Fighters, as well as against the Macedonian people and the Macedonian language.

The association for the Affirmation of the Cultural Values of the Macedonian Bulgarians "Tsar Boris Treti" Ohrid was founded on 9 November 2021, admitted to the Central Registry on 16 November and approved on 17 November 2021. Tsar Boris the Third is associated with the persecution and murder of Jews from the occupied territories by fascist Bulgaria during World War II. Tsar Boris the Third and the Government of Imperial Bulgaria are directly responsible for the deportation of more than 11,300 Jews from the occupied territories in Macedonia, Greece and Serbia, to the Treblinka extermination camp. On 21 January 1941, Tsar Boris the Third signed the anti-Jewish Law for the Protection of the Nation and adopted the slogan of Nazi Germany 'One Tsar, One People, One State. Tsar Boris was subsequently condemned as a conspirator in the implementation of the so-called 'Final Solution to the Jewish Question'.

In August 2022, the Jewish Community and the Holocaust Fund of the Jews of Macedonia strongly condemned the registration of the association, considering it "a blatant example of denial and distortion of the Holocaust, of mockery and insult to the Jews".[422] The actions of the Tsar Boris the Third organisation are clearly not justifiable as an exercise of freedom of association, but instead fall under the scope of Art. 4(b) of the International Convention on the Elimination of All Forms of Racial Discrimination, which obliges States to "declare illegal and prohibit organizations which promote and incite racial discrimination". As held also by this Special Rapporteur, revisionism and attempts to falsify history may, in certain circumstances, fall under the prohibition of hate speech.

[422] https://www.slobodnaevropa.mk/a/31981707.html.

Moreover, it is also recognised that incitement may be express or implied, through actions such as displays of racist symbols or the distribution of materials as well as words, or – as in this case – through the glorification of antisemitic figures. Under Art. 87 of the Durban Declaration, States committed to move forward in acting against organisations that disseminate ideas based on racial superiority or hatred. The General Assembly has also encouraged States to take measures in order to "prevent revisionism in respect of the Second World War and the denial of the crimes against humanity and war crimes committed during the Second World War".[423] Such measures have been adopted by the State of North Macedonia.

Measures adopted by North Macedonia

First, in September 2022, an ad hoc governmental advisory body on the use of names of historical figures of associations was formed. The effectiveness of this measure is attested by the fact that as early as October 2022, the body denied a request to register an organisation under the name Ferdinand I of Bulgaria, another figure closely connected to fascist ideology.

On the 13 October 2022, the Commission for Prevention and Protection from Discrimination of North Macedonia issued a decision concerning the Ivan Mihajlov Cultural Centre. It found that this organisation committed "a prolonged and repeated harassment tantamount to severe discrimination based on national and ethnic affiliation, other beliefs and personal social status in the field of action in associations, foundations or other organizations based on membership", as well as "a prolonged and repeated calling, incitement and instruction of harassment as a severe form of discrimination on the basis of national and ethnic affiliation, other belief and personal social status in the field of activity in associations, foundations or other membership-based organizations".[424] In addition, the Commission held that the Ministry of Justice of North Macedonia committed "indirect discrimination due to failure to exercise its legal powers, which enabled the Ivan Mihajlov

[423]Resolution 77/204, adopted by the UN General Assembly on 15 December 2022.
[424]Opinion of the Commission on Discrimination

Cultural Center in Bitola to carry out actions prohibited by Article 5 and Article 6 of the Law on Prevention and Protection from Discrimination".

On 2 November 2022 the Government of North Macedonia adopted an Amendment Act of the Law on Associations and Foundations.[425] It included a provision prohibiting associations to carry "names, surnames, nicknames, pseudonyms, abbreviations and initials of persons who have on any basis, ways or forms been related to racial, religious, national, ethnic and other impatience, intolerance, hatred, genocide, extremism, propagation or support of fascism, Nazism, National Socialism and the Third Reich". The law has a retroactive effect and applies to already registered associations and foundations. The law stipulates that associations and foundations that contravene the aforementioned provisions are dissolved and deleted from the register after the Minister of Justice makes a decision to this effect.

The Amendment complies with the jurisprudence of the European Court of Human Rights, according to which refusing to register an association whose name is defamatory does not constitute a particularly severe interference: it is not disproportionate to require the applicants to change the proposed name.[426] Moreover, Art. 17 of the ECHR prohibits the invocation of, inter alia, the right to freedom of association with the aim of committing, promoting or justifying acts characterised as xenophobia and racial hatred, including antisemitism,[427] or denying and revising of clearly established historical facts, such as the Holocaust.[428] For example in 2020, on the basis of Art. 17, the ECtHR rejected a claim related to the dissolution of a far-right association which expressed support for persons who had collaborated with Nazi Germany and promoted the ideology of the Vichy regime, especially its racial laws.[429]

[425] https://smartbalkansproject.org/smart-news/the-mps-in-n-macedonia-adopted-new-amendments-to-the-law-on-associations-and-foundations/
[426] ECtHR, APEH Üldözötteinek Szövetsége, Iványi, Róth and Szerdahelyi vs. Hungary, 1999; W.P. and Others vs. Poland, 2004.
[427] ECtHR, Pavel Ivanov vs. Russia; W.P. vs. Poland.,
[428] ECtHR, Garaudy vs. France.
[429] ECtHR, Ayoub and others v. France, 2020.

In February 2023, the deadline for organisations to align with the amended law expired. The Central Registry announced that the request made by both organisations was rejected because the required documents were not submitted within the legally stipulated period. The Commission on the use of names of historical figures by associations gave a negative opinion on the use of the name Vanco Mihailov. According to the Commission, the name is associated with fascist ideology and offends the national feelings of the Macedonian people, which is in contradiction with the adopted amendments to the law on organisations. On 29 March 2023, the organisation “Ivan Mihajlov” was deleted from the Register of Associations. In April 2023, the organisation “Tsar Boris the Third” was deleted from the Register of Associations. In its reasoning, the Commission on the use of names stated that the Bulgarian Tsar Boris the Third was responsible for crimes committed during the Bulgarian occupation of Macedonia in the World War II.

On 13 April 2023, the political party Levica submitted a criminal complaint to the Public Prosecutor’s Office of Ohrid against Hristijan Pendikov, in his capacity as General Secretary of the association “Tsar Boris the Third”. Pendikov was accused of a series of crimes, inter alia that of causing hatred, discord or intolerance on national, racial, religious and other discriminatory grounds, punishable under Art. 319(1) of the Criminal Code.[430]
On 28 April 2023, Tome Blazeski, Chairman of the association Tsar Boris the Third, was called to appear at the local prosecutor’s office on suspicion of “inspiring national, racial and religious hatred, discord or intolerance”.[431]

In May 2023, the Public Prosecutor’s Office in Bitola filed an indictment against an authorised person of the Association “Cultural Center Ivan Mihajlov”, namely the administrator of the association’s Facebook account. He is charged with a prolonged criminal offence also consisting of inciting hatred, discord or intolerance on national, racial, religious and other discriminatory grounds, as well as for another prolonged criminal offense consisting of the dissemination of racist and xenophobic material through a computer system, punishable under Art. 394(g) in conjunction with Art. 45 of the Criminal

[430] https://antropol.mk/2023/04/13/levica-kricichna-pendikov/
[431] https://www.bta.bg/en/news/balkans/446749-chairman-of-king-boris-iii-association-of-ohrid-summoned-to-prosecutor-s-office

Code of North Macedonia. The accused, a 45-year-old resident of Bitola, committed the crimes in the period from 16.04.2022 to 22.03.2023, knowing that he would incite hatred and intolerance based on ethnicity, language, religion and social status against the Macedonian people and its members in a discriminatory manner of the Jewish community in the country.[432]

In sum, the measures adopted by the authorities in North Macedonia have proven effective and appear to be in line with the State's international human rights obligations. These measures have impeded the registration of organisations that glorify Nazism and fascist figures, and they have introduced an obligation for those already registered to change their names. The State has adopted judicial measures consisting in the prosecution of individual members of these organisations that have been allegedly engaged in acts of hate speech and discrimination. However, it is particularly worrying that these organisations received and continue to receive support from a third State, and that the measures adopted by North Macedonia have been opposed by the authorities of a foreign country.

The role of the Bulgarian authorities

In this respect, the role played by the Bulgarian authorities is a source of concern. First, the opening of the Ivan Mihajlov Cultural Center was attended by the Bulgarian Prime Minister Kiril Petkov, the Head of Diplomacy Teodora Genchovska and the Vice President of Bulgaria, Iliana Yotova. In the case of the other organisation, Bulgaria's ambassador to Skopje, Angel Angelov, attended the opening and even cut a red ribbon in the doorway to celebrate the inauguration.

The Bulgarian Ministry of Foreign Affairs, shortly after the Macedonian Parliament voted on the legal amendments for associations and foundations, announced that such Bulgarian clubs will receive State support to continue their work. Bulgaria's Foreign Ministry has expressed "strong concern" over the recent legislative amendment in North Macedonia that prevents organisations and cultural clubs from using names with fascist links.[433]

[432] https://jorm.gov.mk/16155-2/

[433] https://www.eu-ocs.com/bulgaria-voices-concern-over-north-macedonian-law-change-on-associations/

The foundation “Macedonia”, established in 2021 in Bulgaria, has been supporting the funding of these organisations in North Macedonia, and promoting a revisionist history that denies the existence of the Macedonian national identity.[434] According to its website, “the Foundation ‘Macedonia’ is a cultural and educational organization created by Bulgarians from Bulgaria, RNM and the world with one goal - for the population of the Republic of Bulgaria and the Republic of Northern Macedonia to be one society in two countries”.[435] The foundation has threatened that Macedonia would not become a member of the European Union as long as it celebrates 11 October, the Day of People’s Uprising against the fascist occupation, as an official holiday.[436] Viktor Stojanov, president of this Foundation from Sofia, committed acts of hate speech, including threats to physically destroy a member of the Commission for Protection against Discrimination (KSZD) in North Macedonia, Vesna Bendevska. This Commission found that these acts not only incite violence and hatred towards a member of the KSZD, who is an elected State official, but also represents an attempt to influence the independence of the Commission as a whole.[437] The Bulgarian authorities have not taken any action in this respect.

In sum, the role of Bulgaria in these cases is particularly worrying and will be hopefully addressed by the Special Rapporteur. The State of Bulgaria has not only failed to act against organisations that are unlawful under Art. 4(b) ICERD, but it has even supported such organisations in North Macedonia.

[434] https://netpress.com.mk/bugarite-e-otvoraat-klub-i-vo-valandovo/
[435] https://www.foundationmacedonia.com/
[436] https://republika.mk/vesti/makedonija/bugarska-fondacija-makedonija-makedonija-nema-da-stane-chlenka-se-dodeka-go-slavi-11-ti-oktomvri-kako-oficijalen-praznik/
[437] https://republika.mk/vesti/makedonija/viktor-stojanov-od-bugarskata-fondacija-so-smrtni-zakani-kon-vesna-bendevska/

23.06.2023

19

Citizenship and Human Rights

By a kind invitation from Sabina Grigore member of Just Access and The League of Romanian Students Abroad, Just Access joins the conference "Future of European Law and Society". The conference is organised with the support of the Department for Romanians Everywhere and held in the European Parliament in Brussels on 23 June 2023. Our representative Luca Brocca will deliver the speech that tackles the connection between citisenship and the protection of human rights defenders (HRDs) and the lack of explicit protection of HRDs at the European level. Below you can find the complete speech.

One of the most salient legal challenges for European society today is the protection of Human Rights Defenders (HRDs). The lack of explicit protection at the European level poses a significant obstacle to their work, leaving them vulnerable to attacks, discrimination, and cyber threats. While the United Nations has well-developed legal doctrines and mechanisms for defending HRDs, Europe lags behind in this regard. This disparity must be addressed to uphold the principles of European citizenship and ensure the progressive commitments we have made.

“Citizenship” may have contested definitions, but few would deny that it involves solidarity and a shared defence of community interests. The presumptions and implications of

citizenship are proactive: idle acquiescence to governments' and law enforcement agencies' defence of shared interests is not citizenship, not even of a passive kind. Identifying human rights violations that affect others and seeking redress is integral to solidarity, and delegating the vigilant protection and progressive expansion of community interests isn't, theoretically, the task or privilege of governments. Citizenship is about norm-setting as much as about enforcement, even if the latter is largely left to elected representatives and delegated agencies. Thus the political notion and practice of citizenship has a lot in common with a seldom linked legal category, that of HRDs.

HRDs make use of their own human rights, including access to justice, freedom of expression and information, as well as freedom of association, to defend the rights and freedoms of others. These men and women embody the essence of European citizenship, which places human rights and fundamental freedoms at its core, as is clearly highlighted in the Treaty on the EU.

Europe, throughout its history, has experienced the darkness of oppression and the devastation of war. These experiences have served as a catalyst for the development of a collective consciousness that values and safeguards human rights. In the aftermath of World War II, Europe emerged with a renewed commitment to protect the inherent worth and dignity of every human being.

European citizenship is not merely a legal status; it is a set of values that binds us together as a community. It goes beyond national boundaries and transcends cultural differences, uniting us under a shared commitment to human rights and social justice. HRDs are the vanguards of this vision, reminding us of our common humanity and our responsibility to protect and promote the rights of all individuals.

For Just Access' motto we chose "Everyone can be a human rights defender". National, EU and UN human rights mechanisms are supposed to be accessible to everyone without special legal or administrative training and, as the ICC and others praise and acknowledge, the age of "citizen journalism" has evolved toward open-access criminal

investigations by volunteers that stand up to the highest forensic standards. The next step must surely be protecting better those who seek to protect others.

The UN's legal doctrines and practical mechanisms for defending HRDs are reasonably well-developed. There is an active and responsive Special Rapporteur for human rights defenders, and a separate mechanism for reporting reprisals against HRDs. Several regional human rights systems have also appointed a Special Rapporteur on Human Rights Defenders, for instance the African Commission on Human and Peoples' Rights and the Inter-American Commission for Human Rights. By contrast, Europe has no protection for HRDs. There is a reporting apparatus administered by ProtectDefenders.eu[438], a consortium of 12 NGOs, and the EU Human Rights Defenders Mechanism is supposed to provide for a dedicated EU emergency fund. The first has no enforcement powers and the second can grant up to 10K EUR to HRDs in trouble. Neither issues a respected or pioneering body of reasoned, let alone binding, legal decisions.

The European Parliament adopted a resolution three months ago on the EU guidelines on human rights defenders[439]. These guidelines, which were firstly adopted in 2004, are based on the need to provide practical suggestions for enhancing EU action in relation to this issue, and they refer to it as a long established element of the European Union's human rights external relations policy. As the European External Action Service (EEAS) highlighted, the EU Guidelines have confirmed that HRDs are our natural and indispensable allies in promoting human rights and democratization in their respective countries. The EEAS points out that support for human rights defenders is probably the most visible of the EU's human rights activities, as it has a direct impact on individuals.[440]

One Article of the guidelines which is of notable interest is Article 14, which calls upon States to provide "...swift assistance and protection to human rights defenders in danger in third countries, such as, where appropriate, issuing emergency visas and facilitating temporary shelter in the EU Member States". This was the start of what would become the

[438] http://protectdefenders.eu/
[439] https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1737502&t=d&l=en
[440] https://www.eeas.europa.eu/eeas/eu-guidelines-human-rights-defenders_en

so-called Shelter City initiative, whereby HRDs would be welcomed in European cities for a limited period of time in order to rest and take a short break from their difficult situation. This program, which was actually initiated by a Dutch NGO, still faces many challenges, such as the lack of resources, the identification and assessment of at-risk HRDs and most importantly the reintegration of HRDs after their temporary stay in a shelter city.[441]

What is noticeable in the guidelines is, still, the lack of a proposal for a binding mechanism for the protection of HRDs. The guidelines emphasise the importance of the UN special procedures, instead of providing for an efficient solution at the european level.

The European Parliament itself referred to the “essential interest that the EU and its Member States have to support and protect the activities of HRDs”[442]. It referred to the fact that the implementation of the Guidelines by the EEAS, the Commission and the Member States has been uneven, focusing mainly on reactive measures, lacking consistency in the overall implementation of the strategy and characterised by insufficient visibility of EU action and channels of support for HRDs.

The lack of protection is not an abstract problem. Just Access has defended victims of human rights abuses in highly sensitive cases, and suffered a series of cyber attacks in return. We reported them to the German police, who found them credible and serious enough to open investigations. Cyber attacks were also conducted against our Director. We reported the attacks to the Special Rapporteur, and in May 2023 three UN Special Mandates, the SR for HRDs, the Working Group on Arbitrary Detention, and the Special Rapporteur on freedom of opinion and expression, published a strongly worded Regular Opinion in our defence[443]. In this opinion, the Special Rapporteur showed their deep concern at the intimidation and cyberattacks to our director, which appeared to be directly linked to his legitimate work as a HRD including his cooperation with the UN and its mechanisms in the field of human rights. The Special Rapporteur further expressed their

[441] https://heinonline-org.ezp.biblio.unitn.it/HOL/Page?public=true&handle=hein.journals/nethqur49&div=27&start_page=282&collection=journals&set_as_cursor=0&men_tab=srchresults
[442] https://oeil.secure.europarl.europa.eu/oeil/popups/printsummary.pdf?id=1737502&l=en&t=D
[443] https://srdefenders.org/qatar-alleged-intimidation-and-cyber-attacks-against-mark-somos-following-his-communications-with-un-human-rights-bodies-joint-communication/

concern about the chilling effect the alleged intimidation, cyber-attacks and breaches of privacy rights can have on the right to freedom of expression, including the freedom to seek, receive and impart information. However, it was not the first time that the Special Rapporteur expressed this concern.

Though strangely no relevant statistics exist, anecdotal evidence suggests that we are not exceptional in this regard. At UN side events and NGO interactions at umbrella organisations we've joined, such as the CICC, the OSCE Network or UNCAC(convention agasint corruption), during breaks, between sessions, and in the course of interviews for our podcast series, we hear NGO officers and colleagues telling us over and over and over again that they suffer from discrimination, cyber attacks, aggression and bias in ways that fully and directly violate applicable international law. Yet there is nothing they can do at the EU level.

The GDPR is a marvel of progressive privacy protection that the UN, the US, and others admire and follow. By contrast, HRD protection in Europe is bleak. As HRD activities are increasingly democratised, the legal definition and scope of HRD protection must be improved, lest we lose the spirit and renege on the progressive commitments of European citizenship.

28.06.2023

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Corruption in Cambodia and the Influence of the International Level

During the 8th Asia-Pacific Victims of Corruption (VoC) meeting, Piseth Duch, the founder of the business and human rights law group, presented the legal standing of VoCs with regard to Cambodia. While his presentation initially provided a robust legal framework for facing corruption at the national level in Cambodia, two case studies proved otherwise. For this reason, Just Access asked whether the ratification of the UNCAC by Cambodia in 2007 had any influence at the national level, and whether the establishment of a Special Rapporteur (SR) for anti-corruption might lead to better results. This blog post will examine the case of Cambodia to understand the concrete influence of the UNCAC at the national level and whether the establishment of a SR for anti-corruption is feasible and, if that is the case, whether it is also desirable.

In Cambodia, there are several ways to initiate civil and criminal proceedings. As it is a civil law system very similar to France's, the legal standing VoCs is mainly governed by the Criminal Procedure Code and the Anti-Corruption Law (ACL), which was enacted in 2010 due to the high level of corruption in the country.

In addition to the usual remedies provided by civil law, Cambodia has also established an Anti-Corruption Unit (ACU), which is the central institution responsible for investigating and combating corruption. The ACU was established in 2010 along with the enactment of the ACL, demonstrating the Cambodian government's strong commitment to fighting

corruption.[444]The ACU has several privileges granted to it to ensure that it can effectively carry out its duties. These include privileges in investigating corruption cases, freezing an individual's assets, and cooperating with public authorities.

Since its establishment, the ACU has gained tremendous public support, both nationally and internationally.[445]Due to the confidence in the ACU, more and more private sector companies have signed Memorandums of Understanding with it to participate in the fight against corruption and conduct business in a corruption-free environment. The dissemination of the ACL has helped public officials and ordinary citizens to better understand the impact of corruption and actively participate in the fight against this universal social disease.

In addition to efforts to combat corruption at the national level, Cambodia has also ratified the UNCAC in 2007.[446] The ratification encouraged Cambodia to develop and implement comprehensive anti-corruption policies and measures, such as those described above. Cambodia has had to take initiatives to improve transparency, accountability and integrity in public administration, as well as to strengthen anti-corruption institutions and mechanisms to comply with the UNCAC. It is also important that the UNCAC has established a monitoring mechanism to better monitor how corruption has been addressed in Cambodia after ratification in 2007.

In its first review,[447] the Implementation Review Group relied on a self-assessment checklist that provides very detailed and comprehensive information on the implementation of the UNCAC in Cambodia. The review involved all stakeholders, including the legislative, executive, legal and judicial branches, the private sector, civil society, development partners, and academia.

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[444] https://www.unafei.or.jp/publications/pdf/GG11/13_GG11_CP_Cambodia.pdf
[445] https://www.unafei.or.jp/publications/pdf/GG11/13_GG11_CP_Cambodia.pdf
[446] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&clang=_en
[447] https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1600439e.pdf

In addition to pointing out many criticisms of the implementation of the Convention, the Implementation Review Group also highlighted the success of the ACL and ACU. The ACL has proven successful in promoting the effectiveness of all forms of service delivery and strengthening good governance and the rule of law, as well as upholding integrity and justice, which are fundamental to social development and poverty reduction.[448]

Despite the measures that Cambodia has taken at the national and international levels, the case law clearly shows that there is still much to be done in this regard. Piseth Duch decided to mention two recent cases to show this.

The first case concerned the conviction of the former president of Sovann Komar,[449]an NGO which works to give a home to orphans and abandoned children. Sovann Komar has asked authorities to expedite the arrest of its former executive director, Sothea Arun, who had been accused of being a child rapist, being corrupt, and embezzling funds from the organisation.[450] Police reported that sexually explicit images and videos of children and animals were found on Arun's desk at his workplace, where he cared for more than 50 orphans and abandoned children. Sovann Komar added that the man had been accused of raping two girls, and one of them was just six years old. The victims testified in court that sexual assault and rape had occurred since their childhood and continued into their teens. Despite there being 2 arrest warrants in force, and even though complaints have been made to the ACU concerning Arun’s conduct with the Ministry of Social Affairs, Veterans and Youth Rehabilitation and other government offices, he remains at large.[451]

The second case mentioned by Piseth Duch involved Hout Heang, a former judge in Kandal province who was sentenced to two years in prison for bribery.[452] He was charged in 2012 and found guilty of threatening a victim to pay him to give her a favorable decision. The victim filed a complaint with the ACU and Judge Heang was found guilty of bribery.

[448] https://www.unafei.or.jp/publications/pdf/GG11/13_GG11_CP_Cambodia.pdf
[449] https://sovannkomarllc.com
[450] https://www.khmertimeskh.com/501088464/child-ngo-wants-former-director-accused-of-child-sex-abuse-found/
[451] https://cambodianess.com/article/the-former-director-of-the-ngo-sovann-komar-to-go-on-trial-for-child-abuse-in-phnom-penh
[452] https://www.phnompenhpost.com/national/bribery-charges-follow-acu-arrest-kandal-judge

Nevertheless, he was pardoned by the king in 2018 and reinstated as a judge because of his strong connections with both the king and the government.

The case law examined during the meeting clearly showed a gap in the anti-corruption system that needs to be addressed. For this reason, Just Access has asked whether it is feasible to establish a SR to fight corruption and, if so, whether it would be useful to better fight corruption in Cambodia.

The question of whether a SR for anti-corruption is needed was addressed at the special session of the Conference of the States Parties to the UNCAC in Sharm El-Sheikh in Egypt on December 15, 2021.[453] The issue arose as UNCAC implementers increasingly face pushback, from individual attacks on their work to systematic undermining of anti-corruption institutions. By acting as a focal point for the anti-corruption community, a SR would make all human rights mechanisms more accessible to all involved in the fight against corruption.[454]

For this reason, even the European Parliament, in a draft report by the Foreign Affairs Committee 2021 [455] formulated a recommendation to the European Council to insist on the establishment of a UN SR on Financial Crime, Corruption and Human Rights with a comprehensive mandate that includes a goal-oriented plan and regular assessment of the anti-corruption measures taken by states. Although this recommendation was adopted in 2022,[456]it is unlikely to be implemented by the European Council because it requires the unanimous support of all 27 member states.

As Transparency International points out, there is enormous potential to link the anti-corruption movement with the opportunities offered by the existing human rights apparatus. The establishment of a SR would be the clearest step forward and the necessary incentive to engage anti-corruption organizations and defenders.

[453] https://www.unodc.org/unodc/en/corruption/COSP/session9.html
[454] https://www.u4.no/blog/special-rapporteur-on-anti-corruption-mandate
[455] https://www.europarl.europa.eu/doceo/document/AFET-PR-696265_EN.pdf
[456] https://www.europarl.europa.eu/doceo/document/A-9-2022-0012_EN.html#_section3

To better understand whether a Special Rapporteur on anti-corruption is feasible and desirable, it is necessary to analyze a report of the Special Rapporteur on the situation of Human Rights Defenders, Mary Lawlor, published in 2022.[457] In the report, Mary Lawlor analyzes the situation of human rights defenders (HRDs) working against corruption and emphasizes that the protective framework applicable to HRDs should also apply to them, since this is often not the case.

Indeed, HRDs often work in the anti-corruption field. For example, human rights activists who work to protect the environment and expose corruption in business and development projects, including extractive industries, are often at risk of physical attack, and those who organize protests against corruption can be targeted through surveillance, arrest, and excessive use of force.

The report of the SR concludes that the links between corruption, anti-corruption efforts and human rights are multidimensional but not always fully understood. Anti-corruption activists should be considered HRDs and for this reason should be protected by the existing mandate of SR on the situation of human rights defenders.

In conclusion, steps need to be taken at the national and international levels to improve the legal framework for anti-corruption in Cambodia. First, at the national level, the gap between the law on the books and the law in action needs to be addressed. Second, the appointment of a Special Rapporteur on anti-corruption could help put further international pressure on the country to improve the overall situation. Alternatively, the current mandate of the SR on the situation of human rights defenders should be explicitly extended to also protect those defenders working to combat corruption.

[457] https://reliefweb.int/report/world/heart-struggle-human-rights-defenders-working-against-corruption-report-special