State Bar of Texas International Law Section

INTERNATIONAL NEWSLETTER

Summer 2020, Volume 2, No. 2

ilstexas.org

When circumstances keep us apart, sharing information on international legal developments has never been more important.

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

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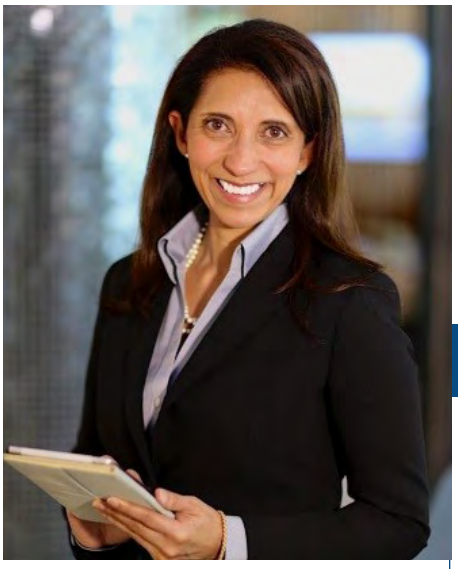

KARLA PASCARELLA

ILS Chair of the State Bar of Texas

Message from Karla Pascarella

A Non COVID 19 Message in the World of COVID 19

As the clear uncertainty of a new bar year comes into view, the International Law Section of the State Bar of Texas is ready to move forward with a solid stance and a heavy dose of creativity to ensure continuity in service to its constituency. Thanks to the efforts of many Chairs before me, the section has gathered significant momentum and built the solid foundation upon which we now stand.

The Section's hallmark events are being planned on a virtual platform and we are investing in the necessary tools and talent to help us capitalize on the opportunities that a virtual platform presents. No longer do we need to struggle with foregoing a key speaker due to travel. Instead, we can broaden our horizons and bring more talent to our members. In previous years, we have discussed technology as an agent of change in our law practice; now, we can offer more e-learning opportunities and utilize technology to advance our objectives. Our reach should expand beyond our borders in a different way, not by traveling abroad, but by inviting practitioners from around the world to collaborate in a different platform. The age of virtual arbitrations, mediations, meetings and collaboration is upon us and the Section will make sure that our practitioners in Texas are not far behind our counterparts around the world and continue to keep up with International developments. Beyond the developments in various areas of practice, we must also highlight and continue to promote key initiatives such as those undertaken and advanced by the International Human Rights Committee. We invite you to join our efforts.

This year's mission began with a puzzle and the pieces are coming together. In the words of Albert Einstein: "To speak about a crisis is to promote it. Not to speak about it is to exalt conformism. Let us work hard instead." ■

TOM WILSON

Editor-in-Chief
International Newsletter

Editor-In-Chief Message

Since the publication of our last International Newsletter, the world has clearly changed. With it, the content of our newsletter has also changed. You will see articles related to health care and the workplace, all of which have been impacted by COVID-19. The changes brought by a worldwide pandemic have certainly impacted the practice of every lawyer whose work involves international legal matters.

At the same time, we must look forward to the time when business and international law will find a new normal. Therefore, we address in this newsletter the future of renewable energy projects in Mexico. We are also continuing to concentrate on international arbitration issues that are important to many of our members.

The economic fallout of the pandemic has also impacted the practice of international law. Therefore, one of our authors addresses the world of international financing.

I recently read the book *Pale Rider: The Spanish Flu of 1918 and How It Changed the World* by Laura Spinney. I highly recommend this book for anyone trying to understand the times in which we live. In one section of her book, Ms. Spinney relates the social unrest that followed the pandemic of the Spanish Flu. We are certainly seeing similar social unrest across the world. For that reason, we must not forget the importance of human rights on the practice of international law. Therefore, we address human rights in relation to environmental issues. We are also proud to publish the papers by the winner and the runner up of the Texas State Bar's International Human Rights Committee's writing competition.

I hope that you will enjoy these articles. I also hope that when we next publish our International Newsletter this coming fall, our world will be in a better place. ■

Digital Healthcare in a COVID-19 World

BY AARON WOO
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We live in a new world. With the uncertainty of the current COVID-19 crisis, how we interact has completely changed as a result of social distancing. For the foreseeable future, direct in-person interactions will be few and far between. To protect both the patient and our healthcare system, the administration of non-essential healthcare services will be virtualized in order to minimize any unnecessary exposure of everyone involved.

But how do you ensure patient confidence in a digital healthcare system? Due to the necessities arising out of the pandemic, the practice of medicine has now changed forever. This article discusses some lessons and needs I have identified through my work with healthcare institutions, software, and digital health companies at the TMCx Innovation Center in Houston.

In 2017, healthcare laws in Texas underwent a major shift by no longer requiring direct in-person consultations when visiting a physician for the first time (22 Tex. Admin. Code § 174.6). Yet, to ensure that the quality of patient care was still maintained, the Texas Medical Board (TMB) established the minimum standards of care for online visits that a physician must provide to patients. Section 111.007 of the Texas Occupations Code mandates a physician providing a telemedical service: (i) practice the same standard of care and service as an in-person/in-office visit; and (ii) have access to the same diagnostics and equipment used in his or her standard facility to provide an accurate diagnosis.

To determine whether the telemedical service meets the in-person standard of care, here are some general guidelines promulgated by the TMB:

(i) If the patient was in the physician's office, would (or should) the physician have performed a physical exam?
(ii) Is the patient able to convey or otherwise provide everything a physician would need to know in order to properly diagnose and treat the ailment?
(iii) Is the treatment or diagnosis provided through telemedicine reasonable and justifiable in an in-person setting?
(iv) Remember, different treatment does not mean unreasonable treatment.
(v) Additionally, the physician must take into consideration the treatment or diagnostic procedures, the quality of the visual exam, access to historical diagnostics and medication history, the patient's chronic conditions, and the need for a telepresenter.

Due to the national emergency, note that Medicare has relaxed the requirements for telehealth services and now permits qualified providers to furnish services to patients in their homes.

Nonetheless, online healthcare visits must still comply with the existing

statutory framework of:

(i) Obtaining the informed consent of the patient residing in Texas for an online visit (Section 111.002 of the Texas Occupations Code);
(ii) Verifying the identity of BOTH the patient and the provider;
(iii) Having the technology capabilities of: (a) Real-Time Audio-Visual Interaction; (b) Store-and-Forward Technology; and (c) Audio-Visual Technology that allows a physician to satisfy the standard of care (Section 111.002 of the Texas Occupations Code); and
(iv) Complying with privacy and data protection under the Health Insurance Portability and Accountability Act (HIPAA).

Despite the national emergency, the Centers for Medicare and Medicaid Services (CMS) still requires a clinician to be a Medicare "qualified provider" and did not expand the list of suitable providers to provide healthcare services that can be reimbursed.[1] However, some changes have been made in light of the pandemic. For example, the technological standards have now been lowered by CMS and now only requires that the device have both audio and video capabilities. Additionally, for telehealth services administered during the pandemic, the U.S. Department of Health & Human Services, Office for Civil Rights (OCR) is being reasonable and waiving penalties for HIPAA violations who are serving patients in good faith using reasonable forms of communication.

In 2017, the Center of Medicare and Medicaid Services (CMS) also pronounced that the texting of patient information is permitted if done through a secure platform such as TigerConnect.[2]

Through telemedicine, a physician's reach is no longer limited by geographic and governmental boundaries. As such, physicians must be licensed in the state in which the patient is located, but the TMB grants special out of state licenses allowing physicians to treat patients located in another state.[3] However, in response to the current crisis, CMS has temporarily waived this requirement and now allows qualified providers to furnish telehealth services to patients regardless of location so that those residing in both rural and non-rural areas can receive proper treatment. Nonetheless, state licensing requirements will still apply to providers practicing across state lines. From an operational standpoint, telemedicine allows for decentralized, as-needed physician staffing which can reduce a hospital system's personnel costs. From a safety standpoint, telemedicine protects both the patient and physician from unnecessary exposure to each other, especially in the new world of infectious diseases.

"Through telemedicine, a physician'sreach is no longer limited by geographic and governmental boundaries."

If the online visit requires a prescription, 22 Tex. Admin. Code § 174.5 stipulates that one of the following must be satisfied:

(i) There must be an existing patient-physician relationship;
(ii) The physician can contact the patient pursuant to a call coverage agreement; or
(iii) The physician must meet all applicable technology standards (as set forth above).

Given the pandemic, however, the Drug Enforcement Agency (DEA) has granted leniency in the existing patient-physician relationship by now allowing DEA-registered providers to issue prescriptions for controlled substances to patients where there has not been any previous medical evaluation, subject to the following requirements: (a) the prescription is issued for a legitimate medical purpose by a provider acting in the usual course of professional practice; (b) audio-visual, real-time, two-way interactive communication devices are used; and (c) the provider is still subject to federal and state laws.[4] Additionally, CMS will not enforce the existing patient-physician relationship required under H.R. 6074, which stipulates that telehealth services could only be provided to patients who had been treated by the provider within the previous three years and had services billed under Medicare.

After the prescription has been filled, the physician must continue to have follow-up instructions and have access to use all relevant clinical information required by the prescribed standard of care. We have seen an influx of mobile app developers providing follow-up services and monitoring for various healthcare specialties just to address this specific need. Despite such flexibility in Texas law, physicians are limited to using telemedicine to treat acute pain with prescribed drugs and strictly prohibited from treating chronic pain with scheduled drugs.

With such forward-thinking legislation by Texas, technology will be the first pillar of defense to bolster our healthcare system against future diseases and pandemics. For digital healthcare to succeed, a patchwork of existing technologies will need to be integrated seamlessly to provide accurate diagnosis and quality of care, within a frictionless logistics chain. From electronic medical record (EMR) systems to wearable devices, from mobile apps to medical transport, technology will allow officials

to track and predict the overall public health of a population so that it can anticipate any unexpected surges that overwhelm the delicate balance of a healthcare system.

Given the staunch requirements of privacy, identity verification, and portability of patient data, it is imperative that healthcare providers incorporating telemedicine into their operations reassess their privacy policies and cybersecurity protocols to identify any areas of vulnerability. For a robust privacy and cybersecurity policy, some structural items to consider are:

(i) Properly disclosing what personal data is collected and how it will be used and disclosed;
(ii) Obtaining all necessary consents or opt-outs required under the jurisdiction of each patient;
(iii) Identifying all vendors and contractors who have access to patient data and having appropriate security and contractual restrictions in place;
(iv) Confirming that all services agreements with IT vendors contain audit provisions to police any vendors who are misusing or inadequately protecting patient data;
(v) Verifying that all cybersecurity defenses in the data supply chain are, at minimum, industry standard;
(vi) Ensuring the software or app architecture is designed for privacy;
(vii) Integrating functionality into the software or app that allows patients to access their information and requesting its deletion; and
(viii) Contractually, limiting any unnecessary exposure by including proper warranty disclaimers and limitations of liability in any related Terms of Service or End User License Agreements.

In response to the pandemic, on March 17, 2020, OCR lowered restrictions and penalties to HIPAA violations for providers implementing telehealth services in the wake of the pandemic so long as they used reasonable care and good faith judgment.

Because telemedicine transcends physical boundaries, a meshwork of privacy laws is now implicated, including HIPAA, the California Consumer Privacy Act (CCPA), and the General Data Protection Regulation (GDPR). How such privacy laws intertwine and supersede each other will still need to be interpreted at the administrative, national, and local levels. As such, the selection of the choice of law and jurisdiction for the telemedicine platform will be critical in reducing any compliance burdens to a healthcare provider.

Given this legal framework, where is the technological frontier of telemedicine heading? Blockchain (an immutable, trusted source of information that is not controlled by a single party) will be a pivotal technology for the transition of physical, in-person patient care into a post-COVID world of digital healthcare. Blockchain technology will aid research, promote efficiency, and instill security in a digital healthcare system where patient data and healthcare records could be safely shared and accessed across multiple institutions. Due to a prevalence of falsified claims by patients, Blockchain will also be crucial in healthcare identity management and records management by reducing patient fraud, inaccuracies, and misdiagnosis by the physician. Any reduction of fraud and improvement of care will certainly be embraced by government payors and private insurers, who are ultimately responsible for determining reimbursements to physicians and facilities.

Here in the Texas Medical Center, artificial intelligence (AI) and machine learning have replaced humans in performing certain critical, life-monitoring functions. Some of the basic tasks under the previous responsibilities of a nurse or tech are now detected by a variety of devices that alert staff and physicians if readings become abnormal. AI has become an irreplaceable component on the hospital floor to relieve the constraints of human staffing. With infectious diseases, AI can serve as an additional barrier to socially distance and insulate human staff fighting on the frontlines from unnecessary contagion while still ensuring a high quality of care.

Outside of the hospital, wearable devices and the Internet of Things (IoT) will be an additional layer of technology in the next frontier of digital healthcare. The well-being of a patient can be remotely monitored after a patient has returned home and into society. Real-time instructions can be given to a patient if the need arises or something abnormal is detected. Real-time data obtained by the wearables and devices can be simultaneously reconciled with any EMR system (on a Blockchain) containing the patient's medical history.

Nonetheless, cybersecurity must be the highest priority as healthcare and patient data becomes entwined in a digital web of devices and information. Cybercriminals have used ransomware to hold entire healthcare systems hostage by hacking into the networks of a hospital and threatening to disable all system-critical, life-sustaining devices. As such, it is critical for healthcare administrators and Chief Information Officers to establish a relationship with the U.S. Department of Justice, Computer Crime and Intellectual Property Section (CCIPS) to thwart any potential threats and avail themselves of time-sensitive remedies. Additionally, cybercriminals are also using the internet to submit fraudulent claims, sell fake vaccines, and create a variety of other healthcare related scams. If a healthcare provider or hospital systems suspects foul play with its IT network, it must immediately report such activity with the FBI's Internet Crime Complaint Center (IC3). But before a cyber-incident cripples a healthcare organization, the

Healthcare Information and Management Systems Society (HIMSS) can advise on the latest industry standards and aid with taking proactive and preventative measures.

As the law is forever catching up with innovation, much is still unaddressed by our judicial system. The future of healthcare raises a plethora of policy, legislative, and legal issues that must be considered to promote the overall health of our population while protecting the quality of care and human rights of each individual patient and healthcare provider. Nonetheless, it is reassuring to see the various U.S. healthcare enforcement agencies embrace digital medicine by timely responding with more accommodating telemedicine laws in response to our current national crisis.

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Endnotes

1 The list of qualified providers can be found here: https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet.

2 https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-10.pdf.

3 http://www.tmb.state.tx.us/page/telemedicine-license.

4 https://www.deadiversion.usdoj.gov/coronavirus.html.

COVID-19 and the Global Workplace

BY CHRISTOPHER BACON AND OSCAR LEIJA
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Managing human resources issues for a multinational company is challenging even during the best of times. Global human resources managers know that it's rarely possible to have a single set of policies and benefit packages that can be applied consistently throughout the company, regardless of the location. Different cultures, standards of living, economies, welfare systems, and legal systems make that impossible. While many companies succeed in having a single Code of Conduct or consistent non-discrimination and anti-harassment policies, when it comes to administering pay and benefits or making decisions about hiring or layoffs, it's much more difficult to do the same thing in every country where the company has operations.

Ordinarily, the inconsistencies in how global companies deal with tough economic decisions in different localities are not so noticeable because the effects of natural disasters, trade wars, or currency devaluations often do not affect all operations in the same way or at the same time. While a dramatic currency devaluation might have devastating effects on the operations in one country if the cost of production has suddenly increased, the operations in another might benefit if its product has become cheaper to buy. While a trade war may threaten a business in the countries that have imposed or been subjected to those tariffs, the economies of other countries may end up benefiting by the addition of new manufacturing facilities that would not be subject to retaliatory tariffs. Even the effects of a global recession are likely to be staggered and will not necessarily manifest themselves in every country at the same time. Hence, it is unusual for companies to have to furlough or lay off employees across the globe at exactly the same time. During the current COVID-19 pandemic, however, multinational businesses have found themselves considering salary cuts, furloughs and outright layoffs throughout their global operations. No country has been immune to the effects of this pandemic. Workers in every major economy have been required or strongly encouraged to "shelter-in-place," while many industries have been forced to temporarily shutter either because of a lack of demand or because of a breakdown in the supply chain.

In this paper, we will look at the unique challenges that multinational companies based in the United States must confront when conducting furloughs and reductions-in-force during the COVID-19. We will begin by looking at the typical challenges that employers face when terminating expatriate employees, either foreign employees who have been hired to work in the United States, and American or U.S. Permanent

Residents who have been "expatriated" on a temporary basis to work for foreign affiliates. We will then discuss why it is usually impossible to approach furloughs and reductions-in-force in the same way in different locations. We will conclude by looking at how newly enacted laws and welfare benefits that have been specifically enacted in response to the COVID-19 pandemic have further complicated the decision-making process that companies must go through when deciding whether to furlough or lay off employees.

Laying off Employees in the United States.

As most global human resources managers know, it is "easier" to terminate employees in the United States because most non-union employees in the U.S. are "at-will" employees who can be terminated without cause.[1] And yet, there are many federal and state laws, not to mention common-law doctrines,[2] which often swallow up the simple principle of at-will employment. The fact is that American employment law can be quite complex when you are laying off a group of employees: What is the impact that our reduction-in-force is having on employees in protected classes? How can we get an enforceable release from laid off employees?[3] Do we have to provide WARN notices?[4] Can the furloughed employees remain on our health plan? Do we have to bargain with the union?[5]

To complicate matters further, American employers may also have to consider the effects of new laws that were enacted in response to the COVID-19 pandemic. Are we better off letting our employees take advantage of the temporary expansion of unemployment benefits under the recently-enacted CARES Act?[6] Will any of our employees be eligible for federally subsidized paid leave under the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act?[7]

Furloughing or laying off foreign employees in the United States.

Terminating an employee who is a U.S. citizen or permanent resident is tough enough. But what do you do about your foreign employees who are in the United States on a non-immigrant visa? When an employer decides to furlough or lay off employees who are in the United States on a non-immigrant visa (an H-1B or L-1A visa, for example) those employees will not only find themselves unemployed, but they are likely to be required to leave the country unless they can find another employer who will sponsor them a visa within 60-days of their termination.[8] While employers of H-1B visa holders have an obligation to pay for their trip back to their country of origin,[9] that will be of little solace to the engineer who has worked in the United States for four or five years and was hoping to eventually secure a Green Card. Many holders of non-immigrant visas have bought homes, enrolled their children in local public schools and have become integral parts of their local communities. Complicating matters even further for these employees is the difficulty of traveling during this pandemic.

Some employers have attempted to avoid layoffs by imposing across-the-board salary cuts for employees that earn over a certain amount. Unfortunately, one of the conditions of being allowed to hire an employee on an H-1B visa is that the employer will pay the employee the amount that it promised the employee at the outset.[10] Hence, that is not a viable solution unless the employer wants to exempt its non-immigrant employees from the salary cuts.

Furloughing or laying off U.S. expatriates in foreign countries.

Generally, when employers need to terminate U.S. employees (citizens or U.S. permanent residents) who have been assigned to a foreign country, they will typically try to relocate the employee back to the United States. The reason for this is simple. In many countries, no-cause layoffs are either illegal or the employer is required to pay separated employees a statutory severance—often substantial in amount—which is usually based on the employees' seniority.[11] There is nothing more frustrating for an employer than to be sued in a foreign court or tribunal by an ex-employee who has just been paid a generous severance only to learn that the employee's release of claims may not be enforceable in the foreign jurisdiction. The risk of this happening increases if the terminated employee happens to be a citizen of the country where he had been assigned.

In addition to the usual concerns about the applicability of foreign labor and employment laws that employers must contend with when terminating a single employee, multinational employers considering layoffs or furloughs of employees assigned to foreign affiliates will also need to think about other countries' legal requirements for conducting reductions-in-force or mass layoffs. While other countries often do permit reductions or redundancies for economic difficulties, companies are frequently required to negotiate the reductions with unions or works council. In some countries, failure to negotiate the decision with the works council can prevent any reductions from taking place.[12] In certain countries, companies must also obtain government approval before proceeding.[13] Given that most countries have more employee-friendly laws than the U.S., companies should not be surprised if expatriates avail themselves of legal remedies in the

country of their foreign assignment if they are included in a layoff.

New laws enacted in foreign countries in response to COVID-19.

U.S. companies with employees in other countries should also keep in mind that new laws have been enacted in many countries in response to the COVID-19 pandemic that might make it more difficult to terminate employees at this time. Argentina, for example, typically allows terminations of employment contracts for "force majeure" reasons. However, the Argentine government recently issued a decree temporarily banning layoffs due to "force majeure" reasons or the lack of work.[14] Likewise, Turkey recently passed legislation that introduces a temporary restriction on termination of employment contracts unless the termination is based on immoral, dishonorable, or malevolent conduct on the part of the employee.[15] At the same time, the change in law does not disallow employers from suspending employment contracts because of COVID-19, meaning employees are not required to provide services and employers are not required to compensate them.

In response to the COVID-19 pandemic, Australia passed legislation limiting the kinds of terminations an employer can conduct due to economic reasons.[16] The legislation generally disallows the use of temporary layoffs for economic reasons. However, an employer can effect a temporary separation by offering employees paid or unpaid leaves of absence. As for permanent layoffs based on redundancy, Australia's new law imposes a handful of obligations on employers before they can permanently lay off an employee. First, an employer must consult with employees on at least two occasions before resorting to termination. Second, the employer must attempt to secure alternative employment positions for the employee. And third, employers must provide the employee with notice (or pay in lieu of notice) and redundancy pay.

> "… new laws have been enacted in many countries in response to the COVID-19 pandemic that might make it more difficult to terminate employees at this time."

Any company considering layoffs or furloughs in another country should also consider whether governmental benefits are available to employers who retain employees, much like the United States Congress provided in the recently enacted CARES Act. In the UK, for example, the government is helping employers with up to 80 percent of wage expenses, up to specific caps.[17] The Netherlands adopted the Temporary Emergency Measure for Work Retention scheme, or NOW,[18] which promises to cover up to 90 percent of eligible employers' wage costs. Along similar lines, South Korea's efforts to stem COVID-19's economic effects include offering employers employment retention subsidies, with the view that the economic benefits available to employers will dissuade them from implementing reductions-in-force.[19] South Korea's subsidies cover up to 90 percent of employers' wage costs, up from the coverage of 66 percent of wage costs the government first promised. However, large firms remain subject to the original 66 percent threshold.

In the case of a company with employees in countries where the government is providing generous subsidies to those employers who retain employees, employers may well decide against layoffs or furloughs on the strength of the government benefits available to employers who refrain from workforce reductions. Whether a company decides to stay the course with layoffs or opts for the government benefits will turn on an employer's specific circumstances. In some instances, the government benefits can offset an employer's expenses. At a minimum, government benefits for employers can defray a company's labor costs; in others, the government benefits may not justify a company's decision to abstain from reductions-in-force. However, before committing to a decision, employers should determine their eligibility for government benefits for employers. If such benefits exist, employers should use that information to inform their decision whether to conduct reductions-in-force.

Other Considerations.

Payroll issues aside, some U.S. companies may want to repatriate expatriate employees for health and safety reasons depending on the extent that COVID-19 has affected, or will affect, the countries where their employees are assigned, and on the ability of those countries' health care systems to treat any employee who becomes sick. As we have all seen, the country-specific data keeps changing. Whereas multinational companies initially focused their attention on their operations in China, then in Italy and other parts of Western Europe, the New York area has been ground zero through much of the month of April—though it

appears that the infection rate there is beginning to plateau. On the other hand, the number of cases in certain Latin American and Middle Eastern countries where many U.S. expatriates work for U.S. multinational companies is now growing at a much faster rate.

A further challenge facing employers with employees in countries where the infection rate is growing exponentially is how to bring those employees home. Even when there are still available flights from those countries, adherence to social distancing guidelines on a flight home could be a challenge. Given the risks, travel may not be advisable for an employee whose age or health conditions make them more susceptible to COVID-19.

Suffice it to say, managing a multinational workforce has never been simple, but COVID-19 has compounded the challenge for U.S. companies that operate internationally, especially at a time when companies are looking to retrench, furlough or lay off employees.

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Oscar Leija is a 2019 graduate of Harvard Law School who recently joined Vinson Elkins LLP. ■

Endnotes

1 *See, e.g.*, Montgomery Cnty. Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex.1998) (citing, *e.g.*, East Line & R.R.R. Co. v. Scott, 72 Tex. 70, 10 S.W. 99, 102 (1888) (noting the general rule)); *see also* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01 cmt. a (Tentative Draft No. 1, 2008) ("The courts in 49 states recognize the principle that the employment is presumptively an at-will relationship.").

2 *See, e.g.*, Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).

3 *See, e.g.*, Older Workers Benefit Protection Act, 29 U.S.C. § 621, et. seq.

4 *See* Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. §§ 2101–2109.

5 *See* United Food and Commercial Workers, AFL-CIO v. NLRB, 519 F.3d 490 (D.C. Cir. 2008); *see also* Porta King Bldg. Systems, Div. of Jay Henges Enterprises, Inc. v. NLRB (8th Cir. 1994) (employer's refusal to bargain with union violated NLRA).

6 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act), Pub. L. No. 116-136.

7 *See* Families First Coronavirus Response Act, Pub. L. No. 116-127.

8 8 C.F.R. § 214.1(*l*)(2).

9 8 C.F.R. § 214.2(h)(4)(iii)(E).

10 *See* 20 C.F.R. § 655.731.

11 In Mexico, for example, an employee who is discharged without cause is entitled to three months' salary plus 20 days' pay for each year of service, and any accrued salary and bonuses. Employees are also entitled to severance payments equal to 12 days' salary. Ley Federal del Trabajo, art. 162.

12 *See* Betriebsverfassungsgesetz 2001 (Works Constitution Act 2001), § 102 laying out works councils' rights (with regard to termination).

13 *See, e.g.*, Industrial Disputes Act, 1947 (requiring covered employers to seek and obtain government approval before terminating workmen) (India).

14 *See* Decreto 329/2020, Boletín Oficial de la República de Argentina, número 34.344 (Mar. 21, 2020).

15 Law No. 7226 on Amendments to Certain Laws, (Repeated) Official Gazette (Mar. 26, 2020).

16 Coronavirus Economic Response Package (Payments and Benefits 2020) Amendment Rules (No. 2) 2020 (Cth).

17 Her Majesty's Revenue and Customs, Collection, Coronavirus Job Retention Scheme (May 15, 2020), https://www.gov.uk/government/collections/coronavirus-job-retention-scheme (collecting government guidance on the United Kingdom's Coronavirus Job Retention Scheme).

18 *See* Government of the Netherlands, Coronavirus: Financial Schemes for Businesses and Self-Employed People, https://www.government.nl/topics/coronavirus-covid-19/information-for-business-owners.

19 *See* Article 60, Labor Standards Act; *see also* Article 41-2, Employer's Obligation to Cooperate, Infectious Disease Control and Prevention Act.

The **"New Normal"** for Renewable Energy Projects in Mexico

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Last spring, I shared thoughts in this newsletter on how the plans set forth by Mexico's President Andrés Manuel López Obrador and his new administration for solar and wind energy were ambiguous.[1] As some noted then, neither of those sources of energy were mentioned in "Proyecto 18," Obrador's stated platform during his presidential campaign.[2] This lack of clarity in policy became more obvious when the administration canceled the fourth long-term energy auction on January 31, 2019. At the time, just a couple of months after Obrador took office, the administration argued that the government simply wanted to review the state of the *Mercado Eléctrico Mayorista*, Mexico's electric wholesale market, before moving forward with any energy auctions.[3]

Today, the message has crystallized: The administration's new energy policy, which places emphasis on "reliability," will prioritize the dispatch of energy by "must run" conventional power plants—namely, those owned by the government through its state-owned companies and in the meantime solar and wind projects will take a back seat in the development of the electric wholesale market in Mexico.

This article will discuss the two newly enacted regulations that have changed the rules of the game for renewable energy market participants, as well as the response and remedies available to private parties to the regulations.

The CENACE Resolution and the New Reliability Policy

On April 29, 2020, CENACE issued a "*Resolution to Guarantee the Efficiency, Quality, Reliability, Continuity and Security of the National Electric System, in connection with the epidemic related to the virus SARS-CoV2 (COVID-19)*" (the "CENACE Resolution").[4] Of particular note is the resolution's technical annex, which describes certain events related to solar and wind projects that allegedly caused problems with the electrical grid. The CENACE Resolution contends that intermittent energy projects (such as solar and wind projects) are not sufficiently reliable to maintain the quality, reliability, continuity and safety of the electricity supply during the COVID-19 contingency.[5]

Operating on that premise, the CENACE Resolution effectively suspends all pre-operative tests for solar and wind projects beginning May 3, 2020—in effect, indefinitely barring such projects from achieving commercial operation. The resolution further provides that certain ancillary services such as voltage and frequency control should be contracted with conventional "must run" power plants as determined by the CENACE.[6]

As the energy industry grappled with the implications and breadth of the *CENACE Resolution*, on May 15, 2020, the Ministry of Energy (*Secretaría de Energía*

or "*SENER*") published the "Resolution issuing the Policy on Reliability, Safety, Continuity and Quality of the National Electric System" (the "*Reliability Policy*").[7] This policy's stated purpose is to establish the guidelines to guarantee electricity supply subject to the ministry's "Reliability Principles" so that the regulators may efficiently operate, regulate and supervise the functioning of the National Electric System (*Sistema Eléctrico Nacional*).[8]

However, the *Reliability Policy* is more than a piece of public policy seeking to provide guidelines to regulators. The *Reliability Policy* actually amplifies regulators' rights to approve or reject solar and wind projects. It gives CENACE broad flexibility to sanction renewable projects as non-reliable if they do not meet certain criteria—technical requirements that are still being debated by energy participants.[9] For example, to approve an interconnection request, CENACE may consider certain "reliability" factors such as the:

- electricity demand of the area, region or system, and the geographic spread and distance in between each solar and wind renewable energy project in such area, region or system;
- meteorological conditions of the area in each interconnection point;
- capacity of "primary regulation" (*regulación primaria*)—the automatic balance between generation and demand—regulation of voltage and short circuit levels per geographic zone; and
- effect the dispatch of conventional power plants has on the reliability of the National Electric System due to the incorporation of solar and wind power projects into the system.[10]

The *Reliability Policy* also provides that isolated supply projects—successor projects to the *autoabastecimiento* (self-supply) regime under the abrogated electricity law prior to the 2014 energy reforms—must also comply with such requirements if they intend to sell electricity surplus or buy shortages in the electric wholesale market.[11]

Legal Remedies Available

Soon after publication of the *CENACE Resolution* and *Reliability Policy*, numerous stakeholders, including project developers, business associations and even representatives of the American and Canadian embassies, raised concern over the negative effect these new regulations would have on the development of the electricity market in Mexico. The Mexican Antitrust Commission (*Comisión Federal de Competencia Económica*) also issued a non-binding opinion criticizing the ambiguity and scope of the CENACE Resolution, warning that it may violate electric wholesale market competition and anti-discriminatory principles.[12]

> "The Mexican government's new policy has increased existing friction between it and affected parties in Mexico's business community."

Private parties have several legal remedies available to them in fighting the implementation of these resolutions. For example, they may file a *juicio contencioso administrativo* (administrative dispute) in the general administrative courts. The caveat with these types of proceedings is that they tend to move slowly and a final resolution may take years. Another option is to seek arbitration under a bilateral investment treaty or an investment chapter of an international trade agreement. Accessing these types of investor protection mechanisms depends on the nationality of the affected party, as well as the availability of such protection in the relevant international treaty. In addition, as with the *juicio contencioso administrativo*, investment treaty arbitration often takes up a lot of time and resources before yielding a tangible benefit to the affected party.

Given these factors, as expected, most affected parties have initiated *amparo* (constitutional habeas corpus writ) proceedings, which may be filed within 30 days of the publication of the administrative act or 15 days following notice of the act first affecting them. As those initial *amparos* were filed, media outlets began reporting that the courts hearing the matters were granting provisional injunction to the plaintiffs—thus suspending the effect of the resolution until the matters are resolved.[13] In response to the numerous lawsuits, CENACE issued a resolution in which it acknowledged that the new CENACE Resolution would not apply to 23 projects listed in such new order, as long as the projects comply with the National Electric System's "reliability" analysis.[14] That loose language seems to open the door for CENACE to keep the listed entities subject to the new criteria under the *Reliability Policy*.

Effects of the New Reliability Policy

The Mexican government's new policy has increased existing friction between it and affected parties in Mexico's business community. As businesses struggle to survive amid the pandemic, the resolution in courts of the legality and breath of the

new energy policy may be a matter of life and death for a lot of small and medium project developers. The vague technical arguments and the discretionary nature of some of the guidelines in the *CENACE Resolution* and *Reliability Policy* have caused courts to initially side with private parties. It has yet to be seen whether these resolutions will end up at the country's supreme court and whether the judicial branch will uphold the legality and breadth of this new policy.

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Corruption Defenses in Investment Arbitrations and Parallel Domestic Investigations and Proceedings[1]

BY SHELBY HART-ARMSTRONG, ALEXANDER SLADE, AND ROBERT REYES LANDICHO[2]
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Recent years have seen an uptick in the expansion and enforcement of anti-corruption laws worldwide. In 2017, China amended its Anti-Unfair Competition Law, broadening the scope of bribe recipients covered by the law, and increasing penalties. In 2019, Italy widened its anti-bribery law, No. 3/2019, increasing penalties for both individuals and companies found guilty of bribery. Also, the past few years have been some of the most active for U.S. Foreign Corrupt Practices Act ("FCPA") litigation. In 2019, the DOJ and SEC reported more than fifty FCPA-related actions, and collected more than US$2.5 billion in total penalties, fines, and disgorgement in FCPA settlements. In the UK, the powers and funding of the Serious Fraud Office ("SFO") have been gradually increasing, and the appointment of a new Director in 2018 has given new impetus to the SFO's investigation of bribery and corruption offenses.

Given these global developments, it is unsurprising that corruption defenses have become more common in international investment arbitration, and often these corruption investigations occur in parallel with related arbitration

proceedings. Yet, while much has been written about the burden of proof for parties invoking corruption defenses within the context of an arbitration, little has been written about how tribunals treat domestic or international criminal investigations or court rulings regarding the same allegations of a corrupt act at issue in an arbitration. Specifically: How do tribunals adjudicating a corruption defense consider parallel criminal investigations into that alleged act of corruption, a conviction, or even the absence of an investigation entirely? This brief note addresses these issues in the limited context of international investment arbitration.

Background on Corruption Defenses in International Investment Arbitration

Corruption defenses generally arise in two scenarios: (1) where a State counterclaims that an investor obtained the investment in dispute via corruption; and (2) where an investor alleges they were forced to pay a bribe to ensure continued performance and/or fair treatment by the host State during the life of the investment.

The seminal arbitration award squarely addressing a corruption defense is *World Duty Free v. Kenya* in 2006. In *World Duty Free*, an airport concessionaire accused Kenya of breaching a 1989 contract by expropriating its investment. Notably, World Duty filed documents in which its CEO admitted to making covert payments to the former president of Kenya. The tribunal held that World Duty's expropriation claim based on "contracts obtained by corruption" could not be upheld by the tribunal because such bribery contravened international public policy.[2] *World Duty Free* established that investors may be entirely precluded from pursuing claims where the investment at issue was obtained via corruption, even where state officers had engaged in the corruption—recognizing that anti-corruption public policy aimed to protect "*not the litigating parties but the public*."[3]

Since *World Duty Free*, corruption defenses have become more common. Indeed, corruption defenses are commonly asserted by States to argue a claim is inadmissible or that a tribunal lacks the jurisdiction to hear a claim due to an investment being tainted by corruption.

In practice, most corruption defenses are dismissed because the tribunals find there to be insufficient evidence for corruption.[4] Indeed, to date, only a few arbitral claims have been dismissed on the basis of corruption.[5]

Logically, domestic corruption findings may affect enforcement of awards or promote settlements, albeit information on such issues is scant. One example is *Siemens A.G. v. Argentine Republic*. An International Centre for Settlement of Investment Disputes ("***ICSID***") tribunal concluded that Argentina violated the Argentina-Germany bilateral investment treaty ("***BIT***") and ordered Argentina to pay Siemens approximately US$208 million, among other payments.[6] Later, however, it was revealed in a German judicial proceeding that Siemens had obtained the contract at issue in the arbitration through bribery. Argentina requested the award be revised based on this new evidence. In response to this request for revision and following settlement talks, Siemens withdrew its claim to the award.[7]

> "Corruption is difficult to prove given the innately covert nature of the crime and often the limited actors involved."

Corruption is difficult to prove given the innately covert nature of the crime and often the limited actors involved. Moreover, corruption defenses demand a high level of proof due to the gravity of the allegation and its consequences. As a result of this proof requirement and the limited powers of arbitral tribunals to investigate corruption—contrasted with domestic criminal authorities' investigatory resources and powers—tribunals often look to domestic findings regarding an alleged corrupt act in assessing corruption defenses.

The Intersection of Investment Arbitration Corruption Defenses and Parallel Criminal Investigations and/or Proceedings

Parties invoking corruption defenses bear the burden of proof[8] and may furnish as proof of corruption a conviction or investigatory findings from domestic authorities.[9] A review of arbitrations addressing domestic criminal investigations serves to demonstrate how tribunals have approached domestic findings in adjudicating corruption defenses.

Domestic Findings of Corruption Are Not Controlling Caselaw in Arbitrations.

From a procedural perspective, a review of arbitral decisions suggests that a party should seek to furnish more than proof of domestic findings or conviction of corruption to substantiate a corruption defense since a number of investment arbitration tribunals have confirmed that domestic corruption findings or convictions are not binding on arbitral tribunals.[10] In *Glencore International A.G. v. Colombia*, Colombia cited pending domestic criminal corruption proceedings for its corruption defense. Although the tribunal recognized that domestic criminal findings "must be considered" when evaluating evidence of corruption, it noted that such findings do not bar tribunals from reaching a contrary conclusion as to corruption because domestic proceedings and arbitrations function in "different legal spheres" and are subject to "diverging standards of proof."[11] Likewise, in *Inceysa v. El Salvador*,

the tribunal rejected the proposition that a domestic court's denial of a corruption claim was binding.[12]

Domestic findings of corruption alone thus appear to be insufficient to prompt a tribunal to find inadmissibility, lack of jurisdiction, or a merits-based finding of corruption. Tribunals will consider the issues themselves and reach an independent decision: Domestic findings are therefore one of multiple factors in their corruption analyses.

However, Tribunals Generally Treat Domestic Corruption Findings, Especially Convictions, as Probative Evidence of Corruption.

Yet, tribunals generally treat positive findings of corruption, especially convictions, by domestic courts as persuasive evidence, considering such findings in their proof analyses. In *Metal-Tech Ltd. v. Republic of Uzbekistan*, where the tribunal concluded it lacked jurisdiction due to the investment being tainted by corruption, the tribunal considered a domestic criminal investigation and ongoing proceedings as one of multiple factors in its corruption analysis. Along with these domestic actions, the tribunal considered the circumstances surrounding the alleged bribery such as: the amount of the payment, the lack of services rendered for the payment, the claimant's affiliates' connections with public officials in charge of the investment, and the claimant's lack of a plausible reason for the payments made to the government official. Indeed, the tribunal considered the "entire evidentiary record" to find that Uzbekistan established corruption, of which the domestic investigations and proceedings were part.[13]

Moreover, in *Niko Resources*, the tribunal at the jurisdictional stage recognized that Bangladesh established corruption, in part, because a Canadian court criminally convicted the claimant for the corruption following its guilty plea—though it ultimately dismissed respondents' corruption objection because there was "no link of causation between the established acts of corruption and the conclusion of the agreements and it [was] not alleged that there [was] such a link."[14] According to the tribunal, the claimant had "committed the acts of corruption which were sanctioned in the Canadian conviction."[15] The *Niko Resources* tribunal took the understandable position that the conviction of a corruption offence supported a finding of corruption in the arbitration, and may have denied jurisdiction if the respondents had established a sufficient nexus between the established corruption and the conclusion of the agreements. Notably, in a later proceeding where the respondents requested the tribunal reconsider its determination of its corruption claim, the tribunal rejected the corruption allegations as "unfounded," and not "instrumental in the procurement of the Agreements."[16]

Unsurprisingly, therefore, while positive domestic findings of corruption bolster a corruption defense, negative domestic findings may undermine corruption defenses. In *EDF v. Romania*, EDF alleged that state officials tried to solicit a bribe, and that when EDF refused, the state unlawfully retaliated. While this arbitration did not concern a corruption defense, it is instructive as to how tribunals may treat negative domestic findings regarding corruption allegations generally. The *EDF* tribunal considered that the Romanian National Anticorruption Directorate ("DNA") investigated the claimant's bribery claim "and twice rejected it," and that criminal courts "affirmed the DNA's conclusions that the claimant's bribery allegations [were] groundless."[17] Given these negative findings and that the claimant's witness testimony as to the corruption was found to be "of doubtful value," the tribunal found that the claimant failed to establish its bribery allegation.[18]

When Faced with Pending Investigations, Tribunals May Conduct an Independent Analysis of the Corruption Allegations, Notwithstanding the Fact that Investigations Have Not Concluded.

Sometimes, a domestic investigation is still pending at the time of an arbitration. Although there are not many publicly available examples of tribunals grappling with this situation, it is clear that such pending investigations bear evaluation by tribunals. Those decisions that are available suggest that the pending status of national investigations does not preclude tribunals from making independent determinations as to whether a party has adduced sufficient proof of corruption. Indeed, this appears to be the favored approach. In some instances, even if no evidence of a finding of corruption is submitted, tribunals have considered public factors such as the length of an investigation or the existence (or lack) of public proceedings as factors relevant to adjudicating an allegation of corruption. Moreover, while tribunals may consider information in pending investigations as such investigations develop, if appropriate, they are unlikely to postpone rendering an award based solely on the existence of a pending investigation.

For example, the *Niko Resources* tribunal rejected certain corruption allegations where investigations had "not led to any trial, let alone conviction" for corruption or where "other regulatory investigations appear[ed] to remain outstanding."[19] Despite the ongoing status of these investigations, the tribunal considered the length of the investigations and absence of a consequent trial or conviction to weigh against a finding of corruption.

In *TSA Spectrum de Argentina S.A. v. the Republic of Argentina*, the tribunal acknowledged ongoing criminal investigations into the alleged bribery. By the time of the award, the investigation had been ongoing for seven years, and public officials and persons affiliated with TSA had been charged. Despite the ongoing nature of these investigations and there being no final judgment, the tribunal found that it was "not unable to determine the TSA's investment was not made in accordance with Argentine law."[20] Conducting an independent analysis of the record, the tribunal concluded that Argentina failed to adduce proof to substantiate its bribery defense. Notably, the tribunal dismissed the underlying claim of the arbitration on another jurisdictional ground, thus the corruption issue was not outcome determinative. The tribunal acknowledged that had there been no other jurisdictional bar, it may very well have joined the corruption defense to the merits of the arbitration.

There exists the possibility that a tribunal may postpone decisions based on the status of a national investigation and decide on jurisdiction or liability once it deems the record sufficient. If national proceedings are sufficiently far advanced, this may appear to be an attractive approach for a tribunal to take. However, a tribunal may be unwilling to postpone decisions in an international arbitration indefinitely based on the pendency of national proceeding or investigations. In *Fraport AG v. the Republic of the Philippines*, the Philippines requested the tribunal postpone its decision, as criminal investigations in Germany, Hong Kong, and the United States were ongoing. The Philippines argued the pending status of these investigations "impeded its ability to fully present its case."[21] Yet the tribunal—which had already postponed proceedings before due to these ongoing investigations—found the record to be sufficient to make a determination as to jurisdiction and liability and denied the postponement request. Notably, the tribunal previously ordered the parties to update it on ongoing developments in the pending Hong Kong and German investigations, supporting the conclusion that a tribunal may consider evidence in pending investigations as it develops.[22]

"... tribunal may be unwilling to postpone decisions in an international arbitration indefinitely based on the pendency of national proceeding or investigations."

The Absence of Domestic Findings of or Action Against an Alleged Corrupt Act Undermines a Party's Corruption Allegations.

The absence of a domestic investigation, charge, or conviction decreases the likelihood of an arbitral corruption finding. In *Laos Holdings N.V. v. Lao People's Democratic Republic*, the tribunal held that Laos failed to establish its corruption defense to an expropriation claim. In doing so, the tribunal found it "disturbing" that no prosecutions were ever initiated against "*any* persons alleged to have accepted bribes," nor was there any evidence of a "serious criminal investigation of anyone other than the principals of the Claimant."[23] The tribunal described such "omissions" as "relevant to the credibility of the Government's allegations."[24]

Similar to the *Laos Holdings* tribunal, the *Glencore* tribunal considered the lack of any investigation or indictment by the state regarding the corrupt act at issue in the arbitration to undermine the State's corruption defense. Although the absence of an investigation or indictment did not "preclude a hypothetical finding by [the] Tribunal that corruption has occurred," such omissions by domestic authorities, "which have a much higher capacity of investigation than [the] Arbitral Tribunal, is one of various elements that must be considered when evaluating the available evidence."[25] Thus, just as domestic positive findings of corruption are probative evidence, so too are absences of domestic action targeting the corrupt act.

Also potentially pertinent to tribunals' analysis of domestic corruption action (or lack thereof) are the perceived motivations behind the domestic action. For example, in *Getma International v. the Republic of Guinea*, the tribunal emphasized repeatedly that Guinea did not launch an investigation into the alleged corruption until long after a complaint regarding the corruption was filed. The tribunal found that the initiation of the investigation was likely motivated by a desire to prevail on its corruption defense in the arbitration. The tribunal concluded that the respondent's "flagrant absence of any follow-up whatsoever given to the complaint," along with its failure to produce evidence from the investigation, evinced that the respondent "gave priority to the grounds of the defense which corruption constitutes, rather than to the prosecution of the corrupted parties."[26] This holding supports that tribunals may consider not just the findings of domestic investigations, but motivations and circumstances surrounding the launching of such investigations.

Conclusion

Arbitral corruption defenses are still largely uncharted terrain since there are very few awards dealing head on with such issues. As a result, how such defenses operate in tandem with parallel domestic investigations and proceedings is still a developing area of the law. The same is likely true in the context of international commercial arbitration – while corruption issues are frequently raised in commercial arbitrations and there are often issues with parallel domestic investigations, this is largely left obscured from the public domain (unlike investment arbitration awards, many of which are published).[27] These issues are therefore ones to watch, as parties more commonly invoke corruption defenses and countries begin more aggressively to enact and enforce anti-corruption laws and policies.

Notwithstanding the developing nature of this area of the law, it is clear that international arbitration tribunals do consider parallel domestic corruption findings—or the absence thereof—in adjudicating whether a party established a corruption defense. Accordingly, parties on both sides (invoking and defending) of corruption defenses should be proactive in tracking parallel domestic investigations into and proceedings regarding alleged corruption.

Visit V&E's website to learn more about V&E's International Dispute Resolution & Arbitration practice. For more information, please contact Vinson & Elkins lawyers Shelby Hart-Armstrong, Robert Reyes Landicho or Alexander Slade.

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Endnotes

1 A version of this article was published on June 14, 2020 as a blog post in Kluwer Arbitration Blog (Wolters Kluwer).

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9 *See, e.g.*, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/18, Decision on Jurisdiction (Aug. 19, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw6322_0.pdf; Another important consideration in navigating parallel domestic findings in arbitrations is confidentiality, particularly ensuring arbitrators do not risk breaching confidentiality and that counsel cannot access confidential attorney communications in domestic criminal investigations. *See Glencore v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award at para. 86.

10 *Glencore v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award at paras. 673–74; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award at paras. 67, 212, 214, 217 (Aug. 2, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award at para. 544 (Aug. 22, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9767.pdf ("The Parties agree that the Tribunal shall be the judge of its own competence in this arbitration. As pointed out by Pakistan '*the Parties further agree that the Supreme Court Judgment is not binding upon the Tribunal's determination of jurisdiction in this arbitration*'") (emphasis in original); *The Republic of Croatia v. MOL Hungarian Oil and Gas PLC.*, PCA Case No 2014-15, Award.

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20 *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/05, Award at para. 167.

21 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award at para. 27 (Aug. 16, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0340.pdf.

22 *Id.* at 57, 59, 61.

23 *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Award at paras. 111–12 (Aug. 6, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10703.pdf (emphasis in original).

24 *Id.* at para. 112.

25 *Glencore v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award at paras. 673–74.

26 *Getma International and others v. Republic of Guinea [II]*, ICSID Case No. ARB/11/29, Award at para. 221 (Aug. 16, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw10741.pdf.

27 For example, in *Concesionaria Ruta Del Sol S.A.S. v. Agencia Nacional de Infraestructura of Colombia*, the tribunal cited multiple other proceedings against Concesionaria, from U.S. criminal cases to Colombian criminal decisions. The tribunal found these domestic findings to be probative evidence of corruption and went so far as to expressly accord these findings full "probative value." *Concesionaria Ruta Del Sol S.A.S. V. Agencia Nacional De Infraestructura Of Colombia*, Bogotá Chamber of Commerce Arbitration Center, Award at page 491, https://mk0iareporternpf7l91.kinstacdn.com/wp-content/uploads/2019/10/Concesionaria-Ruta-Del-Sol-S.A.S.-v.-Agencia-Nacional-de-Infraestructura-ANI-Final-Award-August-2019.pdf. Considering the increase in the publication of international commercial arbitration awards in recent years (as part of the greater trend towards transparency in international commercial arbitration), more commercial awards dealing with corruption allegations may become known. The existing jurisprudence on corruption in investment arbitration set forth in this note will likely, in turn, inform party submissions in commercial arbitrations.

Observations and Thoughts on International Financing: Subscription Credit Facilities as a Useful Tool for International Energy Funds

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Subscription-secured credit facilities, or subscription facilities, are typically formed as revolving credit facilities that are secured by the right to call on the unfunded capital commitments of investors in real estate opportunity funds. However, as the global private equity industry matured and investors and sponsors became more comfortable with subscription financing, its usage has become increasingly popular with other types of private equity funds, for example, buy-out, infrastructure, debt, and natural resources private equity funds. In recent years, an increasing number of energy-focused private equity funds have successfully utilized subscription financing. Although the use of subscription facilities has become more prevalent among the global private equity market, energy-focused private equity funds have, from an observer's perspective, under-utilized this useful tool, considering the many advantages of subscription financing compared with other types of financing, as summarized below.

Overview of Subscription Facilities as an International Financing Tool

Under typical subscription facilities, the borrower or guarantor is structured as a limited partnership or limited liability company, with the limited partners or members consisting of institutional investors. Those investors that meet certain credit criteria (usually based on S&P or Moody's ratings) are designated as "Included Investors," and availability is generally calculated as ninety percent (90%) of the aggregate unfunded capital commitments of such Included Investors. Included Investors are normally highly creditworthy institutional investors (*e.g.*, public or corporate pension funds, endowments and foundations, financial

institutions, life insurance companies, and sovereign wealth funds) that have, among other things, an S&P rating of at least BBB- or a Moody's rating of at least Baa3 or are sponsored by such a creditworthy entity.

Often, a separate subset of the investors that do not meet such credit criteria, but nevertheless deemed by the lenders as having relatively strong credit, are designated as "Designated Investors." Designated Investors are generally subject to concentration requirements as to size and type of investor (rated/unrated/sovereign wealth/high net worth, etc.) and availability with respect to Designated Investors is generally calculated as sixty-five percent (65%) of the aggregate unfunded capital commitments of the Designated Investors, and, in such an instance, availability under the facility is generally calculated as the sum of: (a) ninety percent (90%) of the unfunded capital commitments of the Included Investors; and (b) sixty-five percent (65%) of the unfunded capital commitments of the Designated Investors.

In this ever-evolving market, some lenders are even offering subscription facilities with flat advance rates of sixty-five percent (65%) applicable to all investors. Recently, private equity fund sponsors are also utilizing this financing for single investors and separately managed accounts, particularly for the strongest pension funds and sovereign wealth funds. The combination of (i) the numbers of commitments of investors, (ii) the size of commitments of investors, and (iii) the industry sector of investors included in the borrowing base of subscription facilities provides a more diverse base supporting repayment of the credit facility than many corporate credits.

Loan proceeds are available for myriad purposes, including bridge financing, asset acquisition, asset development, equity investment, working capital purposes and other fund expenses. These facilities, which typically have maturities of one to three years, provide flexibility and pricing advantages over other more traditional forms of acquisition/mini-perm facilities in quick-close acquisitions, or in pre-stabilization repositioning situations where the asset is ultimately designated for traditional asset level financing.

"From the perspective of international private equity funds, subscription facilities have many advantages over other types of secured or non-secured financing...."

A subscription facility may be syndicated (i.e., with a group of lenders providing the facility to the borrower) or bilateral (i.e., between a single lender and the borrower). By sharing the lending risk, a syndicated facility can address a borrower's need for access to larger amounts of capital, with some facilities reaching the dollar equivalent of a few billion U.S. dollars. Moreover, a syndicated facility provides a borrower with access to broader network of financial partners, which affords significant risk mitigation for a borrower. A bilateral subscription facility, on the other hand, often provides more flexible and custom terms and conditions to meet the unique business demands of a borrower.

Advantages of Subscription Facilities for International Private Equity Funds

From the perspective of international private equity funds, subscription facilities have many advantages over other types of secured or non-secured financing, including the following advantages:

1. **High Level of Financial Flexibility for Cross-Border Transactions**
   Subscription facilities can be structured to provide additional options to accommodate an international borrower or a specific jurisdiction's investment or operational needs (*e.g.*, alternative currencies, letters of credit, bridge finance, qualified borrowers).

2. **Collateral for Early-Stage Private Equity Fund**
   If the borrower is a newly formed private equity fund, it generally does not yet have significant investment assets that it can use as primary collateral for a secured financing. In such a circumstance, the borrower can use the unfunded capital commitments from its investors as a primary source of collateral for a secured financing.

3. **Increased Borrowing Capacity**
   Borrowers with significant investment assets can also use unfunded investor capital commitments as additional collateral to maximize borrowing capacity.

4. **Attractively Priced**
   Because the borrowing base typically consists of highly creditworthy institutional investors, subscription facilities often have quite attractive pricing (in terms of interest rate margin for borrowers), historically with applicable margins over

LIBOR ranging between one – two percent (1.00-2.00%) depending on the credit worthiness of the fund's borrowing base and the reputation of the fund's sponsor. The unfunded capital commitments of creditworthy institutional investors are, often more attractive to lenders as collateral than other investment assets of a fund.

5. **Broader Access to Corporate Lenders**
Because credit decisions are based on the creditworthiness of a fund's investors, subscription facilities are more likely to appeal to the broader set of corporate lenders, who are more familiar with such investors, rather than only lenders specializing in a particular asset class.

6. **Quick Access to Capital**
Drawdowns on loans can typically be made between one to three business days for LIBOR or prime rate loans, as compared with the typical ten to fifteen business days draw-down period for capital contributions.

7. **Bridge to Other Sources of Capital**
Since most subscription facilities are structured as revolving credit facilities, the borrower has greater flexibility in deciding when and how much it wants to use such a facility and can use such a facility to smooth out capital calls, pay fund expenses, or provide bridging financing to other sources of capital, *e.g.*, capital contributions. This can avoid the problem of calling capital too often, too early, or too much, in which large amounts of capital sit idle.

8. **Facilitates "True Up" of Capital**
Similarly, the borrower can use a subscription facility to facilitate "True Up" of capital when a fund has multiple closings of investors.

9. **Enhances Fund Yields**
Leverage is the strategy of using borrowed money to increase return on investments. To enhance the fund's yields, the borrower may elect to use subscription facilities to get access to borrowed money (in addition to the capital contributions) for investments. For transparency to its investors, funds are increasingly reporting investment returns on both a leveraged and unleveraged basis.

10. **Minimum Additional Reporting**
Most subscription facilities are structured to have minimum additional reporting other than the annual and quarterly financial statements and other reports that the fund typically prepares for its investors.

11. **Relaxed Financial Covenants**
Subscription facilities generally have more relaxed financial covenants, usually only requiring the fund to comply with the leverage limitations set forth in its own governing documents (*e.g.*, the limited partnership agreement or limited liability company agreement of the fund). This is a welcomed feature to many funds, as it may be difficult to stay compliant with more robust financial covenants (*e.g.*, net assets value covenants and loan-to-value covenants) under turbulent market conditions that many funds experienced in the global financial crisis of 2008.

Conclusion

Given the many advantages of subscription facilities as compared with other types of financing, it is not surprising that subscription financing has become increasingly popular and mainstream among international private equity funds. Energy-focused international funds should, if they haven't already, explore whether they would benefit from subscription financing and whether they can utilize this financing option as a useful tool.

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Human Rights and Environmental Law: The Overlooked Interaction Gains Traction With Climate Change

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What do the Arctic, Indian tea plantations, and Andean lithium mines all have in common? They are all enmeshed in a web of environmental and human rights obligations, and their industries are impacted by climate change.[1] These areas of law largely developed independently and were regulated by national governments within their own territorial boundaries. The globalization of business has precipitated a handful of substantive international regulations of environmental and human rights for businesses. However, 'principles' and 'guidance' have been the mainstay of expectations of businesses, which have traditionally been relegated to the general obligation of "corporate social responsibility" ("CSR").

However, discussions around climate change have started to propel the environmental and human rights elements of CSR into an emerging, but still amorphous, set of legal rights and obligations around the concept of sustainability. Sustainability draws on not only environmental but also social aspects and unveils interlinkages between the fields of environmental law and human rights law.

As a starting point, lawyers need to understand both basic human rights and environmental principles and obligations.

Climate Impacts: The Human Element

The impacts of climate change are many and varied. Reports from the Intergovernmental Panel on Climate Change have noted that climate change can exacerbate flooding, drought frequency and severity, wildfire damage, water scarcity, and food supply instability.[1] The National Climate Assessment has indicated both that these impacts damage infrastructure, ecosystems, and social systems that communities and individuals rely on and that the impacts are expected to be greater for already vulnerable communities, such as marginalized and indigenous peoples.[2]

1 *See, e.g.*, *Summary for Policymakers*, *in* Climate Change and Land: An IPCC Special Report 3, 10, 17 (P.R. Shukla *et al.* eds., 2019), *available at* https://www.ipcc.ch/srccl/.

2 U.S. Global Change Research Program, *Summary Findings*, *in* Fourth National Climate Assessment Vol. 2 (2018), *available at* https://nca2018.globalchange.gov/.

Only then can the convergence and interaction between the two be fully understood. After a brief introduction to developments influencing the legal obligations at the intersection of environmental and human rights law, we present a set of case studies to explore how these interlinkages manifest themselves in various international contexts.

The Path to Recognizing the Interaction

Human rights law and environmental law have largely developed into distinctly separate bodies of law. There has been occasional overlap. For example, assessments under the National Environmental Policy Act, and many of its foreign counterparts, require a consideration of environmental justice, i.e. addressing disproportionate human health or environmental impacts among certain minority or otherwise disadvantaged populations.[2] But generally, these fields had been siloed from each other.

This separation has started to break down in certain areas, in substantial part due to the effects of climate change on both disciplines. The United Nations' 2030 Agenda for Sustainable Development, source of the well-known Sustainable Development Goals ("SDGs"), repeatedly discusses climate change, including not only an SDG specifically focused on climate action but also several other SDGs explicitly referencing a climate aspect.[3] They emphasize that a sustainable response to climate change has both a social and an environmental component, which cannot be fully separated from each other.[4]

Likewise, directives from the European Union ("EU") have placed new focus on non-financial aspects of business. The EU's 2014 Non-Financial Reporting Directive ("NFRD") requires EU member states to adopt legal requirements for large companies to provide disclosures on various non-financial matters, including the environment and human rights. Companies subject to a EU member state's jurisdiction are expected to have policies on these topics or a "clear and reasoned explanation" for a policy's absence.[5] A first round of guidance specifically on reporting climate-related information under the NFRD was published in 2019.[6]

The NFRD is currently under review as part of the EU's "Green Deal," which focuses on reorienting the EU economies toward sustainable development, even committing to integrating the SDGs.[7] As another part of the multi-faceted Green Deal, the EU has also begun to develop a legislative proposal on mandatory environmental and human rights due diligence for companies, to be presented in early 2021.[8]

Additionally, the EU Sustainable Finance Taxonomy is expected to implement a unified classification system that incentivizes development of projects that meet certain sustainable development goals. The final recommendations published by the EU Technical Expert Group on Sustainable Finance would require projects to not only avoid significant harm to certain established environmental sustainability objectives but also make a substantial contribution to at least one of them;[9] projects must also be aligned with the UN Guiding Principles on Business and Human Rights[10] and the OECD Guidelines for Multinational Enterprises.[11]

These legal developments all point towards a more substantial body of obligations related to "sustainability," in which environmental and social safeguards are explicitly integrated and cross-referenced. These obligations can appear in many places and take many forms. To demonstrate, we will examine the three examples raised at the beginning of this article: (1) the Arctic; (2) Indian Tea; and (3) the Andean Lithium Triangle.

A Typology of Human Rights

This article discusses several gradations of human rights, with varying degrees of acceptance. Some, such as the **right to life in its existential form** are among the basic, universal rights that are generally recognized internationally.[1] Some, such as a **right to a healthy environment**, are in a newer category of "green" human rights, which are recognized by some nations (for some rights, many) but have not reached general international consensus.[2] Others, such as **the right to a "dignified life,"** meaning a life with a certain level of socio-economic and cultural wellbeing, are hybrids—rooted in well-accepted rights but not yet expressly acknowledged by most nations.[3]

1 *See* International Covenant on Civil and Political Rights Art. 6, Dec. 16, 1966, *available at* https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

2 *See* UN Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment*, Sustainable Environment as a Human Right, *available at* http://www.srenvironment.org/.

3 *See, e.g.*, Thomas M. Antkowiak, *A "Dignified Life" and the Resurgence of Social Rights*, 18 Northwestern Journal of Human Rights 1 (2020).

The Arctic

Though sparsely populated, the Arctic is a region rife with environmental and human rights aspects that are affected by climate change. This can be seen both (1) on land, with mineral extraction in Greenland, and (2) at sea, with the opening of new maritime routes. Greenland, which is currently an autonomous territory of Denmark, has the legal capacity to become an independent state, but has not yet chosen to do so.[12] This most likely comes down to a question of economics, as it faces an aging population and emigration of its young population to Denmark.[13]

For true independence, Greenland must be able to sustain itself; however, Denmark currently provides a substantial block subsidy to Greenland every year in addition to serving as Greenland's primary export and import partner by a substantial margin.[14] Greenland's primary export is currently seafood,[15] but the ice melt brought about by climate change has opened portions of Greenland to mineral extraction, which has been touted as a potential source of revenue to support an independent state.[16] Certain fisherman are also experiencing a boon; however, other industries, such as shrimpers, farmers, and traditional seal hunters, have suffered greatly as climate change strikes the island and its surrounding waters.[17] Mineral extraction itself would entail environmental effects and potential impacts to Greenlanders that would be subject to assessments of environmental impact and social sustainability.[18]

In a similar vein for shipping fleets, warming waters have recently opened up new routes across the Arctic,[19] unveiling fresh environmental and human rights issues. These routes present a shorter, more fuel-efficient passage than other alternatives, which some have argued can reduce the emissions impacts of the shipping industry.[20] At the same time, the Arctic is one of the last sections of pristine wilderness on the planet.[21] It provides important ecosystem services and climatoregulatory services for the entire planet on the order of multiple trillions of dollars.[22] And it is home to a rich web of biodiversity, which can be severely impacted by maritime traffic.[23]

> “A loss of biodiversity directly compromises their way of life.”

Additionally, the region's flora and fauna are vital to many traditional Arctic indigenous peoples, including Inuit, Métis, and various Amerindian groups in the Americas, and the Sámi and Nenets, among others, in the Nordic countries and Russia.[24] A loss of biodiversity directly compromises their way of life.[25] This relates not only to food sources but also heritage, as landscapes at the intersection of environment and culture are destroyed. Therefore, even if shipping through the Arctic has global emissions advantages, which is a substantial if, there are a host of other environmental and human rights impacts that require assessment and minimization: biodiversity, traditional livelihoods, and cultural heritage.

Indian Tea

If you ever brew a flavorful pot of Darjeeling or Assam tea, the leaves were likely picked by a Dalit woman on a tea plantation in India.[26] Dalits, officially designated as “Scheduled Castes” in the Indian Constitution, comprise nearly one-sixth of India's population.[27] They form the lowest rungs of the ethno-social ladder in India.[28] The women of this group are particularly vulnerable, existing at the intersection of their status as both women and Dalits.

India's tea plantations were established, beginning in the 1830s, by the British during their colonial expansion into India.[29]India's major tea producing regions are located in the northeast, in Assam and West Bengal, and in the south, in Karnataka, Tamil Nadu and Kerala.[30] For tea, an export crop, sufficient cheap labor is key to production. Many workers on the plantations are descendants of the indentured or slave labor imported from other regions of India during colonial times.[31]

Women Dalits tend to carry out the most arduous tasks on the plantations. They pluck the tea leaves, since their hands are considered better-suited to such delicate work.[32] They also haul the leaves, often in 40-kilo baskets, and are exposed to pesticides during sprayings of the plantations. Despite all this, Dalit women are frequently paid wages below the minimum wage for unskilled agricultural workers,[33] which, among other things, prevents them from providing educational opportunities to themselves and their children.[34]

The tea workers often reside in rudimentary accommodations without electricity or an adequate supply of drinking water; cholera and typhoid are common.[35] Nevertheless, medical care on the plantation is often substandard.[36] The facilitative role played by climate change in the spread of disease is well noted and will only exacerbate these problems.[37]

At the same time, climate change is expected to have a significant negative impact on tea production. The tea plant requires a warm, humid climate with rainfall that is well-distributed over the year.[38] However, as the climate warms, rain patterns have become more volatile, with extended dry periods followed by torrential deluges.[39] This all has the effect of diminishing tea production. However, due to the lack of protections involved, tea companies have sought to address this mainly by placing downward pressure on the tea workers' wages.[40]

The Dalit workers in the fields are well aware of this confluence of conditions, and Dalit activists have called on governments to integrate a rights-based approach to adaptation to ensure vulnerable groups are included.[41]

The Andean Lithium Triangle

Electrification of the transportation system is seen as a key components of many climate response plans.[42] Lithium-based batteries are currently the technology of choice for most electric cars today.[43] Indigenous peoples in the Andes are a world away from the manufacturing of electric cars, but their lands overlap "the Lithium Triangle." The area, which spans some 1,800 kms across Argentina, Bolivia, and Chile, contains an estimated 70% of the world's lithium deposits.[44] Currently, lithium is a key element in the manufacture of rechargeable batteries, with a single electric car battery requiring approximately ten kilograms of lithium ore.[45]

In the triangle, lithium is located below salt flats surrounding the Atacama desert, dissolved in saltwater brines. The liquid from these brines is pumped into large ponds at the surface, where the water evaporates over several months, increasing the concentration of lithium salts in the pool before the solution is processed to produce the merchantable product — lithium carbonate.[46] The process requires significant quantities of water, approximately half a million gallons per ton of lithium.[47]

Because the mining is located in an arid region, water is a precious commodity. It is estimated that approximately 65% of the region's water supply has been put to use by the lithium extraction industry.[48] This takes its toll on both the environment and its people. Using satellite images for a 20-year period from 1997-2017, researchers from Arizona State University's School of Sustainability noted increased stretches of drought and a decrease in vegetation by the indigenous Atacama in Chile.[49] This in turn negatively affects the herding and agricultural practices of the indigenous populations.

Scientific reports on the effects of lithium mining on water, like that of Arizona State University, are crucial for local communities to understand the long-term ramifications of trends, such as decreasing availability of water, that they observe. Argentina's environmental law requires an environmental impact assessment to be performed and a report published before any mining activity can occur.[50] Moreover, Argentina has ratified ILO Convention No. 169,[51] which requires that indigenous communities be consulted with the objective of reaching the communities' agreement or consent to the measures affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[52]

Yet, despite substantial growth in lithium mining in recent years, indigenous communities assert that their rights to information, meaningful consultation and to provide their free, prior and informed consent,[53] before the award of lithium mining concessions, have not been respected.[54]

A recent decision by the Inter-American Court of Human Rights ("IACHR") against Argentina, brought by the Lhaka Honhat Association, which represents several indigenous communities in Salta, Argentina,[55] has given hope to indigenous communities whose lands and livelihoods are affected by lithium mining. In the case, the Association claimed that activities of non-indigenous settlers who had moved onto indigenous lands (*e.g.*, cattle herding, logging and mining) had caused water contamination and deforestation, which interfered with indigenous lifestyles and negatively affected both their access to traditional food and water sources and their religious and cultural rights.[56]

The IACHR found that Argentina had failed to adequately protect and allow titling of indigenous lands and had violated the indigenous community's rights to a healthy environment, water, adequate food, and cultural identity.[57] In doing so, the IACHR expanded upon Article 26 of the Inter-American Convention on Human Rights and the Court's 2017 Advisory Opinion on the Right to a Healthy Environment.[58] Significantly, the Court also found that Argentina must ensure that non-indigenous settlers are removed and resettled.[59]

Since indigenous peoples' rights cannot be ignored in mining projects or expansions in the Lithium Triangle, an evaluation of the environmental effects on indigenous communities' rights is essential. This itself will likely result in other considerations, including, *e.g.*, the health impacts of chemicals used in the extraction process[60] and indigenous communities' rights to share in the benefits of resource development of their lands.[61]

Conclusion

Corporate actions implicate environmental and human rights issues across geographic regions and industries. Approaching these topics in separate silos will lead to an incomplete understanding of a company's operating space and impacts. A broader view is necessary; one that evaluates not only effects on the environment and communities and individuals, but also examines the intersectionality of these aspects of sustainability. Climate change has highlighted these overlaps; and, while many of these issues have traditionally been relegated to a supererogatory role within "corporate social responsibility," discussions about climate change and sustainability have started shifting towards substantive legal obligations that inextricably incorporate both environmental and human rights components.

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Endnotes

1 *See infra*.

2 Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994), *available at* https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf.

3 G.A. Res. 70/1 (Oct. 21, 2015), *available at* https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

4 *See id.*

5 Disclosures are to cover: (1) business model; (2) policies and due diligence; (3) outcome of policies; (4) principal risks and risk management; and (5) key performance indicators. *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups*, O.J. L 330/1 (Oct. 22, 2014), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095.

6 *Guidelines on non-financial reporting: Supplement on reporting climate-related information*, O.J. 209/1 (Jun. 20, 2019), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri= CELEX:52019XC0620(01)&-from=EN.

7 *The European Green Deal*, COM (2019), 640 final (Dec. 11, 2019), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0640.

8 Benjamin, Fox, *New Human Rights Laws in 2021, Promises EU Justice Chief*, EURACTIV (April 30, 2020), *available at* https://www.euractiv.com/section/global-europe/news/new-human-rights-laws-in-2021-promises-eu-justice-chief/. *See also* Daniel Feldman *et al.*, *European Union Justice Commissioner Commits to Regulation on Corporate Human Rights and Environmental Due Diligence*, Global Policy Watch (May 7, 2020), *available at* https://www.globalpolicywatch.com/2020/05/european-union-justice-commissioner-commits-to-regulation-on-corporate-human-rights-and-environmental-due-diligence/.

9 Taxonomy: Final Report of the Technical Expert Group on Sustainable Finance (Mar. 2020), *available at* https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf.

10 United Nations Guiding Principles on Business and Human Rights, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. The UN Guiding Principles were unanimously endorsed by the UN Human Rights Council in 2011 and while they are soft law, they are viewed as the global standard with respect to businesses' responsibility to respect human rights.

11 The OECD Guidelines on Multinational Enterprises, https://www.oecd.org/corporate/mne/. EU Technical Expert Group on Sustainable Finance. "Taxonomy: Final Report of the Technical Expert Group on Sustainable Finance." Financing A Sustainable European Economy, March 2020. https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf. Also see Council of the European Union, https://data.consilium.europa.eu/doc/document/ST-5639-2020-INIT/en/pdf.

12 The most recent development in Greenlandic home rule is Denmark's Act on Greenland Self-

Government (2009: 473), which among other things recognized the Greenlanders (Kalaallit) as a people and Greenland's right to become an independent state should it so decide in the future.

13 The Greenland Gold Rush: Promise and Pitfalls of Greenland's Energy and Mineral Resources (Sep. 24, 2014), *available at* https://www.brookings.edu/research/the-greenland-gold-rush-promise-and-pitfalls-of-greenlands-energy-and-mineral-resources/.

14 *Greenland*, *in* The World Factbook 2020, *available at* https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gl.html.

15 *Id.*

16 *See, e.g.*, Natalie Pacini, *Greenland Hopes for Future in Mining, Independence From Denmark*, Medill News Service (Sep. 29, 2014), *available at* https://dc.medill.northwestern.edu/blog/2014/09/29/pacinigreenland0924/#sthash.O4wkEeOF.dpbs. *See also* Tim Boersma & Kevin Foley, The Greenland Gold Rush: Promise and Pitfalls of Greenland's Energy and Mineral Resources (Sep. 24, 2014), *available at* https://www.brookings.edu/research/the-greenland-gold-rush-promise-and-pitfalls-of-greenlands-energy-and-mineral-resources/.

17 Sabrina Shankman, *Greenland's Melting: Heat Waves Are Changing the Landscape Before Their Eyes*, Inside Climate News (Aug. 1, 2019), *available at* https://insideclimatenews.org/news/01082019/greenland-climate-change-ice-sheet-melt-heat-wave-sea-level-rise-fish-global-warming; Lidia Jean Kott, *Fishermen in Greenland are doing better than ever. That might be thanks to climate change.*, USA Today (Jan. 31, 2018, 6:12 AM), *available at* https://www.usatoday.com/story/news/world/2018/01/31/fishermen-greenland-doing-better-than-ever-might-thanks-climate-change/1081920001/.

18 Greenland's Mineral Resource Act requires an environmental impact assessment and social sustainability assessment for large-scale mining projects. *See* Mineral Resources Act, as amended (2009) at Art. 73–78 (Greenland), *available at* https://govmin.gl/wp-content/uploads/2020/01/R%C3%A5stofloven-inkl.-%C3%A6ndringer-fra-12-14-15-16-%C2%B418-og-%C2%B419.pdf. The act requires an opportunity for public participation for projects that are presumed to have a significant negative impact on climate or nature, but public participation is often a pre-condition to authorization of other mining projects as well.

19 *See* Austin Pierce, *On Thin Ice: The Interplay of Distinct International Concerns in Determining the Development of Shipping through the Northwest Passage*, State Bar of Texas International Law Section International Newsletter Winter 2020, at 8 note 2 (2020), *available at* https://files.constantcontact.com/cf349dd3701/372bf235-0a5c-4a91-82dc-5d10d34b3c25.pdf. An ice-free Arctic Ocean is expected during the summer within the next few decades. J.A. Screen & C. Deser, *Pacific Ocean Variability Influences the Time of Emergence of a Seasonally Ice-Free Arctic Ocean*, 46 Geophysical Research Letters, no. 4, February 2019, *available at* https://agupubs.onlinelibrary.wiley.com/doi/abs/10.1029/2018GL081393.

20 The possible reasons for using these routes are varied, and the extent of any climate benefit is a matter of current debate. Pierce, *supra* note 19, at 8.

21 *See* James E.M. Watson *et al.*, *Protect the Last of the Wild*, 563 Nature 27, 27–28 (2018).

22 *See* Eugénie S. Euskirchen *et al.*, *An Estimated Cost of Lost Climate Regulation Services Caused by Thawing of the Arctic Cryosphere*, 23 Ecological Applications, no. 8, Dec. 2013, at 1869, 1869. *See generally* Jimena Alvarez *et al.*, *A Framework for Assessing the Economic Impacts of Arctic Change*, 49 Ambio, no. 2, 2020, at 407.

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Penance and Punishment: Seeking Reparations from Truth Commissions and Trials

Winner of the International Human Rights Committee Essay Contest

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Truth Finding & Reconciliation Commissions, as opposed to the International Court of Justice (ICJ) and International Criminal Court (ICC) provide the best source of reparations for victims of international human rights abuses. Truth Finding & Reconciliation Commissions provide the best source of reparations because of their basic objective of collaborating with victims to achieve transnational justice. In the long term, victims' direct participation in the process ensures prolonged satisfaction with the international human rights regime. Judgment about the best source of reparations is guided by evaluating which institution produces the most versatile and self-sustaining reparation measures. This is to account for the various ways in which victims need assistance after a human rights violation.

Judicial bodies like the ICJ are structurally ill-equipped to award reparation awards because victims have a high burden of proof during legal proceedings, and legal actions following reparation decisions are guided by offender states who have no real motivation to make victims whole again.[1] Additionally, the ICJ resolves disputes between states; so, individuals are shut out of court unless states are willing to espouse their claims. In contrast to these shortcomings, Truth Finding & Reconciliation Commissions "help victims and their families address unanswered questions, while acknowledging the abuse suffered" at the hands of wrongdoers.[2]

Likewise, this paper diverges from current scholarship by acknowledging the ICC ensures broad victim participation but does not live up to a Truth Finding & Reconciliation Commissions' unique ability to address human rights abuses.[3] The ICC is praised as the first international court to implement victim participation during criminal proceedings and require that reparation awards come directly from individual defendants.[4] However, in practice, the ICC excludes other types of reparation measures by utilizing a

financial driven approach to award reparations.[5]

Reparations should, at a minimum, ensure a victim's right to (a) equal and effective access to justice; (b) adequate, effective, and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.[6] To this end, stable states should cooperate with other states grappling with a history of human rights violations, assist judicial organs in the investigation and prosecution of violations, and implement provisions for universal jurisdiction with domestic laws.[7] Part I reviews current scholarship comparing judicial bodies and truth commissions. Parts II, III, and IV respectively describe notable Truth Finding and Reconciliation Commissions, as well as ICJ and ICC, decisions authorizing reparation awards.

Literature Review: Trials vs. Truth Commissions

Scholars are divided about the appropriate institutional device to remedy mass human rights violations. International judicial bodies benefit victims of human rights abuses because they bolster the legitimacy of international law, deter potential rule breakers, and restore law and order following domestic political instability.[8] However, international judicial bodies are difficult for victims because rules of evidence and due process requirements limit what evidence judges can consider when rendering decisions.[9] Additionally, rules pertaining to judicial decision-making are not always victim friendly, since victims must curtail their stories to fit within acceptable pieces of evidence.[10] According to scholar Eric Stover, "if we were ever prompted to design a system for provoking intrusive post-traumatic symptoms in victims of war crimes, we could not do better than a court of law."[11] As a consequence, "when you have to prove the legal status of the terrible events — such as that they amount to genocide — according to technical criteria, even though it seems clear to you that they do — this can undermine the meaning and value of the judicial process for victims."[12]

Prosecutors decide who to take legal action against based on what the evidence shows. When the evidence does not implicate human rights abusers, they are likely to escape prosecution. In addition, international courts are often unable to obtain custody of high-ranking officials who commit human rights abuses.[13] In the case of the ICC specifically, cases fall within the jurisdiction of the Court only if national authorities fail to carry out a genuine investigation and, if appropriate, prosecution.[14] Selective prosecution has dire consequences in the context of reparation decisions because reparations awards are dependent on findings of individual defendant guilt from the ICC and state responsibility findings from the ICJ. [15]

In contrast to the challenges posed by international courts, truth commissions are beneficial because they, "incorporate the best aspects of international judicial tribunals — *i.e.*, live testimony on a world stage that subjects past atrocities to judgment on the basis of international norms — with the best aspects of public reparations — *i.e.*, opportunity both to correct misrepresentations in the historical record and for the majority to acknowledge past misdeeds."[16] Mark Vasallo notes truth commissions are versatile since "commissions may be ad hoc sponsored by the executive or legislative branches of government, international commissions under the U.N. or regional auspices, or may operate under a more permanent national structure like an ombudsman's office."[17] An added bonus is that in some instances, criminal proceedings have spawned from truth commission findings.[18]

Additionally, truth commissions promote the repairing of relationships, acknowledge suffering, and have therapeutic value for all parties involved. In particular, they give survivors of human rights abuses a platform to re-tell their experiences free from strict rules of criminal procedure and stressful cross-examinations.[19] This is important for the reparation's discussion because, "victim participation can also constitute a form of reparation, namely satisfaction."[20] Truth commissions that recommend institutional reform help ensure guarantees of non-repetition while recommendations pertaining to the judicial system, armed forces, and political system assists with preventing future conflicts and human rights abuses.[21] Information about and analyses of these underlying factors helps society rebuild after wrongdoers are prosecuted. It is imperative that society is stabilized after human rights violations because even if international judicial bodies award reparations, reparation mechanisms such as guarantees of non-repetition must have a solid foundation that does not require excessive oversight.[22]

Critiques of truth commissions assert "history is murky and suggestive, and they interfere and distract attention from the prosecution and punishment of past crimes."[23] Like the judicial process, other issues include "divergent interests, scarce resources, and dependence on the good will of decision-makers."[24] Unlike courts, though, truth commissions do not function independently from government leaders. Political decision-makers directly experience the dissatisfaction of community members during the reparations process. Thus, they face ridicule or even political ousting if they do not ever comply with reparations demands. Prosecutors in foreign countries are not susceptible to these internal political pressures.

The ICJ

The jurisprudence of the ICJ is marked by declaratory judgements.[25] This is because the Court's high burden of proof standard is often an unsurmountable obstacle in the way of injured States seeking comprehensive reparation measures. Of note, the Court has only awarded compensation in one case.[26] Injured States must prove with a "sufficient degree of certainty" that the alleged unlawful act would not have happened except for the accused State's acts or omissions. The ICJ generally requires that parties to the case produce evidence. This is a heavy burden for injured States since they are not in a good position to access direct evidence against responsible States. These concerns were raised in *Bosnia and Herzegovina v. Serbia and Montenegro.*[27]

Bosnia Case Study

In the Bosnia case, the ICJ found that Serbia breached an obligation to prevent genocide as described in the Genocide Convention. Turning to the question of reparations, the Court declined to award monetary compensation for impacted Bosniak (Bosnian Muslim) inhabitants of Bosnia and Herzegovina and instead determined satisfaction was the most appropriate reparation measure since it "had not been shown that genocide would in fact have been averted if Serbia had attempted to prevent it."[28] Additionally, the Court refused to award symbolic compensation even though Serbia violated the Court's order in 1993 to "take all measures within its power to prevent commission of the crime of genocide."[29] In purporting to apply a "causal nexus standard," the Court did not find a causal nexus between Serbia's violation of its obligation to prevent genocide and damage resulting from the genocide. However, the Court acknowledged Bosnian Serb forces killed over 7,000 Bosnian men, serious bodily or mental harm occurred, and Bosnian Muslims were specifically targeted victims of beatings, rape, and torture.[30] At the time of these human rights violations, the Federal Republic of Yugoslavia (FRY) was in a "position of influence" over the Bosnian Serbs through its supply of military, political, and financial aid.[31] Indeed, Judge Rosalyn Higgins agreed that "there was little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators possessed as a result of the general policy of aid and assistance by the Federal Republic of Yugoslavia."[32]

So how did the Court come to its conclusion? Simply, Bosnia and Herzegovina did not establish the high burden of proof adopted by the Court. This was caused by the Court's selectivity about what kinds of evidence it would hear. In accordance with the ICJ Statute, the Court can call upon "any party to produce any document or to supply any explanations and formal note shall be taken of any refusal."[33] Despite this broad approach to allowable, presentable evidence, the ICJ refused Bosnia's request for meeting minutes of the Supreme Defense Council of Serbia, Yugoslavia's top political and military body. Rather than allowing the evidence to be presented and deciding on its admissibility, the Court's refusal forced Bosnia and Herzegovina to rely primarily on redacted Serbian records taken during the International Criminal Tribunal for the former Yugoslavia's prosecution of former Serbian President Slobodan Miloševi´c.[34]

In sum, in the worst contemporary genocide in Europe since World War II, the ICJ had an opportunity to award more comprehensive reparations. However, because of its selective evidence decisions and high burden of proof standards, the Court decided that only satisfaction was an appropriate form of reparation. Victims must rely on their governments to espouse claims concerning human rights violations, since only states can bring claims to the ICJ. When governments are not able to do so because of burden of proof requirements from the ICJ, victims are effectively shut out of court on the international stage.

The ICC

Under the ICC reparation scheme, victims may obtain reparations from post-conviction decisions and discretionary awards from the Trust Fund for Victims.[35] Unfortunately, forfeitures and fines against defendants do not always result in victim compensation. Defendants are left with few sources of income after spending money on their defense or strategically placing money in foreign bank accounts. Alternatively, forfeiture of property and assets is a viable option only if it is derived from a crime in which the defendant has been convicted.[36] The Rules of Evidence require a 75 percent cap on a defendant's identifiable assets after considering the defendant and his dependents' financial needs.[37] Additionally, the Court must consider whether it is appropriate to impose a fine and prison sentence.[38] Finally, defendants who commit human rights violations while acting in the capacity of a state agent are not subject to fines.[39]

This forces many victims to rely on voluntary contributions to the Victim Trust Fund. Through its mandate, the Fund can provide general assistance to conflict victims without prejudice to ongoing proceedings and enforce reparation orders from the Court.[40] The Fund primarily awards victims' reparations in the form of compensation.[41] It's mandate allows for funding of rehabilitative measures for victims such as, providing school fees for orphans, reconciliation projects for communities, and psychotherapy for traumatized victims and witnesses.[42] The Fund's

general assistance program can be put into place before a reparation decision is made; however its donation dependent structure is insufficient when dealing with large-scale victim populations.[43] By the very nature of the ICC's jurisdiction over war crimes, genocide, and crimes against humanity, most cases will involve large-scale populations. Scarce resources mean that there is only a select class of victims acknowledged by the Court, and because of limited resources, victims' needs in individual cases fall to the wayside to general activities undertaken pursuant to the Fund's assistance mandate, all of the other ongoing legal proceedings at the Court that may give rise to an order for reparations, and fundraising needs from donors.

The *Lubanga* Case Study

On March 14, 2012, Thomas Lubanga Dyilo was sentenced to 14 years imprisonment for recruiting and conscripting children under fifteen into the Congo [Patriotic Force] for the Liberation of Congo (FPLC).[44] Out of 1,105 applications for participation, 196 victims were allowed to participate.[45] The Fund received 176 applications for reparations.[46] The Trial Chamber ruled Lubanga's indigent status allowed him to contribute non-monetary, voluntary-based reparations.[47] Victims were left with receiving only reparations from the Victim Trust Fund.[48] The Chamber indicated that Victim Trust Fund reparation awards would be handed out on a collective, instead of individual, basis due to the availability of limited funds and the fact that this approach did not require costly and resource intensive verification procedures.[49]

In sum, the ICC deserves praise as a body that involves broad victim participation in the judicial process. However, in practice, its actual reparations scheme does not live up to its goals of providing reparations to victims. The over-reliance on voluntarily contributions forces victims' claims to compete with one another. After mass atrocities, the Victim Trust Fund cannot pool enough resources to account for victims numbering in the hundreds of thousands. Certainly, the ICC appears to be a better mechanism for receiving reparations than the ICJ since the ICJ focuses on state responsibility for human rights violations while the ICC focuses on individual responsibility. Still, the ICC's donor dependent reparations framework does not live up to Truth Finding & Reconciliation Commissions' unique ability to address human rights violations.

Truth Finding and Reconciliation Commissions

Peru's Truth Finding and Reconciliation Commission

In 2001, President Alejandro Toledo established Peru's Truth Finding and Reconciliation Commission to "promote national reconciliation, the rule of justice, and the strengthen the constitutional democratic regime."[50] The Commission investigated human rights violations that had occurred between 1980–2000, during a period of internal armed conflict between guerilla groups and Peruvian armed forces.[51] According to the Commission, approximately 69,280 Peruvians had been killed while others faced forced disappearance, torture, unjust imprisonment, and massive displacement.[52] The Commission gathered over 17,000 victim testimonies.[53] In addition, it convened 19 regional workshops where 846 victims gave their input about appropriate reparations.[54]

The Commission recommended a comprehensive program of reparations called El Plan Integral de Reparaciones ("Integral Program of Reparations" or "PIR").[55] The impressive breadth of recommendations provided by the Commission included health and education assistance, restoration of citizen rights, and individual economic reparations.[56] Furthermore, the commission published information about disappeared victims.[57] The National Council for Reparations registered 9,900 people in 3,565 communities for reparation awards.[58] In 2007, 65 communities received approximately 65 million dollars in reparations.[59]

Victims complained about the delay in economic reparations and delays in finding disappeared loved ones. This was caused by the "limited budget of the task force, the lack of coordination between government agencies, and a lack of technical assistance to the communities in receipt of reparations."[60] According to Isabel Coral, head of the Comisión Multisectorial de Alto Nivel (CMAN), "not a single person has been totally compensated, but we want to strengthen the democracy here in Peru, and we are now planning to conclude this process of reparations within the next 10 years. The payment of this past debt is fundamental to the government."[61] Despite these criticisms, the International Center for Transitional Justice praised the truth commission for taking "significant steps to address the severe and massive human rights violations committed during the country's internal conflict."[62] Notably, the truth commission's efforts also "strengthen[ed] [Peru's] democracy and human rights protections [as well as] prevent[ed] the recurrence of violence."[63]

Chile's Truth Finding & Reconciliation Commission

Chile's Commission was established to examine human rights violations including cases of death or disappearance resulting from Chile's oppressive military regime.[64] As of 1997, 4,886 Chileans received monthly checks from the government due to the death or disappearance of

family members.[65] Family members of the dead or disappeared also received assistance with university or professional education.[66] The reparation program totaled up to 16 million dollars.[67] One Chilean survivor recounted, "monthly checks from the government represented a 'recognition from the state of its own guilt'" and "'[o]ur family has only three things[: a] check that arrives every month, my brother's name in the Rettig truth commission report, and his name on the wall of the memorial at the national cemetery."[68] The Commission helped ensure guarantees of non-repetition by promoting "human rights education for both the military and civilians, greater judicial independence from the military, and changes in the laws on states of emergency, military jurisdiction, and criminal procedure."[69] The Commission also set a "National Corporation for Reparation and Reconciliation" to continue searching for the disappeared.[70]

At the same time family members criticized the exclusion of violations such as torture, unjust detention, and forced exile.[71] The Commission creators had decided to exclude these violations from the initial mandate because of concerns about not having time to investigate all of the incidents prior to the mandate's completion.[72] However, leaders sought to remedy this by starting a second truth commission focused on torture.[73] As a consequence, "[a]pproximately 20,000 persons who had been identified by the commission began receiving monthly pensions of $190 (close to the minimum wage), as well as health, education, and housing benefits."[74] The Commission announced in February 2010 that another commission would follow for new cases involving disappearances, detention and torture.[75] As post-conflict societies move forward with genuinely addressing past injustices, criticisms are necessary and constructive. The most effective incentive is normally internal, and because the ICJ and ICC may lack the tools to hold a country accountable to its citizens, internal political pressure heightened by Truth Finding & Reconciliation Commissions may be the best instrument for actual recovery and forward change and momentum.

Conclusion

International instruments and general principles of international law provide victims of gross human rights violations with a right to receive reparations. The ICJ, ICC, and Truth Finding & Reconciliation Commissions are potential mechanisms to receive reparations such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Truth Finding & Reconciliation Commissions are not infallible, but they historically offer the most versatility when addressing the pain and suffering experienced by victims of gross human rights violations. Truth Finding & Reconciliation Commissions are best equipped and informed to make reparation decisions, and they do so without the inherent conflict of leaving reparation decisions to potential or former abusers of human rights. Moreover, truth commissions' versatility makes them the best institutional mechanisms situated to produce sustainable reparations.

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DO THE CURRENT US ADMINISTRATION'S POLICIES REGARDING IMMIGRATION DETENTION VIOLATE INTERNATIONAL LAW?

First Runner-Up in the International Human Rights Committee Essay Contest

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Since Donald Trump's 2016 election campaign, the topic of immigration into the U.S. through the U.S.-Mexican border became more present in the international media. The polarizing rhetoric of President Trump, and his unconventional proposals, such as building a border wall and new policies imposed through his executive orders, led the media to focus on the immigration situation at the southern U.S. border.

In this paper, I will focus on the practice of detaining people willing to immigrate and assess whether the current practice in the U.S. meets the obligations under international law imposed on the U.S.

The U.S. immigration laws and their enforcement lead to the detention of hundreds of thousands of immigrants every year. In the fiscal year 2019, 503,488 immigrants were booked into U.S. Immigration and Customs Enforcement's (ICE) custody as of September 21, 2019.[1] Fiscal year 2019 was the year with the most detentions since 2005, when the amount of admissions to ICE detention facilities was at 237,667.[2] While in 2005

the average daily population of the detention facilities was 19,619,[3] an average of 50,136 detainees populated the detention facilities every day in 2019.[4] The amount of detained immigrants is composed of lawful permanent residents who face deportation as a result of criminal convictions, asylum seekers, undocumented migrants with long periods of residence in the United States, recent unlawful border-crossers, and individuals with final deportation orders waiting for their enforcement.

In the following, I will define the

international law regarding detention of immigrants that the U.S. is bound by (see **B.**), identify how the current practice violates these standards (see **C.**), and outline a way for the U.S. to return to compliance with international law (see **D.**)

Applicable International Human Rights Law

I. Rights that form the legal basis regarding limitations on Immigration Detention

Regarding the current immigrant detention practices, the U.S. is bound by three international treaties: the International Convention on Civil and Political Rights (ICCPR), the Refugee Convention in its main parts, and the American Declaration of the Rights and Duties of Man (the obligation of the U.S. to assure the standards set forth in the American Declaration is implicit in the Organization of American States (OAS) Charter[5]).

These treaties contain few core rights concerning immigration detention:

First, there is the right to liberty and freedom from arbitrary detention, which is set forth in Article 9(1) of the ICCPR as well as in the Articles 1 and 25 of the American Declaration of the Rights and Duties of Man.

Second, the right to Due Process is protected in Articles 9(1) and 14(1) of the ICCPR and Articles 25, 26 of the American Declaration of the Rights and Duties of Man. These provisions include, apart from the right to a fair trial, that no individual shall be deprived of his liberty except in cases provided for by law.

Third, Article 27 of the 1948 American Declaration of the Rights and Duties of Man and Article 31 of the 1951 Refugee Convention provide for the non-penalization of refugees and asylum-seekers having entered or stayed irregularly.

General Principles

Starting from this legal basis, general principles regarding immigration detention have evolved.

As a result of the territorial sovereignty of nation states, every country has the right to control immigration and to expel or exclude non-citizens. Consequently, the human rights law does not protect a general right of aliens to enter or reside in the territory of a state.[6] International human rights law, however, sets the legal framework for executing these rights of the states:[7]

1. Detention as last Resort

The right to liberty has been specified in the way that immigration detention must be the last resort. The Inter-American Commission on Human Rights (IACHR), the UN Working Group on Arbitrary Detention and the UN Special Rapporteur on the Human Rights of Migrants all have concluded that the detention of migrants is an exceptional measure and thus must remain a means of last resort.[8] This leads to the right of the immigrant to generally remain at liberty during his immigration proceedings and not be presumably detained.[9] Detention is only allowed when an individualized determination comes to the result that detention is required in order to serve a legitimate interest of the state. In this determination, other means that are less infringing but have the same effect must be considered (see below, **B. II. 3.**).

Regarding refugees and asylum seekers, the legal situation is not any different. The UNHCR *Detention Guidelines* demand that detention be the "last resort, with liberty being the default position."[10]

Consequently, a detention system that repeatedly fails to employ the presumption against detention in individual proceedings violates the principle that treats immigrant detention as last resort.[11]

2. Detention must not be Punitive

Another principle derived from the right to liberty,[12] according to Article 9(1) of the ICCPR, is that migrant detention, without the migrant having committed a crime, should never be of punitive nature.[13] In such cases, detention is only allowed as an administrative measure during the legal proceedings determining the immigration status or before a removal subsequent to a decision to deport.[14] Whenever a state uses immigrant detention outside this framework, the detention must be called punitive and violates international law.

The factual difference between administrative and punitive detention is that in the former the detainees are not subjected to prison-like conditions, such as "prison uniforms, highly restricted movement, lack of outdoor recreation and lack of contact visitation."[15]

Regarding refugees and asylum seekers, Article 31(1) of the UN Refugee Convention explicitly states that the authorities "shall not impose penalties, on account of their illegal entry or presence, on refugees."

As the UN Special Rapporteur on the Human Rights of Migrant Workers stated, "irregular migrants are not criminals per se and should not be treated as such." The IACHR clarifies in this context that immigration violations ought not to be construed as criminal offenses.[16]

3. Reasonable, necessary and proportionate

When the requirements for immigration detention need to be specified further than the aforementioned general principles, this has to happen in compliance with the trilogy of reasonability, necessity and proportionality.[17] This is a principle set forth by many courts deciding on Human Rights Law, resolutions and interpretations by international human rights bodies.[18]

Violations of the International Human Rights Standards

1. Overall Detention Regime

The current overall detention regime does not comply with the principle of detention as last resort, and the domestic law regarding arriving aliens gives ICE discretion to do so. All arriving immigrants arriving and applying for admission to the U.S. at any port of entry are classified as arriving aliens. ICE has full discretion over the custody situation of this group of immigrants. ICE's decision on whether the individual is kept in custody, or released with or without a bond, is not subject to judicial review.

The high and rising total numbers of admissions to the ICE detention facilities and the high daily population of these facilities (see above, **A.**) already indicate the non-compliance with the international law principle. Detention is assumed as necessary rather than determined on an individualized basis.[19]

This assumption, however, violates international law. In many cases immigration detention is not necessary and thus illegal. The detention regime must reflect that not all immigrants put under immigration proceedings will be expelled. Consequently, the presumption that detention during immigration proceedings is always necessary cannot be made.[20]

These violations are even aggravated for two special groups of immigrants: asylum seekers and returning lawful permanent residents of the U.S. whose immigration status becomes disputed because of criminal history or abandonment of status. Asylum seekers enjoy special protections against detention under international law (see above, **B.**). Individuals of both groups are likely to have a high motivation of challenging their removal and have good legal chances to succeed.[21] Thus, their detention cannot generally be justified by imminent removal. Neither can the justification of flight risk be accepted, as asylum seekers as well as returning permanent residents have high incentives to show up to their immigration proceedings.

> "In many cases immigration detention is not necessary and thus illegal."

2. Expedited Removal

Expedited Removal describes the removal of an alien that is apprehended at or near the border and is unable to provide sufficient documentation to the immigration officer. This removal is mandatory and no individual judicial review is provided unless the alien is seeking asylum, in which case the alien has to pass a credible fear interview. Detention is mandatory until the removal or until the interview is passed.

The short time of detention helps the government to achieve its legitimate goal to ensure the removal: For aliens that do not seek asylum, a removal order is in effect and detention, for the short period of time until the removal is executed, is justified.[22] For aliens that do seek asylum, the short time of detention until the credible fear interview is justified by the possibility of the asylum seeker not passing the interview and subsequent removal order.[23] Detention in order to carry out such "initial identity and security checks" is legal, as the UNHCR explicitly states.[24]

However, if the detention without individualized determination of the necessity exceeds the brief period of time, the human rights standards will be violated.[25]

3. Reinstatement of Removal

Reinstatement of Removal describes the procedure in place when aliens against whom a prior negative decision already had been issued by an immigration court and had been deported reenter the country illegally. In these cases the prior removal order will simply be reinstated and the alien will be deported without any further way of judicial review. During these reinstatement of removal proceedings the individual is detained.

An exception from the mandatory deportation rule is being made if the immigrant fears persecution or torture in the country to which he would be returned. This will be determined in the "reasonable fear" interview.

In the case of a positive outcome of the interview, the immigrant can apply for withholding of the (initial) removal order in the immigration court. During these proceedings the alien remains in detention.

Similarly to the situation during expedited removal proceedings, detention for a short period of time in order to either execute the removal or conduct the reasonable fear interview will not violate international human rights standards.[26] For the short period, the initial removal order can serve as sufficient basis for detention.[27]

Wherever this period is exceeded, detention is not securing an imminent deportation and consequently can only be legal due to a flight risk or a danger to the community, which must be determined on an individualized basis. Detention with a punitive character,

only based on the earlier removal order violates international law.[28]

Immigrants who did not pass the reasonable fear interview may be detained in order to ensure the execution of an immediate deportation.

Aliens who did pass the reasonable fear interview, however, will have their immigration status determined by immigration courts and a removal is far from being immediate. Thus, the need for detention must be examined on an individualized basis.[29] Yet, in the current system, detention of these individuals is the default. This situation is violating international law.[30]

How to achieve Compliance with International Law

0A return to compliance with international law requires the U.S. to determine on an individualized case-to-case basis whether detention is necessary in order (1) to maintain the legitimate interests of the state and (2) to prevent that the immigrant becomes untraceable or imposes a danger to the community during the proceeding. The necessity of detention is especially unlikely in cases of asylum seekers and returning permanent lawful residents, as they have an incentive of showing up to their own immigration proceedings or in cases where a bond is sufficient. A system of individualized determinations upon arrival is likely to increase the costs for the personnel conducting these determinations, but might decrease the extremely high numbers of daily population in the ICE detention facilities (see above, **A.**) and thus decrease the costs for detention.

Furthermore, judicial review of the decisions on detention on a periodic basis are essential in order to comply with international law.

Conclusion

In conclusion it can be said that the current system of detaining immigrants would be legal under international law regarding expedited removal and reinstatement of removal if the requirements set out by domestic law are complied with. However, for arriving aliens, where ICE has full discretion on the question whether to detain or not, the current practice of presumptive detention violates international law. The numbers of detained immigrants have been rising since 2005, but the current administration is reinforcing this trend and thus is aggravating the violation, even though an increase in individualized determinations with appropriate scrutiny regarding the necessity of detention is likely to decrease the costs of the government spent on immigration detention while simultaneously increasing the liberties of people immigrating into the U.S.

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CALENDAR – UPCOMING EVENTS

2020

International Human Rights Day event
December 10, 2020.
Look for future details to come.

INTERNATIONAL LAW SECTION
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The next issue of ILS Quarterly will be published Fall 2020.

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