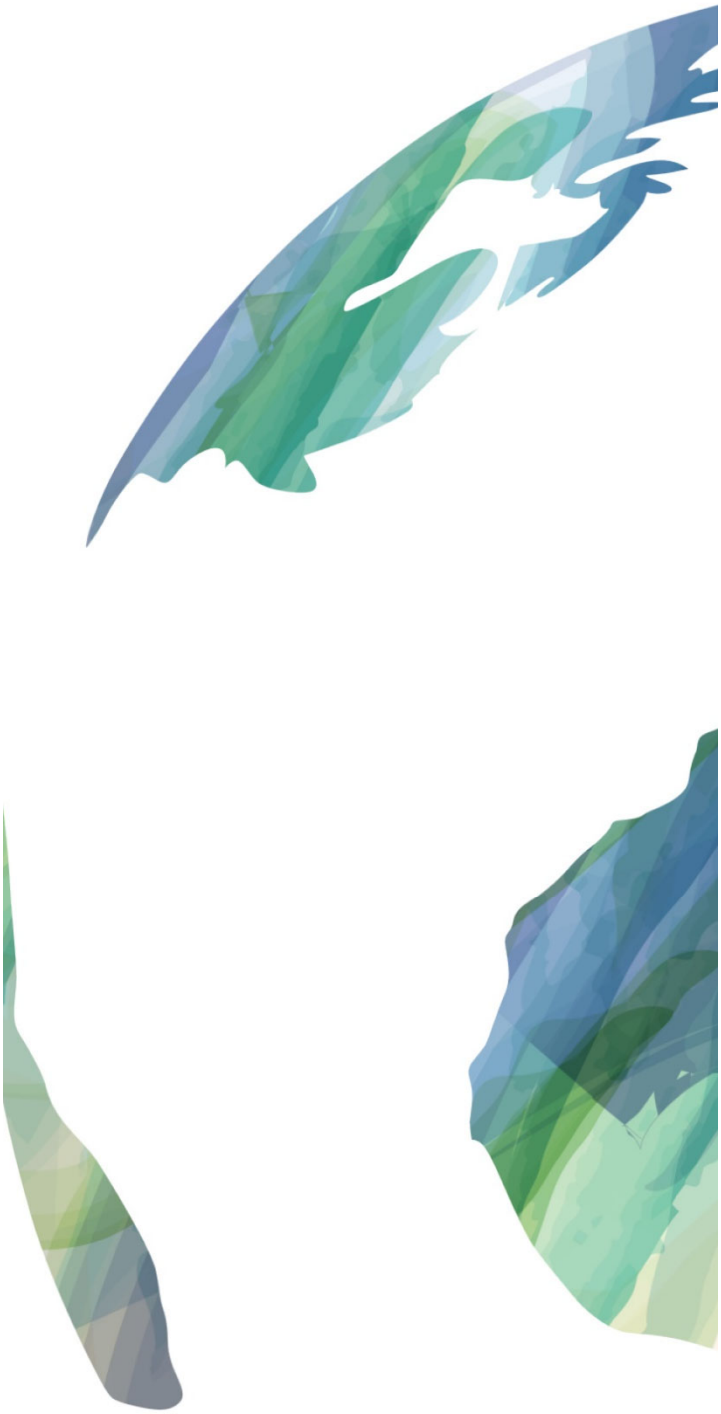
AMERICAN BAR ASSOCIATION
International Law Section

INTERNATIONAL LAW NEWS

VOLUME 48 / ISSUE 3 / SPRING 2021



INTERNATIONAL LAW NEWS

VOLUME 48 / ISSUE 3 / SPRING 2021

CONTENTS

Features

Columns

Chair's Column

Joe Raia

So, how does one effectively introduce a collection of short, thoughtful articles that address significant issues of the day? I say, be brief and let the articles speak for themselves.

If you peruse the table of contents you will find an article that will pique your interest. You will find a thoughtful history of Venezuela's descent, a proposal for a "grassroots" approach to buttressing the rule of law, and the words of a Uyghur lawyer – each offering different insights into the rule of law. We have two perspectives on business and human rights – an emerging UN Treaty approach and more general recognition that business is beginning to "get it"- and how women's rights are faring in Poland. Professor Cindy G. Buys, the Section's latest Mayre Rasmussen Award for the Advancement of Women in International Law recipient, honors Justice Ruth Bader Ginsburg by describing RBG's views on foreign and international law. And, I have not even mentioned the focused discussions of M&E and immigration; CITES and the pandemic; and the new tools being used by the EU to investigate, and prosecute, sophisticated white-collar crime.

Again, I confidently urge you to peruse the table of contents and pick one. Your investment of time will be amply rewarded; as was mine.

Joe Raia is Chair of the ABA International Law Section and Shareholder at Gunster in Miami, FL. He has contributed to ABA policy and comparative work on multiple legal and policy issues. He served for several years on the board of the Italy America Chamber of Commerce Southeast, Inc., a member of the Italian government's Assocamerestero network. He is a member of the International Advisory Committee of the Beacon Council, the economic development agency for Miami-Dade County, Florida. He frequently speakers on matters relating to international dispute resolution.

How Venezuela Lost the Rule of Law

(and how to get it back)

Steven E. Hendrix

Will there be a “Venezuelan Spring”? In 2020, *de facto* President Nicolás Maduro increased his grip on power through the oppression of protests (under the excuse of COVID-19) and the media, and mass patronage to loyal supporters – especially the military. By 2021, five million and a half Venezuelans (18% of the population) have fled the country since 2013, the year Chavez died and Maduro took over – the single largest refugee crisis in Latin American history. Healthcare has collapsed. Price controls and expropriations cripple private initiative. Crime is out of control, while poor Venezuelans go hungry. Oil output is at a 77-year low. In just 2020, agriculture production fell another 30%. A rigged legislative election in December 2020 means the opposition has no formal, remaining role in any branch of government. Venezuela was once Latin America’s most prosperous country and longest-standing democracy. How did this happen?

Roots of Venezuela's Flawed Democracy

Democracy and government legitimacy are predicated on respect for the rule of law. To understand today’s crisis is to understand Venezuela’s flawed democratic experiment going back in time. Before 1958, Venezuela suffered under the ten-year dictatorship of Marcos Evangelista Pérez Jiménez. Worse, it still had not recovered from the last dictatorship of Gen. Marcos Gómez, which had lasted for thirty-six years. In 1958, a military revolt was timed with protests by several left-wing groups, the labor movement, several social groups, and the two mainstream political parties (*Acción Democrática* - AD and the *Comité de Organización Política Electoral Independiente* or "Political Electoral Independent Organization Committee," the Christian Democrat Party - COPEI). President Pérez Jiménez was forced to resign. Venezuelan democracy began with its first modern President, Rómulo Betancourt.

However, as with other Latin American countries moving toward democracy, it was not all-inclusive. To institutionalize their success, the two main political parties undertook a political alliance, the *“Pacto de Punto Fijo*.” The two parties agreed to share political power ("*Partidocracia*") to some degree, regardless of which party won the elections. They attempted to impart permanence to the government based on a concurrent majority that would, in turn, provide stability to the new democracy. The deal assured that government would not return to a dictator's hands by excluding the Venezuelan military's participation in politics. Soldiers no longer could vote nor hold public office. Left-wing parties were also out.

Venezuelan rule of law was excruciatingly slow to reform, from independence through the return of democracy after 1958. And those changes were insufficient to dislodge the old oligarchies from control, fueling broader discontent. The most significant change during the first years of democracy was the nationalization of oil. Administrative reform of the state was even slower. It was not until 1978 that legislation gave autonomy and organizational viability to municipalities under *the “Ley Orgánica del Régimen Municipal*," with the first elections for Municipal Councils in 1979, granting political relevance and identity to local government and achieving municipal autonomy. In 1980, direct elections for state governors and mayors began. In effect, the national political government was democratic, but the parties were authoritarian, a recipe for disaster. In 1989, Venezuela finally began to modify how political parties selected their national candidates. Governors and mayors were no longer chosen by the parties but instead had to compete in elections.

Other reforms came grudgingly. Women's rights to a great extent only came into effect in 1982 with changes to the civil code, a document mostly unchanged since the 1800s. Gross levels of corruption in the 1980s in the executive, legislative and judicial branches meant that economic reform took a back seat. In 1990, the economic reforms across Latin American represented by the so-called "Washington consensus" and accepted by then-President Carlos Andrés Pérez were called "savage neo-liberalism” by Chávez. The measures were widely unpopular in Venezuela.

Like many others in the region, the Venezuelan Criminal Code (*código penal*) had not been modernized

since the 1800s. So it did not reflect new forms of corruption. Citizens noted that the politicians who benefited most by inaction were the very ones responsible for bringing the code up to date. The criminal code was finally modified during the last period of President Rafael Caldera Rodríguez (1998), just before elections that swept Hugo Chávez to the presidency.

So, the dissatisfaction with democracy in Venezuela has deep roots, based in part on the exclusion of the military from political participation, exclusion of other political forces from effective participation, and real grievances against corrupt, inept leadership and a slow reform process. The movement was not new or even specific to only Venezuela. Still, it was one with sufficient weight to approach a center of gravity where it sought to take over entire governments in the region. The populist left sought political change not just in Venezuela but across the hemisphere.

The "*Caracazo"*

During decades of dictatorship, followed by decades more of inept, corrupt democracy, ordinary citizens lost faith in the COPEI and AD political parties. Soldiers at lower ranks felt abandoned in their barracks. Most of the enlisted men came from poor areas (or *ranchos*) surrounding Caracas and other large cities. Little was done to improve their professional careers or standards of living. They were looking for a change.

Lieutenant Hugo Chávez stepped into this vacuum. As early as 1982, Hugo Chávez, Jesús Urdaneta, and Felipe Acosta Carles (later killed during the *Caracazo*) began to organize a political conspiracy to overthrow the government. Chávez founded a political cell within the army named MBR 200 (*Movimiento Bolivariano Revolucioanrio* 200). By 1985, other key officers had joined the movement, including Arias Cárdenas. The leadership and soldiers who joined them started making contacts with the survivors of the guerrilla movements of the 1960s - groups intentionally left out of the *Pacto de Punto Fijo* that had earlier tried to overthrow President Betancourt. After the *Caracazo*, they all believed their time was at hand.

The decades of dismal political governance and the "Washington Consensus" gave the excluded left its agenda. In the so-called "*Caracazo*," the Bolivarian Revolutionary Movement prepared for months, discrediting the government in the media. Next, President Carlos Andrés Pérez increased gasoline and public transportation prices, consistent with an IMF approach to austerity, a measure that hit the poorest the hardest. The morning of February 27, 1989, bus fares doubled, and people started to protest. Perez suppressed the protests and continued in power. But by March 4, 257 were dead, according to the government. Other sources put the figure at more than two thousand. The end of "*Partidocracia"* was at hand.

Coup Attempt, February 1992

On February 4, 1992, a group of army lieutenant colonels led by Chávez mounted an unsuccessful coup attempt, claiming that the events of 1989 showed that the political system no longer served the people's interests. The coup failed, and Chávez was sent to prison. A second, equally unsuccessful coup attempt by other officers followed in November 1992. A year after the two attempted coups, Congress impeached the weakened Carlos Andrés Pérez on corruption charges. Still, the presidency was crippled.

President Caldera Sets the Stage for Chávez

After the disaster of the Pérez presidency, Rafael Caldera – the granddaddy of Venezuelan politics and the father of COPEI – wanted to return to politics and once again run Venezuela as President. But the times had changed. Ironically, in one of the few reforms meant to bring transparency and participation to political parties, new rules now required candidates to win a party's nomination through a primary process. Caldera thought that process beneath him since, after all, COPEI was his own party. So he refused to "lower himself," considering it a lack of respect for the elder statesman. Instead, he set up a run for the presidency as an independent, the head of "*Convergencia*." Knowing his party and power base was now split, Caldera sought non-traditional support: the small leftist parties historically excluded. In exchange, they demanded the immediate release of Chávez from jail. The deal was struck.

Upon his election, Caldera made good on his promise, his "pact with the devil," and pardoned Chávez for his civil and criminal responsibilities for killing many people in his earlier coup attempt and for the crime of usurping democracy. This pardon removed any impediment, civil or criminal, from Chávez, later running as a presidential candidate. Out of jail, with the widespread support of the masses, and the popular support of the troops (not the commanders, but the recruits), Chávez strengthened his political position.

There was yet another unsuccessful coup attempt against Caldera this time. These “near miss” coups reflected the continued frustration and dissatisfaction of the population and democracy’s fragility.

In December 1998, Chávez democratically won the presidency on a broad reform campaign, constitutional change, and a crackdown on corruption. He pursued a populist line of action, alienating civil society and the business classes from the start. The most controversial reform was a new Constitution. In August 1999, a National Constituent Assembly (ANC) convened to begin rewriting the Constitution. In presumably free elections, voters gave all but six seats to persons associated with the Chavez movement. Venezuelans approved the ANC's draft in a national referendum on December 15, 1999.

Constitutional Law lawyers and experts – supported by the traditional parties - argued that the new Constitution was flawed at inception. They argued Chávez had not followed proper constitutional rules to choose a National Constituent Assembly to draft a new Constitution. In essence, the Constitutional Law experts argued the resulting Chávez Constitution was defective because the Assembly representatives' selection was flawed. And therefore, the power constituted by Chávez was already unconstitutional. This constitutional argument was not well-understood by society and did not threaten Chávez politically with his base, but did infuriate the opposition.

April 12, 2002 - The Perfect Storm

This night was the result of a remarkable coincidence and a great surprise. That day there was an electoral march by the opposition toward the Presidential Palace at Miraflores. The marchers decided that, upon arrival, they would not leave Miraflores. They were going to lie down and stay there, for days if necessary until Chávez resigned. This approach by civil society has been successful in other Latin American countries in forcing presidents to leave. Perhaps after receiving counsel from Cuba, Chávez decided he would not allow this style of protest in his country.

Chávez responded with civilian and military components. The civilian part was to assure that all public offices were closed in the downtown area – purportedly for the safety of the government employees and government property – but actually to deter government employees from joining in the protest. From the government’s emergency “situation room,” all top security officials gathered together, civilian police commanders, military brass, ministers, and others. However, the military and Chávez separately formulated *Plan Ávila*. Unknown to the civilian authorities, *Plan Avila* was the Chávez command for the military to fire on unarmed civilian protesters.

Some elements of the military did fire on the unarmed civilians. Others disobeyed orders and refused to fire. The military command was furious with Chávez for having given the order. The military requested the resignation of President Chávez and ordered the Vice Minister for Justice to locate Vice President Cabello so he could be sworn in immediately, or instead of the Vice President, the head of the National Assembly. Chávez then resigned.

However, the Vice President and two other potential successors to the presidency hid in an embassy, seeking asylum. Not being able to find the next in succession created a surprise power vacuum. Chávez was out, but who was next in line? Into this vacuum, the opposition began to meet furiously, trying to decide how to respond to the situation. The military officials wanted to avoid a civil war. In the confusion, taking advantage of the moment, the opposition pushed Pedro Carmona Astanga, a former Venezuelan trade organization leader, to the front as the one to lead the country. Everyone fully expected a non-political caretaker government and snap elections.

That is not what happened. Carmona read a decree on live television drafted by the Constitutional experts repudiating the Chávez revolution. The Presidential Decree upended the Chávez constitution based on its supposed flaws at inception. In this sense, the Decree did not violate Constitutional Law as such. But it was a political disaster and gave everyone the impression that the opposition intended to abrogate the Constitution. Chávez had led a government democratically elected, and now an interim caretaker was overthrowing the Constitutional order of the day. While the Decree wanted the country to revert to its "true" constitutional standing, it was a horrible moment in history to make an academic point about constitutionality or to try to fix problems that were years in the making. Whether Carmona understood the speech he was handed to read – announcing the Decree – is open for debate.

The reaction to the Decree was catastrophic for the opposition. Support began to erode quickly. The rash opposition decision to push the Decree while taking power smacked of a coup, even if entirely unplanned.

The public understood this clearly as a coup against the Congress, Presidency, and Court.

Was the United States involved in this? There is no credible evidence it was. The Embassy likely hardly knew Carmona. While the United States did not hide its disdain for Chávez, at the same time, he was scarcely important enough on the world stage for U.S. attention – with a war against the Taliban and Al Qaeda in Afghanistan and Pakistan already underway, and with the war in Iraq pending. This was not the time to open another front. The U.S. did provide minimal funding to civil society groups and provided training to aspiring politicians, selecting candidates on a non-partisan basis, including many from Chávez's political party. But the events of April 12, 2002, seven months after the terrorist attacks on New York and Washington, took the Americans by surprise more than anyone. The U.S. blunder was to recognize Carmona in the confusion. Ever since then, Chávez and his sympathizers used this fact to shift blame at external agitators (and most emphatically George W. Bush) and to deflect attention from the fact that it was Chávez who had ordered troops to fire on unarmed civilians, leading to his detention and resignation. In doing so, Chávez took a page out of the Fidel Castro playbook, playing David to the U.S. Goliath.

Toward a Bolivarian "Rule of Law" – such as it is

There was one big difference between this “Bolivarian Revolution” and the older leftist revolutionary movements of the 1950s and earlier. The new movement tried to make revolution through the law itself and with new institutions. They did this through “democratic governance.” That is to say, Chávez was popularly elected. The new revolutionaries also use the law to construct and institutionalize their ideal for the government. Later, Brazil (Luis Ignacio Lula de Silva), Argentina (Cristina Fernandez de Kirchner), Bolivia (Evo Morales), Nicaragua (Daniel Ortega), and Ecuador (Rafael Correa) had parallel movements that aspired - to one degree or another- to emulate what Chávez had done.

Chávez became the master at staying within a technical “rule of law” over the long term to solidify his revolution, even if he completely ignored rules in the short term. Here, three examples will demonstrate the point. The Supreme Electoral Tribunal Law modified the number of tribunal magistrates to 32 judges. All of these new judges were named directly by Chávez, without regard to the law. Chávez named the judges after the Constituent Assembly that created the new Chávez Constitution. In short, Chávez did not follow his own Constitution. There were provisions which specified how judges should be named and the procedure to follow. The National Assembly was supposed to call for a list of candidates and a competition among those qualified. The new law, relatively short in length, was approved by the National Assembly, dominated by Chávez's Officialist Party. Still, the legislation was not followed, but the Magistrates remained in place.

Second, the Constitutional Branch (*Sala Constitucional*) of the Supreme Court had previously held that the military commanders were not responsible for any crime in asking for Chávez to resign on the night of April 12, 2002. The Court did this even though most of the members of that Court were from the Official Party. This decision had the effect of *res judicata* (in Spanish, “*cosa juzgada*") against the defendants. Part of the reasoning behind the decision was that the President had, in fact, resigned, even according to the President's top advisor.

However, with new Chávez appointees, the Court went back to re-review the earlier case against the military command. The Court then “annulled” its prior decision and re-opened the claims against the military command. Once this was done, the defense of *res judicata* no longer applied. Following this lead, state courts across the country began similar witch hunts, annulling past decisions and re-opening cases to allow for politically-motivated prosecutions. *Res judicata* ceased to mean anything. The judgment generated mass legal insecurity across the country, resulting from a complete lack of judicial independence. The law is being used as an instrument to effect political change in favor of the revolution.

Third, since the law did say that judges should be named through a competitive process, Chávez's administration then turned to embrace that process to solidify gains to date. All the previous judges who had come up through the ranks throughout the forty years of democratic governance were thrown out in 2002 on the grounds that they were all corrupt. The vast majority (but certainly not all) probably were corrupt. The only ones still in office after that date were those named directly by Chávez and his political machine. However, the fly in the ointment was that some of these new judges wanted to be independent, not subservient to Chávez's Officialist Party. They began to exercise independent judgment. In reaction, through administrative action, some courts

were closed. These non-compliant judges, although named by Chávez, were replaced with new, more loyal ones. From these further nominations and judges, there emerged a competitive process in the future for promotions.

Only existing judges would be considered for promotions. That guaranteed that the Officialist Party remains in control. The difference will be that the new judges would be named consistent with the law. Their nomination could not be criticized because the official process was followed. The naming of these judges would also withstand complaint in the Inter-American legal system since it complied with the strict formalities for an independent judiciary. So those judges would take on permanent tenure in office, solidifying the revolution in the bench for decades to come. Of this group of new judges, who will go against the party now? Who has the stature and independence to affect justice? Due process ended. The rule of law nominally remained in favor of the United Socialist Party of Venezuela (PSUV) PSUV Party. The party just owned the judiciary.

What's Next?

It is essential to understand that Venezuela has few political options left. The Chavez phenomena grew to dominate the country precisely because the traditional parties were viewed as corrupt and incompetent. Today, speaking with representatives from one side or the other, listening to how each describes the situation on the ground, an observer would be forgiven for thinking the two groups were representing completely separate countries. The Maduro supporters and the opposition cannot even agree on the facts, let alone discuss policy options. It is hard to find "white hats" to support when so many "black hats" are found on both sides of the debate. The "white hat" champion approach was tried once with Carmona, to disastrous effect. Each side demonizes the other – and regrettably – to a degree, each side has a valid point, as the years since 1958 have shown. The much more sustainable path now is an institutional one, with consensus-building and democratic transparency.

In the meantime, the Venezuelan government has run the economy into the ground. In what was once the wealthiest country in Latin America in the 1970s, the masses go hungry. Starvation, poor health and sanitation, a collapse in education, and the world's worst inflation rate signal catastrophically poor governance and incompetence. The 2013 Capriles presidential campaign showed that Venezuelans were already tiring of the old model, generating pressure for change. The massive 2017-20 protests show the Maduro regime hangs on through corruption and oppression.

President Barak Obama used targeted sanctions against key Maduro and regime figures. U.S. diplomacy galvanized an international community against Maduro at the Panama 2015 Summit of the Americas. Since then, the Maduro regime actually replaced the leaders of the opposition parties with his own people, held sham elections and used hunger as a weapon against his own people. The U.S. joined the European Union and the Lima Group (Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Guyana, Honduras, Panama, Paraguay, Peru, Saint Lucia) to condemn the use of force by Maduro to stay in power. Noting that elections had been rigged, the international community recognized Juan Guaido, head of the National Assembly (and as such next in line of succession) as the legitimate constitutional president of Venezuela.

Still, Maduro clung on. Despite reinforced sanctions under the President Trump administration, in December 2020, Maduro presided over legislative "elections" so badly rigged that opposition figures decided they could not even participate. As a result, President Juan Guaido was deprived of his seat in the Congress, and Maduro had a *de facto* lock on all branches of government. Having said that, the Biden administration continues to recognize Guaido as the legitimate head of Venezuela's government. In February 2021, the European Union ambassador in Caracas was declared *persona non grata* after the EU increased sanctions against the Maduro regime.

Future approaches in Venezuela must appreciate the real frustrations of government failure – since before the 1960s. Maduro is just the latest extension of those prior failures. And he is more entrenched than ever before. However, the longer he stays in, the more chaotic it will be when he eventually falls.

Venezuelans need to decide their future. Given that sanctions have not yet decisively affected the Maduro regime, policy should reinforce existing sanctions, while also shifting emphasis from Venezuela to the Venezuelans themselves. In other words, the people of Venezuela should be the priority. This should include food aid to the citizens still in Venezuela as well as those refugees in neighboring countries.

The goal for U.S. policy should be to work with the European Union, the Lima Group and the Organization of American States to allow Venezuelans to choose their own government. There should be free, fair and credible elections, consistent with the Inter-American Democratic Charter. Transparency, good governance, and participation must become the norm, as envisioned in the Inter-American Convention Against Corruption and the American Convention on Human Rights. Only then will the population reject antidemocratic populism's allure and again embrace a pluralistic, tolerant, and inclusive approach to democracy and human rights.

Steven E. Hendrix is a Senior Research Fellow with the DePaul University College of Law, International Human Rights Law Institute and a Foreign Service Officer with the U.S. Agency for International Development. The opinions herein expressed are those of the author and do not necessarily represent the opinions of any other institution.

21st Century Global Rule of Law Under Siege

A Proposed ABA Virtual Grassroots Intervention

Gregg B. Brelsford

"In all societies, lawyers are essential to realizing rights enshrined in law . . ."[1]

"Lawyers play a crucial role in shaping society and its institutions."[2]

21st-century Rule of Law ("ROL") is under siege and governmental accountability is losing ground across the globe. In many places there is wholesale violation of constitutional freedoms through widespread jailing of journalists, opposition politicians, and others, restrictions on the Internet, suppression of nongovernmental organizations, and attacks on judicial independence and courthouses. These reversals are so widespread and strikingly similar it seems that terrorists,[3] and authoritarian and dictatorial regimes, are sharing a ROL-attack "best-practices" manual.[4] The ABA has made valiant efforts to stem the tide, but worldwide erosion of the rule of law is accelerating.

Funding to combat ROL-abuse is eroding too. Annual U.S. foreign aid appropriations are less than 1% of the federal government budget. This aid is one of America's most important tools for strengthening ROL, civil society, and democracy in the developing world. [5] Yet, between fiscal years 2017 and 2020, the U.S. government reduced total foreign aid appropriations by 10% and reduced appropriations for Democracy, Human Rights, and Governance initiatives (including ROL) by 13%.

Clearly, today's global ROL-development status quo is not enough – anti-ROL practices, ideology, and culture, and anti-democratic values, are rapidly spreading. What can be done? Fortifying and advancing the ABA's current heroic work in global ROL is now vitally important. But imagine doing even more. This article proposes extending existing strategies by using the new virtual world – the Internet – and complimentary ABA memberships, to integrate thousands of developing country legal professionals, judges, prosecutors, lawyers (governmental and private) and law professors (DLCPs), [6] into the dynamism of the ABA's hundreds of sections and committees.

This virtual-learning and engagement strategy would reach DCLPs at all levels and practice areas. It would include professionals who are relatively isolated in their home legal systems, such as women, religious and ethnic minorities, disabled persons and lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual (LGBTQIA) individuals. It would create a worldwide body of DCLPs attuned to the values of the ROL. And, this expanded rule-of-law grassroots community would swim in the free flow of ideas characteristic of ABA forums and help spread democratic values in countries characterized by undemocratic norms.

---

[1] William Hubbard, "ABA President Statement on Lawyers in China," ABA Archives, dated August 3, 2015, available at https://www.chinaaid.org/2015/08/american-bar-association-aba-president.html (retrieved January 11, 2021).

[2] J. Montoya, *The Current State of Legal Education and Reform in Latin America: A Critical Appraisal*, 59 J. Legal Education, 545, 545 (2010), jle.aals.org/cgi/viewcontent.cgi?article=1280&context=home (retrieved January 12, 2021).

[3] In the first four and a half months of 2015 (between January 1 and May 10, 2015), the UN documented 11 separate attacks against legal professionals and court houses that caused 114 civilian casualties (28 killed and 86 injured), an increase of more than 600 per cent from the same period the previous year. *UNAMA Condemns Attacks on Judges and Prosecutors, United Nations Assistance Mission in Afghanistan, May 11, 2015*, https://unama.unmissions.org/unama-condemns-taliban-attack-judges-and-prosecutors (retrieved January 3, 2021).

[4] "[M]odern authoritarianism defends and propagates itself as regimes from different regions and with diverse socioeconomic foundations *copy and borrow techniques of political control* ... There is also *growing replication of what might be called authoritarian best practices*." Arch Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, Executive Summary, Freedom House, 2017, emphasis added, https://freedomhouse.org/report/special-report/2017/breaking-down-democracy (retrieved January 12, 2021).

[5] Foreign assistance is aid given by the United States to other countries to support global peace, security, and development efforts, and to provide humanitarian relief during times of crisis. It is a strategic, economic, and moral imperative for the United States and vital to U.S. national security. https://www.foreignassistance.gov (retrieved December 25, 2020).

[6] The term "developing country" refers here to a spectrum of economic development and of democratic movement away from authoritarian and dictatorial governance. It does not refer to the sophistication of legal system leaders and professionals. Indeed, every day, exceptional DCLPs fight courageously for ROL in very challenging circumstances. Nor does this article suggest that the flow of knowledge is solely one-way from developed countries to developing countries or that developed countries have nothing valuable to learn from developing countries.

Defining ROL and Integrating the Proposed Virtual Strategy into the ABA's Existing ROL-Development Framework

There is no broadly accepted definition of ROL.[7] Here, ROL means a legal system governed by a constitution and prospective laws generated by representatives chosen through free and fair elections, ensuring access to justice, in which the government and its citizens are held accountable by the enforcement of constitutional and other rights through an independent judiciary. This concept of ROL requires skilled and ethical practitioners in courts, private practice and public service, as well as law schools and law professors, who are actively committed to the ROL.

No single strategy or template for ROL-development currently exists, but all share one universal objective: to enhance the legal skills, knowledge, and ethical values of DCLPs and thereby strengthen the ROL. The ABA, through the International Law Section (ILS), Rule of Law Initiative (ROLI), Center for Human Rights (CHR), and the International Legal Resource Center (ILRC), uses strategies that offer onsite, as well as online, training, organize conferences, and advise on drafting constitutions and statutes. There is also collaborative work with foreign bar associations and ABA leadership visits with DCLP leaders in developing countries.

The ABA does valorous work in these areas. Resource constraints, however, typically limit these efforts to one-time, face-to-face, events. Insufficient funding generally precludes follow-up. This proposed virtual strategy would not compete with existing ROL undertakings. Face-to-face events are gold but this proposed virtual strategy would be at least silver. It builds on the ABA's exceptional initiatives by adding a continuous, interactive, digital, component.

The ABA Mission to Strengthen Global ROL

The legal profession is the heart of ROL. And building ROL is at the heart of the ABA's mission. Goal IV of the ABA mission is to advance ROL "throughout the world." ILS's mission is "to promote professional relationships with lawyers similarly engaged in foreign countries." ROLI's mission is "to promote justice, economic opportunity, and human dignity through the rule of law." ILRC's mission is to "advocate for ... the rule of law on a global scale." They are all uniquely positioned to strengthen global ROL by working closely with grassroots DCLPs. This virtual strategy is in their "sweet spot."

21st Century Assault on Global ROL in Developing Countries

A brief sample of current data in three areas of the assault on global ROL illustrates the present trend of diminishing ROL and governmental accountability in today's developing countries.

ABA President Statements

Concern about sharpening attacks on ROL has risen to the highest levels of the ABA. During the four and one-half years ending December 2020, ABA presidents issued thirty statements calling out attacks on global ROL in: Afghanistan, Cameroon, China, Guatemala, Hong Kong, Hungary, Kenya, Malaysia, Myanmar, Nigeria, Pakistan, Poland, Saudi Arabia, Syria, Tanzania, Turkey, Venezuela, and Zimbabwe.

Falling Global ROL Rankings

World Justice Project ("WJP") ROL Index Reports calculate ROL country scores and rankings for 113 countries. A "higher" score indicates a lower global ranking and "weaker" ROL – a score of 1 is the best and 113 is the worst. WJP rankings for 2014 and 2020 for five developing countries are shown below These countries fell between 12 and 48 places in rankings from 2014-2020, illustrating the global erosion of ROL.

World Justice Project Rule of Law Index – Global Rankings

Country	2014	2020	Deterioration of ROL-Change in Global Rank: 2014-2020
China	76	88	-12
Russia	80	94	-14
Hungary	30	60	-30
Lebanon	49	96	-47
Turkey	59	107	-48

Shrinking Fundamental Rights and Judicial Independence

Despite constitutional and other guarantees, many countries restrict, among other things, fundamental

[7] James R. Silkenat, *The American Bar Association and the Rule of Law*, 67 SMU L. R. 746, 748 (2014), http://scholar.smu.edu/smulr/vol67/iss4/7/ (retrieved January 11, 2021).

freedoms of association, expression, press, and judicial independence. Many have grown suspicious of foreign NGOs as agents of subversion and curb their work through harassment and vague and ambiguous legislation. Judges who seek to hold their governments accountable are increasingly punished.

Turkey

According to the ROL Index above, Turkey dropped 48 places, from 54th to 107th, between 2014-2020. The 1982 Constitution establishes freedom of religion and conscience, thought and opinion, expression, the press, association and assembly, speech, the press, religion and association. However, as of December 2020, Turkey was the second worst jailer of journalists in the world, with 37 behind bars. Prosecutors use very broad definitions of "terrorism" that criminalize, among other things, insulting the state or the president. As of June 2018, Turkey had removed more than 4,000 judges and prosecutors, a quarter of the total, on suspicion of links to the prior year's failed coup - most were imprisoned, including two judges of the constitutional court.

Russia

According to the ROL Index above, Russia dropped 14 places between 2014 and 2020. The Constitution guarantees freedom of speech, the press, religion and association. However, a 2015 law allows prosecutors, without a court order, to declare foreign and international organizations "undesirable" and shut them down. Due to the risk created by ambiguity in the law, ROLI closed its Moscow office in 2016. In 2012, the government granted the state's media regulator the right to block websites without a court order. Between 2015 and 2018, the government cracked down on individual users – even people who simply forwarded images or texts or clicked on "like" in the wrong place ended up in prison.

China

According to the ROL Index above, China dropped 12 places between 2014 and 2020. Article 35 of the Constitution guarantees freedom of the press, assembly and association. But state discretion in implementing these freedoms and the lack of mechanisms to enforce them undermines these constitutional protections. The 2017 Foreign NGO law says that "Foreign NGOs ... must not endanger China's national unity, security or ethnic unity" and must register with security agencies. Critical terms, such as "endanger" and "national unity, security or ethnic unity" are not defined in the law, which creates uncertainty and risk. Anticipating this risk as the law was being debated, ABA ROLI closed its Beijing office in 2016.

In April 2013, the Communist Party circulated Document 9, identifying Western values of democracy and freedoms of expression, the press, and association as *threats* to the primacy of the government. Document 9 started a progressive erosion of the rule of law in China. Indeed, China was the world's worst jailer in 2020, for the second year in a row. Forty-seven journalists are currently serving long prison sentences or are jailed in the Xinjiang region without any charges disclosed.

DCLP Setting and Profile

DCLPs in many places are trained in law schools and law faculties, and are parts of professional legal associations, insufficiently suited to addressing 21st-century legal needs and global ROL challenges. Some law schools have introductory classes with 2,000 or more students in the lecture hall, limited libraries, limited or no audio-visual equipment, and limited on-line legal research or textbook availability. Many national bar associations provide law graduates with few or no opportunities for professional development through continuing legal education, bar conferences, or other support. There is little interaction across various levels of the legal profession: judges, prosecutors, governmental and private lawyers, law professors and law students.

In many developing countries, society is stratified, leaving many DCLPs, such as women, religious and ethnic minorities, and disabled and LGBTQIA professionals, relatively isolated. Additionally, in-country legal training may not be widely available, affordable, or even safe. Many DCLPs are underemployed or their compensation is very low. For instance, as of May 2017, many Egyptian entry-level DCLPs were paid US$ 500-1,000 per month – not enough to support a family. Accordingly, most DCLPs cannot afford to pay ABA dues.[8]

[8] ABA dues for 2021 ranged from $75 to $450. ABA Membership Dues and Eligibility, https://www.americanbar.org/membership/dues_eligibility.html (retrieved January 6, 2021).

Proposed ABA Virtual Grassroots Strategy for Strengthening 21st-Century Global ROL

Extend Complimentary ABA Membership to DCLPs. The ABA and ILS have more than one hundred years of ROL experience and spectacular resources, now including 780 committees, and training, webinars and conferences, second to none in the world. The ABA should use this treasure-trove of experience and resources to further its global ROL-strengthening mission by integrating thousands of DCLPs into the ABA. Based on the economic profile of DCLPs, the ABA should maximize this reach by offering them complimentary memberships.

The ABA's 780 committees address the entire legal spectrum, ranging from admiralty to intellectual property, judicial practice, mergers, and zoning. Total committee email traffic may be nearly two million emails per month. Approximately 200 conference calls per month conduct committee business, craft training programs, and listen to expert speakers.

The positive impact of integrating DCLPs with the ABA's 780 committees seems boundless. These committees are cauldrons of intellectual energy that enhance the profession and our legal institutions. They also strengthen professional identity and pride through a wider sense of professional community. At a deeper level, they embody American lawyers' visceral commitment to democratic values.[9] Imagine building regularized on-going relationships and communication among a broad range of grassroots DCLPs and ABA lawyers - thereby boosting worldwide ROL-building capacity by enhancing individual DCLP professional capacity at the grassroots level.

Minimal Cost – No Loss of Revenue. Much ABA and committee activity is electronic. As we have learned during the Covid-19 pandemic, the incremental cost of electronically adding participants would be minimal. Further, most DCLPs are not currently members of the ABA because they cannot afford the dues. Bringing them into the ABA on a complimentary basis that would expand ABA ROL impact without sacrificing existing membership revenue is, well, virtually priceless.

Implementation. This strategy is not a quick-fix or sprint. It is a marathon. Its benefits will accrue incrementally over time as newer generations of DCLPs continually grow into leadership roles in their home countries. It will also enrich committee composition and may expand business referrals for ABA lawyers. It also reflects existing ABA policy to remove financial barriers to desired ABA participation of economically-marginal groups, such as students.

Let's Use This Virtual Strategy to Enhance ABA 21st Century Leadership to Overcome the Siege and Fortify Global ROL

The ABA is the vanguard of global ROL-development. No other organization can match its leadership, expertise, diversity, and resources. This virtual program would be an innovative, cost-effective, affordable, positive-sum, scalable, virtual strategy to strengthen ROL through capacity-building in developing countries at the grassroots level of the legal profession. Because it is virtual, it bypasses physical-world ROL obstacles, such as terrorist attacks on judicial actors, oppressive governmental elimination of rights-based NGO activity, suppression of constitutional freedoms, and impediments to the dissemination of democratic values. It can strengthen ROL practice and culture worldwide through the accretion of democratic values in an increasingly growing body of DCLPs.

With global ROL currently under siege and ROL-development funding shrinking, the ABA's innovative leadership is needed now more than ever. ROL is in our DNA. In this era of increasing attacks on ROL, now is the time for ABA members to lead the world in using digital strategies to strengthen DCLPs across the planet, fortify 21st-century global ROL and access to justice, and expand the ABA's global membership and presence. Why not use this virtual strategy to fortify global ROL by immersing grassroots DCLPs in the largest, most sophisticated, and dynamic, legal association in the world?

Gregg B. Brelsford is currently a Senior Advisor to the International Law Institute – South Africa Center for Excellence – a rule of law training organization. He was a Vice-Chair for Rule of Law for the ABA International Law Section Middle East Committee, 2017-2019 and is

[9] The value of this approach for strengthening global ROL is highlighted at Nicholas Robinson and Catherine Lena Kelly, *Rule of Law Approaches to Countering Violent Extremism*, ABA ROLI Rule of Law Issue Paper, May 2017, at 9, n. 28, https://www.academia.edu/32787699/Rule_of_Law_Approaches_to_Countering_Violent_Extremism_American_Bar_Association_Rule_of_Law_Initiative_Issue_Paper_May_2017 (retrieved January 6, 2021) ("Rule of law organizations can also help foster independent legal professions by sustaining the capacity, skills, and knowledge of practicing advocates through continuing legal education programs, mentorship networks, or legal awareness campaigns.").

President of Rule of Law Global Associates. He served in Cairo as the Legal Advisor to the Microsoft Egypt Corporate Social Responsibility Program (2011-2012) and as Legal Advisor to the ABA Rule of Law Initiative office in Egypt from 2012-2016. At ROLI, Mr. Brelsford led the flagship Innovation in Legal Training and Education in the Egyptian Legal Profession program where, among other things, he conducted Training of Trainers workshops with Egyptian judges, prosecutors, lawyer and law professors. Mr. Brelsford can be reached at gbrelsford@ruleoflawglobalassociates.com. The views stated here are solely those of the author.

Addressing the "Social" in Environmental, Social and Governance

A United Nations Treaty on Business and Human Rights

Dr. Corinne Lewis and Jolan Goutier

Lawyers are increasingly being asked to advise clients on their human rights impacts, the "social" or "S" component of "Environmental, Social and Governance" (ESG) criteria. Consequently, many are keeping an eye on the developments in the United Nations draft treaty on business and human rights, formally termed the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, with an eye to anticipating future developments related to this social component. In particular, the draft treaty provides insights into the shift that is occurring from voluntary principles to hard law in the areas of human rights due diligence and corporate liability for infringements on the human rights of persons in the social area.

Therefore, this article provides background information on the treaty process, including the position of the United States on the draft treaty. It then considers the key provisions of the most recent version of the draft treaty, the Second Revised Draft of August 2020, concerning the scope of application of the treaty and its provisions on: i) prevention; ii) victims and access to remedy; and iii) liability and jurisdiction. [All parenthetical references to articles are to the provisions of the Second Revised Draft of the treaty.]

The Treaty Process

In June 2014, the UN Human Rights Council mandated an Open-ended Intergovernmental Working Group (OIWG) "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[1] The resolution creating the OIWG was co-sponsored by Ecuador, Bolivia, Cuba, South Africa and Venezuela. However, the treaty had a rather inauspicious start with only a plurality of 20 States of the Council voting in favor of the resolution. The United States, the United Kingdom, numerous European Union member States, Japan, and South Korea, all countries that serve as home states to significant numbers of prominent transnational companies, voted against the resolution. In contrast, over 600 civil society organizations indicated their support in a Joint Statement.[2]

In explaining its negative vote, the United States, announced that it would not participate in the OIWG.[3] The United States has expressed its opposition to the treaty process based on its view that the treaty detracts from the UN Guiding Principles (UNGPs),[4] despite the OIWG's statement that it believes that the treaty and the UNGPs should be "complementary and mutually reinforcing."[5] The United States also considers that the "international community has spoken clearly on this topic, emphasizing the need for the voluntary, multi-stakeholder, and consensus-based approach developed through the [UNGPs],"[6] even though developments in European and other States clearly indicate the movement toward hard law in this area. And true to its word, the United States has not participated in any of the sessions held by the OIWG including the sixth one in October 2020.[7]

[1] UN Human Rights Council. Res. 26/9, para. 1, UN Doc. A/HRC/RES/26/9 (June 26, 2014).
[2] See www.treatymovement.com/statement; https://www.escr-net.org/node/365893.
[3] Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, US Delegation to the UN HRC, Explanation of Vote, Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights, June 26, 2014, https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/.
[4] U.S. Mission to International Organizations in Geneva. The United States' Opposition to the Business and Human Rights Treaty Process (Oct. 15, 2018), https://geneva.usmission.gov/2018/10/15/the-united-states-opposition-to-the-business-and-human-rights-treaty-process/.
[5] U.N. Human Rights Council, Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. A/HRC/43/55. para. 2 (Jan. 9, 2020), https://ap.ohchr.org/documents/E/HRC/other/A_HRC_43_55%20E.pdf.
[6] *Supra*, note 4.
[7] U.S. Mission to International Organizations in Geneva. The U.S. Government's Opposition to the Business and Human Rights Treaty Process (Oct. 26, 2020), https://geneva.usmission.gov/2020/10/26/the-

Participants in the negotiation sessions are primarily State representatives and civil society organizations. Businesses cannot directly participate in these sessions. The limited role of businesses in the treaty negotiation process results from concern about the power of businesses and their potential impact on the negotiations.[8] The concern underpinning this approach is that businesses might try slow down the negotiation process and weaken the provisions of the treaty that they perceive to be opposed to their interests.[9] The current representation of businesses in the negotiations, through the International Organization of Employers and the International Chamber of Commerce, is a compromise position.

The first draft of the treaty, the Zero Draft, was issued by the OIWG in 2018, and has been followed by the 2019 Revised Draft, and the current 2020 Second Revised Draft. The drafts have progressively rendered the provisions increasingly consistent with the UN Guiding Principles on Business and Human Rights. While States continue to negotiate the treaty's provisions, the current Second Revised Draft provides valuable indications of the scope of the increasing expectations on businesses related to the social aspect of ESG measures.

Scope of Application

The treaty is drafted so as to be legally binding on States, not businesses. However, the provisions extensively detail the measures States should take to ensure that: (i) businesses implement their responsibility to respect human rights; (ii) businesses are held accountable for the human rights harm they cause to persons; and (iii) persons harmed are able to obtain a remedy.

The treaty covers all business enterprises, not just those carrying out cross-border activities. Moreover, not only traditional businesses, whether manufacturers, suppliers, or retailers, but also State-owned enterprises, as well as law firms, accounting firms and consulting firms fall within the scope of "businesses" covered by the treaty. The treaty has a similarly broad remit for the "business activities" covered. They include "any for profit economic or other activity" whether undertaken by a "natural or a legal person" (art. 1.3).

The business's actions addressed by the treaty are "human rights abuses" that is, any "harm committed by a business enterprise, through acts or omissions in the context of business activities" that impede international human rights, including environmental rights (art. 1.2). The reference to "human rights" is defined broadly to include the rights and freedoms in the Universal Declaration of Human Rights that are universally recognized, the core human rights treaties and ILO treaties to which a State is a party and customary international law (*e.g.*, prohibition against torture, freedom from discrimination) (art. 3.3).

Prevention

The trend of States' adoption of human rights due diligence laws, which is particularly evident in Europe, is reflected in the treaty's provisions on prevention. States are to require businesses to undertake human rights due diligence (art. 6.2) and this due diligence includes not just an evaluation of human rights but also environmental impacts (art. 6.3), thereby reflecting the increasing recognition of the intersection of environmental harms by businesses and their impacts on persons' human rights. The practical measures that businesses are expected to undertake in carrying out due diligence include: identifying and assessing their actual and potential human rights impacts; taking measures to address those impacts; monitoring the effectiveness of their measures; and communicating with stakeholders as to how they address their actual or potential human rights (art. 6.2). Businesses also are required to adopt a gender perspective when carrying out human rights due diligence (art. 6.3).

Businesses that fail to carry out appropriate due diligence may subject the company to "commensurate sanctions, including corrective action where applicable" (art. 6.6). These measures are in addition to those that may be imposed on businesses for their actual infringements on the rights of persons (covered in article 8, "Legal Liability," and discussed in V. below). Additionally, a business's performance of human rights

---

u-s-governments-opposition-to-the-business-and-human-rights-treaty-process/.

[8] De Freitas, W. (2018). Who is more powerful – states or corporations? The Conversation, https://theconversation.com/who-is-more-powerful-states-or-corporations-99616; Bernaz, N., & Pietropaoli, I. (2020). Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime Under the United Nations Convention on the Law of the Sea. Business and Human Rights Journal, 5(2), pp. 200-220.

[9] Grosbon, S. (2019). Projet de traité international sur les sociétés transnationales et les droits de l'Homme. Entretien avec Juliette Renaud, Chargée de campagne senior sur la régulation des multinationales auprès des Amis de la Terre France. La Revue des droits de l'homme, http://journals.openedition.org/revdh/6503.

due diligence does not automatically absolve it from the responsibility of having caused, contributed to or failed to prevent human rights abuses (art. 8.8).

A key question for businesses will certainly be the extent to which they are responsible for the conduct of businesses in their value chain and other business relationships. The current draft provides that business enterprises are to "prevent and mitigate human rights abuses throughout their operations" (art. 6.1), which is ambiguous and will need to be further clarified.

Victims and Access to Remedy

The treaty makes evident its emphasis on ensuring that those persons whose human rights have been infringed by a business have a remedy. There are numerous provisions addressing this topic: "Rights of Victims" (art. 4); "Protection of Victims" (art. 5); and "Access to Remedy" (art. 7).

The definition of a "victim" is quite broad. It covers persons who individually or collectively suffered harm and includes "immediate family members or dependents of the direct victim, and persons who have suffered harm in intervening to assist victims" (art. 1.1). Thus, the definition of a "victim" also includes all persons, advocates, lawyers, union representatives, community representatives and others, who directly provide help to victims. However, this definition is likely to undergo further refinement and modifications since there were a number of interventions in the October 2020 discussions of the treaty that criticized the lack of clarity and precision in this definition.

The harm that needs to be suffered by the victim to incur the business's responsibility includes "physical or mental injury, emotional suffering, or economic loss or substantial impairment of their rights" (art 1.1). Also, in the most recent draft, there is the explicit introduction of being treated as a victim even if the perpetrator of the human rights abuses is not identified, apprehended, prosecuted, or convicted (art. 1.1).

The challenges faced by persons harmed by businesses have been well documented and analyzed in the Accountability and Remedy Project of the Office of the High Commissioner for Human Rights. To address the expense of such litigation, States are to provide "adequate and effective legal assistance to victims throughout the legal process" and ensure that legal costs at the end of legal proceedings do not impose an unjust and unreasonable burden on victims (art. 7.3).

Also, articles introduced into the Second Revised Draft prohibit courts from dismissing legal proceedings based on the *forum non conveniens* principle (arts. 7.5, 9.3) This principle normally allows the courts of a State to decline jurisdiction if they consider that it would be more appropriate for the litigation to be decided by a foreign court that also has jurisdiction.[10] The aim is to prevent companies from using *forum non conveniens* to transfer cases to courts in countries where justice would be hindered or the plaintiffs deprived of the resources to pursue an effective remedy.[11] Another provision intended to assist plaintiffs is that allowing the reversal of the burden of proof.[12] The most recent version of the draft treaty provides that: "State Parties may, consistent with the rule of law requirements, enact or amend laws to reverse the burden of proof in appropriate cases to fulfill the victims' right to access to remedy" (art. 7.6). While the Revised Draft provided that this principle could be utilized "where needed" and "subject to domestic law" in article 4.16 the newer formulation, with its reference to "rule of law requirements," will require further clarification.

Liability and Jurisdiction

A business may be legally liable for its "failure to prevent another legal or natural person with whom it has a business relationship, from causing or contributing to human rights abuses" in two cases: first, when the business "legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse." And second, where the business should have "foreseen risks of human rights abuses in the conduct of their business activities …. but failed to put adequate measures to prevent the abuse" (art. 8.7). This new approach seeks to impose liability where power is actually exercised, but even where the business does not exercise any control, it may still be liable if the human rights abuses were foreseeable and it

[10] Schneider B. (1975). Le *forum conveniens* et le *forum non conveniens* (en droit écossais, anglais et américain). In: Revue internationale de droit comparé. Vol. 27 N°3, pp. 601-642.
[11] Cassel, D. (2020). Progress in the Newest UN Draft Treaty on Business and Human Rights. Business & Human Rights Resource Centre, https://www.business-humanrights.org/en/blog/progress-in-the-newest-un-draft-treaty-on-business-and-human-rights/.
[12] In that sense, *see* UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the Context of Business Activities, 10 August 2017, E/C.12/GC/24, §45-45: "Shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant."

failed to take adequate measures, presumably including conducting human rights due diligence, to address the abuse. Thus, businesses will need to take these two aspects into consideration when thinking about their supply chains and business relationships.

The most recent draft also addresses jurisdictional competence. It provides that victims can bring claims where: (i) the human rights abuse occurred; (ii) where an act or omission contributing to the abuse occurred; or (iii) the business is domiciled (art. 9.1). In addition, the principle of *forum necessitatis* introduced in the draft ensures that victims can file complaints in States other than those provided for in the treaty when no other jurisdiction can guarantee a fair trial (art. 9.5). Finally, there is a related exception allowing victims to sue a transnational corporation and its subsidiary or business partner in their home States, provided that the two claims against the parties are closely related (art. 9.4). According to Professor Surya Deva, member of the UN Working Group on Business and Human Rights, these revisions reduce the risk of vexatious proceedings brought with the sole purpose of harming companies, and at the same time, they facilitate corporate liability when the actions of victims are legitimate.[13] However, given objections that have been raised, the liability and jurisdiction provisions of the treaty will certainly be subject to further discussion and revision.

Conclusion

New United Nations treaties can take years (as much as a decade) to formulate, and this will likely be the case with the draft treaty on business and human rights. However, when completed, the treaty will be the first to constitute a global standard that makes States legally responsible for ensuring companies implement their responsibility to respect human rights.[14] In the meantime, the draft treaty can be viewed as a reflection of developments rapidly occurring in the regulatory and legislative frameworks of countries as well as the increasing expectations of investors and shareholders related to the social factor, or "S" in ESG.

This article has been adapted from an article published in the ABA International Human Rights Committee (IHRC) Newsletter, Winter 2020, Volume 5 and is reprinted with the permission of the IHRC.

Dr. Corinne Lewis, a partner in the Brussels-based law firm Lex Justi (www.lexjusti.com), specializes in the area of business and human rights. She serves as Co-Chair of the ABA International Law Section's International Human Rights Committee.

Jolan Goutier is a Belgian human rights lawyer. He has worked for "Lex Justi" and for the Organization for Refuge, Asylum & Migration (ORAM). He is a member of the International Prison Observatory - Belgian section.

[13] Surya, D. (2020). BHR Symposium: The Business and Human Rights Treaty in 2020–The Draft is "Negotiation-Ready," but are States Ready? OpinioJuris, http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/.

[14] Kirkebø, T., & Langford, M. (2020). Ground-Breaking? An Empirical Assessment of the Draft Business and Human Rights Treaty. AJIL Unbound, 114, 179-185. doi:10.1017/aju.2020.32.

Businesses' Impacts on Human Rights

Alan S. Gutterman

For states, businesses, and other stakeholders to effectively develop a framework for the relationship between business activities and human rights, it is helpful and necessary to step back and consider the impacts of common day-to-day business activities on universally recognized fundamental human rights. While a great deal of attention is rightly focused on instances where business activities adversely impact human rights (e.g., contamination of drinking water supplies, displacement of communities in the wake of new development projects, and failure to pay wages sufficient to support a dignified standard of living), businesses also pay taxes to support local services and contribute to economic development by providing jobs and underwriting the development of their workers' skills. Impacts vary depending on the specific context and factors such as the type of industry and the state of economic and social development in the areas where the business is operating. The traditional role of business and of societal and political expectations also varies from country to country and within national borders.

More and more businesses, sensitive to the criticisms of corporate social responsibility (CSR) as being little more than a self-serving marketing activity, are taking a hard look at their activities through a human rights lens. For this reason, human rights have become a top priority within the business community, based on surveys conducted by the United Nations (UN), the International Chamber of Commerce, the Economist Intelligence Unit, and the UN Global Compact. Interest has been driven by the recognition that human rights (1) touch on every aspect of a company's operations, (2) are universal and easier for everyone to understand as opposed to CSR, and (3) are the essence of sustainability. Moreover, the evolution and maturation of the global human rights law framework provide businesses with clarity regarding the steps to be taken to fulfill their human rights duties.[1] All of this means that sensitivity to the interaction between business and human rights can be enhanced by focusing on specific rights, such as the following:[2]

- ***Right to an adequate standard of living*:** Businesses contribute to providing members of society with an adequate standard of living by creating job opportunities that allow them to afford decent housing and food. However, when businesses push forward with projects that displace communities without consultation and compensation, they endanger the livelihoods of the members of those communities.
- ***Right to just and favorable working conditions*:** Businesses can provide just and favorable working conditions by following strong health and safety standards, but they can also cause harm to their workers by failing to provide sufficient breaks during working hours or exposing workers to toxic substances that are dangerous to their health.
- ***Right to water and sanitation*:** Businesses can work with governmental authorities to improve the water and sanitation infrastructure in a community, but they may also contribute to water scarcity for domestic and farming uses by using large amounts of water for their business operations or discharging pollutants into the local water supply.
- ***Right to education*:** Businesses pay taxes and licensing and permitting fees that governments use to support education in the communities in which the businesses are operating. However, the failure of businesses to respect restrictions on child labor will prevent children from enjoying their right to education.
- ***Right to access to information*:** Businesses can publish data on their environmental and social performance in languages and formats that make

[1] Why Businesses Say Human Rights Is Their Most Urgent Sustainability Priority (October 13, 2016), https://www.bsr.org/en/our-insights/blog-view/why-businesses-say-human-rights-most-urgent-sustainability-priority.

[2] BUSINESS AND HUMAN RIGHTS: A GUIDEBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS (November 2013), 8. The website of the Office of the UN High Commissioner for Human Rights includes a comprehensive list of human rights issues (https://www.ohchr.org/EN/Issues/Pages/ListOfIssues.aspx) that businesses should consult for guidance in identifying and prioritizing the issues most relevant to their specific situation. Other useful resources are the annual lists of the top ten key issues that are of particular importance in the arena of business and human rights that are published by the Institute for Human Rights and Business (https://www.ihrb.org/).

the information readily available to stakeholders. However, in many cases, governments and businesses do not make the results of environmental impact assessments publicly available and fail to carry out adequate engagement and consultation prior to launching a new project that will have an adverse human rights impact.

- ***Right to nondiscrimination*:** Businesses fulfill their duties with respect to rights to nondiscrimination by implementing and following employment-related practices (e.g., hiring, promotion, and benefits) that do not discriminate on unlawful grounds, but they often engage in discriminatory practices that violate the rights of women (e.g., failing to provide equal pay to men and women for the same work or not allowing women to return to the same position following maternity leave) or of persons with disabilities.

Another method for connecting business activities to human rights impacts is to sort by reference to common business functions:[3]

- ***Human Resources*:** The human resources function must regularly address the impact of decisions relating to workers on their rights to be free of discrimination and on the rights of protected groups such as women and disabled persons. Key questions that need to be asked include whether female and male personnel are hired, paid, and promoted based solely on their relevant competencies for the job; whether women and men are paid the same wage for the same work; and how sexual harassment in the workplace is handled.
- ***Health and Safety*:** The health and safety function involves duties to protect workers' rights to just and favorable conditions of work and health and safety. Therefore, attention needs to be paid to assessing whether the workplace is safe and to protecting the mental and physical health of workers.
- ***Procurement*:** The procurement function is responsible for monitoring suppliers to ensure that they respect the rights of their workers to form and join a trade union and to bargain collectively and to assure that suppliers do not engage in actions that violate the rights of children or prohibitions against slavery. Businesses must impose appropriate labor standards on their suppliers as a condition of the business relationship and engage in due diligence to monitor compliance with those standards.
- ***Product Safety*:** Businesses have an obligation to protect the rights of the customers and end users to health and privacy with respect both to the products and services that the company sells and the processes that it uses in connection with related activities such as marketing. Attention should be paid to products that raise safety issues and/or that might create health hazards, as well as to the collection and use of sensitive personal information of customers and end users.

Businesses can also orient their stakeholder relationships and engagement to the core human rights issues that are most relevant to the members of each stakeholder group. For example, relationships with workers should conform to their human rights to freedom of association, health, an adequate standard of living, and just and favorable conditions of work, and their rights not to be subjected to slavery or forced labor. Relationships with consumers and end users should be guided by respect for their human rights to health, privacy, and personal security. Members of the communities in which a business operates are entitled to respect for their rights to health, water and sanitation, life and health, and an adequate standard of living and, in addition, to not be resettled or otherwise have their access to land and natural resources adversely impacted by businesses without free, prior, and informed consent.[4] Obviously, businesses need to order their activities in ways that do not infringe on the aforementioned rights of community members, such as by knowingly polluting drinking water or emitting toxic chemicals. However, companies can also have a positive human rights impact by creating and supporting programs to provide adequate food and clothing to individuals and groups within the community and promote local cultural life. When identifying and defining stakeholder groups, businesses should take into account particular groups or populations that have been afforded special protection in human rights instruments, including women, children, migrant workers, persons with disabilities, indigenous peoples, and members of certain types of minority groups (i.e., national or ethnic, religious, and linguistic).

[3] DOING BUSINESS WITH RESPECT FOR HUMAN RIGHTS: A GUIDANCE TOOL FOR COMPANIES (2016), 21.

[4] *Id*. at 24.

While the discussion above focuses primarily on the direct impact of a business's activities on human rights through its own operations, the wave of globalization that has occurred over the last several decades has led to calls to expand the human rights duties of businesses to include adverse human rights impacts resulting from their involvement in business relationships with other parties.[5] For example, the UN Guiding Principles expect business enterprises to carry out human rights due diligence that covers not only adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, but also impacts that may be directly linked to its operations, products, or services by its business relationships. Traditionally, human rights due diligence in the supply chain has focused on working conditions and labor rights, often in response to news of unhealthy and unsafe conditions in supplier facilities that resulted in tragic outcomes for workers. However, the trend is to expand the scope of the inquiries to include human rights risks and impacts in other areas such as pollution and other environmental damage caused by the actions and corrupt activities (like bribery) of suppliers and contractors in the countries in which they operate that ultimately interfere with the human rights of the people in those countries.[6]

This article is an excerpt from the author's new book, *Business and Human Rights: Advising Clients on Respecting and Fulfilling Human Rights*, published by the ABA Section of Business Law. More information on the book is available here.

Alan S. Gutterman is a business counselor and prolific author of practical guidance and tools for legal and financial professionals, managers, entrepreneurs, and investors on topics including sustainable entrepreneurship, leadership and management, business law and transactions, international law, and business and technology management. He is the co-editor and contributing author of several books published by the ABA Business Law Section, including THE LAWYER'S CORPORATE SOCIAL RESPONSIBILITY DESKBOOK (2019), EMERGING COMPANIES GUIDE (*3rd Edition)* (2019), and BUSINESS AND HUMAN RIGHTS: A PRACTITIONER'S GUIDE FOR LEGAL PROFESSIONALS (2020). More information about Alan and his work is available at his personal website: www.alangutterman.com.

[5] The OECD Guidelines for Multinational Enterprises defines the term *business relationships* to include relationships with business partners, entities in the supply chain, and any other nonstate or state entities directly linked to its business operations, products, or services.

[6] When developing processes for addressing human rights impacts in their supply chains, businesses can tap into a wide range of resources that have been developed as part of sector-specific standards initiatives and by organizations such as the UN Global Compact. See https://www.unglobalcompact.org/what-is-gc/our-work/supply-chain. The UN Global Compact aligns sustainable supply chain management to several of the UN Sustainable Development Goals, including decent work and economic growth, responsible production, and consumption and climate action.

Impact Investing in Emerging Markets

Successes and Setbacks in the Era of COVID-19

Ellie Webb

Within the impact investment system, emerging markets are on the cutting edge, with 30% of impact funds being directed towards developing economies around the world.[1] A pre-pandemic study estimated a shortfall of 330 billion USD per year in Africa alone, so it is likely that the decrease in tourism and international aid has made these numbers even more extreme.[2] Many of the 2.5 billion people who live on 2.50 USD per day or less reside in those countries where the need for impact investment is greatest, such as in Sub-Saharan Africa and South Asia. Within these markets, investments are generally categorized in education, healthcare, nutrition, environment, infrastructure, and microfinance, as they all offer potential for returns and impact, but these sectors vary, as each market presents different barriers to investment and obstacles.[3] Because emerging markets are less studied and returns are not as guaranteed, some investors have displayed hesitation about investing in these markets, yet many funds have seen emerging markets as unparalleled opportunities for making a true impact on the community level that is guaranteed to change numerous lives. Investors are likely to see specific improvements in these markets, as quality of life can be dramatically improved by increasing access to a single resource.

While impact investing has continued to expand its reach over the last few years, travel restrictions and global disruptions caused by the COVID-19 pandemic have amplified the perceived risks associated with investing in emerging markets. Due diligence is created online rather than being performed in person, and traveling to target sites has come with added risk.[4] In addition, most industries have experienced strain or halted, creating delays in project implementation. More generally, emerging markets lack some of the communication that is required to ensure a project is successfully completed. An example of this setback is that many countries lack the environmental sustainability-reporting infrastructure that exists in developed markets, which creates difficulties in quantifying the effects of impact investing.[5] One minor challenge for a pipeline development approach for firms is that there are few existing businesses that are prepared for an investment structure because of insufficient financial and operational capacities, so many funds must plan projects from the ground up. Many of these emerging market countries are largely community oriented with large rural populations, and this creates challenges with cultural traditions and complex land ownership laws.

The future of impact investing in emerging markets seems to be bright, as even though data on the returns are sparse, the indicators that do exist shed a positive light on their returns. This can be partially attributed to these markets being somewhat insulated from global macroeconomic events that negatively impact more established markets.[6] With this in mind, there are many opportunities for further expansion into new countries. In East Africa, there is no evidence of impact investing in Eritrea or Somalia with very minimal work in South Sudan, Sudan, Burundi, and Djibouti. There, most aid is given through multilateral government loans, which leave many opportunities to strengthen the investing networks in these countries. [7] Countries like these experience large absences of services provided by the public sector and have vast potential for improvement, which requires investment.

In terms of expanding investment into new sectors, public health and access to medical care have not been a major area of focus in emerging markets, yet as these markets become more of an area of focus, this sector will be crucial for improving quality of life. Investing in

[1] https://oxfordbusinessgroup.com/news/covid-19-new-dawn-impact-investing-emerging-economies
[2] https://www.ft.com/content/40d246e3-5cd3-40ae-bb23-fb640d3637a4
[3] https://thegiin.org/assets/documents/pub/impact-investing-in-emerging-markets.pdf
[4] https://www.ft.com/content/40d246e3-5cd3-40ae-bb23-fb640d3637a4
[5] https://esgclarity.com/impact-investing-can-help-emerging-markets-attain-the-un-sdgs/
[6] https://thegiin.org/assets/documents/pub/impact-investing-in-emerging-markets.pdf
[7] https://thegiin.org/assets/documents/pub/East%20Africa%20Landscape%20Study/05Kenya_GIIN_eastafrica_DIGITAL.pdf

public health creates services and facilities, and through the provision of innovative products, the welfare of communities improves. In emerging markets, there are many startling statistics that stress a dire need for investment in healthcare. Indonesia, Kenya, and Zambia only have a single doctor to serve 100,000 people, which contrasts with 26 doctors per 100,000 people in the US. [8]While many sectors like education and public health are important to improving quality of life in these countries, many firms see forays into impact investment through the financial services sector, as banks and MFIs can directly lend to small and medium enterprises. These transformations allow for increased investment and innovation, which can eventually trickle down into other sectors crucial for growth.

While the COVID-19 pandemic led to many dashed hopes of the prospects of global investments, there are also new hopes for the role of impact investments in strengthening economies weakened by the pandemic, specifically in emerging markets. 2020 reminded many investors residing in countries with established markets the importance of essential sectors, including healthcare, technology, education, and logistics, all of which were threatened by a new virus, and these gaps were exacerbated in countries with already crumbling infrastructure and governance. Where government programs fall short, the private sector is able to step in to assist. A GIIN report found that in March and April, 16% of surveyed impact investors expressed interest in expanding their investments, and many notable funds have made decisions to divest from environmentally detrimental companies and towards more sustainable investments. When asked about where they sought to invest next, 58% of those surveyed aimed to invest in sub-Saharan Africa, with 41% aiming to invest in Latin America.[9] These statistics are promising for impact investing in emerging markets, even in a global economy recovering from the impacts of COVID-19.

Ellie Webb is a student at Georgetown University's Walsh School of Foreign Service studying International Politics and Security Studies with a minor in French. She plans to attend law school following graduation to pursue a career working with international organizations in human rights and conflict resolution. This article is an excerpt from the author's contribution to a forthcoming book on impact investment around the world to be published by the ABA International Law Section.

[8] https://thegiin.org/assets/documents/pub/impact-investing-in-emerging-markets.pdf

[9] https://oxfordbusinessgroup.com/news/covid-19-new-dawn-impact-investing-emerging-economies

Justice Ruth Bader Ginsburg's Contributions to International Law

Cindy G. Buys

Many tributes have been written about U.S. Supreme Court Justice Ruth Bader Ginsburg both before and after her recent death on September 18, 2020. However, one aspect of her career that has not received as much attention in these tributes is her views on the role of foreign and international law in the U.S. legal system and her contributions to the development of international law.

Early in her career as a lawyer for the American Civil Liberties Union, Ruth Bader Ginsburg referred to international and foreign legal authorities to support her arguments in *Reed v. Reed,* a case involving gender discrimination.[1] Later as a U.S. Supreme Court justice, Justice Ginsburg regularly gained insights from her interactions with lawyers and judges around the world. She served as chair of the Judicial Advisory Board of the American Society of International Law (ASIL) from 2006 until her death.[2] In that role, she presided over annual meetings of judges from the thirteen federal judicial circuits to share information about international legal issues coming before the federal courts and prepared an annual report of significant international legal matters that had arisen in those courts during the previous year.[3] She also was a regular participant in various law school study abroad programs, such as Loyola of Chicago Law School's program in Rome[4] Wake Forest Law School's program in Vienna,[5] and South Texas College of Law's program in Malta.[6]

In a speech to the Constitutional Court of South Africa in 2006, Justice Ginsburg stated that the value she places on comparative dialogue and on learning from other legal systems builds on the views of the founders of the United States who cared about international opinion.[7] She has pointed out that in the Declaration of Independence, the drafters and signers stated their reasons for separating from Great Britain and forming the new United States of America out of a "decent Respect to the Opinions of Mankind."[8] Referring to statements of the Founding Fathers and early case law from U.S. courts, she stated, "From the birth of the United States as a nation, foreign and international law influenced legal reasoning and judicial decisionmaking."[9] Of course, Justice Ginsburg did not contend that U.S. judges should blindly follow foreign judicial opinions or that such opinions were in any way binding on U.S. judges. Rather, she argued that foreign judicial opinions "can add to the store of knowledge relevant to the solution of trying questions."[10] She advocated that U.S. judges, "learn what we can from the experience and good thinking foreign sources may convey."[11] She also opined that, "The U.S. judicial system will be the poorer ... if we do not both share our experience with, and learn

---

[1] Reed v. Reed, Brief for the Appellant, 1971 WL 133596, at p. 55. Justice Ginsburg served on the Board of Editors of the American Journal of Comparative Law from 1964-72, which she said, "powerfully influenced [her] as a lawyer, law teacher, and now a judge." Ruth Bader Ginsburg, *"A decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, International Academy of Comparative Law (July 30, 2010), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-02-10.

[2] Mark David Agrast, A Woman of Valor, ASIL Newsletter, vol. 36 (Fall-Winter 2020), https://www.asil.org/sites/default/files/NEWSLETTER_CURRENT.pdf.

[3] Id.

[4] *A Supreme Learning Experience*, https://www.luc.edu/law/stories/rome-ruthbaderginsburg/.

[5] *U.S. Supreme Court Justice Ruth Bader Ginsburg gives public lectures in Venice and Vienna as part of Wake Forest Law School's Study Abroad Program*, http://news.law.wfu.edu/2012/07/u-s-supreme-court-justice-ruth-bader-ginsburg-gives-public-lectures-in-venice-and-vienna-as-part-of-the-wake-forest-law-schools-study-abroad-program/.

[6] *U.S. Supreme Court Justice Ruth Bader Ginsburg to teach students in STCL Houston's Malta Summer Program*, https://www.stcl.edu/news/us-supreme-court-justice-ruth-bader-ginsburg-to-teach-students-in-stcl-houstons-malta-summer-program/.

[7] Ruth Bader Ginsburg, *"A decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, Constitutional Court of South Africa (Feb. 7, 2006), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_02-07b-06.

[8] Id.

[9] Ginsburg, *"A decent Respect to the Opinions of [Human]kind", supra* note 2.

[10] Ginsburg, *"A decent Respect to the Opinions of [Human]kind", supra* note 7.

[11] Id.

from, legal systems with values and a commitment to democracy similar to our own."[12]

In the Supreme Court's death penalty jurisprudence under the Eighth Amendment, Justice Ginsburg consistently joined other justices in looking to foreign and international sources for help in ascertaining the "evolving standards of decency that mark the progress in a maturing society."[13] For example, Justice Ginsburg joined the majority in *Atkins v. Virginia* in holding that the Eighth Amendment prohibits imposition of the death penalty on a mentally disabled offender. The Court stated, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[14] Justice Ginsburg and the majority of the Supreme Court continued this theme in *Roper v. Simmons*, where the Court held unconstitutional the imposition of the death penalty on persons under the age of 18.[15] There, the Court acknowledged "the overwhelming weight of international opinion against the juvenile death penalty" which provided "respected and significant confirmation of [the Court's] own conclusions."[16]

Justice Ginsburg also referred to international sources in other areas of law. In her separate opinion in *Grutter v. Bollinger* upholding the Michigan Law School's admissions program against an equal protection challenge, Justice Ginsburg cited two international conventions, the 1965 Convention on the Elimination of all Forms of Racial Discrimination and the 1979 Convention on the Elimination of all Forms of Discrimination against Women, in support of her point that it is possible to distinguish between impermissible policies of discrimination or exclusion and permissible policies of inclusion.[17] She stated her view that Michigan's admissions policy "accords with the international understanding of the [purpose and propriety] of affirmative action."[18]

Justice Ginsburg also joined the majority opinion in *Lawrence v. Texas*, striking down a Texas law that criminalized same-sex intimate sexual conduct.[19] That majority opinion emphasized: "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries," citing *Dudgeon v. United Kingdom*, a leading decision from the European Court of Human Rights.[20]

Justice Ginsburg also has advocated for the U.S. Supreme Court to provide "respectful consideration" to the judgments of the International Court of Justice (ICJ) in a series of cases involving consular notification under the Vienna Convention on Consular Relations (VCCR). In those case, all of the Supreme Court justices agreed the ICJ's opinions were entitled to "respectful consideration." However, the justices differed as to the meaning and result of that consideration.[21] For example, writing for the majority in *Sanchez-Llamas v. Oregon*, Chief Justice Roberts stated that the opinion of the ICJ prioritizing the United States' treaty-based obligation to provide consular notification over state procedural default rules is entitled to "respectful consideration." However, the majority held that U.S. courts are not bound by decisions of the ICJ and Oregon was not required to suppress evidence against Sanchez-Llamas due to its failure to provide him timely consular notification. Justice Ginsburg concurred in the result, but wrote a separate opinion in which she attempted to distinguish the facts and to reconcile the ICJ's interpretation of the treaty and a statute to avoid "friction" and "conflict."[22] In another VCCR case, *Medellin v. Texas*, Justice Ginsburg joined Justice Breyer's dissenting opinion arguing that because the United States had consented to the ICJ's jurisdiction by treaty, U.S. courts were bound by the ICJ's decision that Texas should review and reconsider its judgment against Medellin when Texas failed to provide the required consular notification. [23]

Justice Ginsburg continued her nuanced approach to the use of international and foreign law in her 2018 majority opinion in the antitrust case, *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*[24] There, Justice Ginsburg wrote: "A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord

[12] Ginsburg, *"A decent Respect to the Opinions of [Human]kind", supra* note 1.
[13] Kennedy v. Louisiana, 554 U.S. 407 (2008). See also Trop v. Dulles, 356 U.S. 86, 101 (1958), one of the Court's most oft-cited opinions referencing "evolving standards of decency that mark the progress of a maturing society" to determine what constitutes cruel and unusual punishment under the Eighth Amendment. In that case, the Court held that the loss of citizenship may result in "banishment, a fate universally decried by civilized people" and make a person "stateless, a condition deplored in the international community of democracies."
[14] Atkins v. Virginia, 536 U.S. 304 (2002).
[15] Roper v. Simmons, 543 U.S. 551 (2005).
[16] Id.
[17] Grutter v. Bollinger, 539 U.S. 306 (2003) (Ginsburg, J., concurring)
[18] Id.
[19] Lawrence v. Texas, 539 U.S. 558 (2003).
[20] Id.
[21] 548 U.S. 331 (2006).
[22] Id. (Ginsburg, J. concurring).
[23] Medellin v. Texas, 552 U.S. 491 (2008).
[24] 138 S.Ct. 1865 (2018).

conclusive effect to the foreign government's statements."

Justice Ginsburg also contributed to U.S. jurisprudence on international law through her authorship of majority opinions for the U.S. Supreme Court involving international treaties to which the United States is a party. For example, in her most recent pronouncement on U.S. treaty law, Justice Ginsburg wrote that under the Hague Convention on the Civil Aspects of International Child Abduction, a child's "habitual residence" should be determined by a the totality of the circumstances and, in this case, the shared parental intent was for the daughter to live in Italy.[25] In the earlier case of *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*,[26] Justice Ginsburg rejected a suit under New York law attempting to hold an airline liable for psychic injuries unaccompanied by bodily harm, finding that the Warsaw Convention was intended to create a uniform system of liability rules for its member states.

In the area of international intellectual property law, Justice Ginsburg wrote for the majority in upholding Congress' power to extend the terms of copyrights in *Eldred v. Ashcroft.*[27] In doing so, Justice Ginsburg pointed out the positive incentives for authors that are created by uniform copyright laws between the United States and the European Union.[28] In *Golan v. Holder*,[29] Justice Ginsburg again wrote the majority opinion upholding Congress' power to enact a statute implementing an international trade agreement on copyright law against a constitutional challenge.

There is much to appreciate about Justice Ginsburg's openness to consulting international and foreign law. In her public speeches on the topic, Justice Ginsburg repeatedly has predicted that the U.S. Supreme Court "will continue to accord a 'decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility."[30] While I wholly agree with Justice Ginsburg that the United States can learn from the experiences and insights of other countries, I suspect it will continue to be a slow and intermittent journey. I hope that we will not forget the teachings of the brilliant and notorious RGB as we continue down that path.

Cindy G. Buys is a Professor of Law and Director of International Law Programs at Southern Illinois University School of Law where she teaches international and immigration law-related courses as well as U.S. Constitutional Law.

[25] Monasky v. Taglieri, 140 S.Ct. 719 (2020).
[26] 525 U.S. 155 (1999).
[27] 537 U.S. 186 (2003).
[28] Id. at 206.
[29] 565 U.S. 302 (2012).
[30] See e.g., Ginsburg, *"A decent Respect to the Opinions of [Human]kind", supra* notes 1 and 7.

Collection of Evidence by Judicial Authorities within the EU EncroChat Example

Thomas Lapierre, Héloïse Vigouroux and Julie Zorrilla

As organized crime now operates on a global scale, European countries face increasing challenges in combating cross-border crime. In that regard, the EU has adopted several legal tools to facilitate judicial cooperation and conduct international investigations. The recent and efficient use of European Investigative Orders and Joint Investigation Teams has allowed French, Dutch and UK authorities to hack the EncroChat network, an encrypted and covert means of communication allegedly used by criminal organizations. This led to hundreds of successful and coordinated arrests in several countries in the summer of 2020. This recent example showcases the effectiveness of these legal tools now at the disposal of legal authorities of Member States to lead efficient cross-border investigations.

As cross-border organized crime operates on global scale in an ever-evolving technological context, judicial cooperation is essential for the deterrence, prevention, and repression of transnational criminality. To ensure the productive and successful apprehension of criminal offenders, the European Union has implemented legal tools that allow Member States to coordinate their response to organized and globalized crime.

Initially, the 2000 EU Convention[1] and its additional Protocol of 2001 were the main tools for obtaining cross-border evidence within the EU, completing the Strasbourg Convention of 1959[2] and its additional Protocol of 1978, which were the first regional conventions ever adopted in the matter of European transnational cooperation. Signatory states were expected to afford each other "*the widest measure of mutual assistance*"[3] in proceedings related to offences which fell within the jurisdiction of the requesting State.

In this context, the main way to request judicial assistance was done by drafting a letter rogatory "*for the purpose of procuring or transmitting articles to be produced in evidence, records or documents precising the purpose of the requested proceedings*"[4], or request for mutual assistance transmitted directly through judicial authorities[5].

Letters rogatory were sometimes very time-consuming because they could involve unique issues of domestic procedural law[6] and because they were likely to remain a dead letter.

To overcome such challenges, the Directive regarding the European Investigative Order ("EIO")[7] was enacted in 2014 and implemented in Member States by May 2017 to replace the above framework. The EIO is a judicial decision which has been issued or validated by a

[1] European Union, Convention C197/3 on Mutual Assistance in Criminal Matters between the Member States of the European Union, European Treaty Series no. 30, Strasbourg, 12 July 2000.
[2] Council of Europe, Convention on Mutual Assistance in Criminal Matters, 20 April 1959.
[3] Article 1 of the European Convention on Mutual Assistance in Criminal Matters, Council of Europe, Strasbourg, 20 April 1959 ("*1.The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party. 2.This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law*").
[4] Article 3 of the European Convention on Mutual Assistance in Criminal Matters, Council of Europe, Strasbourg, 20 April 1959 ("*1.The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents. 2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it. 3. The requested Party may transmit certified copies or certified photostat copies of records or documents requested, unless the requesting Party expressly requests the transmission of originals, in which case the requested Party shall make every effort to comply with the request*").
[5] Article 6 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, European Union, 12 July 2000 ("*1. Requests for mutual assistance and spontaneous exchanges of information referred to in Article 7 shall be made in writing, or by any means capable of producing a written record under conditions allowing the receiving Member State to establish authenticity. Such requests shall be made directly between judicial authorities with territorial competence for initiating and executing them, and shall be returned through the same channels unless otherwise specified in this Article* (…)").
[6] Federal Judicial Center, "*Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges*", *International Litigation Guide*, 2014, I., p. 3 and III. C., p. 20.
[7] European Union, Directive 2014/41/EU regarding the European Investigative Order in criminal matters, 3 April 2014.

judicial authority of a Member State to have one or several specific investigative measures carried out in another Member State to obtain evidence in an ongoing criminal investigation.

Other effective measures such as Joint Investigation Teams ("JIT") which was created by EU Law, enable direct cross-border cooperation to simplify criminal investigations.

These tools appear especially effective as the recent example of the EncroChat investigation in 2020 shows.

1. Recent example of an effective EIO facilitating the transfer of evidence in a cross-border context: The EncroChat investigation

1. As the EIO is based on the principle of mutual recognition, the executing authority must recognize the other country's request and ensure its execution according to the same conditions as if the investigative measure concerned had been ordered by an authority of the executing state[8]. An EIO may therefore be issued in proceedings brought by a judicial authority in respect of a criminal offence under the national law of the issuing State, where the investigative acts are necessary, adequate, and proportionate to the case at hand, and within determined time limits.
2. Various investigative acts are covered, such as search and seizure, hearing of suspects and witnesses (including by videoconference or by phone), restitution of articles obtained by criminal means, temporary transfer of persons detained who could provide important information on the criminal offence being investigated, controlled delivery, covert investigations, or interception of telecommunications or transmission of evidence already collected.
3. Executing states have some grounds for refusal to execute an EIO including immunity rules, harm to essential national interests in security matters, non-criminal proceedings, *non bis in idem* principle, dual criminality, incompatibility with fundamental rights obligations, or impossibility to execute the measure.
4. An interesting example of the use of an EIO was when the UK issued an EIO to France in 2020 to obtain evidence already collected by the French authorities as part of the EncroChat investigation which was widely reported in the press.[9]
5. It was reported that the French authorities had managed to hack the EncroChat encrypted network which was hosted on servers located in France and was allegedly used by criminal organizations to secure their communications and conduct their illegal activities.
6. The admissibility of the evidence collected and the validity of the EIO issued by the UK was of course challenged before the English courts.[10] According to British legal practitioners, this was the first time that the issue of EIO was litigated before English Courts but could also be the last since the United Kingdom has left the European Union.[11]
7. Nonetheless, this cooperation was a great success which led to the arrest of a considerable number of alleged criminals in the UK. [12] This example shows the effectiveness with which this investigative tool was used by authorities of Member States to successfully transfer evidence gathered in order to enable investigation and combat organized crime on a global scale.[13]

2. Joint investigation teams allow the hacking of the EncroChat encryption network

8. It should be noted that the hacking of the EncroChat encryption network resulted from a joint effort from French and Dutch authorities which formed a Joint Investigation Team.
9. The 2000 EU Convention allows for the creation of JITs between member states, which consist in teams comprised of judges, prosecutors, and law enforcement authorities, set up in a written agreement between several Member States for a specific purpose and for a limited period of time. The European Council also enacted a framework decision of model agreements in 2017 for such investigation teams.[14]

[8] European e-justice, "European investigative order, mutual assistance and joint investigation teams", 25 November 2019, https://e-justice.europa.eu/content_evidence-92-fr.do.
[9] Dismantling of an encrypted network sends shockwaves through organised crime groups across Europe | Eurojust | European Union Agency for Criminal Justice Cooperation (europa.eu).
[10] EncroChat update: applications to exclude evidence must be made in the Crown Court, https://www.lexology.com/library/detail.aspx?g=408aad04-20cf-4ae3-ba9f-48c39931bbae.
[11] https://www.corkerbinning.com/first-last-challenge-the-eio/.
[12] NCA and police smash thousands of criminal conspiracies after infiltration of encrypted communication platform in UK's biggest ever law enforcement operation - National Crime Agency.
[13] The first and last challenge to the EIO? | Corker Binning.
[14] Council Resolution on a model agreement for setting up a joint investigation team n°2017/C18/01.

10. Usually, JITs are formed where difficult investigations into criminal offences are required on the territories of one or more countries or where there is a need for coordinated and concerted action. JITs have the distinct advantage that information and evidence collected during the investigation may be directly shared between investigators without going through traditional channels of mutual legal assistance.[15]
11. This successful JIT led by the French and Dutch authorities[16] was also supported by EU agencies such as Europol or Eurojust also provided which can provide logistical, intelligence or even legal support.[17] This example showcases the usefulness of this legal cooperation mechanism at the disposal of the Member states and European authorities to conduct efficient and speedy investigations in the context of cross-border crime.
12. In addition, it can be noted that many bilateral conventions are regularly being ratified in this matter. Nevertheless, efforts still have to be made for a better harmonization of cross-border cooperation.
13. Recently, the European Commission issued proposals for a regulation and a directive to establish a legal framework that would facilitate the securing and obtaining of access to electronic evidence by police and judicial authorities in cross-border cases, indispensable to carry out their missions [18] in a world transformed by new technologies.
14. In its 2020 opinion regarding these proposals, and while supporting the above-mentioned objective, the European Data Protection Supervisor ("EDPS") expressed reservations concerning their respect of the Charter of Fundamental Rights of the EU and the EU data protection body of law.
15. It underlined that other alternatives providing greater safeguards for the same purpose should be further assessed and recommended that the proposals reassess the balance between the type of offences for which EIOs could be issued and the categories of data concerned.

Thomas Lapierre is an Associate at Navacelle and admitted to both the Paris and New York bars. Thomas focuses on white collar crime defense and the implementation of compliance programs within companies. https://navacellelaw.com/en/professionals/thomas-lapierre-en/
Héloïse Vigouroux is a Trainee lawyer at Navacelle and has developed an interest for white collar investigations and criminal law through several internships within courts and significant big law firms.
Julie Zorrilla is a Partner at Navacelle and has worked for over eight years on complex cross-border financial and criminal matters handling large-scale corruption and compliance matters, determining the strategy and implementation of internal investigations and advising on both legal and crisis management for corporations with global operations. https://navacellelaw.com/en/professionals/julie-zorrilla-en/

[15] General Secretariat of the EU council, Joint Investigation practical guide, 14 February 2017 available at Joint Investigation Teams - JIT's | Activities & Services | Services & Support | Europol (europa.eu).
[16] Dismantling of an encrypted network sends shockwaves through organised crime groups across Europe | Eurojust | European Union Agency for Criminal Justice Cooperation (europa.eu).
[17] Dismantling of an encrypted network sends shockwaves through organised crime groups across Europe | Eurojust | European Union Agency for Criminal Justice Cooperation (europa.eu).
[18] European Data Protection Supervisor, "*Summary of the Opinion on Proposals regarding European Production and Preservation Orders for electronic evidence in criminal matters*", 2020/C32/04, 31 January 2020.

Can CITES Solve the Pandemic Problem?

Lucas S. Stegman

The rise in Covid-19 vaccinations may herald a light at the end of tunnel for people worldwide struggling through a life-changing pandemic. But experts are already pondering an important question: how to stop this from happening again.

Many public health officials argue that regulation of the $320 billion wildlife trade[1]— especially of markets where wild animals are sold[2]— can help to prevent the next pandemic. Although there is no consensus about what the proper mechanism should be, some advocates suggest that the Convention on the International Trade of Wild Flora and Fauna (CITES) can be amended to fill this role.[3] However, experts are divided on whether CITES is the appropriate tool for this job.

Covid-19 and the Wildlife Trade

Scholars point to CITES as a potential tool for preventing future pandemics because of the strong link between the wildlife trade and the spread of zoonotic diseases. Experts have long recognized this connection: for example, the 2002-2003 SARS pandemic was linked to the trade of live civets.[4] Therefore, it is not a surprise that the Covid-19 pandemic was quickly linked to the wildlife trade, though our understanding of the precise link continues to evolve. Though the specific origin of the virus remains disputed,[5] as does the precise host species,[6] it appears certain that the wildlife trade played an important role in the spread of the virus. Accordingly, scientists and policymakers have begun to search for a regulatory mechanism to limit the international flow of wildlife that could pose a risk to public health.

CITES Secretariat Refuses Calls for Action

At first glance, CITES seems like the ideal candidate for such a regulatory framework: the treaty already regulates the flow of hundreds of wild species between parties and makes it unlawful, with the help of implementing domestic laws, to traffic in certain species that might be threatened by over-exploitation.[7] However, the CITES Secretariat has disavowed calls to regulate the trade of species based on their potential disease risk, stating that "zoonotic diseases are outside of CITES's mandate" because "the concerns of the CITES Parties are focused on regulating international trade."[8]

This response provoked an immediate backlash, especially from conservation organizations. The Natural Resources Defense Council accused the Secretariat of "washing their hands" of an important issue,[9] and the Franz Weber Foundation issued a letter decrying CITES' lack of leadership.[10] These commenters criticized the Secretariat's interpretation of CITES' scope as "very narrow" and point to other text in the Convention,

[1] Malavika Vyawahare, *As Covid-19 Pandemic Deepens, Global Wildlife Treaty Faces an Identity Crisis*, MONGABAY (May 15, 2020), https://news.mongabay.com/2020/05/as-covid-19-pandemic-deepens-global-wildlife-treaty-faces-an-identity-crisis/; Jonathan Kolby, *To Prevent the Next Pandemic, It's the Legal Wildlife Trade We Should Worry About*, NAT'L GEOGRAPHIC (May 7, 2020), https://www.nationalgeographic.com/animals/article/to-prevent-next-pandemic-focus-on-legal-wildlife-trade.

[2] Zack Budry, *WHO to Recommend Extensive Study of First Known Covid-19 Patient, Wet Market Suppliers: Report*, THE HILL (Feb. 21, 2021, 8:33 AM), https://thehill.com/policy/healthcare/539758-who-to-recommend-extensive-study-of-first-known-covid-19-patient-wet-market?rl=1; Dina Fine Maron, *'Wet Markets' Likely Launched the Coronavirus. Here's What You Need to Know*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.com/animals/article/coronavirus-linked-to-chinese-wet-markets.

[3] Vyawahare, *supra* note 1.

[4] Robert Kessler, *Here's How Wildlife Trade and Disease Spread Are Linked*, ECOHEALTH ALL., https://www.ecohealthalliance.org/2018/02/heres-how-wildlife-trade-and-disease-spread-are-linked (last visited Mar. 7, 2021).

[5] *Compare* Maron, *supra* note 2, *with* Rafi Letzer, *The Coronavirus Didn't Really Start at that Wuhan 'Wet Market'*, LIVESCIENCE (May 28, 2020), https://www.livescience.com/covid-19-did-not-start-at-wuhan-wet-market.html, *and* James T. Areddy, *China Rules Out Animal Market and Lab as Coronavirus Origin,* WALL ST. J. (May 26, 2020, 4:51 PM), https://www.wsj.com/articles/china-rules-out-animal-market-and-lab-as-coronavirus-origin-11590517508.

[6] *Compare* Cara Munez, *Did the New Coronavirus Come from Pangolins? New Study Says It's Possible*, U.S. NEWS & WORLD REP. (Feb. 10, 2021, 5:29AM), https://www.usnews.com/news/health-news/articles/2021-02-10/did-the-new-coronavirus-come-from-pangolins-new-study-says-its-possible, *with* Susha Cheriyedath, *More Evidence Pangolin Not Intermediary in Transmission of SARS-CoV-2 to Humans*, NEWS MED. (Oct. 4, 2020), https://www.news-medical.net/news/20201004/More-evidence-Pangolin-not-intermediary-in-transmission-of-SARS-CoV-2-to-humans.aspx.

[7] *How CITES Works*, CITES.ORG, https://cites.org/eng/disc/how.php (last visited Mar. 7, 2021).

[8] *CITES Secretariat's Statement in Relation to Covid-19*, https://cites.org/eng/CITES_Secretariat_statement_in_relation_to_COVID19 (last visited Mar. 7, 2021).

[9] Paul Todd, *Treaty on Wildlife Trade Washes its Hands of Covid-19*, NAT. RES. DEF. COUNCIL (May 6, 2020), https://www.nrdc.org/experts/paul-todd/cites-washes-its-hands-covid-19.

[10] Vera Weber, *Media Release: Fondation Franz Weber Calls Out the CITES Secretariat on its Position on Covid-19*, FOUND. FRANZ WEBER (Apr. 10, 2020), https://www.ffw.ch/en/news/ffw-calls-out-the-cites-secretariat-on-its-position-on-covid-19/.

including the preamble, as evincing a broader purpose than solely regulating exploitative trade.[11]

However, others point out that the most natural reading of CITES' text is to restrict trade for one sole purpose: "for the protection of certain species of wild fauna and flora against over-exploitation through international trade."[12] Under this view, the text—at least in its current form—limits the power of the CITES Secretariat to respond to pandemic issues.

CITES as a Solution?

Proponents of using CITES to address pandemic issues include experts in CITES and the wildlife trade, such as John Scanlon, the former CITES Secretary-General,[13] and Dan Ashe, former director of the U.S. Fish and Wildlife Service and president of the Association of Zoos and Aquariums.[14]

The most compelling argument for using CITES is the treaty's "global mandate": it has over 180 parties and a legally enforceable regime that brings a robust monitoring and recording infrastructure.[15] CITES is well-entrenched in the international trade community: it has a relationship with the World Organization for Animal Health and the United Nations Food and Agriculture Organization, as well as an existing permit regime that could potentially be adapted to regulate potentially infectious species.[16] Given the difficulties in creating new treaties, adapting or amending an existing treaty for a new purpose would be more feasible than drafting an entirely new international agreement. Indeed, as one proponent as has stated, using CITES as a starting point for any pandemic prevention program "would give the nations of the world a huge head start in implementing any new protocols to combat the transfer of zoonotic diseases."[17]

However, using CITES as currently constituted would be almost impossible, as many of the species previously linked to emerging infectious diseases—such as horseshoe bats and palm civets—fall outside of the treaty's current scope.[18] Therefore, parties likely would have to change the language of CITES for use in the public health context.

Notably, proponents disagree over the best method to alter CITES. Some, like Ashe and Scanlon, argue that the key language of CITES can be amended to allow for the regulation of wildlife trade that poses a threat to human health.[19] The Global Initiative to End Wildlife Crime (EWC), has released proposed text of amendments to CITES that would add a new Appendix covering all species whose trade is considered to pose a risk to human or animal health.[20] EWC proposes a separate permitting requirement in order for trade in species listed in that appendix to be lawful.[21]

Others argue that the risks of amending CITES are potentially enormous: opening up the original text of CITES for amendment could lead to the Convention's core provisions being hamstrung by amendments, which could damage CITES' ability to preserve overexploited species. These commenters offer a different approach: an addendum to CITES that would only supplement, not replace, the original text of the treaty. This approach would ensure that the core of CITES would remain safe from pernicious amendments, but could also expand the scope of the Convention to apply to species that pose a high risk of transmitting zoonotic diseases.[22]

Limitations to Using CITES

Not all sources agree that CITES is a proper vehicle for preventing future pandemics. Beyond objections that this would be inconsistent with CITES' mandate,[23]

---

[11] Adiba Firmansyah, *CITES Reform: Enhanced Wildlife Trade Regime Needed to Avoid Next Pandemic*, EJIL: TALK! (July 28, 2020), https://www.ejiltalk.org/cites-reform-enhanced-wildlife-trade-regime-needed-to-avoid-next-pandemic/; Weber, *supra* note 10.

[12] Bruce J. Weissgold, Peter Knights, Susan Lieberman, & Russell Mittermeier, *How We Can Use the CITES Wildlife Trade Agreement to Help Prevent Pandemics*, SCI. AM. (Aug. 24, 2020), https://www.scientificamerican.com/article/how-we-can-use-the-cites-wildlife-trade-agreement-to-help-prevent-pandemics/.

[13] Dan Ashe & John E. Scanlon, *A Crucial Step Toward Preventing Wildlife-Related Pandemics*, SCI. AM. (June 15, 2020), https://www.scientificamerican.com/article/a-crucial-step-toward-preventing-wildlife-related-pandemics/; Don Pinnock, *Why the Wildlife Trade Convention Failed to Prevent Covid-19*, DAILY MAVERICK (May 27, 2020), https://www.dailymaverick.co.za/article/2020-05-27-why-the-wildlife-trade-convention-failed-to-prevent-covid-19/ .

[14] Ashe & Scanlon, *supra* note 13.

[15] Weissgold et al., *supra* note 12; Ashe & Scanlon, *supra* note 12.

[16] Ashe & Scanlon, *supra* note 13.

[17] Weissgold et al., *supra* note 12.

[18] Vyawahare, *supra* note 1; Susan Lieberman, *CITES, the Treaty that Regulates Trade in International Wildlife, is Not the Answer to Preventing Another Zoonotic Pandemic*, SCI. AM. (May 22, 2020), https://blogs.scientificamerican.com/observations/cites-the-treaty-that-regulates-trade-in-international-wildlife-is-not-the-answer-to-preventing-another-zoonotic-pandemic/.

[19] Ashe & Scanlon, *supra* note 13; *Global Initiative Outlines a 'One Health' Approach to Reforming Wildlife Trade Laws*, ASS'N OF ZOOS & AQUARIUMS (Sept. 8, 2020), https://www.aza.org/aza-news-releases/posts/global-initiative-reforming-wildlife-trade-laws?locale=en.

[20] *Outline of Possible Amendments to Wildlife Trade Laws*, END WILDLIFE CRIME, https://endwildlifecrime.org/cites-amendments/ (last visited Mar. 7, 2020).

[21] *Id.*

[22] Weissgold et al., *supra* note 12.

[23] *CITES Secretariat's Statement in Relation to Covid-19*, *supra* note 9; *Coronavirus and the Trade in Wildlife*, EUR. PARLIAMENTARY RSCH. SERV. 5 (May 2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649409/EPRS_BRI(2020)649409_EN.pdf.

commenters have noted that CITES could not do anything to limit the *domestic* sale of potentially infectious wildlife or the *conditions* in wildlife markets that increase the risk of disease spillover.[24] More fundamentally, Susan Lieberman contends that even an amended CITES would not be effective at preventing future pandemics, as it would only regulate the wildlife trade on a species-by-species level, rather than the sweeping reforms that would be necessary.[25] Other commenters worry that this would only drive the trade underground, into the less-regulated illegal wildlife market.[26]

In January 2021, EcoHealth Alliance released a publication examining legal mechanisms for preventing future pandemics.[27] The analysis concluded that amending CITES could play an important role in preventing future pandemics, but this approach would still have significant limitations.[28] EcoHealth Alliance also noted that CITES can do little to prevent domestic trade and that convincing parties to actually implement and enforce the treaty would seriously limit the Convention's potential utility as a pandemic prevention tool.[29]

Conclusion

CITES could be useful in preventing future zoonotic pandemics, especially if amended to expand its mandate. However, this would cause CITES to radically change its focus, whereas it has previously "stayed in its narrowly defined conservation lane."[30] Even if CITES was amended, it will not be a panacea; we must be mindful of the limitations of this approach and find other mechanisms to limit the wildlife trade and prevent another Covid-19.

Lucas S. Stegman is a third-year law student and Blume Public Interest Law Scholar at Georgetown University Law Center. Stegman previously studied at Tufts University Cummings School of Veterinary Medicine, where he earned an M.S. in Conservation Medicine. Stegman is currently a member of the International Animal Law Committee and serves as student liaison to the Endangered Species Committee of the American Bar Association Section of Environment, Energy, and Resources.

[24] Vyawahare, *supra* note 1; *Webinar Explores Role of MEAs and Trade in Preventing Future Pandemics*, INT'L INST. SUSTANABLE DEV. (Sept. 24, 2020), https://sdg.iisd.org/news/webinar-explores-role-of-meas-and-trade-in-preventing-future-pandemics/.
[25] Lieberman, *supra* note 18.
[26] Tanya Rosen, *The Evolving War on Illegal Wildlife Trade*, INT'L INST. SUSTANABLE DEV. (Oct. 6, 2020), https://www.iisd.org/articles/evolving-war-illegal-wildlife-trade; John M. Sellar, *Wildlife Trafficking: Time for a Radical Rethink*, GLOB. INITIATIVE AGAINST TRANSNAT'L ORGANIZED CRIME (May 27, 2020), https://globalinitiative.net/analysis/wildlife-trafficking-covid/.
[27] James Wingard, et al., *Wildlife Trade, Pandemics, and the Law: Fighting This Year's Virus with Last Year's Law*, LEGAL ATLAS (Jan. 2021), https://www.ecohealthalliance.org/wp-content/uploads/2021/01/Wildlife-Trade-Pandemic-and-the-Law.pdf.
[28] *Id.* at 15.
[29] *Id.* at 15–16.
[30] Ashe & Scanlon, *supra* note 13.

The Recent Abortion Decision of the Polish Constitutional Tribunal

Legal Considerations and Social Unrest

Elizabeth M. Zechenter, J.D., Ph.D.

Almost 30 years ago, Poland regained its freedom from communism and started on a path to modernization and political and economic restructuring. Ironically, various rights and freedoms important to Polish women and children, once taken for granted, either before WWII and even under communism, became subject of slow but steady diminishment, especially during the last five years. In 1993, Poland enacted one of the most restrictive anti-abortion laws in Europe (the 1993 Law), which prohibited all abortions, except for three narrowly construed exemptions.[1] On October 20, 2020, the Polish Constitutional Tribunal (TK) struck down the main exemption of that 1993 Law, which was used for 98% of all legal abortions in Poland, in effect outlawing all abortions and resulting in massive social protests that have been continuing from that date until now.[2] The article examines the reasons for the recent Polish Constitutional Tribunal's ruling, its legal validity, and the legal reasoning behind it. Briefly, it addresses few key reasons for the recent legislative initiatives and the legal decisions limiting the rights of Polish women and children.

Poland regained its independence in 1918 and immediately granted the right to vote to all its citizens, women included. The Polish Constitution of 1921 granted women additional rights, including the right to participate in all public affairs without restrictions.[3] In 1932, Polish women became only second in the world to have legal access to abortion.[4] After WWII and the communist take-over, all Polish citizens' rights and freedoms were abridged, and women lost the right to an abortion during the period of Stalin's regime. Once the Stalinist terror receded in 1956, the communist government restored the legal right to abortion and subsidized many other services essential to women such as healthcare and childcare.[5]

Ironically, Poland who regained its independence from the communism in 1990s and was a celebrated poster child for the victory of democracy, has changed its course and began democratic backsliding, be it with respect to the rule of law, independence of the judiciary, disciplinary proceedings against judges, as well as notably stigmatizing and minimizing services and even human rights protections essential to women (e.g., diminished access to modern contraception, limitations on access to reproductive services and prenatal and postnatal care, lack of treatments for infertility, reduction in childcare options, failure to prosecute rape and domestic violence, ongoing and progressive stigmatization of abortion, to name a few)[6]. Even access to the most basic modern contraceptives is currently one of the lowest in Europe.[7] Since the election of the right-wing nationalist and populist party called Law and Justice Party (PiS) in 2015, the push to subdue the independent judiciary and press, to control education, and to restrict women's rights has intensified.[8]

[1] Law on Family Planning and Abortion from January 7, 1993. https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Polish%20abortion%20act--English%20translation.pdf

[2] Decision of the Constitutional Tribunal dated October 22, 2020, Act K 1/20 https://dziennikustaw.gov.pl/DU/2021/175

[3] Women's right to vote was achieved via Decree Regarding Elections by the Polish Parliament on November 28, 1918. Once the Polish Constitution was enacted in 1921, women rights to vote were enshrined in the Polish Constitution of 1921 and additional rights and guarantees were added over time, such as the right of all citizens to participate in public affairs which rights could not be restricted by origin, religion, sex, or nationality of any citizen. See Article 7 of the Polish Constitution of 1935.

[4] W. Nowicka, The Struggle for Abortion Rights in Poland. Pp 167-196 in Sex Politics: Repots from the Frontlines.

[5] Even under the Communist regime, abortions were legal and allowed under almost all circumstances (Polish Abortion Law of 1956).

[6] David, Henry P., and Anna Titkow. "Abortion and Women's Rights in Poland, 1994." *Studies in Family Planning*, vol. 25, no. 4, 1994, pp. 239–242. See also See also How the Catholic Church ties into Poland's judicial reform. https://www.dw.com/en/how-the-catholic-church-ties-into-polands-judicial-reform/a-39809383.

[7] United Nations, Department of Economic and Social Affairs, Population Division. Trends in contraceptive use worldwide in 2015 (ST/ESA/SER.A/349). New York: UN; 2015.

[8] The Breath of the Government on My Back: Attacks on Women's Rights in Poland, in Report by Hrw.org, February 2019.

In 1993, Poland outlawed abortion and enacted one of the most restrictive anti-abortion laws in Europe. This new law (1993 Law) prohibited all abortions, except for three narrowly construed exemptions when: 1) pregnancy creates a threat to the life or health of a pregnant woman; 2) pregnancy is a result of a crime, e.g., rape or incest; or 3) when there is severe and irreversible fetal impairment or an incurable life-threatening disease. Moreover, these exemptions were mostly allowed until the 12th week of pregnancy, limiting access to legal abortion even further.[9]

The 1993 Law has been often referred to as a "compromise law," but if was a compromise, it was a compromise between the Polish Catholic Church (with uncompromising position on abortion) and the new post-communist governments of the newly independent Poland which had a strong dept of gratitude to the Church for their support of Solidarity movement.[10] As many researchers and commentators observed, the "compromise" did not actually involve Polish women, instead it was a political compromise between two largest and most important political institutions of the time.[11] Hence, despite all the protests by the Polish women, the 1993 Law was enacted.

There are many causes for that conservative shift in Polish politics, one of them being the election of the Polish Pope John Paul II, a profoundly conservative man devoted to the survival of the institution of the Polish Catholic Church under communism, who reinforced Church's pro-natalist ideology, who viewed woman's primary role as that of mother and caregiver, and who pushed for the Concordat with the Polish state.[12] This agreement gave an outsized role to the Catholic Church in a previously secular Polish state.[13]

On October 22, 2020, the Constitutional Tribunal limited to rights of women even further when they invalidated exception No. 3 (allowing for pregnancy termination in cases where the fetus is severely deformed) as unconstitutional. It is important to note that TK was not ruling on the issue of abortion itself; abortion is already outlawed. Instead, the TK struck down a limited exemption allowing for termination of pregnancy if the fetus is gravely ill, bound to die, or has some lethal illness; meaning that women will now have to endure continued pregnancy fully knowing the tragic fate awaiting their fetus and maybe even them.

TK's decision relied on Article 38 of the Polish Constitution[14] which states that "The Republic of Poland shall ensure the legal protection of the life of every human being." That constitutional language of Article 38 resulted from the extensive legislative debate and the drafters of the Constitution explicitly rejected the idea of including fetus in the definition of "human being."[15] TK chose to re-interpret the agreed on definition of "human being" and included in that definition an unborn fetus.[16] TK cited Article 30 of the Constitution, which affirms the right to "dignity" to any person with TK vesting rights to "dignity" in an unborn

[9] https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Polish%20abortion%20act--English%20translation.pdf

[10] Anna Grzymata-Busse, The Puzzles of Religious Influence on Politics." In *Nations Under God: How Churches Use Moral Authority to Influence Policy*. Princeton University Press, Princeton; 2015, pp. 1–21. See also How the Catholic Church ties into Poland's judicial reform. https://www.dw.com/en/how-the-catholic-church-ties-in-to-polands-judicial-reform/a-39809383. See also Tomas Bubik, Relationship between Religion, Politics, and Society in the First Postcommunist Decade: The Cases of the Czech Republic and Poland. Anthropos, 2014, Bd. 109, H. 1. (2014), pp. 243-249. See also "From Stalinism to Solidarity (1945–1989)."*White Eagle, Black Madonna: One Thousand Years of the Polish Catholic Tradition*, by Robert E. Alvis, Fordham University Press, New York, 2016, pp. 218–250.

[11] After the overthrow of communism, Polish Church was seen as one of the "saviors" of the nation, and a counter-weight to the "godless" communists. Church was seen as a voice of freedom as many churches supported Solidarity members and sheltered them during marshal law. Pope John Paul II earned an almost God-like stature for his support of Polish people's aspirations to be free and for his support of Solidarity in their struggle against the communists. His election as the Pope solidified the political role of the Polish Church and gave the Church outsized role in the Polish state. See Byrnes, Timothy A. "The Polish Church: Catholic Hierarchy and Polish Politics." *The Catholic Church and the Nation-State: Comparative Perspectives*, edited by Paul Christopher Manuel et al., Georgetown University Press, 2006, pp. 103–116. See also footnote 10. In 1993, the Concordat, a treaty between the Holy See and Poland was signed (July 28, 1993), subsequently ratified by the Polish Parliament in January 1998, signed by Polish president Aleksander Kwasniewski and Pope John Paul II on February 23, 1998, and officially enacted on April 25, 1998. See also Byrnes, Timothy A. "The Polish Church: Catholic Hierarchy and Polish Politics." *The Catholic Church and the Nation-State: Comparative Perspectives*, edited by Paul Christopher Manuel et al., Georgetown University Press, 2006, pp. 103–116.

[12] "From Stalinism to Solidarity (1945–1989)." *White Eagle, Black Madonna: One Thousand Years of the Polish Catholic Tradition*, by Robert E. Alvis, Fordham University Press, New York, 2016, pp. 218–250.

[13] http://www.concordatwatch.eu/poland--s931. See also Byrnes, Timothy A. "The Polish Church: Catholic Hierarchy and Polish Politics." *The Catholic Church and the Nation-State: Comparative Perspectives*, edited by Paul Christopher Manuel et al., Georgetown University Press, 2006, pp. 103–116.

[14] Article 38 of the Constitution states: The Republic of Poland shall ensure the legal protection of the life of every human being.

[15] The 1997 Constitution of the Republic of Poland was adopted by the National Assembly on April 2,1997 and was approved by the national referendum on May 23, 1997. It entered into force on October 16, 1997. See http://www.sejm.gov.pl/prawo/konstytucja/kon1.htm Jan.17, 2000. See also https://www.constituteproject.org/constitution/Poland_1997.pdf. See also Constitution Watch: Poland, 4 EECR 2:21, 1995; Andrzej Rzeplinski, The Polish Bill of Rights: A Case Study in Constitution-Making in Poland, 2 EECR 3(26), 1993.

[16] That attempt at the redefinition of what constitutes "human life" began at the earlier decision by TK of 1997 (TK decision No. K 26/96), and also met with mass social protests.

fetus and none in the living pregnant women.[17] As the Polish Spokesman for Human Rights, professor Bodnar observed, it is not the women but the fetus, be it only one week old, malformed, or bound-to-die one, who has been deemed by TK to be more important as between the two, and one who has more rights to dignity and to legal protections than a living women who has to suffer the tragedy of forced pregnancy.[18]

TK's reasoning is over-broad for other reasons too: the Polish Constitution provides for the right of privacy and the right to make decisions about one's private life in Article 47 while Article 40 contains a prohibition against torture or being subjected to degrading and inhumane treatment. Article 68 provides for the right of individuals to have their health protected. None of these rights were adequately addressed and TK failed to balance the right of women provided in these Articles versus the rights of a fetus, if any. One of the two dissenting judges remarked that he cannot agree with the majority decisions because forcing pregnancy upon a women who is carrying severe ill fetus with no chance for life, amounts to torture and an inhuman and degrading treatment which is expressly prohibited by the Polish Constitution in Articles 40, 47 and 68.[19] As Judge Kieres observed, TK overreached since moral precepts should not be resolved by criminal sanction and no law should force a person to act heroically.

Equally noticeable is TK's lack of consideration given to EU treaty obligations binding on Poland and the recent EU jurisprudence with respect to the protection of women's rights in Poland. Poland already lost three legal cases before the European Court of Human Rights (ECHR) which ruled that in all cases Polish women were unlawfully denied whatever limited rights to abortion they have under the existing Polish laws.[20] ECHR also ruled that Poland violated Articles 3 and [21] Article 8 of the European Convention of Human Rights. On November 25, 2020, the European Parliament adopted a resolution (455 pro to 145 against) that condemned the decision by the TK asking Polish government to refrain from any further attempts to restrict women's reproductive rights and endanger their health[22]. That resolution states that TK's ruling puts women's life and health at risk, failing to protect "an inherent and inalienable dignity of women."

The procedural posture of the TK decision is arguably problematic. TK decision came about at the request of several congresspersons who as members of Poland's supreme legislative body, are in the best position to legislate issues of such social, cultural, and ethical importance, especially in a country which is so deeply divided. Having failed at numerous legislative proposals to outlaw or further restrict the existing rights to abortion, the governing party decided to refer the decision to TK instead, choosing the judiciary to solve the issue for them. The first referral took place in 2017, hence TK waited for three years to deliver its opinion; that 3-year wait period raises concerns about well-documented politization of the current TK and the political genesis of the decision. It is quite telling that the demonstrations are taking place in front of PiS offices and the house of PiS's leader, not in front of TK, as Poles widely believe that Tk is but the tool of the governing party and not an independent institution.

The current TK is the result of legal reforms initiated by PiS, reforms which are disputed for being in contravention of the EU treaties signed by Poland and subject to many ongoing proceedings before the European Court of Justice and the European Parliament.[23] The composition of the TK court, the

[17] Article 30 of the 1997 Constitution states: The inherent and inalienable dignity of the ***person*** shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities. Article 40 state**s:** No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited. Article 47 states: Everyone shall have the right to legal protection of his private and family life, of dishonor and good reputation and to make decisions about his personal life. Article 68 states: Everyone shall have the right to have his health protected.

[18] The state wants to further limit women's rights, risk their lives, and condemn them to torture," said Professor Adam Bodnar, the human rights commissioner, or ombudsman, whose role is independent from the Polish government. This offensive is opposed by civil society." https://apnews.com/article/europe-reproductive-rights-health-poland-courts-56611978e7cd4320cb158831288471d0

[19] Dissenting opinion by Judge L. Kieres. Decision of the Constitutional Tribunal dated October 22, 2020, Act K 1/20. https://dziennikustaw.gov.pl/DU/2021/175

[20] Tysiac versus Poland (2007), R.R versus Poland (2011), and P and S versus Poland (2012).

[21] Art. 8 of the European Convention of Human Rights: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Art. 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[22] https://www.europarl.europa.eu/doceo/document/TA-9-2020-0336_EN.html

[23] Hinsey, Ellen. "Poland's Illiberal Challenge." *New England Review (1990)*, vol. 37, no. 4, 2016, pp. 73–88.

existence of the so-called "double judges" (judges appointed by PiS when these seats where already lawfully filled) and the manner of the appointment of the current chief judge are of questionable legality. [24] That is why the Helsinki Foundation for Human Rights has issued an appeal to the Polish medical professionals asking them to ignore the TK decision, as, in their legal analysis, given that the TK is not a properly constituted and three of its judges are unlawfully appointed, the decision itself is also unlawful and should not be followed.

Strikingly, TK's decision keeps referring to a first-trimester abortion in the case of an irrevocably ill and bound-to-die fetus as a form of "eugenics" and called such abortions "eugenic abortions." It is a common practice of the right-wing parties, such as or PiS and the conservative Polish Catholic Church to use such evocative, imprecise, and deeply misleading language (both the Church and TK speak of *children* and *babies* instead of *fetuses* or *embryos*, women are referred to as *mothers* and wives, and not as women, individuals, or citizens, and so on). [25]

Under Polish law, the TK decision is not legally binding until it is published in the Official Gazette (*Dziennik Ustaw*), and the publication, while delayed, took place in January 2021. The TK decision has now the force of law without the need for additional implementing regulations. Under the Polish system, it is a final decision without the possibility of appeal.

Any abortion that is prohibited by law is automatically treated as a criminal offense subject to criminal penalties under Article 152 of the Polish Penal Code (all those who helped a woman to carry out an abortion, her family, friends, and medical professionals, are subject to a three-year jail term. In the event that a woman undergoes self-abortion, but it is subsequently determined that her fetus was "viable," that women are also criminally liable with jail term of eight years. [26]

Polish women's response to the TK's decisions was swift, with mass demonstrations, estimated to be the largest protest since the fall of communism, across the entire country, from major cities to small villages, with hundreds of thousands of women demonstrating daily, which caught the ruling party off guard [27]. PiS did not expect such massive social resistance or such an eloquent and forceful rebuttal of the TK decision. The massive and continued peaceful women protests were met, with progressively violent police response. Women were teargassed, some were beaten up with clubs, many were arrested, others were thrown down the stairs, or otherwise roughed up, either by the Christian right-wing vigilantes or by the police forces themselves. However, it was also reported that in some cities, the police-women threw away their shields and riot gear and joined the demonstrating women and that some policewomen, while continuing to stand in riot formation, chanted, "we are with you sisters." For several months now, mass protests have been taking place all over the country, with hundreds of thousands of women and men participating. [28]

TK decision has been seen by some in Poland as a political payback by PiS to the conservative Polish Church for their support of PiS in the recent narrowly decided elections. [29] The Polish Church itself is in the midst of the child-abuse scandal, and the allegations of the ongoing cover-up of such crimes. [30] Allegations have been made that the cover-up may to go all the way

[24] Chilton, Adam S., and Mila Versteeg. "Courts' Limited Ability to Protect Constitutional Rights." *The University of Chicago Law Review*, vol. 85, no. 2, 2018, pp. 293–336.

[25] For a detailed analysis of the uses and misuses of language by PiS, the Catholic Church, and by the protesting Polish women, see a lecture by Dr. Katarzyna Zechenter, the Zoom webinar at https://youtu.be/jWlQMQuoes8.

[26] The Criminal Code does not punish a woman for conducting a self-abortion if the abortion is within the time limit (12 weeks) provided by the 1993 Law. By providing criminal sanctions to all others who help women carry out an abortion, including doctors and any helpers, the law ensures that no medical professional will take risks to perform an abortion in prohibited or questionable situations.

[27] M. Ptacin, After Poland Issued a Near-Total Ban on Abortions, Marta Lempart Has Been on the Front Line of the Protests. https://www.vogue.com/article/poland-abortion-marta-lempart.

[28] Kaczyński was behind the use of police brutality against women. https://wyborcza.pl/7,173236,26554021,kaczynski-was-behind-the-use-of-police-brutality-against-women-s.html. See also Polish women's strike activists targeted by the state: our livelihoods and families are under threat. https://monitor.civicus.org/updates/2021/02/17/polish -womens-strike-activists-targeted-state-our-livelihoods-and-families-are-under-threat/

[29] As Poland's Church embraces politics, Catholics depart. https://www.reuters.com/article/us-poland-church-insight/as-polands-church-embraces-politics-catholics-depart-idUSKBN2A30SN

[30] Pedofilia w Kościele. Https://oko.press/tag/pedofilia-w-kosciele/. See also Vatican report on sexual abuse casts dark shadow on Pope John Paul II https://www.dw.com/en/vatican-report-on-sexual-abuse-casts-dark-shadow-on-pope-john-paul-ii/a-55558986. See also Vatican Report Says Pope John Paul II Knew About Allegations Against Former Cardinal. https://www.npr.org/2020/11/10/933382721/vatican-report-says-pope-john-paul-ii-knew-about-allegations-against-former-card

to the Vatican at the time when the Church was under the leadership of the Polish Pope, John Paul II.[31]

It appears that PiS misread the social backlash that TK decisions will cause and is facing massive social unrest. Some PIS politicians have been trying various political and legislative attempts to create a more socially palatable version of the ruling aimed at stopping the ongoing social unrest and continued demonstrations.[32] The protesters and leaders of the Women Strike are refusing any such compromise and are demanding the legal right to abortion and other reproductive services. Among others, Polish women started a new campaign of writing personal letters to the European Court of Human Rights (ECHR) appealing directly for ECHR's protection.

Polish Catholic Church and its close political ally PiS are not only opposed to abortion under any circumstances, but they are also adamantly opposed to "genderism," "feminism," and "LBGT ideology" which they see as a "foreign" and opposed to the traditional Polish values. Any law that promotes equality between sexes, protects LBGT people, or any law that protects women and children from rape or from domestic abuse are seen as expressions of such "genderism."[33] Following up on government's earlier pronouncements, the Polish Parliament accepted just last week a new bill titled "Yes to the family, not to gender" which calls for Poland to withdraw from the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the so called Istanbul Convention, signed by Poland as part of its as part of its EU accession. The Istanbul Convention is essential for victims of domestic violence in Poland because it is filing gaps in the inadequate Polish domestic legislation.[34]

And so the women protests continue.

Elizabeth M. Zechenter, J.D., Ph.D., is a visiting scholar at Emory University.

Author's note: For a more detailed analysis of the issues addressed above, please see the Zoom Webinar with a panel consisting of six Polish lawyers and academics: **Women Strikes In Poland: What is Happening and Why?** https://youtu.be/jWIQMQuoes8

[31] R. Cieniek i P. Kozanecki, Sojusz tronu z ołtarzem. Dobry dla PiS, niełatwy dla Kościoła. https://wiadomosci.onet.pl/tylko-w-onecie/podsumowanie-rzadu-pis-relacje-panstwo-kosciol/hsww8vy

[32] President proposes new "compromise" abortion law to resolve crisis in Poland. https://notesfrompoland.com/2020/10/30/president-proposes-new-compromise-law-to-resolve-polands-abortion-crisis/

[33] W. Nowicka, The Struggle for Abortion Rights in Poland. Pp 167-196 in Sex Politics: Reports from the Frontlines.

[34] https://www.newser.com/story/294076/domestic-violence-decision-brings-protests-in-poland.html

More Than Mere Loose Ends

Immigration Compliance During Mergers and Acquisitions

Ryan Helgeson

Mergers and acquisitions are often complex transactions involving numerous parties and myriad moving parts. While the parties are understandably focused primarily on the economic aspects of the deal, immigration compliance is an issue that should not be overlooked. The issues related to employment transitions and assessing I-9 liability are best addressed early in the process to allow time to adequately address matters that arise.

Employee Transitions During the Merger or Acquisition Process

During a merger, acquisition or change of entity, employers must have a comprehensive plan to ensure that the employees transitioning to the new entity do not fall out of immigration status. Employers that fail to accurately assess their immigration needs risk business disruption or loss of key employees due to visa lapses. The following are considerations for employers retaining visa holders in the H-1B, TN, L-1 and green card categories.

- **H-1B:** The new entity must update all Public Access Files for employees continuing in the same employment. If the terms and conditions of employment will change after the transaction (*i.e.,* new job duties or worksite location), the new entity must file amended H-1B petitions. Finally, a new employer should conduct an assessment of whether it is an "H-1B dependent" employer, which may trigger additional obligations.
- **L-1:** Because employees qualify for L-1 status based upon the qualifying relationship between the foreign and U.S. entities, a detailed analysis of the corporate transaction is necessary to determine whether the qualifying relationship survives or has been terminated.
- **TN:** As with H-1B employees, any change in the terms and conditions of employment must be accompanied by a new TN petition or visa. Employees continuing without change must update their employer information when an extension petition is filed.
- **Green cards:** For ongoing permanent residency applications, the new employer must determine whether it is a successor-in-interest to the former employer. If the new employer does not qualify as a successor in interest under the immigration regulations, it may be necessary to re-start the green card process on behalf of employees. Additionally, a new employer will have to determine the applicability of regulations allowing an employee to transition their application from the former employer.

I-9 Risk Assessment Before the Merger or Acquisition Deal

Due diligence is an important part of any financial transaction. Assessing risk is usually the predominant objective in determining a fair purchase price. Businesses are operating in an enhanced enforcement environment – the risks for noncompliance are real and are likely to be costly. Here are some important considerations for pre-deal due diligence:

- **Evaluation of Seller's I-9 Compliance Culture:** This involves understanding how Forms I-9 have been completed and how they are retained, including determining whether security and record-keeping controls are compliant with regulations.
- **Conducting Audits of Seller's Forms I-9:** The ability of the buyer to conduct an audit of the seller's I-9s is crucial in assessing the value of the seller's potential liabilities. Using external immigration experts to assess I-9 compliance will help a buyer determine potential monetary fines or penalties and aid in the creation of post-deal I-9 compliance strategies.
- **Understanding Seller's Compliance Regime:** In the event of I-9 audit by Immigration and Customs Enforcement, demonstrating a good-faith attempt to maintain compliance can factor heavily into the outcome of the audit, reducing potential fines.

- Buyers should examine a seller's I-9 compliance policies, training and internal enforcement mechanisms in order to understand the seller's overall compliance culture.

Immigration compliance does not have to be a complex process, even though the M&A process can be. Savvy buyers and sellers will utilize experienced immigration counsel to assess risk and mitigate liability throughout the merger or acquisition transaction.

Ryan Helgeson is an Associate in the Chicago office of Vedder Price and a member of the firm's Business Immigration practice group. Mr. Helgeson counsels U.S. and international companies with regard to all aspects of business-related immigration laws helping clients develop and serve their global workforce.

Non-Fungible Tokens

A New Market for Artists and Other Creators

Susan Schwartz

The art world has been abuzz with news of high dollar transactions in non-fungible tokens (NFTs). Christie's auction house is selling a work by the digital artist Beeple (Mike Winkelmann). The work, entitled, "Everydays: The First 5000 Days," is a compendium of 5000 digital pictures he has posted online every day since May 1, 2007. Christie's will be the first major auction house to offer a purely digital work with a unique NFT — effectively a guarantee of its authenticity — and to accept cryptocurrency, in addition to standard forms of payment, for the work. The blockchain registry Verisart is collaborating with SuperRare, a digital art marketplace, to offer ten auctions of NFTs new artworks by leading artists over ten weeks starting in March 2021. And on March 2, 2021, the musician and digital artist Grimes earned $5.8 million by selling a suite of her artworks in the form of NFTs. The digital artworks were published as "WarNymph Collection Vol. 1," and launched via a tweet to her 1.1 million Twitter followers. They sold out within 20 minutes.[1]

The music world is also issuing NFTs at a rapid pace. In early March 2021, the band Kings of Leon became the first band to a release a new album as a NFT. According to *Rolling Stone* the band grossed more than $2 million in sales from the offering in its first week.[2] They were not the first musical act to reap the benefits of NFTs. Rapper Tory Lanez released three new tracks as NFTs. The rapper collaborated with a blockchain company called Bondly.Finance to create 450 song NFTs, all of which also included a chance to meet and greet the star virtually. The tokens sold out within two minutes. Lanez's collection earned a record $500,000, including resales, in the first 24 hours.[3]

NFTs are also being used to generate income from tweets. Twitter's founder Jack Dorsey is selling his first "tweet" as an NFT, with the current highest bidder offering $2.5 million as of this writing. Dorsey launched the sale Friday, March 5th, tweeting out a link to the platform, Valuables.[4] The site allows people to sell one-of-a-kind digital certificates of specific tweets, which are "autographed" and verified by the original sender. The auction will end on March 21st, and Dorsey plans to convert the proceeds from the NFT auction to bitcoin and will donate the bitcoin to the charity Give Directly, a nonprofit that lets donors send money directly to people living in poverty.[5] As to why anyone would pay to own a tweet, Valuables[6] states in an FAQ page: "Owning any digital content can be a financial investment, hold sentimental value, and create a relationship between collector and creator. Like an autograph on a baseball card, the NFT itself is the creator's autograph on the content, making it scarce, unique, and valuable.".[7]

What are NFTs and how do they work? A "non-fungible token" is a unique object which cannot be replaced with something else. When you buy an NFT, you are buying a token and the work of art linked to it. The transaction is registered on the blockchain, a non-centralized ledger. Each token is unique to that work; when a token is purchased and registered on the blockchain, there is a permanent record of the sale and proof of ownership.

While anyone can download and copy a piece of art which is on the Internet, only the owner of the NFT actually owns the right to trade the image or musical composition. Digital images have long been copied without any compensation going to the artist; while this is a violation of the artist's copyright, the unauthorized downloading of images is hard to police and it is expensive to enforce an artist's rights.

What do you do with an NFT? You can display it on your computer, print it out or resell it. While anyone can print out or display an image from the internet, that image does not belong to them and they cannot trade it, so NFTs protect the artist's authorship and make a secondary market possible. The market for NFTs is

[1] News.Artnet.com, March 2, 2021
[2] Rollingstone.com, March 9, 2021
[3] Id.
[4] Id.
[5] Theverge.com, March 8, 2021.
[6] V.cent.co
[7] Id.

growing rapidly and expanding into many areas of art and commerce.[8]

NFTs make it possible for an artist to profit from their digital work in the secondary art market, as many NFTs are attached to "smart contracts" (self-executing agreements) providing resale royalties (a percentage of the profits) to artists when their works are resold for a profit. The artist Kenny Schachter has produced NFTs; one, entitled "That's All Folks", a cartoon image of Donald Trump wearing a clown's nose and incorporating the Looney Tunes logo, was offered in an edition of five. All sold for $500 each. They have since been traded, at a profit, and Schachter has received a resale royalty upon each trade.

NFTs also make it possible for artists to fund their non-digital art projects, much as an IPO can fund a start-up company. Sterling Crispin is a sculptor and conceptual artist. He is launching an NFT which is a diagram of the physical sculpture he intends to create. The sale of the NFT will enable the production of the sculpture, and the two are meant to stay together, according to Crispin. The opening bid is set at approximately $4,700, which the artist based on the production and shipping cost of the work. Crispin views the NFT as both plan and provenance for the physical work and intends that both stay together.[9]

NFTs are a way, right now, for artists to fund their projects and obtain resale royalties when their NFTs are resold for a profit. While 70 other countries around the world offer support to artists through resale royalties,[10] in America artists must fend for themselves. NFTs may accomplish what Congress and state legislatures have been unable or unwilling to do – to fund artists' continuing careers through the institution of a resale royalty scheme.

Susan Schwartz is attorney in Burbank, California specializing in art law and criminal defense. She is a graduate of UCLA Law School where she was a member of the Law Review, Moot Court Honors Program and an editor of the Federal Communications Law Journal. Susan earned a Master's Degree in Art Business, with honors, from the Drucker School at the Claremont Colleges' Center for Arts Management. She was a prosecutor for the Los Angeles County District Attorney's Office, where she worked in the Public Integrity, Justice System Integrity and Hardcore Gang Divisions. She is co-chair of the American Bar Association's International Criminal Law Committee, and a vice-chair of the International Animal Law Committee.

[8] In December 2020, nearly $9m worth of NFT-based art was sold, according to the cryptocurrency news website *beincrypto.com*, more than three times the value of sales the previous month.

[9] "How Artists Use NFT Sakes to Support Their Practice," artnews.com, March 5, 2021.

[10] https://link.springer.com/referenceworkentry/10.1007%2F978-1-4614-7753-2_7

Lawyers in Refuge

An interview series with lawyers who have fled their home countries

International Refugee Law Committee

In September 2020 the Trump Administration began taking steps to ban products that were alleged to be made utilizing forced labor in what is commonly referred to as the Xinjiang region of China. The administration ratcheted the ban up to include more products, like cotton, from the region where evidence continues to show persecution of the Uyghur people.[1] The Uyghur people are an ancient people who have resided in and around the area they commonly refer to as East Turkestan but the People's Republic of China refer to the areas as Xinjiang. Many Uyghurs have become silenced by what has been going on in Xinjiang for fear of reprisals against them and family members by the Chinese Community Party.[2]

The International Refugee Law committee sits down with Maira Aisa for this issue. Maira Aisa is a Uyghur activist, lawyer and active member of the UK Uygur Community. Maira is a Specialist in Housing Law and has worked for the last 5 years for the Local Authority in Homelessness Department in the United Kingdom.

What caused you to leave home?

I am an Uyghur - a child of a refugee who fled China, Xinjiang in 1955 at age of six and has never gone back to the homeland. I was born and grew up in one of the post-Soviet Union countries. I studied civil law as well as election law and my graduate work was written on Tribunal Courts as part of the legal system. I graduated from the University of Law (Uni) with a "red diploma" with the highest score in every module and assignments. However, I did not feel that my diploma was useful, although it was red, as in my third year in University I started facing obstacles. The law firm I was assigned to gave me the impression that since I was not a native, as a Uyghur I would end up doing every office job rather being a successful Lawyer with a growing career. There was no way to escape those evil eyes and gossips on everything I was doing. It gave me so much pressure and fear that kept me always under stress and thought to fail at any points.

The Law market is a very competitive market everywhere in the world and always the best win. Unfortunately, I always was considered for places with much work and less salary and it had been simply connected to my roots and connections. As I did not have a father, brother, or uncle working in the parliament or hold a high-ranking position to say a word or be a referee for me to get a better job. I could understand this tribalism that the system allowed to happen or I needed to be rich to "give in the paw" to be able to get a seat in a good and respective firm. My red diploma never counted. By the time I had my last module to complete and submit my graduated work; I had a visa to leave the country. I felt desperate. Many Asian countries have the same law structures, the attitude to tribalism. In China, I have no idea what their legal system is but I definitely know that a lawyer of Uyghur origin cannot succeed.

Since the crackdown has been announced in Xinjiang many professionals including famous lawyers, legal firms belonging to Uyghurs were closed or passed to Chinese officials. Many lawyers have been downgraded and given limited capacity of work. I mean those who are not in concentration camps or somehow managed to stay alive. Unfortunately, their status may change in a moment to what the communist party officials want them to be. There also has been a migration reported on professionals to the mainland of China and used as slaves. Uyghur colleagues have reported that they have limited connection to their families. Further that their brothers or sisters who work as teachers, bankers, and lawyers had been sent from one place to another in a region for a qualification update. Once, and if they are lucky to be back, they never go back to their previous jobs and they have been qualified to do less paid and

[1] Jeanne Whalen and Eva Dou, Trump administration bans imports of cotton and tomatoes from China's Xingjiang region, citing forced labor, THE WASHINGTON POST, (January 13, 2021), https://www.washingtonpost.com/us-policy/2021/01/13/us-ban-xinjiang-cotton-tomatoes/

[2] John Phipps, If I speak out, they will torture my family: voices of Uyghurs in exile, THE ECONOMIST, (October 15, 2020), https://www.economist.com/1843/2020/10/15/if-i-speak-out-they-will-torture-my-family-voices-of-uyghurs-in-exile

dirty jobs. Uyghurs lawyers in exile have the opposite life and opportunities to grow and professionally build their career. However, since the Chinese Communist Party's atrocities towards the Uyghurs increased and have been severely affecting the community inside Xinjiang and abroad, many Uyghurs lawyers have become human rights activists and have been fighting for every single Uyghur soul left back home in hell.

What inspired you to become a lawyer?

From age of 12 I attended classes in Secondary school relating to very basic law (more rules) in our everyday life. I loved the point that law is a set of rules applied in life, however, I was sure that it also shapes a person's character, personality and way of thinking. I started watching documentaries of great lawyers and their achievements. How they were presenting their defenses in courts. I was attracted to the legal language, the speeches and the way lawyers presented themselves.

What do you currently do and how do you use law in the work you currently do?

I have been working in a Local Authority in the Housing Department in the United Kingdom since 2015 and dealing with homeless cases. Housing Law is my guidance in every step and actions I am taking on each case. At the very beginning I have to make a decision under what section of the housing law I am accepting the case. For instance, if a client is homeless is one section or if they are threatened with homelessness is another. There are several Sections I must apply if the client has priority needs or not, if the client is in need of interim accommodation or not. If the client comes from another Local Authority and who is fleeing domestic abuse. Referrals made to other Local boroughs under the sections of a homelessness reduction act of Housing legislation. Case closures also to be confirmed under what section of legislation it has been done with clear reasons stated. Lastly, when I deal with complaints I always have to refer and reply in the legislation frame and address the comments accordingly to the housing law.

How can people connect with you regarding your work?

I use my legal background and skills to help with homelessness in the United Kingdom. My focus outside of the work is of course, regarding the people of my homeland. I am an active member of the UK Uyghur Community and I am in contact with the World Uyghur Congress (https://www.uyghurcongress.org/en/). I am excited to share that I am a member of the Preparatory Body of The Congress of Nations and States (www.cnsint.org) which is an international movement dedicated to realizing international rights that have been promised to indigenous peoples such as the Uyghurs and creating concrete steps to making that a reality now and together.

This series by the International Refugee Law Committee interviews lawyers who have fled their home countries due to violence and persecution.

Privacy Compromised:
Searches of Electronic Devices at Ports of Entry

Sergio R. Karas and Zachary Gee

The increasing ubiquity and importance of electronic devices as part of our daily lives has produced a clash between individual privacy rights on one hand, and the protection of national security and investigation of criminal activity on the other. Nowhere is this clash more evident than for travelers crossing borders, where many constitutional protections are often weakened.

While basic protections apply at border crossings, immigration and customs agents have broad powers to search arriving travelers without a warrant. In recent years, searches of travelers' electronic devices, including phones, laptops, and tablets have become common. Information stored on the device may be reviewed and used to determine admissibility. The data contained in those devices can and has been used as the basis to lay criminal charges and obtain convictions. The ultimate question at the border is: Do warrantless searches of electronic devices at a port of entry violate constitutionally protected rights?

In 2006, the United States Ninth Circuit Court of Appeals opened the floodgates for electronic device searches at ports of entry with its decision in *U.S. v. Romm.*[1] The court held that a routine border search of the defendant's laptop was reasonable and that a warrant was not required. Later decisions confirmed that position. On the other hand, in Canada, the situation was murky, causing some confusion and concern about officers' powers to search electronic devices. With the increasing use of personal electronic devices, which are now ubiquitous, searches are occurring more often on both sides of the Canada-U.S. border.

The official guidelines for searches of arriving travelers by both the Canada Border Services Agency (CBSA) and the U.S. Customs and Border Protection (CBP) were issued in the form of directives in the -mid-2000s. They have not been completely overhauled to keep pace with technological advances. However, there is a growing body of jurisprudence that can inform on the scope of the powers that both CBSA and CBP officers can exercise when searching electronic devices. The Alberta Court of Appeal decision in *R. v. Canfield*[2] declared Section 99 of the Customs Act[3] unconstitutional and has shattered several decades of jurisprudence by calling into question the nature of electronic devices as "goods" and accepting that they have a significant role in our daily lives. The decision escalates the battle between privacy rights and criminal investigations.

Searches of electronic devices at Canadian ports of entry

When travelers arrive at a Canadian port of entry, Section 99 of the Customs Act grants CBSA Border Service Officers (BSOs) sweeping powers. The Ontario Superior Court of Justice classified electronic information on any device as a "good" entering the country in *R v. Moroz.*[4] All information on the device is treated like any other physical item in the traveler's luggage. This position is reflected in a broad CBSA policy statement regarding the examination of electronic devices:[5]

"CBSA officers do not always examine digital devices. Our policy is to examine a device only if we think we will find evidence on it that border laws have been broken. Reasons an officer might examine your digital device(s) include concerns regarding your:

- *admissibility or admissibility of your goods*
- *identity*
- *failure to comply with Canadian laws or regulations."*

The CBSA directive establishes that without a warrant, travelers are obligated to provide their device password in writing. Also, the device must be turned to airplane mode since data requiring internet access is out of the scope of the search. Anything on the hard drive of the device, including emails, is searchable. At the discretion of the CBSA officer, the device can be seized and detained if any semblance of suspicious or illegal activity is discovered. However, travelers have the option to

[1] 455 F (3d) 990 (9th Cir. 2006) [*Romm*].
[2] 2020 ABCA 383 [*Canfield*].
[3] RSC 1985, c 1.
[4] 2012 ONSC 5642.
[5] https://www.cbsa-asfc.gc.ca/travel-voyage/edd-ean-eng.html

challenge the search via an application to the CBSA Recourse Officer within ninety days and further appeal to the appropriate court. [6]

The CBSA directive contains a section dedicated to legal practitioners. Regarding solicitor-client privilege, it states that *"the CBSA is committed to respecting privacy rights while protecting the safety and security of the Canadian border. If a BSO encounters content marked as solicitor-client privilege, the officer must cease inspecting that document. If there are concerns about the legitimacy of solicitor-client privilege, the device can be set aside for a court to decide of the contents."* [7]

Canadian caselaw has addressed searches of arriving travelers at the border. In 1988, the Supreme Court of Canada (SCC) in *R v. Simmons*,[8] held that there are three main categories of border searches:

1) Routine questioning that every traveler undergoes at a port of entry, accompanied in some cases by a baggage search and perhaps a pat or frisk of outer clothing.[9] The SCC held that "*no stigma is attached to being one of the thousands of travelers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel."*
2) *"Strip or skin search conducted in a private room, after a secondary examination and with the permission of a customs officer in authority."*
3) *"Body cavity search, in which customs officers have recourse to medical doctors, X-rays, emetics, and to other highly invasive means."* The court held that this is the most invasive type of search.[10]

Also, the Ontario Court of Appeal ruled in *R v. Jones*[11] that protecting the border is a principle of fundamental justice. Hence, the border presents a myriad of unique exceptions to the application of the *Charter of Rights and Freedoms*.[12] Officers enjoy broad powers and can search electronic devices almost at will.

Canadian courts have held that electronic devices fall under the first category described in *R v. Simmons* above. In *R v. Leask*[13] the Ontario Court of Justice ruled that a laptop computer is a good, one equivalent to any other physical good in the traveler's luggage. A few years later, in *R v. Moroz*,[14] the same court ruled that cell phones are also deemed a physical good.

The first category of searches in *R v. Simmons* is very broad and predates the advent of electronic devices. More recent Canadian caselaw has dealt directly with searches of electronic devices. In, *R v. Whittaker*,[15] the defendant, after being randomly selected for a secondary search, was suspected of entering Canada to work instead of vacation. A thorough search of his belongings was conducted, including one on two hard disk drives that he claimed to be the property of his employer. The search yielded images of child pornography, and he was charged and convicted of possession. He challenged the evidence, arguing that the search of the drives was unconstitutional and violated Section 8 of the *Charter*.[16] However, the New Brunswick Provincial Court ruled that a search of the stored contents of a laptop computer or external hard drive (memory stick) in the possession of a person seeking admission into Canada did not violate the rights guaranteed by Section 8."[17] *Whittaker* held that searches of electronic devices are considered nothing more than a regular search of goods, reasonable at a port of entry. The court held that since electronic devices contain pertinent information as to identity, reasons for entering, and physical goods of the traveler, the state has the right to inspect and control what enters the country.

R v. Buss[18] followed the reasoning set out in *R v. Whittaker.* In *Buss*, the legitimacy of travel by a U.S. citizen crossing the border raised suspicions. The defendant indicated that he was just planning to visit for 17 days, but that he was also planning to get married to a Canadian fiancée. Upon searching the defendant's phone, information contradicting his statements was found. The CBSA suspected that he intended to stay in Canada permanently. That led to a further search of his laptop, where child pornography was discovered. The defendant was charged and convicted of possession of child pornography. He appealed and argued that the search was unreasonable, since he had not been

[6] https://www.cbsa-asfc.gc.ca/recourse-recours/impartial-eng.html
[7] https://www.cbsa-asfc.gc.ca/travel-voyage/edd-ean-eng.html
[8] 1988 2 SCR 495.
[9] *Ibid*, at para 77.
[10] *Ibid* at para 27.
[11] 2006 ONCA 225.
[12] *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[13] 2008 ONCJ 25.
[14] 2012 ONSC 5642.
[15] 2010 NBPC 32 [*Whittaker*].
[16] *Supra* note 12, at s 8.
[17] *Whittaker, supra* note 15, at para 1.
[18] 2014 BCPC 16.

suspected of the crime at the time of the search, and thus his *Charter* rights were violated. The British Columbia Provincial Court ruled against the defendant and held that the border is a special zone. The court acknowledged that the *Charter* still applies, but that the state must protect national security and control its borders. *Buss* held that an initial suspicion at the border can lead to further searches unrelated to the original reason for suspicion. It must be noted, however, that most of the caselaw has been from lower courts, so it must be considered advisedly.

While travelers can challenge a warrantless search of electronic devices, they must do so at a court hearing within ninety days.[19] At that point, at least some information would have been already viewed and stored by CBSA compromising privacy. One item of particular interest to legal counsel is that in the absence of a clear assertion of solicitor-client privilege, officers are permitted to conduct a full search, and in the event of a dispute, the device is set aside for a court to determine what information can be examined.[20] CBSA officers have the discretion to determine the legitimacy of the assertion of the designation of a document as solicitor-client privileged, and hence, the power to search remains tipped in the CBSA's favor.

The decision by the Alberta Court of Appeal in *Canfield*[21] declared Section 99 (1)(a) of the *Customs Act* to be unconstitutional. In a lengthy decision, the court discussed the role of electronic devices in our lives and the invasive nature of searches of those devices at the port of entry. The facts of the case merit some discussion, as they appear to be rather unique.

Mr. Canfield and Mr. Townsend were each convicted of possession of child pornography. The evidence against them included photographs and videos retrieved when their electronic devices, which included a cell phone and laptop computer were searched at different times by CBSA at the Edmonton International Airport. Both appellants were Canadian citizens and were referred for secondary inspection upon re-entering Canada. Their electronic devices were searched. It is noteworthy that before the searches, both appellants made significant admissions as to the nature of their travel overseas, and that, coupled with their demeanor, raised some suspicion in the CBSA officers' minds. At trial, it was argued that the searches violated the appellants' constitutional rights to life, liberty, and the security of the person, and against unreasonable search and seizure, as protected by the *Charter of Rights and Freedoms*[22] and therefore the evidence found in the electronic devices was obtained illegally. Canfield and Townsend were convicted of possession of child pornography at trial. However, the Alberta Court of Appeal ruled:

> "For the reasons that follow, we are satisfied that the trial judge erred by failing to recognize that *Simmons* should be revisited to consider whether personal electronic devices can be routinely searched at the border, without engaging the *Charter* rights of those being searched. We have also concluded that s 99(1)(a) of the *Customs Act* is unconstitutional to the extent that it imposes no limits on the searches of such devices at the border, and is not saved by s 1 of the *Charter*. We accordingly declare that the definition of "goods" in s 2 of the *Customs Act* is of no force or effect insofar as the definition includes the contents of personal electronic devices for the purpose of s 99(1)(a). We suspend the declaration of invalidity for one year to provide Parliament the opportunity to amend the legislation to determine how to address searches of personal electronic devices at the border." [23]

The court held that the rights of the appellants were violated and that they were arbitrarily detained. However, the court allowed the evidence obtained from the electronic devices to be admitted supporting the convictions. The court held:

> "This is an evolving area of the law; there was nothing unreasonable in the reliance by the CBSA on the authority of *Simmons* and the jurisprudence following it. Quite the opposite; it would have been unreasonable not to rely on those authorities. The border officials acted in good faith in deciding to search the devices and in carrying out the searches. They uncovered real and reliable evidence of a serious offense that is crucial to the Crown's case."[24]

Canfield's application for leave to appeal was dismissed by the Supreme Court of Canada.[25]

[19] https://www.cbsa-asfc.gc.ca/recourse-recours/menu-eng.html.
[20] https://www.cbsa-asfc.gc.ca/travel-voyage/edd-ean-eng.html#04.
[21] *Canfield*, *supra* note 2.
[22] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, Sections 7, 8, and 10.
[23] *Canfield*, *supra* note 2 at para 7.
[24] *Ibid* at para 186.
[25] Leave to appeal to SCC dismissed, 2021 Canada Supreme Court Reports 39376.

Searches of electronic devices at U.S. ports of entry

Under 8 USC § 1357,[26] CBP is granted broad powers to search travelers without a warrant. Like CBSA, CBP has issued a directive regarding the search of electronic devices. The directive states that CBP strives to "protect rights against unreasonable search and seizure, ensure privacy protection while accomplishing enforcement of mission."[27]

Section 5.2 of the directive contains specific protections for attorney-client privileged information, to be followed officers become aware of the privilege. Officers may see some sensitive information before stopping that portion of the search.

In *Riley v. California*,[28] the United States Supreme Court ruled that a warrantless search of a cell phone during an arrest is unconstitutional. *Riley* prevents warrantless electronic searches inland, as the case did not involve the border of a port of entry. Searches at the border are covered under the "border search exception," as described in *U.S. v. Flores-Montano.*[29] This is an exception to the protection against unreasonable search and seizure afforded by the Fourth Amendment to the U.S. Constitution. [30]

U.S. v. Romm[31] held that the contents of a laptop computer may be searched at an international border without a warrant or probable cause. Notwithstanding the case law following *U.S. v. Romm*, *U.S. v. Cotterman*[32] added an interesting twist. A lengthy criminal record related to child sex tourism was used to justify additional screening of an arriving traveler, despite no immediate suspicion of illicit activity. A preliminary search of the defendant's electronics at the border found nothing but the device was nevertheless seized and shipped to a forensic lab. One hundred and seventy days later, images of child pornography were recovered from the device. The defendant was subsequently convicted of possession of child pornography. On appeal, he argued that the evidence should have been suppressed on the basis that there was no suspicion of child pornography that preceded the search and seizure. The Ninth Circuit Court of Appeals held that a traveler's personal property presented for inspection when entering the United States at the border may not be subject to forensic examination without a reason for suspicion. However, the Ninth Circuit also ruled that a track record of criminal activity combined with frequent questionable travel was enough to satisfy the test of reasonable suspicion.

A trio of 2018 cases have followed the decision in *Romm*. In *U.S. v. Vergara,*[33] the defendant was randomly selected for secondary screening, and a search of his electronic devices uncovered child pornography. While the defendant challenged the evidence in court, given that there was no suspicion of a crime at the time of the search, the Eleventh Circuit held that forensic searches can occur at the border without a warrant and are distinguishable from "searches classified as incident to arrest."[34] The court stated that border searches never require a warrant or probable cause but, at most, require reasonable suspicion".[35] Further, in *U.S. v. Touse*t,[36] the facts were similar to *Vergara.* CBP agents discovered that the defendant's name was flagged by a series of private investigations by internet service providers into unusual monetary transfers to countries involved in child sex tourism. CBP agents used that suspicion as the basis for a search of his electronic devices. The search yielded evidence of online child sex tourism and child pornography. The defendant was charged and convicted of receiving and possessing child pornography. The defendant appealed, arguing that the evidence should have been excluded because there was no initial reasonable suspicion of child pornography that preceded the search. However, the Eleventh Circuit affirmed that CBP can seize any electronic devices at the border and undertake comprehensive searches of those devices without any specific individualized suspicion of wrongdoing.[37]

Moreover, in *U.S. v. Kolsuz*,[38] the defendant was subjected to a search of his electronic devices after illegal firearms were found in his baggage during routine airport security screening. His phone was detained offsite, hundreds of miles from the border, for several

---

[26] *Aliens and Nationality*, 8 USC § 1357 (2006).
[27] https://www.cbp.gov/document/directives/cbp-directive-no-3340-049a-border-search-electronic-devices.
[28] 858 F (3d) 1012 (2014).
[29] 541 US 149 (9th Cir. 2004).
[30] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
[31] *Romm, supra* note 1.
[32] 709 F (3d) 952 (9th Cir. 2013).
[33] 884 F(3d) 1309 (11th Cir. 2018).
[34] *Ibid*, at para 1.
[35] *Ibid.*
[36] 890 F (3d) 1227 (11th Cir 2018).
[37] *Ibid*, at 2.
[38] 890 F (3d) 133 (4th Cir. 2018).

months and subjected to a comprehensive search. It yielded a nine-hundred-page long report, which included content unrelated to firearms. Based on that evidence, the defendant was convicted of multiple offenses in addition to the firearms offense, including conspiracy to commit international smuggling. The defendant moved to suppress the evidence, arguing that the months-long detention of the phone offsite re-classified the search and detached it from the border exception. The Fourth Circuit Court of Appeals disagreed and allowed the conviction to stand. The court held that a mere reasonable suspicion at the border is sufficient to justify a search of all the content of a personal electronic device and that anything found from that time on, whether related to the original suspicion or not, is still covered by the border search exception.

Despite the trio of the above cases, *Cotterman* was followed and expanded in *Alasaad v. McAleenan*.[39] Nine arriving travelers to Boston's Logan International Airport, including U.S citizens, filed a class-action lawsuit after they were subjected to the search and seizure of their electronic devices. CBP had concerns about their prior travel history but had no specific suspicion of illegal activity. The searches yielded no evidence, yet their devices were detained for months. The plaintiffs claimed that it was a gross violation of their privacy rights. The U.S. District Court ruled in favor of the plaintiffs, holding that a warrantless search of an electronic device "without reasonable grounds of individualized suspicion of specific illegal activity was a violation of the Fourth Amendment."[40] The U.S. Court of Appeals for the First Circuit reversed this decision under the style of cause *Alasaad v. Mayorkas*.[41] The court held that there were no violations of the Fourth or First Amendments, and that advanced searches do not require a warrant or probable cause. The Court of Appeals held that the U.S. Supreme Court "has not specified the standard to assess alleged government intrusions on First Amendment rights at the border."[42] As for the Fourth Amendment, the court held that the border search exception applies to searches of electronic devices.

The First Circuit Court of Appeals recognized that its decision in *Alasaad* is at odds with that of the Ninth Circuit in *U.S. v. Cano.*[43] In that appeal, the panel reversed the District Court's order that denied the defendant's motion to supress evidence from the CBP warrantless search of his cell phone. The court held that the border search exception was "restricted in scope to searches for contraband."[44] Cano's conviction for importing cocaine was vacated. However, in *Alasaad*, the court cited *Riley* in holding that it would be more appropriate for Congress to identify threats of harm at the border. It held that "the border search exception is not limited to searches for contraband itself rather than evidence of contraband or a border-related crime."[45] A basic search involves the manual examination of a device. On the other hand, an advanced search requires reasonable suspicion and supervisory approval to connect external equipment to a device for review, copy, and/or analysis. The courts in *Alasaad* and *Cano* did agree that both types of border searches may be performed without probable cause or a warrant, and that basic border searches of electronic devices do not require reasonable suspicion.[46] The disagreement had to do with the scope of the search, which *Alasaad* extended beyond the mere search for contraband or evidence of a related crime.

On both sides of the Canada-U.S. border, travelers face a similar situation. Both CBSA and CBP have broad, sweeping powers to search and seize electronic devices without a warrant. While both agencies have shown willingness to protect attorney-client privilege, and safeguard privacy to the extent possible, the jurisprudence to date permits agents to search and seize electronic devices without a warrant at the slightest suspicion of a violation. It is advisable to store confidential data on remote cloud storage rather than on the device itself. For legal counsel, this is the best way to ensure the protection of solicitor-client privilege.

Sergio R. Karas, Karas Immigration Law Professional Corporation, is a Certified Specialist in Canadian Citizenship and Immigration Law by the Law Society of Ontario. He is Past Chair of the Ontario Bar Association Citizenship and Immigration Section, Past Chair of the International Bar Association Immigration and Nationality Committee, Past Chair of the Canada Committee, and current Co-Chair of the International Ethics Committee of the American Bar Association International Law Section. He is the Editor of the Global Business Immigration Handbook.

Zachary Gee is a JD candidate, 2022 at the University of Alberta, Faculty of Law. He holds a Bachelor of Commerce degree with Distinction from the University of Alberta with a major in Business Economics and Law.

[39] No. 17-cv-11730-DJC (Dist Mass. 2019).
[40] *Ibid*, at para 24.
[41] No. 20-1077 (1st Cir. 2021).
[42] *Ibid* at 27.
[43] 934 F (3d) 1002 (9th Cir. 2019).
[44] *Ibid* at 28.
[45] *Supra*, note 41, at 22.
[46] *Ibid* at 17; 19.