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IN THIS ISSUE

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Intergenerational equity, the public trust doctrine and the environment: a human right to a habitable environment

Introduction

Human rights as a legal discipline is ostensibly devoted to the protection of the most vulnerable members of society. Of those protected groups, perhaps the least recognised, and yet most victimised, are individuals of future generations. Their victimisation variously takes the form of being the beneficiaries of a less habitable environment, an economy plagued by debt and weakened or debased political and legal institutions. In all cases, the victimisation arises because the present generation believes itself devoid of the responsibility to maintain such aspects of society for future inhabitants.[1]

Intergenerational equity

This notion, that present generations owe an inherent legal and moral duty to ensure that future generations are afforded the protection of fundamental rights, has been termed by some legal scholars, such as Edith Browne Weiss, as 'intergenerational equity'.[2] Recently, intergenerational equity has become the jurisprudential touchstone of the bulk of the litigation focusing on climate change and the preservation of the environment.[3] This litigation revolves around the contention that the current degradation of the environment constitutes a breach of the rights of future generations to a habitable Earth.

In terms of the pertinent case law relative to the subject of intergenerational equity, such discussion must begin with the hallmark ruling by the Supreme Court of the Republic of the Philippines (Kataas-taasang Hukuman or SCRP) in *Oposa et al v Factoran*[4] (*Oposa*). In *Oposa*, an action was brought on behalf of 43 children, in addition to children yet unborn, against the Government of the Philippines (Pamahalaan ng Pilipinas) concerning the granting of timber license agreements. The SCRP held that the case presented 'a special and novel element', in that the petitioners asserted that they represented their generation as well as generations yet unborn.[5] Notably, the SCRP held that the petitioners were within their rights to file a class suit 'for themselves, for others of their generation and for the succeeding generations'.[6] *Oposa* is of tremendous jurisprudential value pertaining to intergenerational equity, because the SCRP recognised that the ability to sue on 'behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned'.[7]

Public trust doctrine

In an American context, we have the case of *Juliana v United States*[8] (*Juliana*), wherein the plaintiffs consisted of 21 young citizens, an environmental organisation and a representative of future generations. They accused the US government of 'causing various climate-change related injuries to the plaintiffs', through allowing the unchecked use of fossil fuels.[9] The plaintiffs based their claim on the public trust doctrine.[10] The court explained that the public trust doctrine 'operates according to basic trust principles', which impose upon the trustee a fiduciary duty to 'protect the trust property against damage or destruction', the trust property being the environment as a whole within this case.[11] The intergenerational element was acknowledged by the court asserting the trustee owes this duty 'equally to both current and future beneficiaries of the trust'.[12] On appeal, the appeal court reluctantly concluded that the relief requested by the plaintiffs was beyond the court's constitutional power and the plaintiffs' case must be made to the political branches of government or to the electorate at large.[13]

Recently, in the 2023 American decision in *Held v State*[14] (*Held*), we once again see a

decision wherein the court is called upon to adjudicate an application challenging the presumption that the public trust doctrine is the savior of the environment for future generations. *Held* has been touted as a 'landmark case in environmental law',[15] in that it is the first climate litigation in the US 'to reach trial and the first judicial decision directly tying climate change to Constitutional rights'.[16] In *Held*, 16 Montana youths commenced an action against the State of Montana et al, wherein the claimants 'challenged the constitutionality of the State's fossil fuel-based state energy system, which they allege causes and contributes to climate change in violation of their constitutional rights guaranteed under [...] the Montana Constitution; and the public trust doctrine'.[17] Significantly, the court noted that the public trust doctrine is already codified in the Montana Constitution, unlike other jurisdictions.[18] Ultimately, the court ruled that the state's fuel-based energy system was unconstitutional.

Despite *Held* being the first common law constitutional success for the public trust doctrine and intergenerational equity, it is important to note that as the public trust doctrine was already enshrined in the Montana Constitution, it did not require any qualifying argument for its merit and application. Thus, *Held* presents a deceptively attractive solution to the issue of intergenerational equity and the public trust doctrine, suggesting that it may be implemented into other legal orders through statute or constitutional amendment. Such a notion however is naive at best and ignorant at worst. As many scholars have noted, the American, Canadian and British Constitutions are exceptionally difficult to change, nigh impossible.[19]

Conclusion

Intergenerational equity will, in the present and future, require effective legal remedies to protect the human right to a clean environment. That being so, to ensure the preservation of this human right, the law cannot afford to look solely to the public trust doctrine as the savior of intergenerational equity, without a corresponding constitutional safeguard. Failing this safeguard, then, as Francis Wright foretold, ultimately, we 'see, perhaps, unborn generations weeping the injustice of their fathers, and worshipping those truths which they condemned'.[20]

Notes

1 Stephen Humphreys, 'Against Future Generations' (2022) 33 EJIL, 1061.
2 Edith Browne Weiss, 'Intergenerational equity: a legal framework for global environmental change' in Edith Brown Weiss (ed), *Environmental change and international law: New challenges and dimensions* (United Nations University Press 1992) 6.
3 Aoife Daly, 'Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC' (2023) 41 NQHR, 132.
4 [1993] 33 ILM 173 (SCP).
5 Ibid., 185.
6 Ibid.
7 Ibid.
8 *Juliana v United States* No 6:15-cv-01517-TC, 2016 WL 6661146 (D Or 10 November 2016) at [40].
9 Ibid., 12.
10 Ibid., 22.
11 Ibid., 39.
12 Ibid.
13 *Juliana v United States* No 18-36082 DC No.6:15-cv-01517-AA (17 January 2020) at [11], [32].
14 *Held v Montana* No CDV-2020-307 (Mont 1st Dist. Ct.) (14 August 2023).
15 Matthew Grabianski, 'What *Held v. Montana* immediately offers for Constitutional, Environmental Rights' (The Georgetown Environmental Law Review, 16 November 2023) < https://www.law.georgetown.edu/environmental-law-review/blog/what-held-v-montana-immediately-offers-for-constitutional-environmental-rights/> accessed 14 March 2024,
16 Ibid.
17 *Supra.* note 14, 2.
18 Ibid., 92.
19 Tom Ginsburg and James Melton, 'Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty' (2015) 3 IJCL 686, 686. in relation to the American Constitution, the authors state that 'It is often asserted that the United States' Constitution is the world's most difficult to amend'. In regards to the United Kingdom constitution, see Parliament.UK, 'The process of Constitutional Change' (Parliament.UK, 2011) <House of Lords - The Process of Constitutional Change - Constitution Committee (parliament.uk)> [Accessed 27 March] where it was stated that, 'It was common ground amongst our witnesses that, because the United Kingdom does not have a codified constitution, no watertight definition of a constitutional change to which a special process may apply can be given. A number of our witnesses pointed to the fact that the UK constitution consists not only of statutes, but of conventions, practices and underlying principles such as parliamentary sovereignty and the rule of law. Democratic Audit summarised the difficulty which this presents for the establishment of a constitutional change process.' In terms of the Canadian Constitution see Richard Albert, 'The Difficulty of Constitutional Amendment in Canada' (2015) 53.1 Alberta Law Review 86, where the author states, 'No one can deny the difficulty of amending the US Constitution. But the Constitution of Canada may be even harder to amend'.
20. Frances Wright, *A few days in Athens* (E Bliss & E White 1825) 114.

Ragini Kanungo

The right to protest: analysing its scope, restrictions and contemporary developments

'We have a right to protest for what is right'
John Lewis[1]

Right to protest: a manifestation of human rights

Protests have significantly contributed to shaping the socio-economic and political status of countries. Be it gaining independence from colonialism, or activism to promote climate change policies, protests have been at the helm of furthering collective democratic goals. Post-establishment of the United Nations and adoption of the International Bill of Human Rights, the right to protest was recognised as an integral aspect of the right to freedom of expression[2] and right of peaceful assembly[3]. Additionally, depending on the nature of assembly, the right to protest is an implication of the freedom of movement[4], right to religion[5] and right of political participation.[6] However, this right is only protected within the ambit of peaceful protests.

The state authorities must presume that protests are peaceful unless contrary evidence is available.[7] While minor disruption in transportation and economic activities due to protests is acceptable, any form of violence, incitement to violence or hostility renders the protest unlawful, thereby eliminating the bundle of human rights associated with right to protest. Nevertheless, isolated or sporadic instances of violence do not make all protesters liable. The difference in peaceful and violent protest lies in the communicative value of the former and material power of the latter.[8] While a peaceful protest is a manifestation of freedom of speech and expression with the objective of communicating a message to larger audience, a violent protest aims at the appropriation of things and the impoverishment of status quo. Therefore, though the scope of the right to protest is wide enough to encapsulate assemblies conducted outdoors, indoors or online, in the form of strikes, demonstrations or processions, all of these activities must be peaceful.[9]

Non-absolute right: restrictions on the right to protest

The right to protest, much like other human rights, is subject to restrictions. Some of the grounds for restricting the right to protest are: interests of national security, public safety, public order, protection of public health, morals, the freedoms of others, rights and freedoms of others.[10] These grounds for restrictions must comply with the 'three-part test' of legality, necessity and proportionality, otherwise it will be considered as a violation of the right to protest.[11] In addition to the above grounds, countries may derogate from their obligations towards the right to protest in cases of public emergency.[12] Complete prohibition or dispersal of protest must only be applied as a last resort.

Governments are often bestowed with a 'margin of appreciation' while imposing restrictions on protests to balance the right with general public convenience.[13] Even with a margin of appreciation, the restrictions and actions taken by a government have to meet the three-part test. It has been held that in cases of spontaneous violent demonstrations, counterattacks by police must not be lethal – direct use of powerful weapons is disproportionate and therefore violative of right to protest and right to life.[14]

Courts have also upheld restrictions when in conformity with international standards. In India, during protests against the 2019 Citizenship Amendment Act, it was held by the Supreme Court that public ways and spaces cannot be occupied indefinitely under the rhetoric of the right to protest.[15] This was in consonance with the protection of the rights and freedoms of others, emphasised by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions as well.[16] Similarly, in the United Kingdom, a court held that a restriction by law on conducting a 24-hour vigil in Parliament Square, London was legitimate as it balanced the rights of others with the rights of protesters.[17] Thus, it is a fine balance between the right to protest

and its restrictions which ensures a conducive environment for democratic discussions.

Contemporary developments: a threat to the right to protest?

The right to peaceful assembly, and thereby the right to protest, is recognised in the constitutions of 184 member states of United Nations.[18] Yet, legislative and administrative actions over the past few years have purported to impose curbs on the right to protest by increasing penalties for public nuisance and requiring prior authorisation for protests at specific places. With cases of arrests, detentions and compulsions to remove masks, administrative actions against protesters have been questioned as to whether they adhere to an appropriate margin of appreciation. In the US, the states of Utah and Tennessee have enacted laws which include 'noise' as a potential condition for limiting protests (ie, if it causes 'unease, alarm or distress' to persons in the vicinity of the protest).[19] Similarly, in the UK, the enactment of a law in 2022 has authorised police to impose conditions upon the location, size and timing of protests beyond the 1986 Public Order Act.[20] Similar laws without any thresholds leave an opportunity for authorities to misuse their power depending on the political nature of the protests.[21]

It is also important to consider that states have a two-pronged obligation: negative and positive. While states must not interfere with peaceful protests unless warranted, it is also imperative to maintain an environment supportive of peaceful protests. To fulfil the positive obligation, it may seem necessary to impose limitations which restrict anti-social elements from taking to the streets under the veil of the right to protest. A recent example are the farmers' protests in India in February 2024, wherein thousands of protesters intended to enter New Delhi in tractors despite requests by the government for dialogue. To prevent the recurrence of the same violence that followed in the previous protest in 2020, including vandalism and the removal of an Indian flag from Red Fort, authorities prevented the protesters from entering the city. Therefore, it is important to assess each instance of state action on a case-by-case basis to ascertain its objective and impact on the right to protest.

Conclusion

The right to protest, while being a universally recognised human right, is also an indispensable pillar of democracy. It is among the few ways through which citizens can express their concerns and propel social change. International law and jurisprudence have established the scope and restrictions of the right. Contemporary developments must be analysed in light of the same principles to uphold the true essence of right to peaceful protest.

Notes

1 John Lewis was an American civil rights leader and politician. See: David Smith and Nicky Woolf, 'Democrats continue House sit-in demanding vote on gun control' (The Guardian, 23 June 2016) <https://www.theguardian.com/us-news/2016/jun/22/house-democrats-stage-sit-vote-gun-control> accessed 1 March 2024.
2 United Nations, 'International Covenant on Civil and Political Rights' (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171, art.19.
3 Ibid, art. 21.
4 Ibid, art. 12.
5 Ibid, art. 18.
6 Ibid, art. 25.
7 UN Human Rights Committee, 'General Comment No 37 on Article 21 (Right of peaceful assembly) (17 September 2020) CCPR/C/GC/37, para.17.
8 Illan rua Wall, 'The right to protest' (2023) IJHR, 11 <https://doi.org/10.1080/13642987.2023.2262395> accessed 1 March 2024
9 Amnesty International, 'The Right to Peaceful Assembly' Submission to the United Nations Human Rights Committee, 125th Session, Half-Day of Discussion, 11 March 2019, p.10.
10 Supra note 2, art 21.
11 Supra note 9, p 15.
12 Supra note 2, art 4.
13 Pranay Lekhi, 'The Supreme Court of India, Right to Protest and the Indefinite Occupation of Public Space' (Opinio Juris, 23 November 2020) <https://opiniojuris.org/2020/11/23/the-supreme-court-of-india-right-to-protest-and-the-indefinite-occupation-of-public-space/> accessed 1 March 2024
14 *Gulec v Turkey* (1999) 28 EHRR 121 at [71].
15 *Amit Sahni v Commissioner of Police* (2020) 10 S.C.C. 439 (India).
16 UN Human Rights Council, 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assembles – Note by the Secretariat' (4 February 2016) A/HRC/31/66, para.29.
17 *R. (on the application of Gallastegui) v Westminster City Council* [2013] EWCA Civ 28, [2013] 1 WLR 2377.
18 UN Human Rights Committee, 'General Comment No.37 on Article 21' (Right of peaceful assembly) (17 September 2020) CCPR/C/GC/37, para.3.
19 Milos Resimic, 'Limiting the right to protest: Comparing restrictions in the G7, Russia and China' (Transparency International, 15 June 2021), 3 <https://www.jstor.org/stable/resrep32880> accessed 1 March 2024
20 Police, Crime, Sentencing and Courts Act 2022 (UK).
21 See National Security Law 2020 (HKSAR); Global Security Law 2021 (France); Summary Offences (Obstruction of Public Places) Amendment Bill 2023 (South Australia).

Beyza Yanıkoğlu

Is life imprisonment without parole the new death penalty?

Introduction

Criminal justice systems have always tried to determine a 'best way', which satisfies society and answers its needs within the punishment algorithm, to punish perpetrators. When the death penalty faced a rapid abolition in the western world[1], criminal justice systems looked for an alternative: life imprisonment without parole (LWOP). LWOP is one of the heaviest criminal punishments since the 'legal nature of life imprisonment [...] has its own legitimacy, which is drawn from the death penalty because it is considered as its substitute'[2].

The abolishment of right-to-life violating the death penalty has not necessarily solved the human rights compatibility since it allowed the states to put their criminals in prison till their death. So, it was observed that 'initial purpose of substitution by life imprisonment was not to mitigate the conditions for the convicted'[3]. The concern is raised on the grounds of the punishment's duration, being subject to review during the execution and the possibility of parole since the life imprisonment needs to be implemented in a manner that opposes to torture or cruel, inhuman or degrading punishment[4]. However, an excluding-from-society approach could constitute 'a kind of slow torture and psychic mutilation'[5] and 'a slow process of social deformation'[6], which indeed makes no difference from death penalty [7] in a way because 'a human life involves not just existence and survival, but the unique development of a personality [...] and unfettered social intercourse'[8] and links to 'civil death'[9] where the freedom of the individual is terminated permanently.

The European Court of Human Rights' caselaw on LWOP and the context of the 'right to hope' and human dignity

The European Court of Human Rights (ECtHR or the 'Court') accepts states' margin of appreciation in criminal justice and life imprisonment is not *per se* prohibited under the European Convention on Human Rights[10]. However, challenges regarding life imprisonment can be brought before the Court under irreducibility issues, which unveils the question of respecting human dignity and right to hope.

'right to hope' has appeared in the ECtHR's terminology mainly with *Vinter/UK*[11] case when approach to death penalty had started to change. Before this landmark decision, the Court considered life imprisonment contrary to Article 3 (Art 3) due to either sentence being excessive and arbitrary or absence of safeguard of review[12].

Leger/France[13] case was decided that very long sentences did not violate Art 3 despite their anxiety and uncertainty natures. With *Kafkaris/Cyprus*, the ECtHR held that the imposition of an indeterminate life sentence was not necessarily in contrary to Art 3 if there is *de iure* and *de facto* hope, prospect or possibility of release[14] and appeared to outlaw the LWOP in a sense. So, the Court used an applicable test observing *de iure* and *de facto* reducibility. However, it accepted the existence of possibility of release even it depends on President's decision or agreement of Attorney's General[15] and thus did not find any violation regarding Art 3. However, the possibility of release should appear as a legal possibility rather than being treated as grace on discretion by the executive[16].

In *Vinter/UK*, the Court found a violation of Art 3 where this finding guaranteed the applicants' 'right to hope' to be protected. Indeed, the Court acknowledged that LWOPs are obstacles before the rehabilitation and reintegration of the convicted. Also, it focused on the notion of human dignity and right to hope meaning to hope for possibility of release one day as the core of the judgment and allowed to argue that the punishment lacking any possibility of release and hope is a slow form of torture leading the 'social death of the prisoner' and against the human dignity.

However, later in the *Hutchinson/UK* decision[17], the Court found no violation of Art 3 although UK system remained unchanged. This judgment was criticised that

Vinter standards were overruled[18]. After, the Court[19] fortunately gave a signal to return to higher standards. Although the spirit of the right to hope has started to blossom in its other decisions[20] and even inspired other courts beyond its scope[21], it is highly possible that there will be still doubts about the Court's integrity on the issue unless the Court would defend higher standards in a similar case against UK in the future.

Contributions from national courts to the 'right to hope' and outlawing LWOPs

Before it was discussed on a transnational level, right to hope was referred in national courts. The US Supreme Court held in *Graham v Florida*[22] that LWOP gives no chance for reconciliation and no hope. Previously, it did not find LWOP, which was declared as acceptable sentence in *Schick v Reed*[23], constitutionally disproportionate[24] and let the rapid growth of it. In 1977, the German Federal Constitutional Court stated 'The state strikes at the very heart of human dignity when [...] stripping them of all hope of ever earning their freedom [...]'[25]**.** In this decision, court suggested that 'The state cannot turn the offender into an object of crime prevention to the detriment of this constitutionally protected right to social worth and respect [...]'[26] which then also confirmed by Constitutional Court of Africa[27]. Lately, the Supreme Court of Canada[28] ruled that; 'A sentence of imprisonment for life without a realistic possibility of parole is intrinsically incompatible with human dignity', which builds on the outlawing of LWOP sentences[29].

Conclusion

LWOP becomes the most preferred punishment type when death penalty is abolished. The need for a severe punishment to fill the gap is due to the desire to convince and even satisfy the public that criminal justice system still has effective methods for crime prevention and dealing with the perpetrators to protect the community. The idea behind it lies on penal populism, which aims for more punitive sentencing. The criminal is considered more of an enemy who needs to be destroyed rather than an individual who has rights. Thus, the punishment policies face challenges regarding compatibility with human rights law.

So, is it still possible to argue that LWOP within all means is a compatible alternative for the death penalty just because it does not violate right to life? From where I stand, the answer is no. It is because 'right to be protected from ill-treatment may not seem as highly ranked as right to life, but they are both rooted in human dignity and cannot yield to each other where any conflict could arise'[30]. Human rights law is for protecting all individuals including the 'worst kinds' because they might have been less of human in people's eyes, but they sure are not in the eyes of justice.

Notes

1 The Council of Europe (CoE) effectively outlawed the 'death penalty' by Protocol 13 to the European Convention on Human Rights in 2003, so all CoE states, excluding Azerbaijan, ratified the Protocol and abolished death penalty from their criminal justice systems. For further information please see: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=187

Also, Article 6 of the International Covenant on Civil and Political Rights restricts the use of death penalty and then introduced 2nd Protocol in 1989 to abolish the death penalty. The protocol was signed and ratified by 90 states, including all European states, but not signed by 107 states including China, Russia and the United States. Please see: https://indicators.ohchr.org/

2 Veljko Turanjanin, 'Life Imprisonment without Parole: The Compatibility of Serbia's Approach with the European Convention on Human Rights' (2021) 42 LLR 243, 244.

3 Council of Europe: European Committee for the Preventions of Torture and Inhuman or Degrading Treatment or Punishment (CPT), '25th General Report of the CPT', 1 January–31 December 2015, p.34.

4 Dirk van Zyl Smit, 'Life imprisonment as the ultimate penalty in international law: a human rights perspective' (1998)9 CLF, 12.

5 Jeffrie Murphy, *Retribution, Justice, and Therapy* (D Reidel Publishing Company 1979) 240.

6 UN Crime Prevention and Criminal Justice Branch Report, 'Life Imprisonment' (Vienna, 1994), p.7.

7 *S v Tcoeib* (SA 4 of 1993) [1996] NASC 1, 1996 (1) SACR 390 (NmS) at 9.

8 Lean Shaskolsky Shelef, *Ultimate Penalties. Capital Punishment, Life Imprisonment and Physical Torture* (Ohio State University Press 1987) 138.

9 Catherine Appleton, 'Life without Parole' (2015) Oxford Handbook Topics in Criminology and Criminal Justice, 2 < https://doi.org/10.1093/oxfordhb/9780199935383.013.25> accessed 14 March 2024

10 Case 7994/77 *Kotällav v The Netherlands*, unreported, 6 May 1978; Case 13183/87 *Bamber v United Kingdom*, unreported, 14 December 1988; Case 63716/00 *Sawoniuk v United Kingdom*, unreported, 29 May 2001; Case 21906/04 *Kafkaris v Cyprus* (2009) 49 EHRR 35 at [97]; Case 66069/09 *Vinter v United Kingdom* [2016] 63 EHRR 1, GC at [119]; Case 57592/08 *Hutchinson v United Kingdom* 43 BHRC 667, GC at [42].

11 Case 66069/09 *Vinter v United Kingdom* [2016] 63 EHRR 1, GC.

12 Steve Harold Foster, 'Whole Life Sentences and Article 3 of the European Convention on Human Rights: Time for Certainty and a Common Approach?' (2015) 26 LLR

147, 148.

13 Case 19324/02 Leger v France (2009) 49 EHRR 41 at [89]–[94].

14 Case 21906/04 *Kafkaris v Cyprus* (2009) 49 EHRR 35 at [98]–[100].

15 Mary Rogan, 'The European Court of Human Rights, Gross Disproportionality and Long Prison Sentences' (2015) 1 Public Law 22, 25.

Also see Case 36295/02 *Iorgov v Bulgaria (No.2)*, unreported, 2 September 2010; Case 4413/06 *Törköly v Hungary*, unreported, 5 April 2011; Case 70495/10 *Lynch v Ireland*, unreported, 18 June 2013.

16 Italian Constitutional Court, 'Raccolta uffiziale delle sentenze e ordinanze delle Corte Constituzionale' (Offical collection of sentences and orders of the Constitutional Court* (*Publisher's translation), (42), 7 November 1974, s.353 (For this information see: Case 7994/77 *Kotällav v The Netherlands*, unreported, 6 May 1978 at 240).

Italian Constitutional Court, (204/1974), 27 June 1974 (see Case 66069/09 *Vinter v United Kingdom* [2016] 63 EHRR 1 at [72]).

German Constitutional Court, *45 BVerfGE 187*, 21 June 1977; Italian Constitutional Court Judgment No.274, 27 September 1987; French Constitutional Court Decision No.93-334 DC, 20 January 1994. (For this information please see Case 24069/03 *Öcalan v Turkey (No.2)*, unreported, 18 March 2014, fn.7.)

17 Case 57592/08 *Hutchinson v United Kingdom* 43 BHRC 667, GC at [70]–[73].

18 Kanstantsin Dzehtsiarou, 'Is There Hope for the Right to Hope?' (*ECHR Blog*, 19 January 2017) <https://www.echrblog.com/2017/01/guest-post-on-grand-chamber-judgment-in.html> accessed 14 March 2024

19 Case 22662/13 *Matiošaitis v Lithuania*, unreported, 23 August 2017 at [180].

20 Case 24069/03 *Öcalan v Turkey (No.2)*, unreported, 18 March 2014 at [203]–[307]; Case 73593/10 *Laszlo Magyar v Hungary*, unreported, 20 May 2014 [58]; Cases 15018/11 and 61199/12 *Harakchiev and Tolumov v Bulgaria*, unreported, 8 July 2014 at [266]; Case 49905/08 *Cacko v Slovakia*, unreported, 22 July 2014 at [80] and [82]; Case 140/10 *Trabelsi v Belgium* (2015) 60 EHRR 21 at [133]; Case 10511/10 *Murray v The Netherlands*, (2017) 64 EHRR 3 at [87]; Case 22662/13 *Matiošaitis v Lithuania*, unreported, 23 August 2017 at [180]–[183].

21 Constitutional Court of Zimbabwe, *Makoni v Prisons Commissioner* (CCZ 8/16 Const. Application No.CCZ 48/15) [2016] ZWCC 8; Supreme Court of Namibia, *Zedikias Gaingb v The State* [2018] NASC 4; Supreme Court of Canada, *R. v Bissonnette* 2022 SCC 23.

22 *Graham v Florida* 560 U.S. 48, 2010 at [79].

23 *Schick v Reed* 419 U.S. 256, 1974.

24 *Harmelin v. Michigan*, 501 U.S. 957, 1991.

25 Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edition, Duke University Press 2012 366.

See the case: German Constitutional Court, *45 BVerfGE 187*, Decision, 21 June 1977 (also known as the 'Life Imprisonment' case).

26 German Constitutional Court, *45 BVerfGE 187*, Decision, 21 June 1977 at 365.

27 *S v Dodo* 2001 (1) SACR 594 (CC) at 38.

28 Supreme Court of Canada, *R. v Bissonnette* 2022 SCC 23 at [8].

29 Dirk van Zyl Smit, 'R V. Bissonnette: Supreme Court of Canada Builds on ECtHR Precedents to Outlaw Whole Life Imprisonment, and Develops Principles Applicable Also to Extradition that May Lead to Such Sentences' (*Strasbourg Observers*, 28 June 2022) <R v. Bissonnette: Supreme Court of Canada builds on ECtHR precedents to outlaw whole life imprisonment, and develops principles applicable also to extradition that may lead to such sentences. - Strasbourg Observers> accessed 14 March 2024

30 Balazs J Geller, Some Thoughts on the Changing Faces of Human Dignity in Criminal Law', (2013) 1 ELTE Law Journal 29, 39.

Nicholas Lower

Cultural genocide must have a prevention mechanism

'The international community has become increasingly aware of the destruction of Ukrainian cultural heritage, such as highly visible architectural monuments, religious buildings and public monuments [. . .] The combination of modern weapons and the widespread use of First World War types of trench systems is [also] destroying buried cultural heritage at an alarming rate.'[1]

Global armed conflict has thrust cultural genocide to the forefront of human rights advocacy over the last decade.[2] Organised looting, the illicit trafficking and sale of cultural objects and the intentional destruction of cultural property have become tools of armed conflict used to deprive a people of their cultural history and identity.[3] States' request to only include biological genocide in the Genocide Convention is insufficient because peoples can be eradicated through destruction of their cultural property and identity.[4] Criminalising biological genocide may succeed in preserving the immediate generation, but the destruction of language, art, artifacts and architecture erases the historical footprint of previous generations and deprives future generations of a distinct cultural identity. The systematic destruction of cultural property that binds a people together ultimately leads to the partial or total physical destruction of that people.[5]

There is currently only a piecemeal approach to protect cultural heritage and

property, such as Article 8(2)(b)(ix) of the Rome Statute regarding war crimes, Article 15 of The International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 4 of the World Heritage Convention.[6] However, these articles are insufficient insofar as they do not mandate prevention and punishment by states like the Genocide Convention mandates for biological genocide: punishment only occurs after the cultural destruction has happened. Cultural genocide must have a prevention mechanism because once an artifact is destroyed, it is lost forever; while restoration may be plausible, this falls short of the goal of preservation.[7]

Defining cultural genocide

Biological genocide's description as the 'crime of all crimes' has been effective in condemning genocidal acts perpetrated by rogue regimes, but this description has unfortunately forced genocide into a narrowly perceived category that Raphael Lemkin disagreed with during the drafting of the Genocide Convention.[8] Lemkin's idea of vandalism was the original conception of cultural genocide. He defined vandalism as:

> 'the systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts, and literature. The contribution of any particular collectivity to world culture as a whole forms the wealth of all humanity, even while exhibiting unique characteristics.'[9]

Lemkin believed there were interdependent techniques of genocide, and the conception of vandalism was one such technique.[10] Ultimately, cultural genocide was omitted from the treaty because both colonial and authoritarian states' were fearful of liability for their treatment of indigenous and minority oppressed peoples.[11] Because of this omission Lemkin's fear of vandalism being used as a genocidal technique has come to fruition. There may be hope in the future to criminalise cultural genocide because a core purpose of the United Nations, Article 1(3), is to solve international problems of a cultural character through collective action.

The Genocide Convention is insufficient

In the past, cultural genocide disproportionately affected indigenous peoples such as the Maya or the indigenous peoples in the United States and Canada.[12] However, the last decade has created an intertwining of vandalism and iconoclasm as an effective tool of armed conflict by bad actors.[13] This is evident in recent conflict in Ukraine which has been described as a 'heritage war' with Russians directing attacks towards museums and culturally significant architecture and sites.[14] The UN Educational, Scientific and Cultural Organization (UNESCO) has confirmed that 127 religious sites, 151 buildings of historical and/or artistic interest, 31 museums, 19 monuments and 14 libraries have been damaged in Ukraine.[15] The President of the EU Agency for Criminal Justice Cooperation (Eurojust) asserted at a Ukrainian conference on justice and cultural heritage: 'We must do everything possible to ensure that these crimes do not go unpunished. Culture is our heart, our DNA. And attacks on cultural objects are attacks on what is an integral part of ourselves.'[16] Culture is the fabric and soul of humanity and includes pillars such as language, architecture, artifacts, art and science.[17] The erosion of even one of these cultural pillars undermines a nation's identity; cultural and national identity are inextricably intertwined.[18]

Amend the Genocide Convention to include cultural genocide

Cultural property must receive more protective mechanisms than what is currently guaranteed in various charters and covenants. Biological genocide has been described as the ultimate infringement of the right to self-determination, but Lemkin's idea of vandalism must be added to the Genocide Convention to create a spectrum approach to criminalising all forms of genocide which lead to the whole or partial destruction of a people. Criminalising cultural genocide will finally bridge the gap between self-determination and biological genocide.

A push to amend the Genocide Convention would require hegemonic States, such as the United States, to address their own past wrongs, and would ensure that cultural destruction does not become a staple of future armed conflicts. Future aggressors are watching how third-party states respond to this unfortunately effective tool of warfare. Cultural genocide must be amended into the genocide convention so the cultural heritage of the past can continue to be celebrated and the peoples of tomorrow retain their

fundamental right of self-determination through retaining their cultural identity.

Notes

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3 Id.

4 Anja Gauger, 'The Continuation of Genocide Without Mass Murder: The Cases of "Cultural Genocide" and "Ecocide" in Australia' Masters thesis, School of Advanced Study, University of London (2012).

5 Gerard John Maguire, 'A Genocide By Any Other Name: Cultural Genocide In The Context Of Indigenous Peoples And The Role Of International Law' (2018) 1(9) Strathclyde Law Review https://www.strathclydelawreview.com/volumes accessed 15 March 2024

6 Id. at 3.

7 Karen Krasiowitx, 'Preservation, Conservation, Restoration: What's The Difference?' (Computor History Museum, 26 October 2012) https://computerhistory.org/blog/preservation-conservation-restoration-whats-the-difference/ Accessed 15 March 2024

8 Edward C. Luck, 'Cultural Genocide and the Protection of Cultural Heritage' (2018) 2 J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy 1, 18.

9 Alana Tiemessen, 'Cultural Genocide in Law and Politics' *Oxford Research Encylopedia of International Studies* (Oxford University Press 2023) ://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-762 accessed 15 March 2024

10 Luck, *supra* note 6.

11 *Id.*

12 Edward C. Luck, 'Cultural Genocide and the Protection of Cultural Heritage' (2018) 2 J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy 1, 18; Kimberly Matheson, Ann Seymour, Jyllenna Landry, Katelyn Ventura, Emily Arsenault and Hymie Anisman, 'Canada's Colonial Genocide of Indigenous Peoples: A Review of the Psychosocial and Neurobiological Processes Linking Trauma and Intergenerational Outcomes' (2022) 19(11) Int J Environ Res Public Health 6455.

13 Matthew Clapperton, David Martin Jones and MLR Smith, 'Iconoclasm and strategic thought: Islamic State and cultural heritage in Iraq and Syria' (2017) 93 International Affairs 1205, 1205.

14 UNESCO, 'Damaged cultural sites in Ukraine verified by UNESCO' (UNESCO, 7 February 2024) < https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco> accessed 15 March 2024

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16 Rubryka, 'United for Justice. United for Heritage: Ukraine holds conference devoted to Russia's destruction of cultural monuments' (Rubryka, 1 March 2024) < https://rubryka.com/en/2024/03/01/konferentsiya-united-for-justice-united-for-heritage/#:~:text=Over%20the%20course%20of%20two,to%20Prosecutor%20General%20Andrii%20Kostin.> accessed 15 March 2024.

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Francesca Ceravolo

Human rights matter: a call on Italy to establish a Paris Principles compliant National Human Rights Institution

Introduction

Following her country visit to Italy in June 2023, the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, published a report conveying crucial findings and recommendations on the thematic areas under consideration[1]. The report highlights that Italy belongs to the minority of Council of Europe Member States still lacking an accredited National Human Rights Institution (NHRI) in accordance with the 1993 Principles Relating to the Status of National Human Rights Institutions (the Paris Principles)[2].

NHRIs are at the forefront of human rights promotion and protection at the domestic level, as they have been designed by the Paris Principles as the only holders of a general mandate – either based on the constitution or the law – to advance the entire spectrum of civil, political, economic, social and cultural rights within the relevant country. Moreover, NHRIs operate with guarantees of non-interference

by the executive[3]. In light of this, the failure of Italian authorities to establish a Paris Principles compliant NHRI signals a disregard of international commitments and affects the country's capacity to adequately and comprehensively protect human rights.

The Paris Principles

Endorsed by the United Nations (UN) General Assembly through Resolution 48/134 of 20 December 1993, the Paris Principles regulate competence, responsibilities, composition and methods of operation of NHRIs, serving as internationally acknowledged benchmarks for evaluating the legitimacy, independence and effectiveness of these institutions[4]. Under the Paris Principles, the NHRI should be granted the broadest possible mandate; this mandate should be clearly defined in a constitutional or legal act, indicating the institution's composition and competences. The institution acts as a guardian and overseer of human rights matters by advising authorities, promoting alignment with international standards, advocating for treaty ratification, contributing to state reporting and enhancing human rights education and awareness[5]. The NHRI's structure and the selection of its members should be informed by guarantees of pluralist representation of the forces involved in human rights advocacy, ensuring the cooperation with or the presence of representatives of non-governmental organisations, trade unions, professional associations, religious and philosophical groups, universities, parliament and government departments (in an advisory capacity only). To operate effectively and maintain independence from the executive power, the NHRI should be equipped with adequate infrastructure and sufficient funding and employ its own dedicated staff. Its members should be appointed through an official act with indication of the mandate's specific duration; renewal of the mandate is permitted, without prejudice to the principle of pluralism[6]. In summary, under the Paris Principles' framework, NHRIs are diverse and impartial entities responsible for promoting and safeguarding all facets of human rights. They function as a bridge between the state and civil society actors, as well as between international and domestic stakeholders[7].

Italy's non-compliance with the Paris Principles

To date, no institution in the Italian legal system has received accreditation status under the Paris Principles' regime[8]. Several bodies and institutions in the country work for promoting and safeguarding human rights. Nevertheless, an excessive fragmentation sharply contrasts with the Paris Principles' main purpose, which is the establishment of a single institution serving as a focal point in the relations with international and national stakeholders. Moreover, the characteristics of the existing institutions do not align with the requirements outlined in the Paris Principles[9]. The Extraordinary Commission for the Protection and Promotion of Human Rights, the Permanent Committee on Human Rights and the Parliamentary Commission for Children and Adolescents are parliamentary subunits staffed by members of the Italian Parliament[10]. Consequently, they do not function as separate entities with their own dedicated and specialised staff, and their composition does not meet the pluralism criteria set by the Paris Principles. Government bodies, including the Interministerial Committee for Human Rights and the National Office against Racial Discrimination, do not conform with the Paris Principles for an obvious and more compelling reason: their lack of independence from the executive branch[11].

Finally, independent authorities, such as the Italian Authority for Children and Adolescents (Autorità garante per l'infanzia e l'adolescenza) and the Italian Data Protection Authority (Garante per la protezione dei dati personali or DPA), fail to fulfill the comprehensive mandate necessary for a NHRI, as their spheres of competence are limited to specific areas of human rights[12]. Despite numerous efforts to establish a NHRI since 1993, legislative inertia or shortcomings of the proposed bills have prevented them from successfully gaining final approval. During the third cycle of the Universal Periodic Review in 2019, Italy reaffirmed its intention to establish a NHRI and received several recommendations urging to take concrete steps in this direction[13]. A recent bill under consideration by the Senate of the Republic (Senato della Repubblica) suggests assigning the NHRI role to the DPA by expanding its mandate to encompass the protection of human rights[14]. According to its supporters, this solution would streamline

resource allocation and prevent redundant institutions.

Additionally, the DPA's characteristics already align with the Paris Principles standards, except for the broad mandate to promote and protect human rights, which would be provided by the new law if approved[15]. Finally, some scholars assert that data protection is not only a fundamental right but also essential for safeguarding all other basic freedoms[16]. However, this approach raises significant concerns. First, logistical or budgetary considerations should never override human rights protection and promotion. Second, it is unclear why the DPA is the optimal candidate for becoming the new NHRI; while safeguarding data is undeniably important, there are aspects of human rights that remain unaffected by data protection yet warrant significant attention. Third, simply expanding the mandate of an existing institution may not fully align with the Paris Principles; the DPA might tend to prioritise its traditional responsibilities, allocating minimal resources and efforts to the new tasks.

Given these concerns, it is imperative for Italy to explore alternative and more robust pathways to adhere to the Paris Principles. More generally, authorities should place the establishment of a Paris Principles compliant NHRI at the forefront of the political agenda, expediting legislative processes and transitioning from abstract declarations to tangible actions.

Notes

1 These areas include: the human rights of refugees, asylum seekers and migrants (particularly in the context of recent Italian policies and practices undermining humanitarian maritime search and rescue operations), freedom of expression, women's rights and gender equality, and other human rights-related issues.

2 Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, 'Report following her visit to Italy from 19 to 23 June 2023' (21 November 2023), p. 37, <https://rm.coe.int/country-visit-report-on-italy-following-the-visit-from-19-to-23-june-2/1680adae5a> accessed 18 March 2024.

3 European Network of National Human Rights Institutions (ENNHRI), 'About National Human Rights Institutions' <https://ennhri.org/about-nhris/#:~:text=NHRIs%20address%20the%20full%20range,domestically%20in%20an%20independent%20manner> accessed 15 March 2024.

4 Dunja Mijatović, 'Paris Principles at 25: Strong national human rights institutions needed more than ever' (Human Rights Comment, 18 December 2012) <https://www.coe.int/ro/web/commissioner/-/paris-principles-at-25-strong-national-human-rights-institutions-needed-more-than-ever> accessed 15 March 2024

5 United Nations Office of the High Commissioner for Human Rights, 'Principles relating to the Status of National Institutions (The Paris Principles)' adopted on 20 December 1993 by General Assembly Resolution 48/134. See 'Competence and responsibilities' Points 1, 2 and 3, <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris> accessed 18 March 2024. In more detail, the institution's primary responsibilities include: submitting advisory opinions, recommendations, proposals and reports to the government, parliament and other entities; promoting alignment of national laws, policies and practices with international human rights instruments ratified by the state, and their effective implementation; fostering ratification of or accession to the previously mentioned instruments; contributing to state reports to international institutions, including UN bodies; cooperating with the UN, the regional institutions and the national institutions of other countries; supporting human rights education and research; and raising public awareness about the importance of protecting human rights and combating discrimination.

6 United Nations Office of the High Commissioner for Human Rights, 'Principles relating to the Status of National Institutions (The Paris Principles)' adopted on 20 December 1993 by General Assembly Resolution 48/134. 'Composition and guarantees of independence and pluralism' Points 1, 2 and 3, https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris accessed 18 March 2024.

7 See European Network of National Human Rights Institutions (ENNHRI), 'About National Human Rights Institutions' https://ennhri.org/about-nhris/#:~:text=NHRIs%20address%20the%20full%20range,domestically%20in%20an%20independent%20manner accessed 15 March 2024.

8 NHRIs' adherence to the Paris Principles is overseen by the Global Alliance of National Human Rights Institutions (GANHRI) through a rigorous accreditation and periodic revision procedure: compliant NHRIs are granted 'A status', partially compliant NHRIs receive 'B status', while non-compliant institutions are not accredited. See: Global Alliance of National Human Rights Institutions, 'Accreditation' (GANHRI, 30 November 2023) https://ganhri.org/accreditation/ accessed 15 March 2024>

9 Federico M. Savastano, 'L'Autorità nazionale per i diritti umani. Vecchi percorsi e nuove ipotesi per un organismo che non riesce a vedere la luce' (The National Authority for Human Rights. Old paths and new hypotheses for an organism that cannot see the light'* (*Publisher's translation)) (2023) (1) NOMOS 1–23.

10 Università degli Studi di Padova, 'Organismi parlamentari' (Università degli Studi di Padova, 20 November 2015) <https://unipd-centrodirittiumani.it/it/schede/Organismi-parlamentari/263> accessed 15 March 2024

11 See Federico M. Savastano, 'L'Autorità nazionale per i diritti umani. Vecchi percorsi e nuove ipotesi per un organismo che non riesce a vedere la luce' (The National Authority for Human Rights. Old paths and new hypotheses for an organism that cannot see the light'* (*Publisher's translation)) (2023) (1) NOMOS 1–23.

12 Federico M. Savastano, 'L'Autorità nazionale per i diritti umani. Vecchi percorsi e nuove ipotesi per un organismo che non riesce a vedere la luce' (The National Authority for Human Rights. Old paths and new hypotheses for an organism that cannot see the light'* (*Publisher's translation)) (2023) (1) NOMOS 1–23.

13 United Nations Human Rights Council, 'Report of the Working Group on the Universal Periodic Review – Italy'' (27 December 2019) A/HRC/43/4, https://undocs.org/A/HRC/43/4 accessed 18 March 2024.

14 Stefania Pucciarelli, 'Istituzione del Garante per la

protezione dei dati personali e dei diritti umani attraverso l'assegnazione al Garante per la protezione dei dati personali dei compiti di istituzione nazionale indipendente per la protezione e promozione dei diritti umani' ('Establishment of the Guarantor for the protection of personal data and human rights through the assignment to the Guarantor for the protection of personal data of the tasks of an independent national institution for the protection and promotion of human rights'* (*Publisher's translation)) (9 November 2022). A.S. 303, Senato della Repubblica. <https://www.senato.it/service/PDF/PDFServer/BGT/01361649.pdf> accessed 18 March 2024.

15 See Federico M. Savastano, 'L'Autorità nazionale per i diritti umani. Vecchi percorsi e nuove ipotesi per un organismo che non riesce a vedere la luce' (The National Authority for Human Rights. Old paths and new hypotheses for an organism that cannot see the light'* (*Publisher's translation)) (2023) (1) NOMOS 1–23.

16 See Ginevra Cerrina Feroni, 'Un'Autorità nazionale per i diritti umani in Italia: una prospettiva internazionale ('A national human rights authority in Italy: an international perspective'* (*Publisher's translation)), (2022) Intervento AA.VV., 29–31. The idea is that the DPA has evolved into the defender of personal dignity, not only in the digital environment but in all facets of life. By tackling sensitive matters including stalking, revenge porn and cyberbullying, the DPA provides support and protection to vulnerable individuals. Furthermore, the DPA oversees the legitimacy of investigative techniques like facial recognition, and endeavors to maintain a proper balance between the right to information and the rights to privacy, to be forgotten and to the protection of personal reputation. In essence, safeguarding rights and freedoms heavily relies on protecting data, because ensuring complete confidentiality of pivotal life choices is crucial for self-determination.

Kriti Mahajan

A potential role for the International Anti-Corruption Court in development financing

'Corruption is paid by the poor'
– Pope Francis

Corruption is especially egregious in the development financing sector because it undermines the very aim of development assistance, which seeks to invest in public health, education and infrastructure to alleviate poverty in nations that are especially exposed due to conflict or weak institutions. In 1996, World Bank President James D Wolfensohn's speech about the 'cancer of corruption' broke the taboo of speaking about this issue facing development finance agencies.[1] Almost three decades have passed since then, and development financing has been increasing its focus on anti-corruption to ensure that donors' funds achieve their targets in aiding vulnerable communities and increasing accountability within institutions and dealings with developing and transition countries.

Although the exact terms of the International Anti-Corruption Court (IACC) have not been set, the literature (particularly González and Goldstone (2022), Stephenson and Schütte (2019), Stephenson (2018), Shaeffer, Groves and Roberts (2014) and Wolf (2014)) currently foresees that the IACC will aim to prosecute more severe 'grand corruption' offences such as those involving high-level government corruption, large sums of money, damage to public rights and freedoms or planned corrupt acts to target the functioning of a region or nation.[2] Senior United States District Judge Wolf's proposal of the IACC also includes a role for an independent prosecutor, which would act only when state parties were unable or unwilling to investigate or prosecute corruption cases genuinely.[3] This would encourage states who wish to avoid such intervention in their jurisdiction to strengthen their domestic anti-corruption institutions and processes.

Why corruption in development aid should fall within the mandate of the IACC

There is an argument to be made that corruption in development aid projects should be included within the IACC's jurisdiction, namely that it aligns with the original values pushing for the IACC in the first place. One rationale for the IACC's scope limitation to 'grand corruption' is its ability to undermine democracy. This danger is even more acute when corruption occurs in states

receiving development assistance, which are often more vulnerable to the delegitimising effect of corruption on their democracies. Corruption in development financing is also cross-jurisdictional and complex, requiring the attention of an overarching international institution. An international court investigating and prosecuting corruption in development financing cases would capture fraud schemes that may occur across multiple jurisdictions. It could facilitate information sharing, operating similarly to the World Bank's 'Sanctions Listing of Ineligible Firms and Individuals' and cross-debarment process amongst the major global Multilateral Development Banks.[4] States, international aid organisations and non-government organisations (NGOs) could avoid contracting with firms and individuals found guilty at the IACC. Finally, in keeping with the current discourse on the predicted scope the IACC, only financially or politically significant cases of corruption in development projects would be included in its jurisdiction.

Engaging with criticisms of the IACC proposal

There is much doubt about the feasibility of the IACC even being established.[5] However, this article focuses on whether the IACC could present an opportunity to further combat corruption, specifically in the field of development financing. One concern, which particularly applies to the development financing context, is that wealthy nations could use this institution against less powerful developing countries. This could promote anti-corruption as a Western or neo-imperialist notion, undermining global progress in this field.[6] However, the neo-imperialist concern is avoidable in cases of development financing if the message sent by the court's decisions is not solely focused on punishing nations in which the fraud occurs but also, for example, on asset seizure and returning lost funds to the victims of the corruption; those whom the development assistance was intended for. Pointing out corruption in development projects can sometimes lead to a loss of aid funding due to donors being concerned about their return on investment or not wanting to be associated with corruption. In those instances, communities that already lack resources fall even further behind. IACC judgements are well placed to address this since they could order not only asset repatriation but also encourage the original donors of proceeds recovered in development project corruption cases to continue to allocate those funds to the nations and projects they were originally intended for. This addresses the most egregious aspect of development finance corruption: it diverts already constrained resources from communities that require them most.

How the IACC could strengthen domestic law to better implement international anti-corruption law

Domestic laws implement international anti-corruption obligations and are therefore vital to combatting corruption in development aid financing. Strengthening domestic law will assist not only in limiting corruption in countries receiving donations but also help prosecute perpetrators when it does occur. Each jurisdiction will have different areas of anti-corruption law that require development; however, there are two broad recommendations which, if implemented, would particularly assist in development aid corruption.

Firstly, laws need to allow for the enforcement of a wide range of foreign orders, including the return of the proceeds of corruption in particular. This would include laws that facilitate international cooperation and mutual legal assistance even when there are no bilateral legal assistance agreements to recover assets lost to corruption in development projects.[7] Secondly, since the prosecution of corruption discovered in development projects (either through referrals from international aid organisations or prosecution of aid agreement breaches) often applies domestic law, it must have robust anti-corruption measures that implement the international anti-corruption conventions. For both of the above reforms, the IACC can provide leadership and anti-corruption best practice recommendations for states that lack capacity or political will or those who have signed international anti-corruption conventions but have not effectively implemented them in domestic law.

Now is the time to contemplate solutions which can further international law's ability to combat corruption and make development aid more accountable for donors and recipients. Ambitious applications such as in the development aid corruption context demonstrates the enormous potential

the IACC holds in the face of scepticism surrounding its establishment.

Notes

1 Phil Mason, 'Twenty Years with Anti- Corruption. Part 1: Old issue, new concern – anti-corruption takes off' Chr Michelsen Institution (CMI), 18 March 2020, 6; James D Wolfensohn, 'People and Development' (Presidential Speech Annual Meetings Address No. 99712, 1 October 1996), <https://documents1.worldbank.org/curated/en/135801467993234363/pdf/People-and-development-annual-meetings-address-by-James-D-Wolfensohn-President.pdf> accessed 18 March 2024.

2 Devika Dhir, 'An Accountability Deficit: The Case for an International Anti-Corruption Court' (2020) 26 *Auckland University Law Review* 211, 213. The literature currently foresees that the IACC will aim to prosecute grand corruption, see: Michel Levien González and Justice Richard Goldstone, 'The case for an international anti-corruption court' (*International Bar Association,* 13 September 2022) https://www.ibanet.org/the-case-for-an-international-anti-corruption-court accessed 15 March 2024; Matthew C. Stephenson and Sofie Arjon Schütte, 'An International Anti Corruption Court? A synopsis of the debate' Report U4 Brief 2019:5; Brett D. Shaeffer, Stephen Groves and James M. Roberts, 'Why the US Should Oppose the Creationof an International Anti-Corruption Court' Report No.2958, 1 October 2014; and Matthew Stephenson, 'Guest Post: Is an International Anti-Corruption Court a Dream or a Distraction?' *(GAB The Global Anticorruption Blog*, 4 October 2018) https://globalanticorruptionblog.com/2018/10/04/guest-post-is-an-international-anti-corruption-court-a-dream-or-a-distraction/ accessed 15 March 2024.

3 Cedric Ryngaert, 'Towards an International Anti-Corruption Court?' European Parliament Report, October 2022, 1, www.europarl.europa.eu/RegData/etudes/BRIE/2022/702580/EXPO_BRI(2022)702580_EN.pdf accessed 18 March 2024.

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5 See Matthew C Stephenson and Sofie Arjon Schütte, 'An International Anti-Corruption Court? A synopsis of the debate' Report U4 Brief 2019:5; Brett D. Shaeffer, Stephen Groves and James M. Roberts, 'Why the US Should Oppose the Creation of an International Anti-Corruption Court' Report No.2958, 1 October 2014; Matthew Stephenson, 'Guest Post: Is an International Anti-Corruption Court a Dream or a Distraction?' (GAB The Global Anticorruption Blog, 4 October 2018) https://globalanticorruptionblog.com/2018/10/04/guest-post-is-an-international-anti-corruption-court-a-dream-or-a-distraction/ accessed 15 March 2024.

6 Matthew Stephenson, 'Dear International Anticorruption Court Advocates: It's Time to Answer Your Critics' (*GAB The Global Anticorruption Blog*, 1 March 2016) https://globalanticorruptionblog.com/2016/03/01/dear-international-anticorruption-court-advocates-its-time-to-answer-the-critics/ Accessed 15 March 2024

7. Tracking Anti-Corruption and Asset Recovery Commitments (OECD: Stolen Asset Recovery Initiative (STAR), 2011), p.40.