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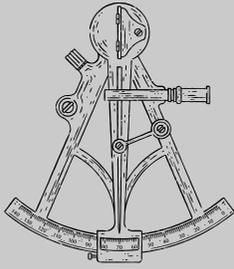
MODERN PIRACY: FIGHTING RANSOMWARE WITH A UNIVERSAL FOUNDATION AND WHY AN INTERNATIONAL
CYBERCRIME TREATY MUST FOLLOW IN THE FOOTSTEPS OF THE PARIS AGREEMENT

*Jaimee Salgado**

ABSTRACT

Ransomware attacks have crippling effects on both the public sector and private industry. What is even more concerning is the proliferation of hacks on the healthcare industry and the utter disregard for human life by hackers. The world is desperately lacking in viable punishment options for cyberspace criminals, but there is potential for streamlining jurisdictional issues by treating these modern-day pirates much as States have treated the physical act of piracy for centuries. Given the complexities of cyberspace and the ability for ransomware attackers to disappear from the “domestic” jurisdiction without a trace, leaving the responsibility on a purely domestic level will only leave victims without recourse for suffered economic or even physical harm. State legislation and international treaty law must approach ransomware using the Paris Agreement as a template, with foresight and due diligence measures, to universally punish hackers in cyberspace like pirates on the high seas. If the world does not make swift changes, hackers might end up adding murder to their resume.





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I. INTRODUCTION

On the night of September 11, 2020, a woman with a life-threatening condition was rushed to University Hospital Düsseldorf.¹ This choice was ill-fated as the hospital had come under attack from ransomware and could not accept emergency patients.² The woman was diverted to Wuppertal, approximately twenty miles away.³ This diversion resulted in about an hour delay in treatment and, ultimately, the woman's untimely death.⁴

When the ransom note was found, it was addressed to Heinrich Heine University, not the affiliated University Hospital Düsseldorf.⁵ As it turns out, the hospital was never the intended target for the attack.⁶ Another curious characteristic, the ransom note did not contain a requested dollar amount; it listed the actual contact information of the hackers.⁷ Police were able to make contact with the perpetrators, inform them of their mistake in attacking the hospital, and apprise them that their misstep endangered patients.⁸ After learning of their blunder, the hackers produced the digital key so the process of decryption could begin.⁹ The hackers then disappeared and have not been reachable since.¹⁰ German prosecutors have since opened a homicide investigation.¹¹ If the investigation were to proceed to trial, it would be the first ever documented case of a death associated with a ransomware attack.¹²

Ransomware attacks on hospitals and healthcare centers pose a significant threat to patients, especially during the coronavirus pandemic.¹³ A hospital often operates and manages needed information, like medications systems, entirely online.¹⁴ When medical staff cannot access patients' labs and charts, the patient's treatment suffers and, in some

* Finance & Marketing Editor vol. 54, *The George Washington International Law Review*; B.S. 2011, University of Colorado Denver; (The author may be reached at jsalgado@law.gwu.edu)

¹ *Prosecutors Open Homicide Case After Cyber-Attack on German Hospital*, THE GUARDIAN (Sept. 18, 2020, 12:28), <https://www.theguardian.com/technology/2020/sep/18/prosecutors-open-homicide-case-after-cyber-attack-on-german-hospital>.

² Melissa Eddy & Nicole Perloth, *Cyber Attack Suspected in German Woman's Death*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/world/europe/cyber-attack-germany-ransomware-death.html>.

³ *Prosecutors Open Homicide Case After Cyber-Attack on German Hospital*, *supra* note 1.

⁴ Ashli Lopp, *Ransomware Attack Results in Woman's Death*, WAMS (Oct. 30, 2020), <https://wamsinc.com/2020/10/30/ransomware-attack-results-in-womans-death/>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *German Hospital Hacked, Patient Taken to Another City Dies*, AP NEWS (Sept. 17, 2020), <https://apnews.com/article/technology-hacking-europe-cf8f8eee1adcec69bcc864f2c4308c94>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Sean Lyngaas, *German Investigators Treating Ransomware Attack as Negligent Homicide, Reports Say*, CYBERSCOOP (Sept. 21, 2020), <https://www.cyberscoop.com/germany-ransomware-homicide-duesseldorf-hospital/>.

¹² *Id.*

¹³ *Id.*

¹⁴ Kevin Collier, *Major Hospital System Hit with Cyberattack, Potentially Largest in U.S. History*, NBC NEWS (Sept. 28, 2020, 4:04 PM), https://www.nbcnews.com/tech/security/cyberattack-hits-major-u-s-hospital-system-n1241254?cid=sm_np_d_nn_tw_ma.

cases, cannot even begin; when such a vital system does not function, the potential for patient death skyrockets.¹⁵ Security organizations have begged ransomware gangs to cease attacks on the healthcare sector, but to no avail.¹⁶

Ransomware attacks are not new and do not appear to be subsiding anytime soon.¹⁷ Given the increase in this type of attack, a resulting death was almost inevitable.¹⁸ In March of 2020, hackers attacked the second largest hospital in the Czech Republic, which was a major hub for testing for the coronavirus.¹⁹ Healthcare systems in the United States also came under attack in the Fall of 2020.²⁰ In 2019, seven hospitals in Australia²¹ and seven hundred and sixty-four healthcare providers in the United States fell victim to ransomware attacks.²² There is also the infamous WannaCry ransomware attack where hackers, operating for the North Korean government, infected the United Kingdom's National Health System (NHS).²³ As in the case of the University Hospital Düsseldorf, the NHS was not WannaCry's direct target, but that did not prevent the ransomware strain from throwing eighty healthcare facilities into disarray²⁴ and costing more than \$100 Million.²⁵ As of January 2021, over 93% of healthcare practices have experienced an attack since 2017.²⁶

While there appears to be movement from the private sector in aiding healthcare organizations shore up their digital vulnerabilities,²⁷ it remains to be seen whether policy makers realize the grave impact a ransomware attack can potentially have.²⁸ While inadequate domestic laws are part of the problem, the inability to enforce criminal punishment transnationally presents the larger issue of holding cybercriminals responsible for their actions.²⁹ The severe lack of cyber specific enforcement measures, both on a local and international level, leave the proverbial backdoor open for digital pirates to exploit domestic institutions without consequence.³⁰ This lack of protection from ransomware attacks allows hackers to commit transnational crimes, then slip away into the ether while actual human lives hang in the balance.³¹

¹⁵ *Id.* (quoting Kenneth White).

¹⁶ Lyngaas, *supra* note 11.

¹⁷ *German Hospital Hacked, Patient Taken to Another City Dies*, *supra* note 8.

¹⁸ *Id.*

¹⁹ Sean Lyngaas, *All Hands on Deck: Infosec Volunteers to Protect Medical Organizations During COVID-19 Crisis*, CYBERSCOOP (Mar. 20, 2020), <https://www.cyberscoop.com/covid-19-cybersecurity-volunteer-groups-h-isac/>.

²⁰ Collier, *supra* note 14.

²¹ Dan Goodin, *Ransomware Forces 3 Hospitals to Turn Away All but the Most Critical Patients*, ARSTECHNICA (Oct. 1, 2019, 2:25 PM), <https://arstechnica.com/information-technology/2019/10/hamstrung-by-ransomware-10-hospitals-are-turning-away-some-patients/>.

²² *German Hospital Hacked, Patient Taken to Another City Dies*, *supra* note 8.

²³ Collier, *supra* note 14.

²⁴ *Id.*

²⁵ Rob Sobers, *134 Cybersecurity Statistics and Trends for 2021*, VARONIS, <https://www.varonis.com/blog/cybersecurity-statistics/> (last updated Mar. 16, 2021).

²⁶ *Id.*

²⁷ Lyngaas, *supra* note 19.

²⁸ Lyngaas, *supra* note 11.

²⁹ Lopp, *supra* note 4.

³⁰ *Id.*

³¹ *Id.*

This article explores the through lines of piracy and ransomware, discussing ransomware's elevation to the level of *jus cogens* in international law and the State due diligence that typically follows such a categorization. This article also examines the role of scholars and experts in propelling soft law into concrete legislation. Finally, this article calls for the adoption of a new international treaty regime for all cybercrime, using the framework of the Paris Agreement, based on the *jus cogens* theory and multiple statements from the scholarly community warning of the danger of cybercrime.

II. BACKGROUND

A. Ransomware's Beginning, its Current State, and the Problem with Keeping Punishment Bound Up in Territorial Ideals

In the early days of technology, before the Internet, ransomware demanded more action from the victim to infect a system,³² but as technology progressed, so has the efficiency and injurious effect of ransomware attacks.³³ Better understanding of the threat of ransomware starts with knowing how ransomware works.

Ransomware is a type of malicious software, or "malware," that invades a computer system, locking it down, until the victim produces a demanded ransom.³⁴ The malware typically enters the system through human error, usually in the form of a corrupted link sent through email.³⁵ However, sometimes hackers can enter through the "backdoors" of digital vulnerabilities in the system.³⁶ Hospitals and healthcare facilities are prime targets for ransomware because restricted access to an organization's digital systems can endanger patients, creating the utmost urgency to pay.³⁷ This urgency has only increased during the coronavirus pandemic.

Once the organization pays the ransom, the hackers use a digital key to start decryption and return the system to its normal state.³⁸ Ransomware, on its face, is purely economic.³⁹ However, Düsseldorf Hospital shows that economic loss is not the only detrimental effect

³² Danny Palmer, *What is Ransomware? Everything You Need to Know About One of the Biggest Menaces on the Web*, ZDNET (May 10, 2021), <https://www.zdnet.com/article/ransomware-an-executive-guide-to-one-of-the-biggest-menaces-on-the-web/>.

³³ Bill Brenner, *WannaCry: The Ransomware Worm that Didn't Arrive on a Phishing Hook*, NAKED SECURITY (May 17, 2017), <https://nakedsecurity.sophos.com/2017/05/17/wannacry-the-ransomware-worm-that-didnt-arrive-on-a-phishing-hook/>.

³⁴ *What is Ransomware*, KASPERSKY, <https://usa.kaspersky.com/resource-center/definitions/what-is-ransomware> (last visited Jan. 20, 2021).

³⁵ Video Interview with Paul Rosenzweig, Professorial Lecturer in Law (The George Washington University Law School, 2020) (on file statement).

³⁶ *Id.*

³⁷ Lily Hay Newman, *Ransomware Hits Dozens of Hospitals in an Unprecedented Wave*, WIRED (Oct. 29, 2020, 3:17 PM), <https://www.wired.com/story/ransomware-hospitals-ryuk-trickbot/>.

³⁸ *What is Ransomware and How Does Ransomware Work – Statistics and Examples*, UNITRENDS, <https://www.unitrends.com/solutions/ransomware-education> (last visited Jan. 21, 2021).

³⁹ Marin Mrcela & Igor Vuletic, *Healthcare, Privacy, Big Data and Cybercrime: Which One is the Weakest Link?*, 27 ANNALS HEALTH L. 257, 262 (2018).

ransomware causes. From humble beginnings, ransomware can now take down a country's most vital infrastructure

1. From Floppy Disks to Entire Transport Grids: Ransomware Has Grown Up

The first known incident of ransomware dates to the PC Cyborg Trojan in 1989.⁴⁰ The virus spread throughout the healthcare industry via a floppy disk.⁴¹ Once installed, and after 90 reboots, the computer system locked down, requested the user renew their license, and send money to a P.O. box in Panama care of PC Cyborg Corporation.⁴²

The dawn of the Internet era became a catapult for ransomware, with hackers now able to target general Internet users.⁴³ One of the more successful early attacks told users that law enforcement had locked their PCs because of illegal online activity.⁴⁴ If users paid the fine, the “police” overlooked the “infringement” and restored access to the computer.⁴⁵

A new era of ransomware began with the devastating 2017 WannaCry 2.0 attack.⁴⁶ Within four days, WannaCry had infected 200,000 computers in 150 countries with no sign of the usual phishing email trickery.⁴⁷ Instead, the hackers used a leaked NSA code to penetrate computer networks and implant the malware, which laid dormant until instructions were given to deploy and encrypt the system.⁴⁸ The reason WannaCry advanced so rapidly is because no user action was required once implanted; the virus exploited digital vulnerabilities as it wormed its way through systems.⁴⁹ The United Kingdom's National Health Service took a massive blow as multiple health organizations were knocked entirely offline.⁵⁰ Russia took the brunt of the attack with collapses in “banks, telephone operators, and even IT systems supporting transport infrastructure.”⁵¹ WannaCry also affected private industry with Renault halting several of its car production lines at various locations.⁵² It is now known that the North Korean government backed the group of hackers who perpetrated the attack,⁵³ showing that States, in addition to private actors, sometimes hold responsibility. Ransomware poses a continuously growing threat with lasting injuries, yet because of the nature of the crime, hackers are especially difficult to catch and punish.

⁴⁰ Palmer, *supra* note 32.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Brenner, *supra* note 33.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Palmer, *supra* note 32.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Press Release, Dept. of Justice Office of Public Affairs, *North Korean Regime-Backed Programmer Charged with Conspiracy to Conduct Multiple Cyber Attacks and Intrusions* (Sept. 6, 2018), <https://www.justice.gov/opa/pr/north-korean-regime-backed-programmer-charged-conspiracy-conduct-multiple-cyber-attacks-and>.

2. The Ever-Increasing Menace and the Inability to Prevent

There will never be a way to prevent ransomware, the only thing to do is mitigate.⁵⁴ Estimates show that a new ransomware attack launches every 40 seconds.⁵⁵ Not only is the threat of ransomware ever present, the cost of the actual ransom as well as recuperation costs from downtime have increased year over year.⁵⁶

Another recent and disturbing trend within ransomware is double extortion.⁵⁷ Hackers can now remove sensitive information from company files before they encrypt the data.⁵⁸ Hackers then have more leverage over companies, who originally decided not to pay the ransom, because the hackers can release the companies' sensitive information.⁵⁹

It can take months for a company to recover from a ransomware attack.⁶⁰ For companies that have enough resources to deny the ransom payment, such as Norsk Hydro and Maersk, recovery can take several months and sometimes hundreds of millions of dollars.⁶¹ For companies that do not have such resources and do pay the ransom, there is still lag time in day-to-day operations that have costs for the business.⁶² Ransomware attacks are known to fiscally injure the victim, but there are also real-world effects after the attack that could potentially ruin a company,⁶³ or in the case of University Hospital Düsseldorf, result in a loss of human life.

The trouble with prosecuting ransomware attacks is the perpetrators are not typically located within the same country where the attack took place.⁶⁴ The lack of physical evidence from a cyber-attack, combined with tactics like using innocent persons' devices to make it appear as though the attack is coming from multiple locations, make it incredibly

⁵⁴ Video Interview with Paul Rosenzweig, *supra* note 35.

⁵⁵ *What is Ransomware and How Does Ransomware Work – Statistics and Examples*, *supra* note 38.

⁵⁶ Eric C., *Ransomware Facts, Trends & Statistics for 2021*, SAFETY DETECTIVES, <https://www.safetydetectives.com/blog/ransomware-statistics/> (last visited on Jan. 20, 2021) (listing ransom amounts increasing from an average of \$4,300 in 2018 to an estimated \$8,100 in 2020, Cost of down time increasing from \$46,800 in 2018 to an estimated \$283,800 in 2020).

⁵⁷ Camille Singleton, *Ransomware 2020: Attack Trends Affecting Organizations Worldwide*, SECURITY INTELLIGENCE (Sept. 28, 2020), <https://securityintelligence.com/posts/ransomware-2020-attack-trends-new-techniques-affecting-organizations-worldwide/>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Joe Tidy, *How a Ransomware Attack Cost One Firm £45m*, BBC NEWS (June 24, 2019), <https://www.bbc.com/news/business-48661152>.

⁶¹ *Id.*; see also Andy Greenberg, *The Untold Story of NotPetya, the Most Devastating Cyberattack in History*, WIRED (Aug. 22, 2018, 5:00 AM), <https://www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed-the-world/> (describing the timelines and costs of the NotPetra ransomware attack for Norsk Hydro and Maersk).

⁶² Palmer, *supra* note 32.

⁶³ Tidy, *supra* note 60.

⁶⁴ Pablo de la Riva, *Analyzing the World's top 3 Cybercrime Countries*, BUGUROO, <https://www.buguroo.com/en/blog/the-worlds-top-3-cybercrime-and-online-fraud-hotspots> (last visited Jan 20, 2021); Sintia Radu, *China, Russia Biggest Cyber Offenders*, U.S. NEWS & WORLD REPORT (Feb. 1, 2019, 5:30 PM), <https://www.usnews.com/news/best-countries/articles/2019-02-01/china-and-russia-biggest-cyber-offenders-since-2006-report-shows>.

hard for the victimized state to even locate the hacker.⁶⁵ This poses a conundrum of how States are supposed to punish and deter perpetrators who do not live within their jurisdictional borders.

3. Jurisdiction: History and Jurisdictional Problems with Cybercrime

Ransomware creates complicated international issues within the legal system that domestic laws are not equipped to handle on their own, and with ransomware expanding at an alarming rate, an international perspective is needed. Jurisdiction within the international space is not as comprehensively defined as within a nation's own borders.⁶⁶ It has become clear, however, that the issue of cyber-attacks is one of international character that needs further inspection from the international community.⁶⁷

Domestically, States have three areas of jurisdiction at their disposal: the jurisdiction to prescribe (legislate), the jurisdiction to adjudicate, and the jurisdiction to enforce the laws prescribed.⁶⁸ Jurisdiction to adjudicate is an important factor in the national process, however this article will only examine the State's ability to create laws and enforce them; if no law is created, there is nothing to adjudicate, and the inability to punish wrongdoers leaves adjudication somewhat pointless.

Historically, the jurisdiction to prescribe is rooted in the notion of territory.⁶⁹ International law allows a State to create legislation when the person, property or conduct occurs within the State's own borders.⁷⁰ International law also allows domestic legislation for actions that have a "substantial effect" within the domestic territory.⁷¹ In the case of the Düsseldorf Hospital, the attacks' effects were felt by a domestic hospital, with a German national paying the ultimate price. This would fall within the parameters of international law under which Germany can create legislation protecting its nationals in similar circumstances.

A State has the jurisdiction to enforce any law that it has jurisdiction to prescribe on any person outside of its territory so long as the person(s) is given notice and the

⁶⁵ Timothy Summers, *Hunting Hackers: An Ethical Hacker Explains How to Track Down the Bad Guys*, THE CONVERSATION (Feb. 1, 2017, 9:57 PM), <https://theconversation.com/hunting-hackers-an-ethical-hacker-explains-how-to-track-down-the-bad-guys-70927>.

⁶⁶ LORI FISLER DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW CASES AND MATERIALS*, 728 (7th ed. 2019).

⁶⁷ *The Oxford Statement on the International Law Protections Against Cyber Operations Targeting the Health Care Sector*, OXFORD INSTITUTE FOR ETHICS, LAW AND ARMED CONFLICT, <https://www.elac.ox.ac.uk/the-oxford-statement-on-the-international-law-protections-against-cyber-operations-targeting-the-health-care-sector>?page=1#widget-id-2220386 (last visited Jan. 20, 2021); Council of the European Union Press Release, Declaration by the High Representative Josep Borrell, on behalf of the European Union, on malicious cyber activities exploiting the coronavirus pandemic (Apr. 30, 2020, 1:00 PM), <https://www.consilium.europa.eu/en/press/press-releases/2020/04/30/declaration-by-the-high-representative-josep-borrell-on-behalf-of-the-european-union-on-malicious-cyber-activities-exploiting-the-coronavirus-pandemic/>; The European Economic and Social Committee, 2014 O.J. (C 451) 5.

⁶⁸ DAMROSCH & MURPHY, *supra* note 66, at 725.

⁶⁹ C.E.T.S. No. 185 art. 22(1).

⁷⁰ RESTATEMENT (FOURTH) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 408 (AM. L. INST. 2017).

⁷¹ *Id.* at § 409.

opportunity to be heard, either personally or by another representative.⁷² Ransomware hackers are cloaked with anonymity and typically disappear without a trace.⁷³ Connecting A with B, if the authorities cannot find the hackers, there is no opportunity for notice or for the individual to be heard. If a person is not notified or heard, a country cannot arbitrarily enforce the prescribed law upon that individual. The convergence of cyber-crime with the presumption of territoriality can pose a conundrum in real life enforcement of law.⁷⁴ Some courts have allowed the prosecution and enforcement of domestic law of one state against nationals of another, but only when the parties are identifiable.⁷⁵

Under international law, Germany has jurisdiction to prescribe a law encompassing the crimes that occurred during the Düsseldorf Hospital incident.⁷⁶ However, enforcing those laws and achieving the desired deterrence, is quite difficult if the hackers are never found.⁷⁷ Fortunately, ransomware is not the first crime to deal with the issue of jurisdictional limbo.

B. Piracy's Ambiguous Relationship with State Jurisdiction and Modern Jurisdictional Remedies

1. Piracy and Modern State Jurisdiction Over the High Seas

Piracy is suggested by historians and lawyers alike as the first widely accepted crime against humanity.⁷⁸ *Hostis humani generis* (enemies of all mankind) emerged from Roman jurists who viewed pirates as less of a criminal and more as an enemy of the State.⁷⁹ States that sponsored and protected piracy enabled growth and power within the practice.⁸⁰ Support of piracy and lack of criminal penalties made the practice that much more difficult to suppress.⁸¹ When States were lenient, piracy strengthened; when States stood strong together and passed laws calling for harsh punishments of the practice, piracy receded.⁸²

Throughout the nineteenth and twentieth centuries, the international community and individual States created a latticework of legislation both on the domestic and international level to address the issue of piracy.⁸³ Current international law, under the United Nations Convention on the Law of the Sea (UNCLOS) Article 101, defines piracy as illegal actions

⁷² RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 431(3)(a)-(b) (AM. L. INST. 1986)

⁷³ *German Hospital Hacked, Patient Taken to Another City Dies*, *supra* note 8.

⁷⁴ Francis Wharton, *Conflict of Criminal Laws*, 1 THE CRIMINAL MAGAZINE 689, 689-90 (1880).

⁷⁵ *Ashton Inv. Ltd. v. OJSC Russian Aluminum (Rusal)*, [2006] EWHC (Comm) 2545 [59]-[61] (Eng.).

⁷⁶ RESTATEMENT (FOURTH) THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 408, 409 (AM. L. INST. 2017).

⁷⁷ Wharton, *supra* note 74.

⁷⁸ Lauren Benton, *Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction*, 23 INT'L J. MAR. HIST. 225, 225 (2011).

⁷⁹ *Id.* at 228; Evans F. Horsley, *State-Sponsored Ransomware Through the Lens of Maritime Piracy*, 47 GA. J. INT'L & COMP. L. 669, 674 (2019).

⁸⁰ Evans F. Horsley, *State-Sponsored Ransomware Through the Lens of Maritime Piracy*, 47 GA. J. INT'L & COMP. L. 669, 674 (2019).

⁸¹ *Id.*

⁸² *Id.* at 674-75.

⁸³ *Id.* at 675-76.

conducted for private objectives on the high seas, outside of any domestic jurisdiction.⁸⁴ Thus, under modern international law, piracy can only occur outside of a State's territorial jurisdiction.⁸⁵

A shift occurred in the 17th century; from the theory that States could assert their own sovereignty over the high seas to the theory of freedom of the high seas, which allowed States the right to navigate freely and subsequently take down pirates without infringing on another sovereign.⁸⁶ Piracy is the rare exception to the jurisdictional rules laid out in international law.⁸⁷

One persuasive justification for allowing any State to impose jurisdiction over piracy is the particularly hostile nature of a pirate's conduct.⁸⁸ Pirates act without regard to any law of any sovereign, or the persons and property therein, which makes piracy a concern for all sovereigns.⁸⁹ Much like the high seas, cyberspace also poses a conundrum for jurisdictional laws, and thus hackers, much like pirates, pose a threat to all States.⁹⁰

2. Cyberspace Exemplifies the Same Issues Found in Piracy on a Larger Scale

The high seas allow States, and individuals within, to traverse freely; so does the landscape of cyberspace. Cyberspace is not subject to territorial boundaries.⁹¹ Be that as it may, States still have some traditional jurisdiction to prescribe under international law if the effects are felt within their borders.⁹² As discussed in Section II.A.3., however, a State is still left with the possibility that domestic laws created for cyberactivity cannot be enforced on perpetrators in an international circumstance.⁹³ This is potentially problematic, given the larger scope of cybercrime compared to pirates of previous centuries.

⁸⁴ United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]

((a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)).

⁸⁵ *Id.* at art. 101(a)(i)-(ii).

⁸⁶ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 792 (1988); RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 72; RESTATEMENT (FOURTH) THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 76.

⁸⁷ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 793 (1988).

⁸⁸ *Id.* at 794.

⁸⁹ *Id.* at 794-95.

⁹⁰ Horsley, *supra* note 80, at 678.

⁹¹ Susan W. Brenner, *Cybercrime Jurisdiction*, 46 CRIME, L., AND SOC. CHANGE 189, 194 (2006).

⁹² RESTATEMENT (FOURTH) THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 71.

⁹³ *See supra* Section II. A. 3.

Piracy, as defined by the law of nations, is robbery or forcible depredations on the high seas.⁹⁴ Piracy, a physical event where proximity is crucial, cannot be replicated to all vessels on the high seas at the same time.⁹⁵ A ransomware attack eliminates the need for proximity, increases the scale of attacks committed, and provides for anonymity, automation of criminal activity, and remote access.⁹⁶ Pirates acted without regard, making their actions worrisome to all States.⁹⁷ Ransomware has amplified these worrisome actions to a global scale.

Piracy is indiscriminate in nature, as are ransomware attacks.⁹⁸ The typical target for pirates and hackers is not necessarily another State, but instead private entities or individuals, with the end goal being economic gain.⁹⁹ Another commonality is the difficulty in finding and identifying the culprit.¹⁰⁰ Pirates escaped into open waters, ransomware hackers disappear into lines of code.¹⁰¹

Additionally, just because piracy occurs in the “sovereignty free zone” of the high seas does not render the pirates or their vessels stateless.¹⁰² Pirates maintain their nationality and the consequences that come with citizenship.¹⁰³ Hackers do not lose their nationality simply by committing a hack either. Pirates were punished for centuries by any state that could catch them, and this universal punishment is considered acceptable by the international community under the concept of customary international law and *jus cogens*.¹⁰⁴

C. Customary International Law: a Cybercrime Treaty Must Build on *Jus Cogens* Universality

History shows that when the international community stands strong together, international crimes, like piracy, dissipate.¹⁰⁵ Ransomware is an inherently international crime, much like piracy, yet international treatment of ransomware is lackluster. The Budapest Convention is the only international treaty addressing cybercrime, but it thrusts the responsibility of catching cybercriminals solely on domestic legislatures and does not provide any element of cooperation in an international law capacity.¹⁰⁶ The only way of ensuring true international cooperation is building a treaty on the foundation of *jus cogens*, using scholars, jurists and the like to propel the legal conversation forward, and by using a

⁹⁴ *U.S. v. Smith*, 18 U.S. 153, 162 (1820).

⁹⁵ Brenner, *supra* note 91, at 194.

⁹⁶ *Id.*

⁹⁷ Randall, *supra* note 87, at 794-95.

⁹⁸ Horsley, *supra* note 80, at 678.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Randall, *supra* note 87, at 794.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 794-95.

¹⁰⁵ Horsley, *supra* note 80, at 674-75.

¹⁰⁶ The Budapest Convention, signed Nov. 2001, has only 64 parties, and as of July 2020, mandates what domestic laws should be, and only outlines limited cooperation internationally through a Mutual Legal Assistance Treaty (MLAT). C.E.T.S. No. 185, *supra* note 69.

framework that has universal appeal and is flexible enough to change with new developments.¹⁰⁷

A multilateral treaty on its own is not enough to create universal jurisdiction.¹⁰⁸ Universality only comes when a customary rule arises from a treaty regime or state practice surrounding the treaty principles.¹⁰⁹ Thus, unless these treaties are built on customary international law, they will only pertain to State enacted domestic law.¹¹⁰

Essentially, customary international law is an idea that is so commonplace within global society that States have adopted the idea as universal law.¹¹¹ A treaty can codify an existing customary international law,¹¹² even though once the customary international law is established, it becomes a universal norm to be respected by all States on an international and domestic level, regardless of treaty participation.¹¹³ The universal punishment of piracy has been considered customary international law for centuries¹¹⁴ and has earned a spot in an even higher set of rules that cannot be violated by any individual or State.¹¹⁵

1. Jus Cogens: The Highest Form of Customary International Law

Within customary international law, there is a category of peremptory norms, also known as *jus cogens*.¹¹⁶ *Jus cogens* is a norm that rises above the level of conventional customary international law and cannot be defiled by any entity, regardless of international treaties, local law or customs, or even another customary international law.¹¹⁷ *Jus cogens* can void part or the whole of a treaty if the treaty conflicts with the *jus cogens* norm.¹¹⁸ A treaty or treaty provision can also be displaced if a new *jus cogens* norm is formed after the treaty has entered into force.¹¹⁹ *Jus cogens* trounces all.

¹⁰⁷ See *infra* Section III.

¹⁰⁸ Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Separate Opinion of President Guillaume, 2002 I.C.J. 35, 40 (Feb. 14).

¹⁰⁹ RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 72, § 102(3).

¹¹⁰ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons art. 2(2), Dec. 14, 1973, 1035 U.N.T.S. 167; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(1), Dec. 20, 1988, 1582 U.N.T.S. 95.

¹¹¹ *Customary International Law*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/customary_international_law#:~:text=Customary%20international%20law%20results%20from,for%20visiting%20heads%20of%20state (last visited Jan. 20, 2021) (Some examples of customary international law are non-refoulement and granting immunity for heads of state); Customary international law must be a combination of a general and consistent practice of states that the state feels a legal obligation to apply, also known as *opinio juris*. DAMROSCH & MURPHY, *supra* note at 76.

¹¹² DAMROSCH & MURPHY, *supra* note 66, at 76.

¹¹³ Partial Award, Prisoners of War - Eritrea's Claim 17 (Eri. v. Eth.), Eri.-Eth. Cl. Comm'n ¶¶ 39-40 (2003); DAMROSCH & MURPHY, *supra* note 66, at 87 (citing from Meron, Human Rights and Humanitarian Norms as Customary Law 3-10, 114-35, 192-95 (1989)).

¹¹⁴ Randall, *supra* note 87, at 791.

¹¹⁵ DAMROSCH & MURPHY, *supra* note 66, at 99.

¹¹⁶ The theory of jus cogens goes back to Roman law and has been a constant in international law through modern times. *Id.*

¹¹⁷ *Id.* (quoting the International Criminal Tribunal for the former Yugoslavia (ICTY)).

¹¹⁸ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

¹¹⁹ *Id.* art. 64.

The International Law Commission has said “there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* norms.”¹²⁰ However, the international community routinely references several norms, including piracy.¹²¹ Since no State can escape the reaches of *jus cogens* norms, and because ransomware is, for all intents and purposes, modern day piracy, a certain level of responsibility is automatically applied to State actions toward the crime of ransomware.

2. Due Diligence and State Responsibility in Intrinsically International Crimes

Within any state, there is a certain level of due diligence performed to avoid breaching a rule of international law, which incurs legal liability.¹²² Other, sometimes non-legal, reasons for State responsibility include averting economic harm, embarrassment, and public outcry over the State’s actions.¹²³ The International Law Commission (ILC) outlined that States are in breach of an obligation under *jus cogens* norms if the breach is a “gross or systematic failure” by a State responsible for fulfilling the legal obligation.¹²⁴ States must cooperate to end a breach of *jus cogens* norms, cannot aid or assist in maintaining the circumstances stemming from the breach, and cannot recognize the result of the breach as lawful.¹²⁵ The ILC does not create binding law on its own, but it does have substantial influence,¹²⁶ and since *jus cogens* norms by definition are accepted as international law, the ILC’s comments on States’ responsibility toward the norms holds weight.

Norms, such as piracy, implore every State to cooperate in its suppression.¹²⁷ Keeping with the comparison of piracy and ransomware, the current landscape of ransomware would suggest a handful of States may be in breach of their due diligence obligations.¹²⁸ The world has experienced an increasing amount of ransomware attacks and yet, direct action to suppress these attacks has either not been attempted or has not prevailed, given the jurisdictional red tape.

Piracy, unlike the rest of the settled *jus cogens* norms, occurs on the high seas, which is not claimed as territory by any nation.¹²⁹ Similar to the high seas, the concept of a

¹²⁰ DAMROSCH & MURPHY, *supra* note 66, at 101 (quoting the International Law Commission).

¹²¹ See, e.g., Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. OF INT’L AND COMP. L. 609, 625 (1977).

¹²² Neil McDonald, *The Role of Due Diligence in International Law*, 68 INT’L & COMP. L. Q. 1041, 1042 (2019).

¹²³ *Id.* at 1049.

¹²⁴ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, [2001] 2 Y.B. Int’l L. Comm’n 31, 112 (Art. 40, comment 3: “The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.”).

¹²⁵ *Id.* at 113-14, art. 41.

¹²⁶ International Law Commission, <https://legal.un.org/ilc/work.shtml> (last visited Jan. 24, 2021).

¹²⁷ *Draft Articles on the Law of Treaties with commentaries*, [1966] 2 Y.B. Int’l L. Comm’n 187, 248 (art. 50, comment 3 (explaining why treaties cannot conflict with *jus cogens* norms)).

¹²⁸ de la Riva, *supra* note 64.

¹²⁹ UNCLOS, *supra* note 84, art. 87.

completely international territory can be applied to the Internet and cyberspace.¹³⁰ Both piracy and ransomware attacks begin and end in the international space,¹³¹ with the effects of ransomware felt more acutely on the domestic level. The similar through lines of ransomware attacks and piracy¹³² create a *jus cogens* norm, especially given the lacking domestic ability to enforce jurisdiction on an international criminal. This new *jus cogens* norm is made stronger if codified in an international treaty. Treaties do not appear overnight though, and sometimes scholars and experts need to sound the alarm and lead the way towards international legislation.¹³³

3. The Role of Soft Law in Creation of Lex Lata

There is disagreement between governments about international legislation on cybercrime. The European Union has worked at protecting its own member states through resolutions,¹³⁴ council decisions,¹³⁵ and regulations to circumvent cyber-attacks.¹³⁶ The UN, as of December 2019, passed a resolution on cybercrime by a narrow margin of 79 in favor, 60 against, and 33 abstaining.¹³⁷ Many Western states voted against the draft resolution pushed by Russia in November 2019.¹³⁸ The U.S. deputy ambassador, Cherith Norman Chalet, stated that the resolution will “undermine international cooperation to combat cyber-crime at a time when enhanced coordination is essential.”¹³⁹ Ms. Chalet also noted that member states are not in agreement for the need or the value of a new treaty addressing cybercrime because of differing political ideologies.¹⁴⁰ In a world that has different needs and values regarding cybercrime, sometimes scholars and other individuals outside of government create a clearer path to international legislation.

i. Ransomware Must Streamline the Process Used by Climate Change Advocates in Developing International Treaties

In the past, academics, writers, and commentators have been able to move the needle on issues that international law struggled to tackle itself.¹⁴¹ The International Court of

¹³⁰ Horsley, *supra* note 80, at 679.

¹³¹ *Id.* at 679-80.

¹³² *Id.* at 678.

¹³³ See *infra* Section II. C. 3. i-ii.

¹³⁴ European Parliament resolution of 3 October 2017 on the fight against cybercrime, EUR. PARL. DOC. (COM 346) 29 (2018).

¹³⁵ Council Decision 2020/1127, 2020 O.J. (L 246) 12.

¹³⁶ Council Implementing Regulation 2020/1125, 2020 O.J. (L 246) 4.

¹³⁷ Report of the Third Committee, *Countering the use of information and communications technologies for criminal purposes*, U.N. Doc. A/74/401 (Nov. 25, 2019); *A New UN Cybercrime Treaty? The Way Forward for Supporters of an Open, Free, and Secure Internet*, COUNCIL ON FOREIGN RELATIONS (Jan. 13, 2020), <https://www.cfr.org/blog/new-un-cybercrime-treaty-way-forward-supporters-open-free-and-secure-internet>.

¹³⁸ Report of the Third Committee, *Countering the use of information and communications technologies for criminal purposes*, U.N. Doc. A/74/401 (Nov. 25, 2019).

¹³⁹ Edith M. Lederer, *UN gives green light to draft treaty to combat cybercrime*, AP NEWS (Dec. 27, 2019), <https://apnews.com/article/79c7986478e5f455f2b281b5c9ed2d15>.

¹⁴⁰ *Id.*

¹⁴¹ DAMROSCH & MURPHY, *supra* note 66, at 239.

Justice uses “the teachings of the most highly qualified publicists of the various nations” to influence the court’s interpretation of the law.¹⁴² In the case of climate change and the environment, these subsidiary means have lifted the issues onto the international law stage.¹⁴³

International environmental regulation is relatively new to the global scene, much like ransomware. As climate change became increasingly concerning, and policy makers seemed unconcerned about the ramifications, scholars stepped up to raise awareness, most notably through the 1972 Stockholm United Nations Conference on the Environment.¹⁴⁴ The 1992 Rio United Nations Conference on Environment and Development followed in Stockholm’s footsteps and began the idea of “sustainable development” for all people, from the most local stage to the international level.¹⁴⁵ The theory of achievable, sustainable development goals was a radical thought for its time and triggered spirited deliberations between government officials and between governments and their citizens,¹⁴⁶ much like the cutting edge discussion of cybercrime today.

ii. Cybercrime and the Elevation to the Global Stage

There are several entities making statements to the international community concerning ransomware attacks, placing the issue in a similar spot to the climate change statements of the 1970s. The first statement comes from the Oxford Institute for Ethics, Law and Armed Conflict.¹⁴⁷ The Oxford Statement on the International Law Protections Against Cyber Operations Targeting the Healthcare Sector sounded the alarm of the detrimental effects ransomware attacks have on hospitals in general, as well as during the COVID-19 pandemic.¹⁴⁸ The group of public international lawyers state that “cyber operations do not occur in a normative void or a law-free zone,” and that “international law, and in particular the Charter of the United Nations, is applicable and essential to

¹⁴² Statute of the International Court of Justice art. 38(d), Oct. 24, 1945.

¹⁴³ *United Nations Conference on the Environment, 5-16 June 1972, Stockholm*, UNITED NATIONS, <https://www.un.org/en/conferences/environment/stockholm1972> (last visited Jan. 24, 2021) [hereinafter *U.N. Conf. on the Env't*].

¹⁴⁴ This conference was the first of its kind to thrust environmental issues to the forefront of the international conscious. *Id.* From this conference, the Stockholm Declaration and Action Plan for the Human Environment emerged. U.N. Conference on the Human Environment, *Stockholm Declaration and Action Plan for the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

¹⁴⁵ In addition to continuing the conversation of climate change, Rio emphasized that social, economic, and environmental elements are all interrelated and that to achieve success in one, the other two need to be continuously maintained. Rio also brought together politicians, diplomats, scientific experts, the media, and non-governmental organizations. Rio came with its own declaration and twenty seven additional, universal principles, propelling climate change from soft law into the start of our modern-day environmental treaty regime. *United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992*, UNITED NATIONS, <https://www.un.org/en/conferences/environment/rio1992> (last visited Jan 24, 2021) [hereinafter *U.N. Conf. on Env't and Dev.*].

¹⁴⁶ *Id.*

¹⁴⁷ *The Oxford Statement on the International Law Protections Against Cyber Operations Targeting the Health Care Sector*, OXFORD INSTITUTE FOR ETHICS, LAW AND ARMED CONFLICT, <https://www.elac.ox.ac.uk/the-oxford-statement-on-the-international-law-protections-against-cyber-operations-targeting-the-hea?page=1#widget-id-2220386> (last visited Jan. 20, 2021).

¹⁴⁸ *Id.*

maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful information and communications technology environment.”¹⁴⁹

High Representative Josep Borrell made a declaration in early 2020, on behalf of the European Union, concerning cyber-attacks exploiting the coronavirus pandemic, condemning the attacks and vowing to reinforce “their cooperation at technical, operational, judicial and diplomatic levels, including with their international partners.”¹⁵⁰ Mr. Borrell called upon every sovereign to practice due diligence and pursue action against individuals operating attacks from within its borders, “consistent with international law and the 2010, 2013 and 2015 consensus reports of the United Nations Groups of Governmental Experts (UNGGEs) in the field of Information and Telecommunications in the Context of International Security.”¹⁵¹ Several entities have since aligned themselves with the declaration.¹⁵²

¹⁴⁹ The statement currently has over one hundred and thirty five private signatories of well-known legal stature. The statement further lays out seven principles for states to use in developing national positions and multilateral processes as follows:

1. International law applies to cyber operations by States, including those that target the health-care sector.
2. International law prohibits cyber operations by States that have serious adverse consequences for essential medical services in other States.
3. International human rights law requires States to respect and to ensure the right to life and the right to health of all persons within their jurisdiction, including through taking measures to prevent third parties from interfering with these rights by cyber means.
4. When a State is or should be aware of a cyber operation that emanates from its territory or infrastructure under its jurisdiction or control, and which will produce adverse consequences for health-care facilities abroad, the State must take all feasible measures to prevent or stop the operation, and to mitigate any harms threatened or generated by the operation.
5. During armed conflict, international humanitarian law requires that medical units, transport and personnel must be respected and protected at all times. Accordingly, parties to armed conflicts: must not disrupt the functioning of health-care facilities through cyber operations; must take all feasible precautions to avoid incidental harm caused by cyber operations, and; must take all feasible measures to facilitate the functioning of health-care facilities and to prevent their being harmed, including by cyber operations.
6. Cyber operations against medical facilities will amount to international crimes, if they fulfil the specific elements of these crimes, including war crimes and crimes against humanity.
7. The application of the aforementioned rules of international law is without prejudice to any and all other applicable rules of international law that provide protections against harmful cyber operations. *Id.*

¹⁵⁰ The EU has experienced a surge in phishing and malware distribution targeting the healthcare infrastructure at the forefront of the emergency. Council of the European Union Press Release, Declaration by the High Representative Josep Borrell, on behalf of the European Union, on malicious cyber activities exploiting the coronavirus pandemic (Apr. 30, 2020, 1:00 PM), <https://www.consilium.europa.eu/en/press/press-releases/2020/04/30/declaration-by-the-high-representative-josep-borrell-on-behalf-of-the-european-union-on-malicious-cyber-activities-exploiting-the-coronavirus-pandemic/>.

¹⁵¹ *Id.*

¹⁵² *Id.* (The Candidate Countries Turkey, Republic of North Macedonia, Montenegro, Serbia and Albania, the country of the Stabilisation and Association Process and potential candidate Bosnia and Herzegovina, and the EFTA countries Iceland, Liechtenstein and Norway, members of the European Economic Area, as well as Ukraine, the Republic of Moldova and Armenia.).

The European Economic and Social Committee issued an opinion in 2014 on “Cyber attacks in the EU,” recognizing the EU’s dependency on digital infrastructure and calling attention to the expounding risks from a potential cyberattack and the lack of policies providing adequate security.¹⁵³ The committee advocated for, among other things, “active international engagement with non-EU states to develop a coordinated global policy and response to cyber security threats.”¹⁵⁴

Just like the climate change advocates in the 1970s, cybercrime scholars around the world are alerting to the serious potential harm, not only of ransomware attacks, but cyberattacks on a broad scale. A human life was lost because of one such attack and the need for thorough legislation, on both a domestic and international scale, is past the tipping point.

iii. A New Approach to Cybercrime Treaty Regimes: The Paris Agreement Model

Stockholm, Rio, and their successors,¹⁵⁵ launched the environmental treaties established today. The Paris Agreement stands out as a new archetype of treaty and incorporates several elements that address the environment in a way the aligns with realistic expectations while providing for the needs of a continuously evolving issue.¹⁵⁶ Cyberspace is everchanging and needs a treaty regime just as malleable and internationally accepted as The Paris Agreement because of cybercrime’s potential for global harm.

The Paris agreement is flexible and enacts a long-term, enduring framework, meant to increase global action over time.¹⁵⁷ The agreement lays out a somewhat skeletal outline with the foundational responsibility of mitigating the effect of climate change applied to all States and the acknowledgment that different States are affected by climate change to varying degrees.¹⁵⁸ The Paris Agreement utilizes the idea of foresight,¹⁵⁹ using five expert groups in the area of climate change to apprise an executive committee, at least every six

¹⁵³ The internet economy represents a fifth of the GDP in the EU. The European Economic and Social Committee, 2014 O.J. (C 451) 5.

¹⁵⁴ *Id.*

¹⁵⁵ *Conferences on the Environment and Sustainable Development*, UNITED NATIONS, <https://www.un.org/en/conferences/environment> (last visited Jan. 24, 2021). (New York 1997, New York 2000, Johannesburg 2002, New York 2005, New York 2008, New York 2010, Rio 2012, New York 2013, New York 2015).

¹⁵⁶ DAMROSCH & MURPHY, *supra* note 66, at 1437.

¹⁵⁷ Conference of the Parties to the United Nations Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015) [hereinafter *Paris Agreement*].

¹⁵⁸ DAMROSCH & MURPHY, *supra* note 66, at 1437; The agreement acknowledges the climate problem has both local and international aspects that need addressed. From this acknowledgement, the agreement recognizes that each state is affected differently, not only by climate change but by the measures used to combat climate change and stipulates different levels of responsibility by the developed and developing worlds. By differentiating within the body of the treaty, unlike predecessors who used a stiff approach via the annex, the agreement can manage a future change in circumstance or competence. *Paris Agreement, supra* note 157, art. 7, ¶ 2.

¹⁵⁹ The process through Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM) allows for foresight. The agreement also compels collaboration from “relevant organizations and expert bodies outside the Agreement”. *Paris Agreement, supra* note 157, art. 8.

months.¹⁶⁰ This allows for the convention to stay readily up to date with data from experts on mitigation of current climate issues as well as possible future harm.¹⁶¹

The Paris Agreement is legally binding, on a domestic and international level.¹⁶² Unlike the Budapest Convention, which places the onus of most legislation on the domestic level,¹⁶³ the Paris Agreement insists on international cooperation from all parties.¹⁶⁴ The Agreement turns on the “global response,” through the local differentiations, and without which, the entire concept of reducing the world’s temperature falls apart.¹⁶⁵

The Paris Agreement also keeps States honest in their efforts toward the global reduction of temperature through its distinctive transparency measures.¹⁶⁶ Despite the Agreement’s level of required transparency, and the added stipulation of no reservations to the convention,¹⁶⁷ the agreement is almost universally accepted.¹⁶⁸ As of November 2020, 188 countries have ratified the convention.¹⁶⁹ It stands to reason the flexibility of the Agreement combined with the global objective of mitigating climate change is easily workable on the national level because it allows states to develop domestic plans applicable

¹⁶⁰ *The Executive Committee of the Warsaw International Mechanism for Loss and Damage*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://unfccc.int/wim-excom> (last visited Jan. 24, 2021).

¹⁶¹ Using constantly refreshed data from experts, in combination with local updates on State efforts, the action under the agreement is also able to update every five years. As a final flourish in adapting to the changes within the issue of climate, the agreement charges the parties to enhance education, training, public awareness, participation and access to information and encourages participation by private entities. This incorporation will propel the performance of States under the agreement even further. *Paris Agreement*, *supra* note 157, arts. 13, 14, 12, 6.

¹⁶² DAMROSCH & MURPHY, *supra* note 66, at 1437; *Paris Agreement*, *supra* note 157.

¹⁶³ Collier, *supra* note 14.

¹⁶⁴ There is mention of determining the national contribution and instructions for domestic level mitigation measures, but these measures are all collaborated to achieve a global goal:

Article 2

1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the *global response* to the threat of climate change . . .

2. This Agreement will be implemented to reflect equity and the principle of *common* but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Article 3

As nationally determined contributions to the *global response* to climate change, all Parties are to undertake and communicate ambitious efforts . . . with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement. (*emphasis added*). *Paris Agreement*, *supra* note 157, arts. 2, 3, 4.

¹⁶⁵ *Id.*

¹⁶⁶ Through reports and international assessment, reviews, consultations, and analysis, as well as information submitted by the parties, States are held accountable to their proposed national contributions. *Paris Agreement*, *supra* note 157, art. 13.

¹⁶⁷ States cannot pick and choose which articles they want to follow. They must accept the whole the agreement or none of it. *Paris Agreement*, *supra* note 157, art. 27.

¹⁶⁸ DAMROSCH & MURPHY, *supra* note 66, at 1437.

¹⁶⁹ *Paris Agreement*, BRITANNICA, <https://www.britannica.com/topic/Paris-Agreement-2015> (last visited Jan. 24, 2021).

to domestic issues while still contributing to the international goal of global temperature reduction.¹⁷⁰

Climate change, unlike cybercrime, is a slow burn, and in the Paris Agreement, there are no articles addressing sanctions for non-compliance.¹⁷¹ When faced with more immediate consequences, sanctions may be necessary, as suggested by the North Atlantic Treaty Article 5.¹⁷² Ideally, cybercrime could be solved without such measures, but cybercrimes have immediate impact and some result in harm equivalent to a physical attack. Without sanctions, the level of cybercrime mitigation may not reach the high levels needed to control this threat.

Climate change is an inherently international issue, with effects felt in every State, which cannot be mitigated without the world standing strong together, working on both the domestic and international level. Cybercrime is also an inherently international issue with effects felt on the domestic level. These two problems are not only similar in scope but the cry for action in each circumstance is analogous. The international community can apply the framework of The Paris Agreement to the complexities of cybercrime, and the foundation of *jus cogens* can only strengthen the universality of such a treaty.

III. ANALYSIS

A. Cybercrime Laws Need a Reboot

The world must build off ransomware's *jus cogens* foundation, using the outcry from scholars around the globe to propel the legal conversation, and build an international treaty regime, based on the framework of The Paris Agreement, to codify this preemptory norm and strengthen the overall global defense against cybercrime. First, the international community must examine why the present tools are not working, then identify what steps must take place to install a working international treaty regime.

A large and pertinent area of improvement is the international legislation space. The Budapest Convention entered into force in 2001, making its age alone enough to disqualify its application to the current digital circumstance.¹⁷³ The Budapest Convention itself also leaves a lot to be desired. First, the bulk of the responsibility of tracking down cybercriminals is thrust upon the states to legislate domestically; the convention does not

¹⁷⁰ *Paris Agreement*, *supra* note 157.

¹⁷¹ *Id.*

¹⁷² A ransomware attack can hold ramifications like that of a physical attack, such as loss of life. *Prosecutors open homicide case after cyber-attack on German hospital*, *supra* note 1. The North Atlantic Treaty article 5 describes the way it presents a united front against physical attacks as follows:

Article 5: The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area . . .

North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter NATO].

¹⁷³ C.E.T.S. No. 185, *supra* note 69.

establish a true global goal.¹⁷⁴ The convention does have aspects of a limited Mutual Legal Assistance Treaty (MLAT),¹⁷⁵ but MLATS are primarily concerned with cross-border cooperation in civil and criminal proceedings. The biggest issue with prosecuting ransomware attacks, and cyberattacks in general, is the inability to locate the suspect in the first place. Without the ability to pinpoint the criminal's location, a country does not know which other States to ask for cross-border cooperation. The Budapest Convention does address a valid concern, and if States can locate the criminal, the treaty could come in handy. However, the convention leaves many more gaping holes in the assessment of cybercrime and how to mitigate the attacks in the first place.

Ransomware is modern-day piracy, and the world must treat the problem with the same universality as traditional piracy. Both crimes occur in jurisdictionally ambiguous realms, both are committed for economic gain, in most instances, and both are predominantly perpetrated by private entities harming private entities. Yet, the world considers one practice the enemy of all mankind, while the other practice is tied up in bureaucratic red tape, leaving its victims helpless. Ironically, the enemy of *all* mankind can only attack one vessel at a time; ransomware can take down hundreds of healthcare facilities, and other infrastructure, all at once from a location potentially half a world away.

Hackers have an extreme disregard for human life and economic suffering. A person can hack into a hospital, or any number of other systems, without having to physically witness the harm they cause, which removes this indiscriminate nature one step further away from any compassion hackers had to begin with. Policy makers trudge along at a snail's pace, trying to come to an agreement with other States on what specific issues within cyberspace need focus and what issues are irrelevant, leaving innocent civilians at risk of arbitrarily losing their lives from a ransomware attack.

Ransomware is of the level of *jus cogens* because of its almost identical criminal intentions to piracy and the similar lack of jurisdictional boundaries. History has shown the world can mitigate international crimes by standing strong together.¹⁷⁶ In today's legislative scheme, the world can show strength through an almost universally accepted treaty. The international community needs to use ransomware's *jus cogens* foundation, and the due diligence responsibilities that come with, combined with the scholarly uproar against cybercrime to create a new treaty regime based on The Paris Agreement's core tenants¹⁷⁷ and NATO article 5¹⁷⁸ to ensure a strong, united front against the threat of cybercrime.

B. Cybercrime Treaty 2.0

Ransomware and piracy are immediate family members separated by time and severity. Piracy's end goal was economic gain, ransomware's end goal is also economic

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Horsley, *supra* note 80, at 674-75.

¹⁷⁷ Flexibility, foresight, international legal goals and obligations, and transparency. *See supra* Section II. C.

3. iii.

¹⁷⁸ NATO, *supra* note 172, art. 5.

gain.¹⁷⁹ Piracy harmed individuals one at a time,¹⁸⁰ ransomware harms individuals across multiple countries with one key stroke.¹⁸¹ Piracy is of the level of *jus cogens* and thus, ransomware is as well. The many statements and opinions concerning the global prosecution of cybercrime mirrors the trajectory of the environmental treaty regimes and should be used as a springboard, in concert with the *jus cogens* norm, for international legislation. The new urgency created by arbitrary loss of life only compounds the need for a new convention sooner rather than later, which puts the world in quite a predicament.

Just as with climate change, scholars, experts, and even some policy makers from around the world have been sounding the alarm for years of the harm that could potentially radiate from a cyberattack. Over the past decade, the world has seen company after company, organization after organization, fall at the hands of ransomware attacks; some instances costing hundreds of millions of dollars and months of rebuilding. Despite this, and as recently as 2019 in the United Nations,¹⁸² the international community cannot agree on the need for, or the type of, assistance required to address this issue. To tackle an inherently international problem like cybercrime, the world needs to act as one unit. States were able to suppress piracy once they stood strong together and the same can be said for the mitigation of cybercrime.

Policy makers around the world should take a note from the Paris Agreement. Cyberspace, much like climate change, has many different facets and many ways of trying to mitigate the impact. Climate change is inherently international, as is cybercrime. Climate change requires every country doing their part to suppress the damage, as does cybercrime, as shown by the successful, united suppression of piracy. The high-level political issues posed by climate change are similar enough to the red tape concerning cyber space to use the almost universally accepted framework of the Paris Agreement.

To get more countries on board with a cybercrime treaty and to codify the *jus cogens* norm, the treaty needs to use the same core tenants as the Paris Agreement.¹⁸³ The treaty must be flexible, meaning it must be brief, have a long-term global goal, and outline high level principles that are applicable to all States. The treaty should also acknowledge that different countries should have different levels of responsibility. There is so much disagreement on the details of cybercrime legislation that the international community has not even been able to update the only cyber specific convention over the course of its twenty-year existence. High level mitigation principles and goals allow for States to fill in details through their individual nationalized plans. The responsibility of each state needs to mirror the capacity of that State. Since each State would determine the details of their own plan while working toward the global mitigation goal, the new treaty removes the current obstacle of hammering out details that work for all States.

The new treaty needs foresight, through expert analysis, on a continuous basis. Cyberattacks and cybercrime are incredibly technical and not all policy makers will have the knowhow to understand the challenges society is currently facing, let alone problems

¹⁷⁹ Horsley, *supra* note 80, at 678.

¹⁸⁰ UNCLOS, *supra* note 84, art. 101.

¹⁸¹ Brenner, *supra* note 33.

¹⁸² Report of the Third Committee, *supra* note 138.

¹⁸³ See *supra* note 177.

that can arise in the future. Climate change also needs technical knowhow and the Paris Agreement accounted for that with the inclusion of the WIM.¹⁸⁴ To stamp out cybercrime, expert groups on different subjects within the field of cyberspace need to weigh in on present problems and future possible incidents and keep the treaty and national plans as up to date as they can be. Since technology develops at an alarming rate, a cybercrime treaty must account for this and adjust the update calendar according to the expert's recommendations.¹⁸⁵

A cybercrime treaty must legally bind countries on an international scale. To see a reduction in attacks, the world needs a global response. The treaty needs a simple and salient goal that all States can rally behind. If the treaty cannot find universal or near universal acceptance, each State will continue the struggle of fighting the issue independently, cyberattacks will continue to increase, and the treaty will be dead on arrival, much like the woman in Düsseldorf. The goal should resemble the reduction in emissions to achieve a global drop in temperature,¹⁸⁶ only for cybercrime, the goal is a global reduction in cyberattacks.

The main problem with prosecuting cybercrime is the cloak of anonymity. A cybercrime treaty must include a transparency measure and hold states responsible if they are not contributing to cybercrime mitigation. A cybercrime treaty should also include a no reservations article to promote further transparency and cooperation with the treaties global goal. Once again, the only way the world has seen a suppression of crime of this nature is when the globe stands strong as one unit.¹⁸⁷

If a State is actively hiding information or disregarding cybercriminal activities within its borders, the treaty needs back up measures to sanction and punish the violating state. Experts have opined that if countries refuse to root out hackers within their own borders, the international community must act and force the State to quell the wrongdoers or interrupt the criminal activity.¹⁸⁸ Unfortunately, unlike the Paris Agreement, a cybercrime treaty needs additional sanctions as a protective measure against uncooperative States because cybercrime deals with more immediate harm, which may produce physical harm or death of innocent civilians. In this instance, NATO article 5 is an appropriate example of how sanctions can aid in presenting a united front against cyberattacks, at least for the treaty parties.¹⁸⁹ While NATO article 5 refers to a physical attack, the world has now seen physical harm from a ransomware attack.¹⁹⁰ NATO is clear, an attack on one is an attack on all and deals with threats accordingly.¹⁹¹

Ransomware invokes the theory of *jus cogens* with numerous comparisons to traditional piracy. Therefore, a treaty is not necessarily required to hold states accountable

¹⁸⁴ *The Executive Committee of the Warsaw International Mechanism for Loss and Damage*, *supra* note 160.

¹⁸⁵ Additionally, it can only help to educate and train the public and use insight from private companies. If the public is aware of the types of risks from cybercrime and how to avoid them, the action plan under the treaty will only strengthen. Paris Agreement, *supra* note 161. Private companies are also already coming to the healthcare industries aid and running system checks to find potential problems. Lyngaas, *supra* note 19.

¹⁸⁶ Paris Agreement, *supra* note 157.

¹⁸⁷ Horsley, *supra* note 80, at 674-75.

¹⁸⁸ Newman, *supra* note 37.

¹⁸⁹ NATO, *supra* note 172, art. 5.

¹⁹⁰ *Prosecutors open homicide case after cyber-attack on German hospital*, *supra* note 1.

¹⁹¹ NATO, *supra* note 172, art. 5.

for blissful ignorance of crime in their backyard. But, by using the framework of the Paris Agreement, with the addition of sanctions for non-compliance, the world will ideally create a near universal cybercrime treaty and add additional building blocks to enforce the *jus cogens* norm even further. Whether the new treaty will indeed be universally accepted is unknown, but States still must exercise due diligence and responsibility, at least regarding ransomware, under the *jus cogens* norm. Ransomware, as with piracy, demands that States work in cooperation to suppress the criminal activity and the world will not see a reduction in harm until the international community takes a stand.

IV. CONCLUSION: “AND MILES TO GO BEFORE I SLEEP”¹⁹²

Ransomware is only one of a multitude of cybercrimes. With technology progressing at warp speed, it is only a matter of time before the list of crimes get longer. Ransomware is a *jus cogens* norm, as is evident through its many similarities to piracy. Using this new norm in combination with the multiple expressions of concern from scholars and experts around the world, the international community has enough ammunition to start developing a new treaty to address the problem, not just of ransomware but of the other known crimes committed in cyberspace. Cybercrime is political and progress in this area is held up by competing domestic views.¹⁹³ To ease these disagreements, the framework of the Paris Agreement is ideal for the development of a new cybercrime treaty. The international community must establish a long-term global goal and high-level principles that many, if not all, States can rally behind, and in the process address all cybercrime in addition to ransomware. Sovereigns must work hand in hand with experts in the field, bring in the private sector to aid in countermeasures, and educate and train the public to recognize and mitigate cybercrime risk. Finally, the globe must insist on transparency and compliance with the object and purpose of the treaty, with the use of sanctions for non-compliance as a last resort.

States have a duty to other States as well as their own citizens. If a State refuses to aid in suppression of cybercrime, despite the new *jus cogens* norm of ransomware, other States must act as a unit and come together against such refusal. Up until the Fall of 2020, ransomware never killed anyone, so far as the public knows. Now it is not a question of if, it is a question of when and how many more will lose their lives because a criminal found a digital back door. The woman in Düsseldorf could have been anyone. She was simply the unlucky soul who needed emergency care and paid the ultimate price. This is unacceptable and should concern everyone, regardless of political ideology or domestic leanings and custom. Not knowing every piece of cybercrime puzzle is not a reason to neglect present action. The world has the tools to remedy the problem and the world must step up.

¹⁹² Robert Frost, *Stopping by Woods on a Snowy Evening* (1923).

¹⁹³ Report of the Third Committee, *supra* note 138.







EMPOWERING VICTIMS OF GRAND CORRUPTION: AN EMERGING
TREND?

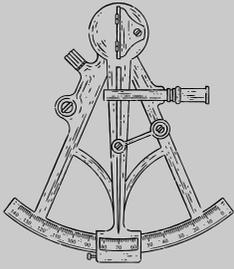
*Naomi Roht-Arriaza*¹

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Abstract

Who is the victim of systemic corruption? The traditional answer in law is everyone and no one, or public administration itself. When state funds are misused or go missing, at the most the State is the victim. Therefore, only the State has standing to sue for, or receive restitution of, the stolen assets. But that long-held consensus is changing. Activists and lawyers have begun to argue that under systematic corruption it's not just states, but individuals and communities as well as society as a whole that suffer losses and need to be both represented and repaired.

Courts are beginning to agree, based on human rights law developed in large part in the context of atrocity crimes and now translated to the sphere of anti-kleptocracy. Prior research has focused on asset recovery in capital exporting states, and how it should be returned to the people of the looted country. This article brings together for the first time the background law and systematizes the cases in the courts of the looted country, focusing on Latin American states because they generally both suffer from top-down, systemic corruption and have been at the vanguard in marrying international human rights law, victim participation in criminal proceedings, and international anti-corruption law. It posits that victims want to participate in corruption trials not just to get reparations, but also to access the case files in order to seek information for further investigations and to monitor the diligence and strategic choices of prosecutors. Finally, it also highlights the sometimes indirect ways in which international law becomes effective in national courts, here involving not only vertical moves from international bodies to national courts, but horizontal shifts from one subject area to another.



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Who is the victim of systemic corruption? In more and more places, grand corruption no longer matches the individual, episodic “bad apple” scenarios around which much anti-corruption law is built. Nor is it simply a question of the citizenry having to pay off underpaid police, teachers, or permit issuers to get their services. Instead, grand corruption, also described as kleptocracy or systemic corruption, involves high-ranking officials using and transforming the entire apparatus of the state, from the highest levels, for private gain. That is, state or private officials do not only solicit and accept bribes to channel business to private interests or to create phantom jobs or projects, they also use control over, or alliances with, legislators, regulators, and judges to create laws and regulations that permit the sacking of the state and ensure impunity for doing so. Corruption has become the *raison d’etre* of the state itself.

While corruption is not a new problem, globalization has increased the scale, ease, and scope of money movements and thus money laundering, increasing the ability of kleptocrats to hide the proceeds of large-scale corruption. International aid and commercial flows can be skimmed even with the “safeguards” that have been put in place to avoid such skimming. Beneficial ownership, bank secrecy havens, and the explosion of “enablers”—law firms, accounting-consulting powerhouses, and the like—have made it easier to create layers of global ownership that make it difficult to follow the money. The immense amount of money generated by illegal business— from drugs to trafficking in people, minerals, timber, and wildlife—provides an inexhaustible source of financing, and cover, for kleptocracy. Organized crime networks are now allied with “legitimate” elites and officials on the take to create interlocking systems that control territory, populations and resources. States with weak or nonexistent institutions and rampant inequality have facilitated the takeover of state resources by the few. To give just the most recent example, allegations abound around the world about fraud or other misconduct in pandemic-related spending or procurement.² Far from being failed states, these are states that work very well for those few, just not for the common good. One recent estimate found over 60 countries where grand corruption is the “operating system.”³

The traditional answer in law to the question of who is a victim in grand corruption cases is everyone and no one, or public administration itself. When state funds are misused or go missing, at most the State is the victim. Therefore, only the State has standing to sue for, or receive restitution of, the stolen assets. When the assets are found abroad, they should be repatriated to the state, and when proceedings are domestic, only the State is able to represent the interests of the people in proceedings—criminal or administrative—to recoup its losses. Until recently, this was the consensus.

However, that consensus is slowly changing. In the last decade or so, activists and lawyers have begun to argue that it’s not just states but individuals and communities as well as society, that suffer losses and need to be both represented and repaired in cases

² *Why Fighting Corruption Matters in Times of COVID-19*, TRANSPARENCY INT’L (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi-2020-research-analysis-why-fighting-corruption-matters-in-times-of-covid-19>.

³ *See generally* SARAH CHAYES, *THIEVES OF STATE* (2015).

involving grand corruption.⁴ These arguments come in part from the experience of state capture and the difficulties of holding corrupt leaders and company officials accountable, as well as from a history of human rights and humanitarian law development around the rights of victims. The emerging bottom-up movement now recognizes the human rights implications of grand corruption and is striving to translate those implications into policy and caselaw.

Latin America has a leading role in the corruption and human rights conversation, which has moved anti-corruption from a concern of technocrats to a popular movement.⁵ Cases in the region are slowly beginning to reflect the new thinking on victims' rights, while courts in other cases have reiterated the old-school view of the state as the only victim. The debate reflects the prominence of the issue in Latin America where grand corruption, often combined with the broad reach of organized crime, is a highly salient public issue.⁶ Latin America has also been at the forefront of struggles to assert and formalize the rights of victims of human rights violations, including state obligations of prevention and redress.

This emerging movement, first chronicled here, is in some ways surprising. There are few hard obligations in human rights law around combatting corruption, which was not even widely recognized as a human rights issue until recently. The United Nations Convention Against Corruption, described below, contains obligations "subject to domestic law." And yet, courts are increasingly using the jurisprudence developed out of obligations towards victims of human rights-related crimes, first at the international and regional level and then widely incorporated into domestic cases in new areas such as anti-corruption. This article traces how the current crop of human rights infused anti-corruption cases have been influenced by the decades-long struggle in the region to identify, investigate, and prosecute grave violations of human rights, including crimes against humanity, enforced disappearances, extrajudicial executions, and torture. Secondarily, discussions on reparations for corruption are drawn from prior experience with diffuse harms in environmental and climate-related cases. In other words, international law is moving not just into domestic systems, but the precepts developed in one area of law are migrating to others.

This article posits that the fight for victim access to information, participation, and reparation for those who have been harmed by acts of grand corruption is a step forward in effectively combatting systemic corruption and kleptocracy in three ways. First, victim

⁴ See, e.g. *Open-ended Intergovernmental Working Group on Asset Recovery*, Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation, CAC/COSP/WG.2/2016/CRP.1 (Aug. 4, 2016), <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604993e.pdf>.

⁵ See, e.g., 9and10news Site Staff, *Mass Protests Held Against Brazil President Bolsonaro*, 9&10 NEWS (Sept. 13, 2021), <https://www.9and10news.com/2021/09/13/mass-protests-held-against-brazil-president-bolsonaro/>; Astrid Suarez & Regina Garcia Cano, *A look at what has prompted thousands to protest across Colombia*, GLOB. NEWS (May 10, 2021, 1:47 PM), <https://globalnews.ca/news/7848667/colombia-protests-explained/>; Giovanni Batz, *Guatemala's National Strike Demands Structural Change*, NACLA REP. (Sept. 7, 2021), <https://nacla.org/guatemala%E2%80%99s-national-strike-demands-structural-change>.

⁶ *What People Think: Corruption in Latin America & The Caribbean*, TRANSPARENCY INT'L (Sept. 23, 2019), <https://www.transparency.org/en/news/what-people-think-corruption-in-latin-america-the-caribbean#> ("85% of people think government corruption is a big problem").

participation, either directly or through an organization that represents them, can surface new information and help unravel the skeins of scheming, thus allowing anti-corruption campaigners to connect dots, find leads, and open new lines of investigation. In practice, this access-based rationale looks very much like arguments in favor of freedom of information and access to justice.

Second, participation shines a light on proceedings that otherwise risk public prosecutors or judges colluding in sweetheart deals with those charged with corruption. The incentives for prosecutors—whether because they themselves are complicit, or simply because it is difficult and expensive to prosecute powerful political and economic actors in complex cases shrouded in secrecy—are to make a deal, quickly and quietly, or to ignore all but the most notorious cases. Judges will often need an outside push to consider difficult damages and causation issues. The higher up the suspect is in government or private elites, and the more systemic the corruption, the more likely that investigations and proceedings will feature easy non-prosecution deals, incompetent prosecutions, loss of files or of witness whereabouts, and the like.

Third, victims bear the brunt of the lack of services or personnel, shoddy or unsafe infrastructure, or land grabs and environmental mayhem that are the result of many corruption schemes. While sometimes these effects are diffused throughout society, more often they are not. Where specific individuals or communities are differentially affected, they are usually already marginalized or vulnerable. Moreover, civil society and victim groups are often the whistleblowers on corrupt deals and are attacked for their advocacy. Sometimes, as in the case of environmental and indigenous rights activist Berta Cáceres,⁷ they are murdered. Putting a face to the real effects of grand corruption helps clarify the stakes and build public support for investigations and trials. Ultimately, it helps rebuild the missing or shaky trust in public institutions which is a prerequisite for a functioning democracy.

Part I of this article explains the evolving international law on the rights of victims to access proceedings and to claim reparations in grand corruption cases. Part II considers cases arising from Latin America that clearly show the dual influences of the UN law against corruption and the prior human rights-based decisions of the courts regarding broad access to information and participation rights for victims. Part III returns to international law on reparations and its potential applicability to grand corruption. Part IV takes up risks, difficulties, and objections. Part V concludes with some recommendations to advance this agenda.

I. The Evolving Law on Corruption and Human Rights

⁷ See Nina Lakhani, *Backers of Honduran Dam Opposed by Murdered Activist Withdraw Funding*, THE GUARDIAN (Jun. 4, 2017, 6:30 EDT), <https://www.theguardian.com/world/2017/jun/04/honduras-dam-activist-berta-caceres> (describing community violence and murders of known activists opposing the construction of the Agua Zarca dam on the Gualcarque river in Honduras). See also NINA LAKHANI, WHO KILLED BERTA CÁCERES? DAMS, DEATH SQUADS, AND AN INDIGENOUS DEFENDER'S BATTLE FOR THE PLANET (2020).

Starting in the late 1970s, and accelerating in the twenty-first century, states began to prosecute companies tied to their jurisdiction accused of bribing foreign officials, through the Foreign Corrupt Practices Act, the UK Bribery Act and other similar laws.⁸ Almost all the successful cases settled before trial with large fines, paid to the U.S. or British treasuries. None of the money was returned to the country where the bribery took place. Eventually, critiques of this situation pushed the prosecuting states to develop more nuanced and creative strategies for returning assets to the home country without having them returned to the corrupt structures that demanded illicit payments in the first place. The U.S., for instance, created the Department of Justice's Kleptocracy Asset Recovery Initiative.⁹ In a few cases, assets were earmarked for development purposes¹⁰ and in one case (BOTA Foundation in Kazakhstan) a separate foundation, with multistakeholder oversight, was created to distribute the funds.¹¹

More fundamentally, the perception of corruption changed. Until the 1990s, theorists were divided as to whether corruption sapped economic strength or greased the wheels of economic growth. Even after international financial institutions officially declared war on corruption in the mid-1990s, the aggrieved party was still the state alone, deprived of development revenue. Moreover, corruption was an aberration, an exception to good governance norms that needed to be rooted out. The moralizing tones of, usually a developed country's, modernizers seemed to permeate the discussion.¹²

Starting in the 2010s, increased consideration of economic, social, and cultural rights, and the glaring impact of grand corruption on public services, led to new consideration of corruption as a human rights issue. In 2009, the International Council on Human Rights Policy published a report on the topic.¹³ The United Nations Human Rights Council published a number of resolutions as well as a 2015 report on the negative effect of corruption on human rights.¹⁴ In 2019 the Inter-American Commission on Human Rights put out a ground-breaking report on the link between corruption and human rights. Among other findings, the Commission wrote: [I]n light of the State's obligation [to investigate acts of corruption] ... the state authorities ... must initiate without delay serious, impartial and effective investigations by all available legal means and aimed at determining the truth of the facts and the prosecution and eventual punishment of the perpetrators. During the

⁸ See generally Organization for Economic Co-Operation and Development (OECD) (for a compendium of similar laws); Foreign Corrupt Practices Act (FCPA) of 1977, 15 U.S.C. §§ 78dd-1–78dd-3; Bribery Act, 2010, c.23 (UK), <https://www.legislation.gov.uk/ukpga/2010/23/contents>.

⁹ See, e.g., *Money Laundering and Asset Recovery Section*, THE U.S. DEP'T OF JUST. <https://www.justice.gov/criminal-mlars>.

¹⁰ LARISSA GREY ET AL., FEW AND FAR: THE HARD FACTS ON STOLEN ASSET RECOVERY 5 (2014), <https://www.oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf>.

¹¹ See generally SWATHI BALASUBRAMANIAN & COLBY PACHECO, ACHIEVING DEVELOPMENT IMPACT WITH AN INCLUSIVE ASSET-RETURN MODEL: THE CASE OF THE BOTA FOUNDATION IN KAZAKHSTAN, IREX (2015), https://www.irex.org/sites/default/files/node/resource/bota-case-study_0.pdf.

¹² See, e.g., the critique posed by David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455 (1999).

¹³ See INT'L COUNS. ON HUM. RTS. POL'Y, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION (2009), https://reliefweb.int/sites/reliefweb.int/files/resources/9B49DD6CB2609631492575BB001B821D-Corruption_HRTs.pdf.

¹⁴ Rep. of the Human Rights Council, U.N. Doc. A/HRC/28/73 (Jan. 5, 2015).

investigation process and the judicial proceedings, the victims should have ample opportunity to participate and be heard, both in the clarification of the facts and the punishment of those responsible, as well as in the search for just compensation.”¹⁵ At the same time, the Organization for Economic Co-operation and Development (OECD) also recognized the link, recommending that businesses coordinate their anti-corruption and human rights compliance activities more closely.¹⁶

The development of a series of international treaties, culminating in the 2005 United Nations Convention Against Corruption (UNCAC), changed the perception of who was considered a victim, who had the right to participate in proceedings, and who was the subject of reparations. For the first time, UNCAC provides that victims of corruption have rights. A number of articles make clear that the state is not the only victim of corruption, and that those harmed have access and compensation rights. The obligations in Articles 32 and 35 are “hard,” (framed as “shall,” unlike much of the Convention) although given the differences in national legal systems, the particulars are left to each state. Article 13(1) sets out a policy of encouraging public participation in anti-corruption efforts.¹⁷ Article 32(5) reads: “Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.” Clearly, if the only victim of corruption offences were the State, this article would be unnecessary, nor would it include the reference to “victims” in the plural. According to the treaty’s drafting history, States contemplated individual, collective, and legal (corporate) victims. One early draft of the text read:

1. Each State Party shall ensure that its domestic legislation takes into account the need to combat corruption and provides, in particular, for effective remedies for **persons** whose rights and interests are affected by corruption in order to enable them, in accordance with the principles of their domestic law, to obtain compensation for damage suffered. [emphasis added]
2. Each State Party shall, subject to its domestic law, allow the views and concerns of victims to be presented and considered at the appropriate stages of

¹⁵ La Organización de los Estados Americanos [OEA], Comisión Interamericana de Derechos Humanos [CIDH], *Corrupción y derechos humanos: Estándares interamericanos*, at 107, Doc. 236, (Dec. 6, 2019) <http://www.oas.org/es/cidh/informes/pdfs/CorrupcionDDHHES.pdf>.

¹⁶ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], INTERNATIONAL ORGANISATION OF EMPLOYERS [IOE], CONNECTING THE ANTI-CORRUPTION AND HUMAN RIGHTS AGENDAS: A GUIDE FOR BUSINESS AND EMPLOYERS’ ORGANISATIONS (Sept. 2020), <https://biac.org/wp-content/uploads/2020/09/2020-08-31-Business-at-OECD-IOE-AC-HR-guide.pdf>.

¹⁷ G.A. Res. 58/4, U.N. Convention Against Corruption at 13(1) (Oct. 31, 2003) (“Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.”).

criminal proceedings against offenders without thereby undermining the rights of the defence.¹⁸

In the course of the negotiations, the concerns of the States Parties to the UNCAC about victims were so important that they led delegates to create a separate article, which subsequently became Article 35. Article 35 sets out a requirement that:

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.¹⁹

The legal action referred to in Article 35 may be civil, or it may form part of a criminal action; this flexibility was deemed necessary by the existence of different legal systems.

In the preparatory work for Article 35, there are other indications of its scope. States proposed, for example, that the compensation should cover “material damage, loss of profits and non-pecuniary losses.”²⁰ It is impossible to think that a State, as such, could suffer the last two types of damage, especially non-pecuniary. This is also reflected in the Interpretative Note in Article 35, which specifies that “[t]he expression ‘entities or persons’ includes States as well as legal and natural persons.” Finally, Article 57(3)(c), on asset recovery, requires states to “... give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.” This makes it clear that states are not the only entities entitled to recovered assets.

Taken together, these articles make clear that persons or entities other than the state are entitled to participate in proceedings, whether they be criminal or civil suits, or administrative actions. The provisions beg the question of how to define “victim” or “persons who have suffered damage.” Perhaps understanding the difficulties in too strict a formulation given wide differences in national law, the preparatory drafts simply required that (1) damages have been caused to the person or entity and (2) that there is a causal link between the act of corruption and the damages.²¹ How strictly a causation requirement should be construed, and whether it is subject to limits based on legal or proximate cause, has been the subject of debate ever since.

¹⁸ Travaux Préparatoires de las negociaciones para la elaboración de la Convención de las Naciones Unidas contra la Corrupción [Preliminary Activities of the Negotiations for the Elaboration of the U.N. Convention against Corruption] at 32(A) (Nov. 2012), https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_S.pdf [hereinafter *Preliminary Activities Against Corruption*].

¹⁹ *Preliminary Activities Against Corruption*, *supra* note 18, at 35. In addition, Article 57(3) reads: (c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime. *See also* Anita Ramasastry, *Is There a Right to be Free from Corruption?*, 49 UC DAVIS L. REV. 703, 708 (2015).

²⁰ *Preliminary Activities Against Corruption*, *supra* note 18, at 35.

²¹ *Preliminary Activities Against Corruption*, *supra* note 18, at 35.

II. The interpretation of UNCAC: filling gaps from other sources of international law

Human rights groups and the networks of family members of those killed and forcibly disappeared in the 1970s and 1980s under authoritarian regimes and during civil wars have changed the legal landscape for anti-corruption campaigners. They were one of the driving forces behind developing international law on the rights of victims to participate as rights-bearers in criminal processes, on an equal footing with defendants. Victims have rights, including the right to be heard, the right to demand the truth of what happened to them and their loved ones, and the right to reparation. The definitions developed in this context, involving powerful figures able to create impunity for themselves, have proven useful in anti-corruption efforts involving equally powerful figures.

Human rights law provides a right to remedy for victims.²² The evolution of soft law elaborating these provisions began with the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.²³

“Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.²⁴

In the context of human rights law, this was followed by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which uses an almost identical definition²⁵.

The Inter-American human rights system has played a key role in broadening and specifying the definition of a victim. In many countries in the Americas, the jurisprudence of the Inter-American system is binding law, while in others it is highly influential. The Rules of Procedure of the Inter-American Court of Human Rights, in force since November 2000, defines “alleged victim” in Article 2 (Definitions) as “the person whose rights under the Convention or another treaty of the Inter-American System have allegedly been violated.”²⁶ Likewise, Article 35 establishes that in order to submit a case to the Court, the Inter-American Commission must identify the alleged victims, and when it is not possible to identify one or more alleged victims because there are massive or collective violations, the court will decide in due course whether to consider them victims.²⁷

²² E.g. International Covenant on Civil and Political Rights, Treaty Series 999 (December): 171 (1966), Art. 2(3).

²³ G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (Nov. 29, 1985).

²⁴ G.A. Res. 40/34, *supra* note 22, ¶ 1.

²⁵ G.A. Res. 60/147, ¶ 8 (Dec. 16, 2005).

²⁶ Inter-Am. Ct. H.R. [IACHR], *Rules of Procedure of the Inter-American Court of Human Rights*, art. 2, ¶ 25 (November 28, 2009), https://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf.

²⁷ *Id.* at art. 35, ¶ 1.

The jurisprudence of the Inter-American Court has progressively broadened the definition of a victim and has recognized victims who were not originally recognized as such.

In the judgment handed down on November 19, 1999, in the *Case of Villagrán Morales y Otros (Street Children) v. Guatemala*, the Court recognized the relatives of the minors who were tortured and murdered as victims in their own right. Such relatives were subjected to cruel, inhuman, and degrading treatment as a result of the heinous crimes perpetrated against their children by state agents.²⁸

The Court has also recognized the rights of indigenous communities as such, not just the rights of individual community members. In its most recent pronouncement on the subject, Advisory Opinion 22/16 of February 26, 2016,²⁹ the Court reiterated its recognition of indigenous and tribal communities, as well as trade union organizations, as subjects of rights in and of themselves who can collectively invoke the human rights protected by the Convention. The Court stressed that the violation of those rights has a collective dimension and cannot be limited to individual effects.

The jurisprudence of the European Court of Human Rights (ECHR) is less expansive. The Court has consistently held that the Convention does not provide for the institution of an *actio popularis*.³⁰ Article 34 of the European Convention defines victim as including the person or persons directly or indirectly affected by the alleged violation, either because it caused harm or because they have a valid and personal interest in seeing it brought to an end.³¹ An association that merely represents the general interests or populations involved, rather than their interest in the specific dispute, does not qualify.³² On the other hand, where an association was formed specifically to defend the legal rights of its members in the dispute under consideration, the ECHR found that:

The term “victim” in Article 34 must also be interpreted in an evolutive manner in the light of conditions in contemporary society. And indeed, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. That is precisely the situation that

²⁸ Villagrán Morales et al v. Guatemala, Inter. Am. Ct. H.R. (ser. C) No. 63, ¶ 174-176 (Nov. 19, 1999); see also Bámaca Velásquez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 163-165 (Nov. 25, 2000).

²⁹ Ownership of Rights of Legal Persons in the Inter-American Human Rights System (Interpretation and Scope of Article 1.2, in Relation to Articles 1.1., 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62.3 of the American Convention on Human Rights, as well as Article 8.1. A and B of the Protocol of San Salvador), Advisory Opinion 22/16, Inter-Am. Ct. H.R. (ser. A) No. 111 ¶ 71-76 (Feb. 26, 2016).

³⁰ See Roman Zakharov v. Russia, App. No. 47143/06 ¶¶ 164-171 (Dec. 4, 2015), <https://hudoc.echr.coe.int/eng?i=001-159324> (listing requirements for standing for the institution of an *actio popularis*). Under certain circumstances, for example secret surveillance, a threat of harm is enough to give rise to standing. Id. See note 76 for more on *actio popularis*.

³¹ Vallianatos & Others v. Greece, Apps. No. 29381/09 and 32684/09, 59 Eur. Ct. H. R. 12, 536-537 ¶47 (Nov. 7, 2013), <https://hudoc.echr.coe.int/eng?i=001-128294>.

³² Id. at ¶48.

obtained in the present case. The Court cannot disregard that fact when interpreting the concept of “victim.” Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory.³³

Thus, associations and groups can be victims but there must be a tight link between the association’s purposes and the object of the litigation.

The advent of the International Criminal Court (ICC) in 1998 also advanced the discussion of victims’ rights. The Rome Statute governing the ICC contains extensive provisions regarding victims’ participation at different stages of the proceedings,³⁴ and (for the first time in an international criminal proceeding) allows for court-ordered reparations.³⁵ These innovations gave rise to a robust debate over the forms and extent to which victims could or should participate in criminal justice, especially in cases where impunity tends to be the norm.³⁶ It also led to a great deal of thinking about how to provide integral reparations where it was difficult to tie the wrongdoing to specific victims.³⁷

Current debates surrounding the role of victims in grand corruption cases have been informed by this evolution in the areas of human rights and international criminal law.³⁸ Thus, victims’ groups have pushed for access to and participation in the proceedings, in addition to insisting on a broad view of what integral reparations should look like. These developments are starting to show up in national courts. The next section takes up these aspects in turn.

III. Participation of victims in proceedings

National courts have found that victims of corruption—or non-governmental organizations representing the public interest in combatting corruption—can participate in

³³ Gorraiz Lizarraga & Others v. Spain, App. No. 62543/00, ¶38 (Apr. 27, 2004), <https://hudoc.echr.coe.int/eng/?i=001-61731>.

³⁴ See Rome Statute of the International Criminal Court art. 68(3), ¶ 3, Jul. 17, 1998, 37 I.L.M. 99 (“where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”).

³⁵ . *Id.* at art. 75 ¶¶ 1-6.

³⁶ Luc Huyse, *The Process of Reconciliation*, in RECONCILIATION AFTER VIOLENCE: A HANDBOOK, 20 (David Bloomfield et al. eds., 2003); Christine Van den Wyngaert, *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 CASE W. RES. J. INT’L L. 475 (2011).

³⁷ There have been debates about the proper allocation of responsibility between the Court’s reparation orders and the separate Trust Fund for Victims. See, e.g., WAR CRIMES RESEARCH OFFICE, THE CASE-BASED REPARATIONS SCHEME AT THE INTERNATIONAL CRIMINAL COURT (June 2010), <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-12-the-case-based-reparations-scheme-at-the-international-criminal-court/>.

³⁸ Another strand of thinking on victims’ rights comes from environmental law. Environmental cases provide a rich history of how to remedy diffuse harms, including by granting civil society groups or indigenous peoples the right to represent the interests of natural features like rivers and mountains. That evolving jurisprudence is beyond the scope of this article. See, e.g., David Takacs, *We Are the River*, UNIV. ILL. L. REV. 545, 545 (2021).

criminal or administrative proceedings brought by the state. Others have added corruption charges to what would otherwise be criminal negligence cases. And still others have refused to allow victims to participate, on the grounds that the state is the only victim.

Courts have taken two major routes to let victims in: directly linking their interests to the case or allowing public interest groups focused on anti-corruption to act in the name of the victims, often where law allows representation of “diffuse interests” by such groups. I discuss each below.

A. Direct representation

In some corruption cases, the causal link between the corrupt acts and harm to specific plaintiffs is easy to make and proximate cause is less problematic. These are generally cases where a separate tort (civil damages) case would be warranted, but where victims, especially in civil law systems, find it important to join the criminal case for corruption as private prosecutors, *partie civile*, or complainants. This may be based on the need for access to information about the facts, on the difficulties and costs of separate civil actions, or on a healthy suspicion of the prosecuting authorities (or all three).

A good example is the “*Once*” (“*Eleven*”) case in Argentina. Leaders of the Ministry of Transportation in charge of running and maintaining commuter trains apparently pocketed the train maintenance budget over several years, leading to dilapidated and unsafe trains. In February 2012, a train crash killed 51 people and injured 789 others.³⁹ The courts found the state officials guilty of fraudulent administration and sentenced two ex-Ministers of Transportation, among others, to prison.⁴⁰ The representatives of various classes of victims of the crash participated in the proceedings.

Another potential example comes from the IGSS/Pisa and IGSS/Chiquimula cases in Guatemala. High-ranking officials in the procurement and head offices of the state’s medical service, along with well-connected private operators, received a \$2.5 million dollar bribe from a large medical supply firm for a multimillion-dollar contract to provide kidney dialysis to 530 patients.⁴¹ The firms had no existing clinics, no knowledge or experience of the procedure, and supplied faulty or inoperative dialysis machines and supplies that caused patients great pain. Infections increased 900% and 49 people died.⁴² A group of patients, aided by two civil society groups, brought a criminal complaint. The fraud portion of the complaint eventually led to over twenty indictments. The issue of victims’ participation arose when a group of eight former patients accepted the defendants’

³⁹ *One train crash: Argentine ex-ministers jailed*, BBC NEWS (Dec. 29, 2015), <https://www.bbc.com/news/world-latin-america-35196316>.

⁴⁰ Tribunal Oral en lo Criminal Federal 2 [TOCF nro.2] [Oral Federal Criminal Court], 30/3/2016, “Córdoba, Marco Antonio y otros s/ inf. Arts. 196, inc. 1 y 2 y 173, inc. 7° en función del 174 del CP”/ Registro de sentencias nro. 1753 (CFP 1188/2013/TO1) (Arg.) (presenting the case against the Ministry of Transportation regarding the February 22, 2012 train collision).

⁴¹ Nómada, *El pago de Pisa a los sobrevivientes del IGSS parece un gesto humano, pero busca algo más*, NÓMADA (Feb. 27, 2018) <https://nomada.gt/pais/la-corrupcion-no-es-normal/el-pago-de-pisa-a-los-sobrevivientes-del-igss-parece-un-gesto-humano-pero-busca-algo-mas/>.

⁴² *Id.* See also the three-part investigation by Insight Crime into this case: Alex Papadovassilakis, *Social Insecurity: The Case of IGSS-Pisa in Guatemala* (Dec. 2021), <https://insightcrime.org/investigations/social-insecurity-case-igss-pisa-guatemala/>.

(inadequate) settlement offer and the victims' lawyers quit. The trial court ruled that the remaining victims and their family members could not testify or otherwise participate in the proceedings because they had lost their representation, but an appeals court panel reversed this, finding that due process required that they be able to present evidence.⁴³ Until now, no one has been held responsible for the wrongful deaths, and although the trial court convicted several men for fraud, the convictions were overturned in a questionable appeals court decision.⁴⁴

The case of fraud in the bidding, contracting, and construction of the Agua Zarca hydroelectric dam on the Gualcarque River in Honduras would seem to be the poster child for the need for victims' participation in court proceedings involving grand corruption. Dam construction directly affected the livelihoods, health, and culture of downstream Indigenous communities.⁴⁵ Leaders of the Lenca community were murdered due to their vocal denunciations of corruption and their opposition to the project, on orders of dam construction executives and their security chiefs acting with the connivance of public authorities.⁴⁶ And without corrupt bidding and licensing processes, the dam would never have been built, at least not in the same way.⁴⁷ The victims included well-known Goldman Environmental Prize winner Berta Cáceres, who was shot in her home in March 2016. Moreover, community members and civil society organizations were skeptical that the Honduran prosecutor's and public ombudsman's offices would adequately represent the public interest, as they had been systematically weakened and faced strong pressures to go easy on the powerful.⁴⁸

The case was originally investigated by the Organization for American States (OAS)-backed Anti-Corruption Mission (MACCIH), created to shore up the local prosecutor's office.⁴⁹ The prosecutor's office filed a case against DESA, the dam builder, in March 2019.⁵⁰ It alleged that the bidding process, environmental impact report, and other

⁴³ Nómada, supra note 42.

⁴⁴ Insight Crime, supra note 43.

⁴⁵ See *Agua Zarca Dam Conflict in Honduras*, CLIMATE DIPLOMACY, <https://climate-diplomacy.org/case-studies/agua-zarca-dam-conflict-honduras> (last visited Oct. 7, 2021) (detailing the conflict surrounding the construction of the Agua Zarca dam by Honduran company Desarrollos Energeticos S.A. (DESA)).

⁴⁶ See Nina Lakhani, *Backers of Honduran Dam Opposed by Murdered Activist Withdraw Funding*, THE GUARDIAN (Jun. 4, 2017, 6:30 EDT), <https://www.theguardian.com/world/2017/jun/04/honduras-dam-activist-berta-caceres>

(describing community violence and murders of known activists opposing the construction of the Agua Zarca dam on the Gualcarque river in Honduras). See also NINA LAKHANI, WHO KILLED BERTA CÁCERES? DAMS, DEATH SQUADS, AND AN INDIGENOUS DEFENDER'S BATTLE FOR THE PLANET (2020).

⁴⁷ Monte Reel, *Backers of Honduran Dam Opposed by Murdered Activist Withdraw Funding*, BLOOMBERG GREEN (Sept. 14, 2020, 7:00 AM), <https://www.bloomberg.com/features/2020-blood-river-hydroelectric-power-honduras/> (analyzing the murders of Honduran activists and unsuccessful prosecutions of those killings).

⁴⁸ Julia Aikman Cifuentes and Adriana Beltrán, *A Year of Setbacks to Honduras' Anti-Corruption Efforts*, WOLA COMMENTARY (Feb. 4, 2021), <https://www.wola.org/analysis/honduras-anti-corruption-efforts/>.

⁴⁹ See Charles Call, *Fleeting Success: The Legacy of Honduras' International Anti-Corruption Mission 8* (AM. UNIV. CTR. FOR LATIN AM. & LATINO STUD., Working Paper Series No. 27, June 2020), https://papers.ssm.com/sol3/papers.cfm?abstract_id=3633943# (analyzing the impact of MACCIH and the OAS mission in Honduras).

⁵⁰ Proceso Digital, *El estatus de los casos MP-Maccih*, PROCESO DIGITAL (Dec. 6, 2020, 10:25 PM), <https://proceso.hn/el-estatus-de-los-casos-mp-maccih/>.

licensing processes had been irregular, unlawful, and fraudulent. Apparently, DESA was granted the contract without bidding for it and the environmental impact assessment did not meet any of the legal requirements, including consultation with the surrounding Indigenous communities. Charges were filed against 16 defendants, including fraud, abuse of authority, violations of the duties of state officials, negotiations incompatible with the exercise of public functions, and falsification of documents.

The trial court accepted, in the face of a defense challenge, the right of the Civic Council of Popular and Indigenous Organizations, known as COPINH, to be a civil party in the corruption case, giving their lawyers access to documents and hearings.⁵¹ The judge used the United Nations definition of victim as “persons who, individually or collectively, have suffered harm ... through acts or omissions that are in violation of criminal laws.”⁵² She also referred to ILO Convention 169 (on Indigenous Peoples), which requires free, prior, and informed consent before actions are taken that could affect the rights of Indigenous people. COPINH, the judge found, was an indirect victim. Defendants appealed.

The Court of Appeals, in an August 28th, 2019 decision, agreed with the defendants that COPINH was not a proper civil party.⁵³ They based this decision on two procedural provisions in national law. First, Article 17 of the Criminal Procedure Code⁵⁴ defines victims as those directly affected, including the state and public and private entities; the family member of someone who has been killed; and the members of a commercial or civic organization regarding the crimes that affect it as well as the common owners of property, with respect to their indivisible interests. The court assumed that only the civic organization provision applied, but then read it narrowly to refer only to commercial or property interests which, according to the court, were not implicated here. Moreover, ILO 169 had already been interpreted as merely a “programmatic” obligation by the Supreme Court, and so didn’t change the outcome. Second, the court noted that this is not a human rights violations case, where the victim would have had standing to intervene. The only victim was the State because the protected interest is public faith and the administration of the state. Nor was the environmental harm to riparian communities enough, since remedying that harm was not the purpose of the lawsuit. The victims filed a constitutional challenge (known as an *amparo*) to the Supreme Court on November 4th, 2019.

⁵¹ *Violence, Corruption & Impunity in the Honduran Energy Industry: A profile of Roberto David Castillo Mejía*, DUE PROCESS L. FOUND 17 (August 2019), <http://www.dplf.org/sites/default/files/violence-corruption-impunity-a-profile-of-roberto-david-castillo.pdf>.

⁵² G.A. Res. 40/34, ¶ A(1) (Nov. 29, 1985).

⁵³ Corte de Apelaciones de lo Penal con Competencia Nacional en Materia de Corrupción [Court of Criminal Appeals with National Jurisdiction Over Corruption], 28/8/2019, “Auto s/ Recurso de Apelación de la Defensa,” (Exp. 13-2019) (Hon.); see also Centro de Estudio Sobre la Democracia (CESPAD) [Democracy Study Center], *Caso Fraude sobre el Gualcarque: arbitrariedad procesal y exclusion de las víctimas* [Fraud Case on the Gualcarque: procedural arbitrariness and exclusion of the victims], CESPAD (2021), <http://cespad.org.hn/wp-content/uploads/2021/08/Gualcarque-WEB.pdf> (providing reports on judicial decisions and structural reforms following the Fraud on the Gualcarque case).

⁵⁴ Código Procesal Penal [Criminal Procedure Code] art. 17 (1999) (Hon.), <http://www.poderjudicial.gob.hn/CEDIJ/Leyes/Documents/PPP-RefDPL.pdf>.

Over 18 months later, on August 10, 2021, the Supreme Court unanimously ruled in favor of COPINH.⁵⁵ The Court grounded its ruling in human rights law and ILO Convention 169 on Indigenous rights, in particular the right to participation of Indigenous peoples in decisions affecting their interests. It found that COPINH represented the Lenca and other Indigenous peoples, who had concrete interests in water and land rights in this case and thus constituted “victims.” It referenced the U.N. definition, Article 8 of the American Convention on Human Rights establishing access to justice as a right, and due process provisions of the Honduran constitution.⁵⁶ Allowing COPINH to fully participate in the case would not interfere with the administration of justice, but rather provide transparency and objectivity.⁵⁷ While the decision referred to the rights of public interest organizations, it was a narrow ruling, based on the particular collective and territorial rights of the Indigenous Lenca and carefully distinguished the general right of legal entities to be classified as victims. As a result, all the proceedings subsequent to COPINH’s exclusion have been nullified, and the case will be redone with full victim participation.⁵⁸

The DESA case is not the only one in Honduras where direct harm is relatively easy to establish. In the Pandora case, corrupt lawmakers and their allies established two phantom foundations to receive international funds, supposedly for agricultural development, crop diversification, rural schools, and young rural mothers.⁵⁹ Instead, \$11.7 million of the money went to illegally finance political campaigns.⁶⁰ Among those charged were former ministers, ex-functionaries of the Agriculture and Finance ministries, foundation heads, and elite businessmen. The Honduran Court of Appeals in 2020 closed the cases of 22 of the 28 charged defendants.⁶¹ The specific villages and groups who were supposed to receive the funds, according to the projects financed, argued that they should have a claim as victims.⁶² Nonetheless, when they tried to intervene in the appeal of the case closure, the Supreme Court denied them access to the proceedings.⁶³

In these cases, the complainant can sue because of interests that are particular to them as an individual or as a group. In other cases, the difference between individual or group

⁵⁵ Recurso de Amparo Penal SCO 0974/2019, Sala Constitucional, Corte Suprema de Honduras [Appeal for Criminal Protection SCO 0974/2019, Constitutional Room, Supreme Court of Honduras] (Hon.).

⁵⁶ *Id.*

⁵⁷ *Id.* (considering) at 18.

⁵⁸ Corte de Apelaciones de lo Penal con Competencia Nacional en Materia de Corrupción [Court of Criminal Appeals with National Jurisdiction Over Corruption], 1/9/2021, “Auto Motivado del 1 de sept. de 2021,” (Exp. 13-2019) (Hon.), <https://copinh.org/wp-content/uploads/2021/09/Gualcarque.-Corte-A.-Expediente-13-2019.pdf> (describing the reasoning behind including COPINH in the matter before the court).

⁵⁹ Proceso Digital, *UFECIC presenta caso “Pandora” que involucra a 38 funcionarios y diputados en corrupción*, PROCESO DIGITAL (June 13, 2018, 6:02 PM) <https://proceso.hn/ufecic-mp-presenta-caso-pandora-que-involucra-a-38-funcionarios-y-diputados-en-corrupcion/> (describing the Pandora case, an action alleging embezzlement and fraud of certain Honduran public officials).

⁶⁰ Proceso Digital, *El estatus de los casos MP-Maccih*, PROCESO DIGITAL (Dec. 6, 2020, 10:25 PM), <https://proceso.hn/el-estatus-de-los-casos-mp-maccih/>.

⁶¹ EL CASO PANDORA: UN FALLO ALEJADO DE LA NORMATIVA JURÍDICA NACIONAL Y ESTÁNDARES INTERNACIONALES, CENTRO DE ESTUDIO PARA LA DEMOCRACIA (Jan. 2020), <http://cespad.org.hn/wp-content/uploads/2021/01/Caso-Pandora-WEB-corregido.pdf> (discussing the July 19, 2020 decision extensively).

⁶² *Id.* at 22.

⁶³ Corte Suprema de Justicia, Sala Constitucional, Amparo Interpuesto por el Consejo para el Desarrollo Integral de la Mujer (Constitutional Challenge by the Council for Comprehensive Women’s Development) (April 20, 2021) (Hon.) (decision on file with author).

victims representing their own interests and those representing the more diffuse interests of taxpayers or society at large are less clear. For example, there is a Mexican case involving bribes in highway construction used to finance political campaigns in the State of Mexico. Senator Emilio Alvarez and Ana Riojas, a member of the federal Assembly, who initially brought the complaint, brought a writ of *amparo* seeking to correct a lower court decision denying them access to the case file as “victims.” They cited the evolution of domestic and international law (including UNCAC) to facilitate greater access for victims to criminal proceedings. They pointed to Article 20 of the Mexican Constitution, which sets out the rights of victims, Article 108 of the Criminal Procedure Code, and Article 4 of the Victims Law of 2013, which reads: “direct victims are physical persons who have suffered economic, physical, emotional or general harm or detriment that endangers or harms their legal goods or rights as a result of the commission of a crime or a human rights violation recognized in the constitution or in ratified treaties”.⁶⁴ Here, the relevant rights violation is the right to be free from corruption. At least one lower court had already agreed with the complainants.⁶⁵

The lower court treated the issue as one of standing, and found that to seek this remedy, the complainants had to show that their rights, or their individual or collective interests, had been affected. The generic interest of society was not enough, there had to be specific individual or group interests at stake.⁶⁶ The court then found that simply having denounced the illegal conduct to prosecuting authorities was not enough to convert the complainants into victims. They had not personally suffered physical harm, financial loss, or negative impact on a fundamental right as a result of the defendants’ alleged crimes—in any case, the entire society was affected.⁶⁷

The appeals panel disagreed.⁶⁸ It found that the definition of victim has changed in Mexican law over time, and that the new constitutional scheme post-2000 contemplates a progressive definition of victim, giving victims an equal status to offenders, including participation in criminal proceedings. The Mexican Supreme Court had earlier found that victims can challenge a prosecutor’s failure to indict through *amparo* proceedings, due to the right to reparations that accrue to victims if there is a guilty verdict.⁶⁹ The court here found that a broad reading of the rights of victims was necessary given expansive Inter-American jurisprudence and given the growing importance of collective or supra-individual claims. Once the court recognized collective claims, it was a small step to name the fight against corruption as such a claim, one that therefore any affected member of society could raise. The court imposed two limits: the complainant must be part of the affected community and the complainant must actively file a complaint about the alleged

⁶⁴ *Id.* Ley General de Víctimas [LGV] Art. 4, Diario Oficial de la Federación [DOF] 09-01-2013, (Mex.).

⁶⁵ Adriana Greaves & Estefanía Medina, *Corrupción Nunca Más Un Delito Sin Víctimas*, [Never Again is Corruption a Victimless Crime] MEXICANOS CONTRA LA CORRUPCIÓN Y LA IMPUNIDAD (Mar. 27, 2021), <https://contralacorrupcion.mx/corrupcion-nunca-mas-un-delito-sin-victimas>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Emilio Álvarez Icaza Longoria y Ana Lucía Riojas Martínez, Octavo Tribunal Colegiado en Materia Penal del Primer Circuito [TCC] [First Circuit, 8th Tribunal Panel in Criminal Matters] R.P. 104/2020 (Mex.) (on file with the author).

⁶⁹ *Id.*

wrongdoing.⁷⁰ Here, those requirements were easily met, and thus the two legislators were entitled, as victims, to copies of the case file and to full participation in the proceedings.

Another recent case came to the same conclusion in administrative proceedings rather than a criminal prosecution. The Mexican Supreme Court found that 2016 reforms creating the General Law of Administrative Responsibilities as part of a package of anti-corruption laws changed the role of a complainant from that of a simple spectator to a central participant in the subsequent investigation and proceedings.⁷¹ It thus overruled its earlier negative jurisprudence, citing the Inter-American Commission on Human Rights and anti-corruption treaties to find that where the authorities decide not to open an administrative proceeding despite a complaint, this impacts the complainant's desire to see the irregularities investigated --and thus, corruption effectively fought, as the constitutional reform intended—but also, at the same time, bars the complainant's ability to intervene actively in the proceeding as a third party, to argue, to present evidence, and even to disagree with decisions that determine the non-existence of administrative responsibility. Thus, "it is through the complainants that the social controls ("una contraloría social") that overcome the State's inability to combat the phenomenon of corruption can be relied on."⁷² The complainant is different from a mere bystander and has standing to fully participate in the administrative proceedings against public employees.⁷³ However, because this is an administrative proceeding aimed at sanctioning the public servant, reparations for the complainant are not available.

B. Civil society organizations representing diffuse interests

A second way of managing victim participation is through representation by organizations. A number of countries' legislation gives public interest organizations standing in at least some cases to intervene in cases involving the interests they represent—including Argentina, Brazil, Ecuador, Peru, Chile, Costa Rica, El Salvador, Guatemala, Paraguay, Venezuela, and Bolivia.⁷⁴ Other countries have liberal standing requirements through the application of the ancient Roman principle known as *actio popularis*. Countries

⁷⁰ *Id.*

⁷¹ Responsabilidades Administrativas, Suprema Corte de la Justicia de la Nación, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Undécima Época, 06/2001, Caso 29993 (Mex.), <https://sjf.scjn.gob.mx/SJFSem/Paginas/DetalleGeneralScroll.aspx?id=29993&Clase=DetalleTesisEjecutorias>.

⁷² *Id.* at 2.

⁷³ *Id.* at 2.

⁷⁴ Código de Processo Penal [CPP.] [Crim. Proc. Code] art. 37 (Braz.); Código de Procedimiento Penal [CPP] [Crim. Proc. Code] arts. 76(4), 78 (Bol.); Código Procesal Penal [CPP] [Crim. Proc. Code] art. 70 (Costa Rica); Código Procesal Penal Comentado [CPPC] [Crim. Procedural Code Annotated] [Civil Code] art. 12(4), 302 (El Sal.); Código Procesal Penal [CPP] [Crim. Procedural Code] [Civil Code] art. 117(4), 302 (Guat.) Código Procesal Penal [CPP] [Crim. Proc. Code] art. 70 (Para.); Código Proceso Civil [Cód. Proc. Civ.] [Civ. Proc. Code] art. 82 (Peru); Código Proceso Penal [Cód. Proc. Pen.] [Crim. Procedural Code] arts. 118, 301 (Venez.); see also *Hacia el reconocimiento de la querrela colectiva en causas de corrupción*, ASOCIACIÓN CIVIL POR LA IGUALDAD Y LA JUSTICIA [ACIJ] (2018), <https://acij.org.ar/wp-content/uploads/2018/12/Hacia-el-reconocimiento-de-la-querrela-colectiva-en-causas-de-corrupcion.pdf> (discussing rights enshrined in various Latin American Criminal Procedure Codes).

that follow this principle typically will allow “any person” to sue the government for its failure to uphold the law.⁷⁵

Thus, environmental organizations can represent the rights of the environment or of natural features, consumer rights organizations can represent the rights of consumers, and anti-corruption organizations can represent the interests of victims in corruption proceedings. The courts refer to collective harms (to a specific, identifiable group as such) and diffuse harms (to society as a whole or unorganized subgroups of people).⁷⁶ While most of these laws are geared towards public interest, or diffuse or collective interests generally, Argentina (as of 2009) allows public interest representation in crimes against humanity and grave human rights cases, and Costa Rica does so specifically in corruption cases. Brazil allows public interest organizations to intervene when the prosecutors’ office has not acted by the legal deadline; the prosecutor’s office can take control of the case back at any time.

A number of countries allow standing for environmental organizations in cases involving protection of the environment, and such standing is encouraged in treaties like the Aarhus and Escazú agreements.⁷⁷ Indeed, litigation around climate and the environment may prove a fruitful source of inspiration and caselaw on diffuse interests, public interest standing, and the required causal connection between the corrupt acts and the harm. For example, in the *Neubauer v. Germany* case brought by young activists to push Germany to establish more long-term climate reductions, the court held that the fact that climate impacts will affect virtually all persons living in Germany did not prevent the young plaintiffs from being affected in their own right, and therefore meant that they had standing to sue.⁷⁸

The series of cases known as “Ill-Gotten Goods” (*Biens Mal Aquis*) in France gave new impetus to the push for organizational standing in corruption proceedings. In that case, the civil society organizations Transparency International and Sherpa denounced the political leaders of Equatorial Guinea, Congo, and Gabon and their families for their participation in acts of grand corruption connected with assets stolen from their countries and now located in France. The French Court of Cassation (the country’s highest court in criminal matters) decided that the organizations had standing, as they had been specifically

⁷⁵ Several countries in the region, as well as Spain and other European countries, employ versions of the “acción popular” or popular action. Juanjo Escopet, *La Acción Popular en Otros Países* (Oct. 2019), available on Scribd.

⁷⁶GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 3-6 (2009), <https://perma.cc/YB2H-U45Y> (identifying environmental harm as a diffuse harm and the differences in courts’ and commentators’ interpretations of collective and diffuse interests).

⁷⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 4, Jun. 25, 1998, 2161 U.N.T.S. 447, <https://unece.org/DAM/env/pp/documents/cep43e.pdf> (listing requirements for standing for actions under the Aarhus Agreement); See also Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, art. 5, Mar. 4, 2018, https://repositorio.cepal.org/bitstream/handle/11362/43583/4/S1800428_en.pdf (listing requirements for standing for actions under the Escazú Agreement).

⁷⁸ *Constitutional Complaints against the Federal Climate Change Act Partially Successful*, BUNDESVERFASSUNGSGERICHT (April 29, 2021), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>.

affected as anti-corruption organizations. Article 2 of the French criminal procedure code⁷⁹ requires a showing of damages to be classified as a victim and to be able to act in the criminal case. The acts of corruption reported were considered sufficient to generate personal and direct effects on the complainant organizations, and therefore to give them participation in the criminal trial even without specific authorization from the legislature.⁸⁰ As a result, the son of Equatorial Guinea's president was stripped of his Paris mansion, among other goods.⁸¹

Organizations have sought the ability to see the files and evidence, to be able to propose and cross-examine witnesses, and to address the court at sentencing. Criminal files are usually closed except to the parties, including those designated as victims. The organizational goal here is to contribute additional evidence and perspectives and to ensure that the case is being diligently prosecuted.

Thus, in Argentina, the courts have held that civic anti-corruption organizations may access the case file so long as doing so does not implicate privacy concerns of the parties or reveal details of prosecutorial strategy. In a case popularly known as "Bribes in the Senate" the Argentine courts prosecuted former president de la Rúa and other high-ranking government officials for politically related bribery.⁸² Two anti-corruption NGOs petitioned for access to the case file. The Buenos Aires federal court found that organizations defending collective interests were in a position analogous to those of an individual victim with respect to their legal interests. They were, at the very least, potential victims. Given that, regulations limiting access to the case file to prosecutors and parties were not absolute and had to give way to the interest in openness and public access that underlay Argentina's (then recent) procedural reforms. However, this interest was limited to the court documents in the case and did not extend to personal information about the defendants.

A different Argentine case directly connects access for anti-corruption organizations to a human rights rationale. An anti-corruption group (Fundación Poder Ciudadano) acted as criminal complainant in a corruption case. The defendants objected that the criminal procedure code only allows civil society groups to intervene as complainants in cases of crimes against humanity or grave human rights violations.⁸³ The law at issue deals with

⁷⁹ CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.][CRIM. PROC. CODE] art. 2 (Fr.).

⁸⁰ Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 9, 2010, Bull. crim., No. 09-88-272 (Fr.).

⁸¹ *Paris Villa of Equatorial Guinea Leader's Son Obiang Seized*, BBC (Aug. 3, 2012), <https://www.bbc.com/news/world-africa-19120379>. See generally *Teodorin Obiang Definitively Convicted In The "Ill-Gotten Gains" Case: A Decision That Puts The Final Dot On The Chapter Of Confiscation And Opens The Restitution One* (July 29, 2021), <https://www.asso-sherpa.org/teodorin-obiang-definitively-convicted-in-the-ill-gotten-gains-case-a-decision-that-puts-the-final-dot-on-the-chapter-of-confiscation-and-opens-the-restitution-one>.

⁸² Juzgado Nacional en lo Criminal y Correccional Federal [JNCC] [National Court in Criminal and Federal Correctional Matters] 28/122005, "Incidente de asociación civil por la igualdad y la justicia," La Ley [Art] (149 CPPN) (Arg.).

⁸³ CODIGO PROCESAL PENAL DE LA NACIÓN [COD. PROC. PEN] art. 82 (Arg.) ("Intereses colectivos. Las asociaciones o fundaciones, registradas conforme a la ley, podrán constituirse en parte querellante en procesos en los que se investiguen crímenes de lesa humanidad o graves violaciones a los derechos humanos siempre que su objeto estatutario se vincule directamente con la defensa de los derechos que se consideren lesionados." [Collective interests. Associations or foundations, duly legally registered, may become civil parties in criminal cases investigating crimes against humanity or grave human rights violations, so long as their stated goal is directly related to the defense of the rights at stake.]

cases of death, torture, and forced disappearance arising from the “dirty war,” not with corruption, they argued. The Federal Court of La Plata (2nd Chamber) disagreed, finding that since corruption affects a wide range of human rights, and the organization was set up to deal with corruption, the requirements of the statute were met.⁸⁴ As a complainant, the organization could participate in the proceedings, call witnesses, and make sure that the case moved forward.

Mexican courts, despite the openness to individual complainants representing the public interest, have been less willing to accept organizations, especially in high-profile cases where the apparent purpose of the intervention is to avoid a sweetheart deal between defendants and prosecutors. For example, the prosecution of former Veracruz governor Javier Duarte—believed to have stolen at least \$35 million US dollars and (at the very least) allowed impunity for murders of journalists and others—resulted in a plea bargain that greatly reduced the charges and led to a relatively short nine-year sentence, given the gravity of the crimes.⁸⁵ TOJIL, an anti-corruption NGO, claimed that the short sentence reflected a sweetheart deal based on bribes to prosecutors and asked for an investigation. TOJIL also asked to be accorded victim status in that investigation. A lower court initially agreed, based on arguments similar to those above, but an appeals panel reversed 2-1, the majority finding that the complainants had not shown that they had suffered any legally cognizable harm, that there was no right to live in a corruption-free society, and that a human rights organization could only claim victim status if its members had been harassed or threatened as a result of their actions.⁸⁶ TOJIL has asked the Inter-American Commission on Human Rights to take the case; it is still under study regarding admissibility.⁸⁷

In another emblematic case, the prosecutors’ office refused to let the same organization intervene in the criminal case against former PEMEX (Mexican oil company) official Enrique Lozoya for grand corruption, a case connected to the Odebrecht bribery scandal. The organization, now supported by Mexico’s interior ministry, has appealed that decision through an *amparo*.⁸⁸

In short, courts are slowly opening the door to claims by victims, based on human rights considerations, but are obviously concerned about opening the door too wide and are searching for limiting principles. These to date include specific treaty obligations (as with ILO 169) or status as complainants in the case, not just interested parties.

⁸⁴Participación Ciudadana, *En Un Fallo Sin Precedente, La Justicia Permitió a Poder Ciudadano Ser Querellante en Causa de Corrupción* [In an Unprecedented Ruling, Justice Allowed Poder Ciudadano to be a Plaintiff in a Case of Corruption], PODER CIUDADANO (June 11, 2018), <https://poderciudadano.org/en-un-fallo-sin-precedente-la-justicia-permitio-a-poder-ciudadano-ser-querellante-en-causa-de-corrupcion/>.

⁸⁵Kate Linticum and Patrick J. McDonnell, *Ex-Mexican governor accused of embezzling billions just got 9 years in prison. Many think that’s not enough*, L.A. TIMES, (Sept. 27, 2018).

⁸⁶Atención y determinación [Attention and Determination], FED/VG/UNAI-CDMX/0000435/2018, Diario Oficial de la Federación [DOF], 04-10-2018 (Mex.).

⁸⁷*Javier Duarte’s Case*, TOJIL, <https://tojil.org/english-respaldo>.

⁸⁸Arturo Angel, *Inteligencia Financiera Pide a Jueza Reconocer a ONG Como Víctima en Caso Lozoya y Darle Acceso Al Proceso* [Financial Intelligence asks Judge to Recognize NGO as Victim in Lozoya Case and Give It Access to the Process], ANIMAL POLITICO (Apr. 17, 2021), <https://www.animalpolitico.com/2021/04/lozoya-uif-ong-corrupcion-victima/>.

IV. Reparations for Corruption

Of course, the other reason why victims seek participation in corruption cases is to obtain reparations for the harm suffered. In general, reparations for harm are potentially available in civil suits, as a beneficiary of administrative proceedings against state officials, or through participation as a civil complainant or private prosecutor in a criminal case brought by the state. In countries where this is allowed, many victims prefer the criminal route, in part because the state bears the costs of investigating and trying the case. Often, civil suits are subject to short statutes of limitation, payment of a bond, and other procedural obstacles, especially when the defendants are powerful private actors or state officials.

There has been very little in the way of reparations to individual or collective victims in grand corruption cases, despite the language of Article 35 of UNCAC. Compensation has occasionally been paid for wrongful death or injury connected to corrupt acts, but the tie to corruption has not been explicit. There are substantial obstacles to implementing a holistic reparations policy, including lack of access to information and lack of expertise in defining, proving, and presenting expert opinions on what damages and broader reparations should entail. Cases involving grants of financial or other redress to individuals or public interest groups are scarce, in part because most cases have not yet reached a post-verdict stage.

Nonetheless, courts may learn from the region's experience implementing reparations programs in cases of grave human rights violations. One major change involves shifting from a compensation framework focused exclusively on individual money damages to a much wider and complex view of what is involved. The United Nations Basic Principles on the Right to Redress and Reparation set out an oft-used framework, encompassing restitution, rehabilitation, compensation, and guarantees/measures of non-repetition.⁸⁹ The Principles also make it clear that reparations need not be monetary but can also be the restoration of citizenship or a job, medical or psychosocial rehabilitation, or a wide variety of reform measures. Other work on integral reparations has stressed that they can be both material and symbolic, and both individual and collective.⁹⁰

Given the scope of the harms and this "integral reparations" framework, most reparations for grave human rights violations have not come through tort-like damages administered by courts. Rather, government administrative programs have departed from attempting to put the victim back to where they would have been absent the violation and instead focus on acknowledgement, dignification and collective along with limited individual reparations.⁹¹ In Colombia (but not elsewhere), land restitution has been a major

⁸⁹ G.A. Res. 60/147, ¶ 3, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, (Dec. 16, 2005).

⁹⁰ See e.g., Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157 (2004); *The Handbook of Reparations*, 56 AM. J. COMP. L. 236, 238 (2008) (book review).

⁹¹ PABLO DE GREIFF, *REPAIRING THE PAST: COMPENSATION FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS* 4, 10, 12, 13, 15, 17 (2006).

focus of quasi-judicial proceedings.⁹² Everywhere, such programs have involved at least a stated commitment to psycho-social and medical rehabilitation and a broad swath of reforms, even if in practice the reality has fallen far short of the stated goals.

Another lesson from reparations practices to date in the region that individual reparations can be limited and potentially divisive when the harms are widespread or perceived as collective harms. Intra-family disputes, marginalization of women and children in provision of compensation,⁹³ and the rise of a host of local opportunists and scam artists have accompanied these programs. Most surveys indicate that victims want individual compensation.⁹⁴ Collective reparations have generally focused on access to educational and health infrastructure and economic development (such as electrification, road construction, and market access), leading to debates about whether basic governmental functions can be rebranded as ‘reparations.’⁹⁵ All these debates are relevant to thinking more creatively about reparations in the grand corruption context. It may be that a form of administrative reparations makes the most sense here as well.

In cases of grave human rights violations and international crimes, human rights law (especially in the Americas) prohibits blanket amnesties and limits the use of statutes of limitations or other immunity devices. Nonetheless, under certain circumstances, conditional amnesties that require truth-telling, restitution of stolen assets, and a commitment to not take up arms have been apparently acceptable, as in Colombia’s Integral System for Truth, Justice, Reparation and Non-Repetition.⁹⁶ In the context of grand corruption, international law to date puts no such limits on amnesties or plea bargains, which are common. Should there be limits to such bargains given the propensity for authorities to go easy on the powerful? Should such deals be conditioned on continued monitoring or compliance, on apology, on those convicted being debarred from future employment or connections to state contracts? Should the rationales behind long statutes of limitations and/or equitable tolling while the wrongdoer cannot be brought to justice be extended to grand corruption cases, which are equally difficult to find evidence for and

⁹² See, e.g., Philipp Wesche, *Business Actors and Land Restitution in the Colombian Transition from Armed Conflict*, 25 INT’L J. HUM. RTS. 295, 300-01 (2021).

⁹³ Ruth Rubio-Marin, *WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* (Social Science Research Council, 1st ed. 2006).

⁹⁴ See e.g., PHUONG PHAM ET AL., *SO WE WILL NEVER FORGET: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 43 (Jan. 2009); PATRICK VINCK & PHUONG PHAM, *BUILDING PEACE SEEKING JUSTICE: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT ACCOUNTABILITY AND SOCIAL RECONSTRUCTION IN THE CENTRAL AFRICAN REPUBLIC* 35 (Aug. 2010); PATRICK VINCK, *A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SECURITY, DISPUTE RESOLUTION, AND POST-CONFLICT RECONSTRUCTION IN LIBERIA* 66 (June 2011); PHUONG PHAM & PATRICK VINCK, *TRANSITIONING TO PEACE: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND JUSTICE IN NORTHERN UGANDA* 44-45 (Dec. 2010).

⁹⁵ Naomi Roht-Arriaza & Katherine Orlovsky, *A Complementary Relationship: Reparations and Development*, Intl. Ctr. For Transnat’l Just., July 2009, <https://www.ictj.org/publication/complementary-relationship-reparations-and-development>.

⁹⁶ *Comprehensive System of Truth Justice Reparation and Non-Repetition (SIVJRNR)*, www.jep.gov.co/Infografas/SIVJRNR_EN.pdf (describing Colombia’s Integral System for Truth, Justice, Reparation and Non-Repetition).

equally come up against powerful defendants able to engineer impunity? To date, cases involving reparations are mixed even in the context of international crimes.⁹⁷

What would reparations look like? Sometimes it's easy: where properties have been stolen by force or duress, or obviously fire sale prices have been paid, as in Colombia⁹⁸ or Nayarit (Mexico),⁹⁹ restitution of either the property itself or the stolen funds, plus damages for pain and suffering, is appropriate. Where an individual, community, or specific group has suffered physical injury or wrongful death because of a malfunction or lack of function of equipment bought as part of a fraudulent scheme, as seen in the train maintenance or COVID-19 ventilator cases, victims should have the option of joining the criminal corruption case, bringing a separate civil torts case, or following both paths and receiving different damages for each. Collective entities like Indigenous peoples or unions should receive restitution and compensation for losses to land, natural and cultural resources, and for the time and expense of defending against corrupt schemes. In Guatemala and Colombia, judges have ordered private sector defendants to complete the public works projects that were never finished due to corrupt contracting, where it was clear the project would actually benefit affected communities and not simply become a useless "white elephant."¹⁰⁰ All this requires work to visualize and specify damages but can be done within existing frameworks.

A road construction case in Guatemala¹⁰¹ provides one of the few examples where judges have gone beyond fines and compensation to incorporate the broader notion of

⁹⁷ See cases from Chile deciding there is no statute of limitations for reparations for international crimes like enforced disappearance, versus Argentine cases finding that even though the crimes themselves are not subject to a statute of limitations, civil reparations actions for the same crimes are. Re Chile, *see*: Corte Suprema, N°2080-08, *Ortega Fuentes, María Isabel con Fisco de Chile* (April 8, 2010) reproduced in Carlos Céspedes Muñoz, *Statute Of Limitations Of The Civil Action Derived From Crimes Against Humanity*, *Revista de Derecho y Ciencias Penales* n° 16 (131-150), 2011, Universidad San Sebastián (Chile). See also the position of the Inter-American Court of Human Rights, *Caso Órdenes Guerra y otros vs. Chile*, (Nov. 29, 2018), Series C No. 372. For Argentina, *see*, e.g. Supreme Court of Justice, *Villamil, Amelia Ana e/ Estado Nacional s/ daños y perjuicios*, .2 CSJ 203/2012 (48-V)/CS1 (March 8, 2017). Thanks to Ximena Medellín for raising this issue with me.

⁹⁸ Nelson Camilo Sánchez León, *Tierra en Transición: Justicia transicional, restitución de tierras y política agraria en Colombia* [*Land in Transition: Transitional Justice, Land Restitution, and Agrarian Policy in Colombia*] (2017) <https://www.dejusticia.org/en/publication/tierra-en-transicion-justicia-transicional-restitucion-de-tierras-y-politica-agraria-en-colombia/>.

⁹⁹ During the government of Governor Roberto Sandoval and Prosecutor Eduardo Veytia, the Mexican state of Nayarit suffered massive, forced dispossession of property by state authorities acting in concert with organized crime. *See* Lucía Chávez, *Corrupción y Crímenes Atroces en México: El Caso Nayarit*, JUSTICIA EN LAS AMÉRICAS BLOG (Sept. 10, 2020), <https://dplfblog.com/2020/09/10/corrupcion-y-crimenes-atroces-en-mexico-el-caso-nayarit/>.

¹⁰⁰ This type of reparation needs to be preceded by careful study to ensure that roads will actually benefit farmers. They should not be "roads to nowhere" or primarily benefit the same corrupt elites and organized crime. *See, e.g.*, Alex Papadovassilakas, *Fugitive's Return Promises New Graft Revelations in Guatemala*, INSIGHT CRIME (Aug. 26, 2020), <https://insightcrime.org/news/brief/fugitive-graft-guatemala/>; *Odebrecht Case: Politicians Worldwide Suspected in Bribery Scandal*, BBC NEWS (Apr. 17, 2019), <https://www.bbc.com/news/world-latin-america-41109132>

¹⁰¹ *See* STEVEN DUDLEY, *THE WAR FOR GUATEMALA'S COURTS: HOW POLITICAL, CORPORATE, AND CRIMINAL INTERESTS SEEK TO INFLUENCE GUATEMALA'S JUSTICE SYSTEM* (2014), https://insightcrime.org/images/Investigations/guatemala_courts/TheWarforGuatemalasCourts (describing how the High Risk Courts are responsible for hearing complex or controversial human rights, corruption or organized

reparations incorporated into human rights law. The former mayor and other officials of the town of Chinautla gave out road-building contracts to family and friends who had no ability to carry them out. After a criminal conviction, the state asked for both material and moral damages, along with a public apology.

The trial court agreed with the government on damages in the amount equal to the crooked contracts (denying the request to triple the damages), but then added detailed instructions on “guarantees of non-repetition” as an element of reparations. First, the defendants were to publicly apologize in the town square to the people of Chinautla, promising to never do it again. The apology was to be videotaped and written and video versions were to be distributed to the local schools, media and the Association of Municipal Governments. Second, the town was to erect a plaque in a public place in front of the city hall, with the words “The Town of Chinautla has zero tolerance for the corruption and impunity of public employees and officials.”¹⁰² Third, the local magistrate was to witness and confirm that these acts were carried out within two weeks of the sentence, with criminal charges to follow from non-compliance.

More complex reparations questions arise when the harm encompasses an entire sector or when the complainant is a public interest organization. Should reparations be paid directly to the organization, on grounds that it has acted as a “private attorney general” and should be compensated for the time and risk involved? That is the theory, for example, behind citizen suits in the United States. Are there specific criteria that enhance the trustworthiness and legitimacy of anti-corruption NGOs or attorneys wishing to represent victims or groups of victims? Are there specific rules needed to ensure that recoveries for victim representatives accrue to victims? Should the organization have to agree to distribute any proceeds to those most affected? How would those be defined? Would the costs and fees of the organization be deducted? Or would it make more sense to use attorneys’ fees or bounty-type provisions to encourage public interest organizations, while directing reparations to the public treasury? These questions, while crucial, await further research.¹⁰³ They are now being discussed on parallel tracks: in asset recovery cases¹⁰⁴ and in national courts dealing with corruption at home.

A few experiences in Latin America provide tantalizing glimpses of ways forward. Costa Rica pioneered the idea of social harm as an element of reparations. Social harm, a kind of diffuse harm, differs from collective harm or aggregated individual harms, in that those affected cannot be identified even as a group. Examples include environmental harm, harm to the government’s reputation as an effective service provider, and harm to cultural heritage.

crime cases and how the judges in this case were also familiar with cases involving genocide, crimes against humanity and similar crimes).

¹⁰² Evelyn Boche, *Chinautla debe construir un monumento contra la corrupcion* [Chinautla Should Construct a Monument Against Corruption], *ELPERIÓDICO* (Sept. 9, 2020), <https://elperiodico.com.gt/nacionales/2020/09/09/chinautla-debe-construir-un-monumento-contra-la-corrupcion/>.

¹⁰³ See, e.g., JUANITA OLAYA GARCIA, *DEALING WITH THE CONSEQUENCES: REPAIRING THE SOCIAL DAMAGE CAUSED BY CORRUPTION* (2016), <https://ssrn.com/abstract=3475453>.

¹⁰⁴ See, e.g. Samuel J. Hickey, *Remediation in Foreign Bribery Settlements: The Foundations of a New Approach*, 21 *CHL J. INT’L L.* 367, 367-418 (2021), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1790&context=cjil>.

Article 37 of the Costa Rican Criminal Procedure Code allows victims of a criminal act to intervene in order to obtain restitution or damages.¹⁰⁵ To claim social harms, the Procurator or Inspector General [*Procuraduría*] represents the victims. Article 16¹⁰⁶ gives the *Procuraduría* the right to intervene in corruption and tax evasion cases and to have the same rights as the prosecutor therein. Article 38¹⁰⁷ specifically allows the *Procuraduría* to claim social damages for criminal acts that affect collective or diffuse interests. At the same time, Article 70 defines victims as “associations, foundations and others, in the crimes that affect collective or diffuse interests, so long as the objective of the group is directly related to those interests.”¹⁰⁸

These provisions have been applied in several dozen corruption and other types of cases. Among the largest corruption awards, the *Procuraduría* received \$9.2 million in social harm against former president Calderón and former officials of the social security administration, arising out of a medical supplies contract that was steered to a specific supplier in exchange for bribes (Caja-Fischel case).¹⁰⁹ In the ICE-Alcatel telecommunications bribery case,¹¹⁰ the defendant agreed to a partial settlement in 2015, paying \$10 million to the *Procuraduría* for social harm.¹¹¹ Social harm was defined as the loss of trust in public administration.

Colombia also uses the mechanism of a Procurator or Inspector General to represent the public interest in cases involving corrupt government officials. In the Ruta del Sol II/Odebrecht case, private companies related to the Brazilian construction company Odebrecht paid off officials to win a road construction contract. In January 2017, the Inspector General filed a “popular action” on behalf of the collective interests of administrative morality, defense of public property, and efficient access to public services.¹¹² On December 6, 2018, the Administrative Court of Cundinamarca ruled in favor, ordering a suspension of the concession contract, measures aimed at rebidding the

¹⁰⁵ Procuraduría General de la República de Costa Rica Jurisprudencia sobre Daño Social [Office of the Attorney General of the Republic of Costa Rica, Jurisprudence on Social Damage], <https://www.pgr.go.cr/servicios/procuraduria-de-la-etica-publica-pep/temas-de-interes-pep/dano-social/jurisprudencia-sobre-dano-social/> (“Art. 38: Acción civil por daño social La acción civil podrá ser ejercida por la Procuraduría General de la República, cuando se trate de hechos punibles que afecten intereses colectivos o difusos”).

¹⁰⁶ LA ASAMBLEA LEGISLATIVA DE LA REPÚBLICA DE COSTA RICA DECRETA: CÓDIGO PROCESAL PENAL [The Republic of Costa Rica Criminal Procedure Code] art. 16 (1996) <https://wipo.lexres.wipo.int/edocs/lexdocs/laws/es/cr/cr040es.pdf>.

¹⁰⁷ *Id.* at art. 38.

¹⁰⁸ *Id.* at art. 75 (allowing anyone to initiate or intervene as a private prosecutor, known as a “querrellante”, in cases involving diffuse interests, abuse of power or human rights violations by a public official).

¹⁰⁹ Sala tercera de la corte suprema de justicia [Third Chamber of the Supreme Court of Justice] May 11, 2011, 04-005356-0042-PE (Cr.).

¹¹⁰ Sala tercera de la corte suprema de justicia [Third Chamber of the Supreme Court of Justice] May 11, 2011, 04-006835-0647-PE (Cr.).

¹¹¹ Carlos Cordero Pérez, *Alcatel Lucent Indemniza al ICE con \$10 Millones por Daños y Perjuicios* [Alcatel Lucent Indemnifies ICE with \$10 Million in Damages], EL FINANCIERO (Aug. 4, 2015, 3:04PM), <https://www.elfinancierocr.com/tecnologia/alcatel-lucent-indemniza-al-ice-con-10-millones-por-danos-y-perjuicios/UXKPPC46UVGVPCJHNOUY5LDDOU/story/>.

¹¹² Res. 5216, Feb. 15, 2017, sec. 5.1 (Colom.) https://www.sic.gov.co/sites/default/files/normatividad/052017/Resolucion_5216.pdf (the response to the Inspector General’s action can be found in the precautionary measures decision).

road projects, an embargo on the defendants' assets, and the payment of \$800,000 in collective damages.¹¹³

The use of the Inspector General's office allows diffuse interests to be represented without a showing that a specific organization has interests in the subject and puts state resources to work in favor of recovering assets that can then be used. However, in states where the entire apparatus of the state is either too weak, dysfunctional or captured to operate in the public interest, the Inspector General's office is as much at risk of failure or capture as the prosecutors or judges. Any monies obtained simply go back to the state's coffers, where there is no obligation that they be used to redress the harms alleged. In addition, if victims' agency in demanding participation in corruption cases has an independent value, it is not served through the use of the Inspector General mechanism.

V. Risks of a victim-centered approach

While expanding victims' access to court and to reparations has undeniable advantages, it also presents some caveats and risks. These include political, organizational, and security risks, as well as the over-privileging of criminal prosecutions over other, perhaps more impactful, approaches.

One clear risk is the abusive use of corruption charges by the powerful to disable political opponents or commercial rivals. While hard to prove, corruption is notoriously easy to allege, and the region is no stranger to the use of ill-founded charges to discredit, disable, and criminalize political opponents or social activists.¹¹⁴ Organizations registered as "public interest" can mask a variety of funding and political agendas.¹¹⁵ And a lot of corruption is legal, as "campaign finance" or "lobbying."

A second risk shares with cases involving grave human rights violations the dangers inherent in taking on powerful actors who enjoy broad impunity from investigation and action. Anti-corruption campaigners around the world have faced reprisal and bringing victims and their advocates into more active roles increases the dangers to them.¹¹⁶ Third, expanding victim access will require re-tuning of prosecutors' and inspector generals'

¹¹³ *Condena histórica contra Ruta del Sol II* [Historic Condemnation of Ruta del Sol II], SEMANA (Dec. 14, 2018), <https://www.semana.com/pais/articulo/tribunal-de-cundinamarca-emite-condena-historica-a-odebrecht/265530/>.

¹¹⁴ Among the most well-known examples are Lula da Silva in Brazil and Thelma Aldana or Juan Pablo Solórzano in Guatemala, but there are more.

¹¹⁵ A good example would be the "Foundation Against Terrorism" in Guatemala, a recognized non-governmental entity, some of whose leaders were recently placed on the Engels sanctions list for their anti-democratic activities. See U.S. DEP'T. OF STATE, BUREAU OF WESTERN HEMISPHERE AFFAIRS, SECTION 353 CORRUPT AND UNDEMOCRATIC ACTORS REPORT (2021), <https://www.state.gov/reports/section-353-corrupt-and-undemocratic-actors-report/>.

¹¹⁶ See generally FRONTLINE DEFENDERS, FRONTLINE DEFENDERS' GLOBAL ANALYSIS 2020 (2020), https://www.frontlinedefenders.org/sites/default/files/fl_d_global_analysis_2020.pdf. See also FIDH, MEXICO CRIMINAL STRUCTURE WITHIN THE PUBLIC PROSECUTOR'S OFFICE OF THE STATE OF NAYARIT AND CRIMES AGAINST HUMANITY, 10 (2021), <https://reliefweb.int/sites/reliefweb.int/files/resources/Mexico%20--%20Criminal%20structure%20within%20the%20Public%20Prosecutor%E2%80%99s%20Office%20of%20the%20State%20of%20Nayarit%20and%20crimes%20against%20humanity.pdf> (discussing the experience of the Nayarit Truth Commission's efforts to expose corrupt land grabs, which led to killings and other harm).

offices and the development of new expertise in damages valuation, procedural mechanisms for group representation, and the like.

More fundamentally, a risk exists that expanding victims' access will inordinately privilege criminal accountability over other forms of dealing with grand corruption. These might include trying to make civil suits, asset recovery actions, or administrative actions more viable, the use of investigative or "truth" commissions focusing on corrupt networks or schemes, or political and popular organizing to remove corrupt individuals and their parties.¹¹⁷ It might lead to a focus on individuals rather than structures and networks, which is exactly the opposite of what emerging research shows underlies corruption in the region. Criminal processes take a long time, are expensive, and require ceding decision-making to lawyers. They are also backwards looking, and it is not clear to what extent they create general deterrence.

These are, of course, the same critiques that accompanied the expansion of criminal justice, and especially international criminal justice. The International Criminal Court, in particular, has repeatedly faced criticism that it displaced other forms of justice, led to overblown expectations of access and reparations, and has depoliticized struggles to their detriment. It has taken years for the Court, and criminal justice generally, to be seen as one tool in a much larger toolbox, and not necessarily the main actor. A similar discussion can be expected to arise over grand corruption cases.

A final objection might center on the neocolonialist, pro-Western business agenda behind the anti-corruption work touted by the World Bank and IMF and by the rhetoric of developed country administrations. A more radical anti-corruption agenda would be bottom-up and would connect the anti-corruption agenda to allied efforts to hold businesses and international financial institutions accountable for human rights violations and environmental depredation. The anti-corruption groups leading the efforts described here tend to share this more bottom-up view.

VI. Conclusion

In order to move this agenda forward, civil society groups in the region should take a page (or two) from previous efforts regarding criminal prosecution of grave violations, as well as recent legal and political campaigns related to the right to a healthy environment and climate. For example, a concerted, multistate effort to create laws in those states that do not have them and allow long-standing, recognized, and active anti-corruption non-governmental groups to represent collective and/or diffuse interests, including in corruption cases, might be possible. This would especially be viable if pursued together with other groups working on cases involving diffuse interests, such as environmental groups. This would involve creating model legislation and then working to introduce and pass the legislation. Another similar initiative might involve enshrining the United Nation's

¹¹⁷ Nómada, *El pago de Pisa a los sobrevivientes del IGSS parece un gesto humano, pero busca algo más*, NÓMADA (Feb. 27, 2018) <https://nomada.gt/pais/la-corrupcion-no-es-normal/el-pago-de-pisa-a-los-sobrevivientes-del-igss-parece-un-gesto-humano-pero-busca-algo-mas/> (civil suits have their own dangers, including small settlements to desperate victims, as exemplified by the IGSS-Pisa Guatemalan cases discussed earlier).

definition of “victim” into laws for criminal cases (i.e. criminal procedure codes) or into specific anti-corruption statutes. A final legislative strategy might focus on asset recovery laws, including in non-conviction-based confiscations, and their ability to fund victim reparations rather than simply return in full to state treasuries.

Beyond legislation, civil society groups that want to pursue a victim-centered strategy around corruption might look for forums and cases likely to create good precedent that could then be used as an example elsewhere in the region. In cases involving grave human rights violations, Argentine cases and the judgment in the Fujimori trial in Peru were particularly influential. These cases were cited and used elsewhere in the Americas. In the corruption context, cases would ideally feature a strong moral outrage component, but also as clear a causal link as possible between the harm and the corrupt acts, and, if possible, identifiable individuals or collectivities who suffered the harm. These might be related to COVID-19, land grabs, or corrupt contracting or licensing for environmentally and socially destructive megaprojects in the territories of Indigenous peoples. The goal would be to make good precedent and obtain integral reparations. If that is not possible, a secondary goal may be to set up a handful of good test cases for the Inter-American human rights system. It will take sustained pressure from petitioners in different states to develop a regional jurisprudence that can move national law forward.

As a matter of international law, rights-based approaches are becoming more salient in environmental and anti-corruption arenas, raising similar issues about standing, causality, and redress. Litigation strategies have begun to overlap and merge, as civil society networks exchange ideas and information not simply across countries but across previously separate subject areas. Parallel movements in corporate compliance, also driven by national law, international soft law principles, and professional networks, are increasingly integrating environmental, social (including human rights) and governance (including anti-corruption) (ESG) issues. We can look forward to greater borrowing among these previously discrete issue areas, as well as further expansions of human rights law into a broad array of social issues, based on the idea that victims should be at the center.



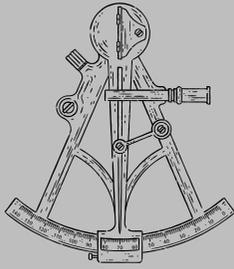
ADDRESSING UNSUSTAINABLE SOVEREIGN DEBT THROUGH PARALLEL
SYSTEM(S) OF TRANSNATIONAL FINANCE

Ilias Bantekas¹

¹ Professor of International Law, Hamad bin Khalifa University (Qatar Foundation), College of Law and Adjunct Professor of Law, Georgetown University, Edmund A Walsh School of Foreign Service.

Abstract

Unsustainable debt plagues developing and several developed countries. Many developed countries are resource-rich, yet they accept conditions and mechanisms imposed by lenders and international financial institutions that make no financial sense, which in turn violates entrenched human rights. This article suggests that indebted countries, particularly at a regional level, should coalesce and use their existing resources to create one or more parallel transnational finance mechanisms that would allow them to develop on the basis of a sustainable debt burden. Despite some backlash from the World Bank Group and other international financial institutions (IFIs), parallel systems of regional finance will enhance the target states' capacity to maximize and mobilize their domestic resources and, in so doing, create meaningful employment, capacitybuilding, and technology transfer while also financing other regional projects in countries with smaller mobilization capacity.



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I. INTRODUCTION

Unsustainable debt has typically been depicted through the lens of its secondary cause, namely lending practices,¹ or the accumulation of debt in and by itself.² In this manner it is divorced from all those forces that sustain insurmountable debt, especially in states that are resource-rich, but which are nonetheless appropriately described as least developed countries (LDCs). Human rights treaty bodies have made it clear that states cannot invoke their financial obligations to IFIs (and by implication private lenders) in order to avoid satisfying their human rights obligations.³ Here, the focus is on the creation of debt by reference to the neoliberal global financial architecture that sustains and fosters it.⁴ By way of illustration, many creditors and affiliated states prefer the existing practice of debt restructuring, whereas holdout creditors typically pursue their claims by relying on bilateral investment treaties (BITs),⁵ where they attempt to depict debt as 'investment',⁶ or pursue their claims before a select number of domestic courts. These courts, in turn, construe the *pari passu* clause in bond and loan agreements in a manner that allows holdout creditors to sue the sovereign debtor even if all other creditors have agreed on a restructuring of the debt.⁷ Where the

¹ See Agasha Mugasha, *THE LAW OF MULTI-BANK FINANCING* 88–91 (2007); Mauro Megliani, *Private Loans to Sovereign Borrowers*, in *SOVEREIGN DEBT AND HUMAN RIGHTS* 69 (Ilias Bantekas & Cephas Lumina eds., 2018).

² See Rosa Lastra & Lee Buchheit, *SOVEREIGN DEBT MANAGEMENT* (1st ed., 2014); Klaus-Albert Bauer & Andreas Cahn, *COLLECTIVE ACTION CLAUSES AND THE RESTRUCTURING OF SOVEREIGN DEBT* (Klaus-Albert Bauer, Andreas Cahn & Patrick S. Kenadjian eds., 2013); Rodrigo Olivares-Caminal, *THE LEGAL ASPECTS OF SOVEREIGN DEBT RESTRUCTURING* (2009); Alexis Rieffel, *RESTRUCTURING SOVEREIGN DEBT: THE CASE FOR AD HOC MACHINERY* (2003).

³ Complaint No. 76/2012, *Fed'n of Emp. Pensioners of Greece v. Greece*, Eur. Comm. on Soc. Rts., Decision on the Merits ¶¶ 66–81 (Dec. 7, 2012); Complaint No. 80/2012 *Pensioners' Union of the Agricultural Bank of Greece v. Greece*, Eur. Comm. On Soc. Rts., Decision on the Merits ¶ 90 (Dec. 20, 2012); *Capital Bank AD v. Bulgaria*, 44 Eur. H.R. Rep. 48, ¶ 90 (2005).

⁴ See Odette Lienau, *Who is the "Sovereign" in Sovereign Debt? Reinterpreting a Rule-of-Law Framework from the Early Twentieth Century*, 33 *Yale J. Int'l L.* 63, 95–101 (2008); Afrodad, *Fair and Transparent Arbitration on Debt*, GLOBAL POLICY FORUM (Jan. 2002), <https://www.globalpolicy.org/component/content/article/210/44728.html>.

⁵ See Daniella Strik, *Investment Protection of Sovereign Debt and its Implications on the Future of Investment Law in the EU*, 29 *J. INT'L ARB.* 183, 196 (2012); Joanna Simoes, *Sovereign Bond Disputes Before ICSID Tribunals: Lessons from the Argentina Crisis*, 17 *L. & BUS. REV. AM.* 683, 718 (2012); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 *AM. J. INT'L L.* 711, 758 (2012).

⁶ See *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

⁷ See *NML Capital, Ltd. et al. v. The Republic of Argentina*, 699 F. 3d 246 (2d Cir. 2012). The US Court of Appeals effectively held that because of Argentina's debt restructuring it was not technically bankrupt, in which case there would be a ranking of its debt. As a result, the *pari passu* clause in its sovereign bonds entailed that Argentina could not (even through an IMF-backed debt restructuring process) arbitrarily prioritize its supermajority creditors to the detriment of the unsecured creditors. The holdout creditors' injunction was remanded to a District Court, which ordered Argentina to pay the total amount into an escrow account. Upon refusal by the US Supreme Court to hear Argentina's objections, a judge from the Southern District of New York issued an order permitting an indenture trustee to receive payments from Argentina but not paying the holders of the restructured bonds. Argentina countered by adopting legislation appointing an Argentine trustee, but this led to backlash from creditors whose bonds had been restructured under English law, who sued for late interest payments in London. See *Knighthood Master Fund LP v. Bank of New York Mellon*, Case No: HC-2014-000704, EWHC 270 (Ch) (2015). Ultimately, Argentina was forced to settle with the holdout creditors (vulture fund) by paying 75 per cent of principal

ensuing debt is unsustainable, there is ample justification for replacing it with alternative mechanisms leading towards meaningful development. However, to replace unsustainable debt with development it may be necessary for indebted nations to divorce themselves from the existing architecture and coalesce into a parallel one with purely developmental aims in mind, not simply replacing existing debt with new forms of debt and underdevelopment.⁸ This paper explains, in very broad and theoretical terms, how this may be conceptualized.

Surprisingly, law is not a big ally of development. Creditor states are wary of ‘allowing’ borrower nations to invoke odious, unsustainable, and illegal debt justifications for non-payment of sovereign debt, for fear that this may crystallize into custom.⁹ As a result, when borrower nations are at the brink of unilateral debt repudiation, their creditors step in to facilitate so-called debt restructuring.¹⁰ This may entail a mixture of partial debt relief or cancellation (usually through informal mechanisms, such as the so-called Paris and London Clubs¹¹); extended repayment options; further concessional funding; private debt haircuts; and a range of conditionalities that aim to sustain the remainder of the debt and ensure prompt repayment of interest and capital. The chief aim of debt restructuring is to avoid, at all costs, unilateral actions by the borrower, and ensure that repayment is not in doubt. However, such negotiated settlements, typically forced upon borrowers lacking short-term liquidity, do not in any way diminish the right of states to repudiate odious and illegal debt. Indeed, such repudiation is justified by peremptory considerations of justice and equity but also founded on sovereignty and self-determination.¹²

Before setting out to explore the nature of unsustainable debt, it is necessary to examine the contemporary scope of odious, illegal, and illegitimate debt. Several national debt committees have been set up in the past decade to examine the origin of national debt.¹³ The

and interest claimed plus a compensation for legal fees. See Mauro Megliani, *Private Loans to Sovereign Borrowers, in SOVEREIGN DEBT AND HUMAN RIGHTS* (Ilias Bantekas & Cephas Lumina, 2018).

⁸ See Ilias Bantekas, *The Human Rights and Development Dimension of Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws*, 31 FLA. J. INT'L L. 130 (2019).

⁹ See e.g., U.N. Conf. on Trade & Dev., Robert Howse, *The Concept of Odious Debt in Public International Law* UNCTAD/OSG/DP/2007/4 (2007) (a discussion on the post-Saddam Hussein Iraqi debt); U.N. Report on Effects of Foreign Debt and other Related Int'l Fin. Obligations of States on the Full Enjoyment of All Hum. Rts., particularly Econ., Soc. and Cultural Rts., 8–9, U.N. Doc. A/64/289 (Aug. 12, 2009); *But see* G.A. Res. 69/319, at 1 (Sept. 29, 2015).

¹⁰ See Rosa Lastra & Lee Buchheit, *SOVEREIGN DEBT MANAGEMENT* (1st ed., 2014).

¹¹ The London Club, known also as the Bank Advisory Committee, is an informal grouping of private banks controlling sovereign debt. The Paris Club is an informal grouping of states that own/control sovereign debt of middle-income and those low-income countries that do not qualify for HIPC debt relief. The Paris Club proclaims its commitment to debt relief programs through two general avenues: (1) longer repayment period (the maximum repayment period is now twenty-three years including six years of grace for commercial loans and forty years (including sixteen years of grace) for ODA loans); (2) debt cancellation, where for the poorest and most indebted countries the level of debt cancellation may reach 67 per cent. Despite these significant initiatives, the Paris Club's instruments and terms make no reference to the HDI, the MDGs or human rights in their assessment of debt sustainability. See PARIS CLUB, <https://clubdeparis.org/en/> (last visited Nov. 17, 2021).

¹² Howse, *supra* note 9, at 1.

¹³ Ecuador conducted an official Debt Audit under Decree 472/2007 of President Rafael Correa (2007/2008) as in <<http://www.auditoriadeuda.org.ec/>>. In the absence of effective debt audits, other countries, chiefly in Latin America, have set up parliamentary commissions to investigate the legitimacy of their debt. Brazil and Argentina

most important among these is undoubtedly the Greek Truth Committee on Public Debt, whose mandate was to investigate the origins and causes of the public debt of Greece.¹⁴ In its preliminary report in 2015 it defined illegitimate debt as:

Debt that the borrower cannot be required to repay because the loan, security or guarantee, or the terms and conditions attached to that loan, security or guarantee infringed the law (both national and international) or public policy, or because such terms and conditions were grossly unfair, unreasonable, unconscionable or otherwise objectionable, or because the conditions attached to the loan, security or guarantee included policy prescriptions that violate national laws or human rights standards, or because the loan, security or guarantee was not used for the benefit of the population or the debt was converted from private (commercial) to public debt under pressure to bailout creditors.¹⁵

In perhaps the most influential contemporary study on odious debt, commissioned by the UN Conference on Trade and Development (UNCTAD) and authored by Robert Howse, several case studies of illegitimate, odious, and illegal debt are set out. Prominent among these is the *Tinoco* arbitration, where a successor Costa Rican government argued that the debts incurred by its predecessor, the dictator Tinoco and his entourage, could not be attributed to the state because none of the loans were in the public interest and the money was used for purely private ends. Chief Justice Taft sat as sole arbitrator and agreed with this position, particularly since the Royal Bank of Canada, which paid several cheques to Tinoco, was aware of the dictator's unpopularity in the country and the fact that the money was employed for illegitimate ends.¹⁶ In the case of the Greek debt, most of the post-2010 bail out loans were found to be illegitimate because less than 8 per cent were earmarked for public expenditures, the remainder were used to repay existing debt, while the initial debt (for which the loans were granted) was private debt that had forcefully and artificially been converted into public debt.

The Greek Truth Committee further defined odious debt as debt:

which the lender knew or ought to have known, was incurred in violation of democratic principles (including consent, participation, transparency and accountability) and used against the best interests of the population of the borrower state, or is unconscionable and whose effect is to deny people their fundamental civil, political or economic, social and cultural rights.¹⁷

are credited with such commissions. *See also* Maria L. Fattorelli, *CITIZEN DEBT AUDIT: EXPERIENCES AND METHODS* (2013).

¹⁴ *See* Ilias Bantekas & Renaud Vivien, *The Odiousness of the Greek Debt in Light of the Findings of the Greek Debt Truth Committee*, 22 *Eur. L.J.* 539 (2016).

¹⁵ ILIAS BANTEKAS ET AL., *TRUTH COMMITTEE ON PUBLIC DEBT: PRELIMINARY REPORT*, 10 (2015), www.hellenicparliament.gr/UserFiles/8158407a-fc31-4ff2-a8d3-433701dbe6d4/Report_EN_final.pdf; *See also* U.N. Rep. on Effects of Foreign Debt, *supra* note 9 ¶¶ 8-22.

¹⁶ William H. Taft, *Arbitration Between Great Britain and Costa Rica*, 18 *AM. J. OF INT'L L.* 147, 169 (1924).

¹⁷ BANTEKAS, *supra* note 15 at 10.

If self-determination is to be meaningful, debt which has a detrimental impact on the livelihood, dignity, and well-being of a population must be open to debate and approval in accordance with constitutional and international human rights guarantees.¹⁸ Limitation of liability and confidentiality clauses, immunity waivers (for the borrower), conditionalities that infringe fundamental rights, and the imposition of measures that stifle democratic debate render debt instruments invalid and the debt odious. Indeed, in the majority of cases lenders impose such conditions upon sovereign borrowers and thus have full knowledge of the odious nature of the agreement. In a recent UNCTAD report titled ‘Sovereign Debt Workouts: Going Forward (Roadmap and Guide)’, it was emphasized that debt restructuring currently lacks legitimacy, impartiality, good faith, transparency, and sustainability.¹⁹

The Greek Truth Committee defined illegal debt as:

debt in respect of which proper legal procedures (including those relating to authority to sign loans or approval of loans, securities or guarantees by the representative branch or branches of government of the borrower state) were not followed, or which involved clear misconduct by the lender (including bribery, coercion and undue influence), as well as debt contracted in violation of domestic and international law or which had conditions attached thereto that contravened the law or public policy.²⁰

The rule whereby states may not invoke their domestic law as justification for violating their obligations under international law²¹ is inapplicable in situations where the lender intended to violate or bypass fundamental provisions of domestic law, particularly of a constitutional nature, through a debt instrument entered into with the borrower. This is because such an agreement violates the principle of legality, fails to satisfy good faith, and breaches third parties’ legitimate expectations. Surely, the superior character of an agreement under international law was not meant to be used to blatantly bypass and violate fundamental constitutional provisions, breach human rights, and put third parties’ legitimate expectations into doubt.

This article aims to show that, despite the existence of an oppressive international financial architecture to which all states have succumbed, the creation of regional or other mechanisms to reduce debt in favor of human-based development is possible. The next

¹⁸ There are a variety of definitions and classifications of odious debt. See JEFF KING, *THE DOCTRINE OF ODOUS DEBT IN INTERNATIONAL LAW: A RESTATEMENT 4-5* (2016), who classifies odious debt in four categories, namely: war debts, illegal occupation debts, corruption debts, and subjugation debts. The latter type is that which is explored in this chapter and this book. It should be observed that the part of the Greek debt that was not assumed by a loan or other agreement (as explained below) is far broader than the concept of subjugation debts stipulated by King. See also Ilias Bantekas, *The Contractualization of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?* 10 *Glob. Constitutionalism* 1 (2021).

¹⁹ U.N. Conference on Trade and Development, *Sovereign Debt Workouts: Going Forward: Roadmap and Guidelines*, at 4 (April 2015).

²⁰ ILIAS BANTEKAS ET AL., *supra* note 15, at 10.

²¹ Int’l Law Comm’n, *Responsibility of States for Internationally Wrongful Acts*, art. 32, U.N. Doc. A/56/49 (Vol. 1) (2001).

section discusses the concept of unsustainable debt. followed by Section III analyzes the various stakeholders in sovereign debt management and their various objectives. Section IV explores the likelihood of more than one system of global finance, while Section V examines how this may be achieved through the mobilization of resources by means of a dedicated coalition. Finally, Section VI briefly examines the transformation of the existing foreign investment architecture from its race to the bottom to a development-based process designed to meet national development needs.

II. UNSUSTAINABLE DEBT

Debt unsustainability is the result of many factors. Chief among these are the absence of transparent and ethical lending norms, the privatization of credit-related services, and the dislocation of fundamental human rights from debt processes. The introduction of binding responsible banking rules in the field of sovereign loans is therefore imperative,²² hence the statement in the Monterrey Consensus that debtors and creditors possess a “shared responsibility” for unsustainable debt is an acknowledgement of the obvious.²³ In domestic law, if a bank grants a loan to a minor without their parents’ consent it could not retrieve any capital or interest from the parents. Equally, if the same bank were to lend money to a person that possessed no assets or other collateral it would risk losing its capital in case of non-payment by the debtor.²⁴ As a result, domestic retail banking is generally a cautious business, but this is not the case with sovereign lending (or investment banking for that matter) because of the special treatment afforded to financial institutions by states. Practice from the post-2008 financial crisis suggests that states are eager to re-capitalize even the most irresponsible banks with taxpayers’ money to the detriment of social spending. In late 2018, the United Nations Independent Expert on Debt and Human Rights launched his Guiding Principles on Human Rights Impact Assessments of Economic Reforms, which set out the human rights principles and standards that apply to states, international financial institutions, and creditors when designing, formulating, or proposing economic reforms.²⁵ It should be pointed out that even when sovereign debt is legitimate, it may none the less be unsustainable. A debt is generally unsustainable where:

it cannot be serviced without seriously impairing the ability or capacity of the government of the borrower state to fulfill its basic human rights obligations, such

²² UNCTAD set up its Principles on Responsible Sovereign Lending and Borrowing, the effect of which is discussed in CARLOS D. ESPÓSITO ET AL., *SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING 1* (CARLOS D. ESPÓSITO ET AL. EDS. 2013).

²³ International Conference on Financing for Development, *Report of the International Conference on Financing for Development* ¶ 47, U.N. Doc. A/CONF.198/11 (Mar. 18, 2002).

²⁴ Such an eventuality is regulated in advanced systems under consumer law and the application of strict rules against banks and financial institutions. In the context of the EU there are several instruments catering for consumer protection in the financial services sector. *See, e.g.*, Council Directive 2014/17/EU, 2014 O.J. (L 60) 34 (EU); Council Directive 2014/92/EU, 2014 O.J. (L 257) 214 (EU). on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

²⁵ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Economic Reforms*, U.N. Doc. A/HRC/40/57 (Dec. 19, 2018).

as those relating to healthcare, education, water and sanitation and adequate housing, or to invest in public infrastructure and programmes necessary for economic and social development, or without harmful consequences for the population of the borrower state (including a deterioration of the borrower state).²⁶

The glaring absence of any human rights considerations is evident in the assessment of debt sustainability.²⁷ When poor countries apply for debt relief, concessional funding, and regular lending, the creditors will have to assess the applicant's debt sustainability. In practice, debt sustainability is narrowly defined by the ability of a country to pay its debts based upon of its export earnings alone.²⁸ By way of illustration, if the projected export earnings of country X are US \$100 million in a given year and the annual repayments of interest and capital on its intended loan amount are US \$95 million, its debt will be considered sustainable and will be eligible for funding. This narrow method of assessment, however, fails to consider the country's expenditures for health, education, housing, infrastructure, and other social projects, as though they are irrelevant.²⁹ This method only supports the interests of the lenders. Hence, in the above scenario, the debtor country would be forced to meet its annual social expenditures with only US \$5 million, despite creditors' awareness that the real costs are closer to US \$20 million.³⁰ It is no wonder that campaigners are urging multilateral creditors to redefine debt sustainability as the level of debt that allows a country to achieve its MDG/SDGs targets.³¹ The Independent Expert on the Effects of Foreign Debt has suggested that:

Any concept of debt sustainability should include an assessment of what minimum expenditure is required to enable a government to meet its obligations to its citizens, including the provision of basic social services such as health and education. In

²⁶ TRUTH COMMITTEE, TRUTH COMMITTEE ON PUBLIC DEBT: PRELIMINARY REPORT 10.

²⁷ See ECON. GOVERNANCE SUPPORT UNIT, DEBT SUSTAINABILITY ASSESSMENTS: THE STATE OF THE ART (2018) [https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/624426/IPOL_IDA\(2018\)624426_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/624426/IPOL_IDA(2018)624426_EN.pdf) (distinguishing the EU from the IMF approach).

²⁸ See IMF, *Joint World Bank-IMF Debt Sustainability Framework for Low-Income Countries*, <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/39/Debt-Sustainability-Framework-for-Low-Income-Countries> (Mar. 12, 2020); see also IMF, *Assessing Debt Sustainability in Emerging Market Economies Using Stochastic Simulation Methods*, IMF Working Paper WP/05/226 (Jan. 2006).

²⁹ The Paris Club proclaims its commitment to debt relief programs for poorer nations through two general avenues: (1) longer repayment period (the maximum repayment period is now twenty-three years including six years of grace for commercial loans and forty years (including sixteen years of grace) for ODA loans); (2) debt cancellation, where for the poorest and most indebted countries the level of debt cancellation may reach 67 per cent. Despite these significant initiatives, the Paris Club's instruments and terms make no reference to the HDI, the MDGs or human rights in their assessment of debt sustainability.

³⁰ Conversely, banks must also act prudently in relation to their own lending and investment capacities. Prudential requirements mainly concern the amount of capital and liquidity that banks hold. The goal of these rules is to strengthen the resilience of the EU banking sector so that it can better absorb economic shocks, while ensuring that banks continue to finance economic activity and growth. See 2013 O.J. (L 176) 1; 2013 O.J. (L 176) 338.

³¹ See UNCTAD, DEBT SUSTAINABILITY AND THE SUSTAINABLE DEVELOPMENT GOALS, https://www.unescap.org/sites/default/files/Session2_5_Debt%20sustainability%20and%20the%20SDGsDaniel%20Munavar.pdf; Magdalena Bexell & Kristina Jönsson, *Responsibility and the United Nations' Sustainable Development Goals*, 44 F. FOR DEVELOPMENT STUD. 13, 13 (2017).

particular, human rights should be used as a basis for assessing debt sustainability and for the cancellation of all unsustainable debt. Such an approach would consider all indebted countries irrespective of their income and assess the level of debt they could carry without undermining their human rights obligations.³²

Sovereign debt not only hampers the global financial architecture, but it is also probably the most serious impediment to the full realization of all rights. It is also a major underlying reason for mass phenomena, such as irregular migration.³³ A multilateral (as opposed to discrete unilateral) approach would require regional (or highly indebted countries as a grouping) or global efforts to arrive at a treaty based on five key pillars. First, debt should be payable only when sustainable, calculated strictly on the basis of universally agreed human rights indicators.³⁴ Second, debt should be transparent and covered by a collective right to truth regarding its causes and origins.³⁵ Third, all parties involved in the accumulation of debt, namely lender states and international organizations, should bear responsibility where it is due.³⁶ Fourth, financial services and practices worldwide, including export credit agencies³⁷ and credit rate agencies,³⁸ should be regulated in such a way that ensures responsibility³⁹ and a ceiling on interest. It is unacceptable that most of global debt is interest-

³² Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, at 19, U.N. Doc. A/64/289 (2009).

³³ This is a relatively unexplored issue. *But see*, INT'L ORG. FOR MIGRATION, DEBT AND THE MIGRATION EXPERIENCE: INSIGHTS FROM SOUTH-EAST ASIA (2019); RANABIR R SAMADDAR, A POST-COLONIAL ENQUIRY INTO EUROPE'S DEBT AND MIGRATION CRISIS (SPRINGER SINGAPORE, 2016) (makes the link between migration and brain drain with the European debt crisis).

³⁴ *See Rep. on Indicators for Monitoring Compliance with International Human Rights Instruments*, at 3, U.N. Doc. HRI/MC/2006/7 (May 11, 2006).

³⁵ The only international instrument that obliges and at the same time entitles states to audit their debt is Council Regulation 472/2013, art. 7(9), 2013 O.J. (L 140) 8. National debt commissions, such as those of Greece, Ecuador, Argentina, and Brazil, have found this right to stem from their constitutions.

³⁶ *See* U.N. Conference on Trade and Development, *supra* note 19, at 23; which stipulates that: "A lender has a responsibility to make a realistic assessment of the sovereign borrower's capacity to service a loan based on the best available information and following objective and agreed technical rules on due diligence and national accounts."

³⁷ Neslihan Turguttopbas, *Export Credit Agency Activities in Developing Countries* 27 THE INT'L TRADE J. 281(2013); Geetha Muralidhar, *The Role of Export Credit Agencies in a Fast-growing BRIC Economy* 4 GLOB. POLICY 112 (2013).

³⁸ Frank Partnoy, *What's (Still) Wrong with Credit Ratings* WASH. L. REV., 21; John Ryan, *The Negative Impact of Credit Rating Agencies and Proposals for Better Regulation*, (Stiftung Wissenschaft und Politik Working Paper FG 1, 2012/Nr. 01,2012).

³⁹ The Eurogroup, which has been a key decision-maker in the post-2008 EU financial crisis, is an informal mechanism at ministerial level that discusses the shared responsibilities of EU member states related to the Eurozone. *See Eurogroup, COUNS. OF THE EUR. UNION*, <https://www.consilium.europa.eu/en/council-eu/eurogroup/>. In *Joined Cases C-105-109/15 P, Konstantinos Mallis et. al. v Eur. Comm'n and Eur. Cent. Bank*, ECLI:EU:C:2016:702, the CJEU found that the Eurogroup is an informal grouping of the euro area finance ministers, and as a result its acts could not be attributed to the Commission or the ECB. *But see, Joined Cases C-8-10/15P, Ledra Advertising Ltd et. al. v. Eur. Comm'n and Eur. Cent. Bank*, ECLI:EU:C:2016:701, where the CJEU held that where the EC Commission is involved in the signing of MoU within the framework of the European Stability Mechanism it is acting within the sphere of EU law. Therefore, it is bound to refrain from MoU that are inconsistent with EU law, including the EU Charter of Fundamental Rights.

generated (dwarfing the initial capital lent) or predicated on unconscionable practices in which banks invest little and sometimes no money but reap huge benefits to the detriment of entire populations.⁴⁰ The fifth, and final, pillar requires that foreign investment law and the law applicable to IFIs, such as the IMF and the European Central Bank (ECB), ceases being fragmented from general international law and particularly fundamental human rights and international environmental law.⁴¹

III. THE STAKEHOLDERS

Just like every battlefield, in the sphere of sovereign debt there are two major camps, or stakeholders. The first group consists of debt sustainability advocates (broadly understood), while the other group is comprised of all those who view debt as a necessary component of the existing international financial architecture and promote debt institutions and mechanisms.⁴² The first camp is rather diverse, encompassing groups advocating in favor of a wholesale elimination of sovereign debt, while on the other side of the spectrum are those favoring only those debts that are sustainable, lawful, and in compliance with fundamental human rights.⁴³

These two basic stakeholders are both far yet close in their assessment and perspectives on debt. Their respective differences are clearly attributable to their professional or societal context, their cultural background, and their economic contexts, among others, all of which dictate their ‘language’ and ideas about debt. If one’s entire professional life has been spent in a bank that provides loans, which work well for some debtors but not so well for others, one’s viewpoint of financial institutions will be painted by the vision that success depends on how well you can manage money. If one were to adapt this to a much broader framework of an international financial institution (IFI) dealing with heavily indebted nations suffering from poor governance structures, the viewpoint would not be much different.⁴⁴ A senior employee at the IFI whose personal performance is assessed by reference to loss and profit considerations will naturally determine an LDC’s debt from an arithmetical perspective, without assessing whether his or her arithmetical approach enhances opportunity, enablement and choice. This is irrelevant to the personal traits of said employee but rather is

⁴⁰ There do exist ethical financing systems that are not predicated on asymmetrical risk between all lender and borrower, namely Islamic finance. At its heart lies the absolute prohibition of a guaranteed rate of return for the lender (i.e. irrespective of whether the borrower makes a profit or loss), which necessarily eliminates the imposition of interest-like profit (*riba*). See Qur’an 2:275 (Yusuf Ali), stating that “those who devour usury will not stand excepts as stands one whom the Evil one with his touch hath driven to madness”. See also Mahmoud A. El-gamal, *An Economic Explication of the Prohibition of Gahrar in Classical Islamic Jurisprudence* (Rice Univ. Press) 2001; Mir Siadat Ali Khan, *The Mohammedan Laws against Usury and How They Are Evaded*, 11 J. OF COMPAR. LEGIS. AND INT’L L. 233.

⁴¹ See Andreas Kulick, *Global Public Interest in International Investment Law* (2012).

⁴² See W. Mark C. Weidermaier & Mitu Gulati *International Finance and Sovereign Debt in Oxford Handbook of Law and Economics* 482-500 (Francesco Parisi (ed., 2017); Lee C. Buchheit & G. Mitu Gulati, *Restructuring Sovereign Debt After NML v. Argentina*, 12 CAP. MKT. L. J. 224.

⁴³ Eric Toussaint, *The Debt System: A History of Sovereign Debt and their Repudiation* (2019).

⁴⁴ See Fred Bell, *Culture, Conduct and Ethics in Banking: Principles and Practice* 222-65 (2019); specifically, regarding the banking culture of the World Bank Group, see Steve Berkman, *The World Bank and the Gods of Lending* (2008).

conditioned on the institutional choices of IFIs and states with drawing rates, which are further translated into managerial directives. Liquidity must translate into development. If development does not materialize, the only possible conclusion that can be drawn, according to this camp, is that the indebted population is not working hard enough, or that its people are unable to take advantage of the resources available to them.⁴⁵

On the other hand, most debt campaigners see debt as one of the many flaws in the existing international financial architecture. How is it that resource-rich countries are among the poorer in the world, at least in terms of the Human Development Index (HDI) of their people? To take the matter further, is it fair that the industrialized North, which boasts few natural resources, reaps the financial benefit of the resources of the South, which has the highest possible HDI for its people? The anomaly and unfairness of this global financial architecture have been explained elsewhere in much detail⁴⁶ and need not be replicated here. However, it deserves pointing out that each stakeholder cannot help but situate its arguments within this architecture. This is because neither group can conceive of a world existing without it. Even radical calls to eliminate debt do not always consider operating outside existing boundaries of international finance and international trade.⁴⁷

This paper argues that it is unreasonable to expect the pro-debt camp (let us call them that, although this is far too narrow and does not do justice to the broader spectrum of this camp) to give up on the existing global financial architecture. It is equally unrealistic to assume that their opponents will argue in favor of a wholesale elimination of such an architecture. If a middle ground does exist, and this paper argues that it does, it must be structured in such a way that attracts sufficient support so that it may challenge the existing system. Consequently, this new system must find a common language with the system it wishes to oppose, while at the same time reinterpret fundamental notions for which it stands for, namely sustainability, high standard of living, protection of fundamental human rights, debt repudiation and global financial cooperation. All of these are inter-linked and indivisible in nature.

IV. TOWARDS A PARALLEL SYSTEM OF GLOBAL FINANCE

Parallel systems of finance are generally possible and prevalent within domestic legal systems. Alongside formal banking structures there exists a plethora of informal banking institutions, such as informal remittance systems, private borrowing, family loans and many others.⁴⁸ Although the formal finance system may not only disfavor, but outright

⁴⁵ See generally against this notion, Marlene Kim, *Are the Working Poor Lazy?*, 41 CHALLENGE 85 (1998).

⁴⁶ Jeffrey G. Williamson, *Trade and Poverty: When the Third World Fell Behind* (2013).

⁴⁷ Regional or like-mind financial architectures, such as BRICS or ECOWAS are based on free market models with characteristics similar to the neoliberal model of the World Bank Group. See Sonia E. Rolland, *The BRICS' Contributions to the Architecture and Norms of International Economic Law* 107 PROC. OF THE ANN. MEETING (AM. SOC'Y OF INT'L L.) 164.

⁴⁸ A good illustration are the underground banking systems, known as *hawala*, which operate as a form of unlicensed bank and is used for making money transfers around the world with little regulation. Although in the post-9/11 era it is typically associated with terrorist financing, it was and continues to be the lifeline for poor communities relying on remittances from relatives working abroad. See Charles B. Bowers, *Hawala, Money*

prohibit some, or all, of these for a variety of reasons (such as tax evasion), they exist because of their convenience to their end users.⁴⁹ By way of illustration, a low paid (and perhaps undocumented) foreign laborer in Europe is not allowed to open a bank account, let alone afford the fees for inter-bank international transfers (even if his family possessed a bank account in their home country). As a result, he or she is forced to transmit through informal means. In equal measure, in post-conflict or conflict-ridden societies, one typically encounters informal or tribal systems of civil and criminal justice. Such informal justice systems usually operate alongside formal systems of justice.⁵⁰ Despite the informality of the former, its end users may still prefer it over its formal counterpart, on account of some of its qualities. For instance, informal systems may be absent of corruption, have legal certainty, be quicker, and be free from costs.

In the sphere of sovereign debt and finance, regulation is formal and typically regulated by treaties or private agreements. These treaties and agreements are, however, inextricably linked to other spheres of regulation and subject to a distinct set of sources, as is the case with human rights and environmental law. While all of these may be viewed as forming a broader regulatory regime, there is a tendency in some instances to distinguish each sphere from the other and treat them as parallel universes. Parallel systems of regulation are well known in international law. This process, conveniently known as fragmentation,⁵¹ is wholly artificial because it serves the goals and aspirations of the powerful stakeholders that are behind it. The reason is that the rules, even customary in nature, found in one regime are not considered applicable in the other. Foreign investment law is usually cited as a key (but not the only) field of fragmentation. There, it is common ground that the investment obligations of home states override all their human rights and environmental obligations, even if these emanate from treaty and customary law.⁵² Investment tribunals have no problem with the notion that investment treaties exist as distinct spheres of regulation from other international law obligations and that these spheres are so distinct that they cannot conflict with each other (and that even if they were deemed to be in conflict, investment obligations are supreme).⁵³

Laundering, and Terrorism Finance: Micro-lending as an End to Illicit Remittance, 37 DENVER J. INT'L L. & POL. 379 (2009).

⁴⁹ Special economic zones are now mushrooming throughout Asia. Some of these are now centers of excellence, with top quality courts and laws. Key among these are the Qatar Financial Center (QFC), the Dubai International Financial Center and the Astana International Financial Center (AIFC). See Horst Eidenmuller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J OF GLOB. LEGAL STUD. 707. See also *International Commercial Courts: The Future of Transnational Adjudication* (Georgios Dimitropoulos, Stavros Brekoulakis (eds.) Oxford Univ. Press 2021).

⁵⁰ See Donald L. Hafner & Elizabeth B. L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability can and Should work Together* 30 B.C. INT'L & COMP. L. REV. 91 (2007); Pacific Manirakiza, *Customary African Approaches to the Development of International Criminal Law*, in Jeremy Levitt, *Africa: Mapping New Boundaries in International Law* 44 (Hart ed., 2008).

⁵¹ See Anne van Aacken, *Fragmentation of International Law: The Case of International Investment Protection* 17 FIN. YEARBOOK OF INT'L L. 91 (2008).

⁵² Edward Guntrip, *Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law*, 65 INT'L & COMPAR. L.Q. 829 (2016).

⁵³ Transnational law may also be said to compete with international law, albeit not necessarily in conflicting terms. See generally ENFORCEMENT OF TRANSNATIONAL REGULATION: ENSURING COMPLIANCE IN A GLOBAL WORLD (Fabrizio Cafaggi ed., 2012).

Even so, there are strong calls for the systemic integration of foreign investment law in the general sphere of international law.⁵⁴ The emergence of transnational law⁵⁵ means that states are happy with the idea of a party autonomy-regulated sphere that sits in the middle of domestic and international law, in which both state and non-state actors are participants.⁵⁶

If this situation exists in a variety of forms at the micro and macro level, then it is not at all unreasonable that two parallel systems of international financial regulation can, or should, exist. The key objection to such an eventuality will no doubt arise from the chief proponents of the pro-debt camp. The existing neo-liberal financial architecture rests on the premise that the resource-rich Global South will supply the industrialized Global North with cheap raw material, with which the latter will manufacture goods that will be sold at several times the value of the raw materials.⁵⁷ The Global South will purchase these manufactured goods at high prices and mortgage its natural resources, thus going into a spiraling debt that requires 'bail out' loans from IFIs and private banks. Traditional financing will then overshadow the measures imposed for the repayment of debt, namely: the granting of preferential treatment to the companies of the Global North, succumbing to calls to privatize lucrative monopolies, corruption and others.⁵⁸ Why would the financial institutions of the Global North abandon such a system in favor of a radical reappraisal that risks bringing into complete disarray all those things that distinguish the haves from the have not? The only plausible incentive would be distribution of wealth in such a manner that all people can increase their standard of living, even if that means a sharp reduction in the profits of the financial world in the Global North.⁵⁹

⁵⁴ Indeed, there is a growing body of practice and scholarly opinion advocating in favor of the principle of systemic integration between human rights and foreign investment obligations in accordance with article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT). See Silvia Steininger, *What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration*, (2018) 31 LEIDEN J. INT'L L. L. 33 (2018).

⁵⁵ The ultimate validation of *lex mercatoria* (of offshoot of transnational law) rests on the fact that not all legal orders are created by the nation state and accordingly that private orders of regulation can create law. Gunther Teubner, *Global Bukovina: Legal Pluralism in the World Society*, 15 GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

⁵⁶ See Ilias Bantekas, *The Contractualization of Public International Law* 17 INT'L J. L. IN CONTEXT 100 (2021).

⁵⁷ And equally, that labor-intensive work will be outsourced to the Global South in order to reduce the cost of production. This allows the North to concentrate on the global services sector, whose fees are notoriously high. Richard M. Locke, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* (2013). For a good analysis of the genesis and features of the phenomenon of global value chains see William Milberg & Deborah Winkler, *OUTSOURCING ECONOMICS: GLOBAL VALUE CHAINS IN CAPITALIST DEVELOPMENT* (2013).

⁵⁸ It is fictitious to claim that debtor states *consent* to the conditionalities agreed with the IMF or the Paris Club. The international finance architecture is structured in such a way that developing states or states in distress are unable to make alternative choices. See Lorand Bartels, *HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENTS* (Paul Craig & Gráinne de Búrca eds., 2005); Heather Grabbe, *THE EU'S TRANSFORMATIVE POWER: EUROPEANIZATION THROUGH CONDITIONALITY IN CENTRAL AND EASTERN EUROPE* (2005). In many cases, conditionalities are forced upon states through political and financial pressure and sometimes through unilateral or multilateral sanctions. See Kris James Mitchener & Marc-D. Weidenmier, *Supersanctions and Sovereign Debt Repayment* 29 J. INT'L MONEY AND FIN. 19, who view these super-sanctions as a form of neo-imperialism.

⁵⁹ Innovation is a crucial factor in anti-poverty planning because of its potential to create meaningful primary and secondary employment. But clearly industrialized nations fear that too much innovation in the Global South

But this is clearly not a viable incentive, and it is evident that any such outcome will be fought with some vigor if it were ever espoused.

Let us imagine that the Global South was united and committed enough to adopt a parallel financial architecture. What would that system look like and what would be its key pillars?

a) Members would be committed to a form of growth that promotes personal wellbeing in accordance with the modern manifestations of the HDI and which is sustainable in the long run.⁶⁰ This is a human rights-based growth and not a GDP-centered growth. Human-centered growth is both sustainable and irreversible, in the sense that people enjoying a high standard of living cannot accept anything falling below this.⁶¹

b) On the basis of pillar (a), which is foundational, it follows that states will not accept any debt that is incurred contrary to human-centered growth and will not repay a debt that is unsustainable, or which fails to observe the fulfillment of a human-centered growth.⁶²

c) Global South members would have to agree on their cut-off policy from the existing neoliberal architecture and, in the process, explain how they plan to enhance human development. This is by no means a straightforward proposition.⁶³ Moreover, the ultimate aim must be to reach a stage of development whereby the two camps can comfortably sit at the same table and negotiate a sensible merger of the two parallel systems. But whatever is agreed upon should not detract from the aim of human development and wellbeing as a universal value and norm setter. Any new, parallel, regional financial architecture that purports to free nations from illegal, odious, and unsustainable debt must necessarily put in place a bottom-up participatory framework that provides fundamental human rights to all, promoting human development to the highest possible degree. This may consist of a system that is radically different from neoliberal economics with the aim of eradicating the roots of poverty and lack of choice and opportunities. Such a system requires that public wealth and natural resources be allocated in a manner that benefits everyone equally. Under the current system, public wealth is

will make it wonder what value is left in the Global North. See Clayton M. Christensen, Efonso Ojomo, Karen Dillon, *THE PROSPERITY PARADOX: HOW INNOVATION CAN LIFT NATIONS OUT OF POVERTY* (2019).

⁶⁰ See Ilias Bantekas & Lutz Oette, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE*, 619-66 (3rd ed. 2020).

⁶¹ Ilias Bantekas, *Wealth and Growth-based Policies have Augmented Global Poverty and Eroded Human Rights: A Return to Human-Centered Thinking*, 1 INT'L HUMAN RIGHTS L.REV. 30 (2012).

⁶² *Id.* at 32-36.

⁶³ In the event of conflicts between national constitutions and BIT obligations, several countries have been forced to take a stand. South Africa, eg, adopted the Promotion and Protection of Investment Act in 2013, after a commissioned report concluded that BITs were incompatible with s 28 of the South African Constitution, which concerns expropriation and compensation. Countries in South America have also gone ahead to denounce BITs through the so-called Bolivarian Alternative for the Americas.

only available to an elite few and it is in their favor to exacerbate the current state of inequality.

Even if such an ideal situation was attained, how would the Global South survive the political, financial, and perhaps even military backlash from a disgruntled Global North?⁶⁴ One should also take into account that it would be inconceivable for a domestic court to compel a person to service its debt if his or her earnings did not suffice for the basic sustenance needs of his or her family.⁶⁵

V. MOBILIZING A COALITION FOR A PARALLEL FINANCIAL SYSTEM

International law has gone through several changes in the last two decades, but many of these have remained under the radar, chiefly because international law scholars (at least those who publish) deal with classical aspects of this discipline and, in any event, many, but certainly not all, are not in a position to fully appreciate and apprise themselves of developments happening in the practice of law. The chief among these developments, for the purposes of this paper, is the gradual elimination of treaties in favor of more flexible mechanisms, such as (mere) agreements, memoranda of understanding (MoU),⁶⁶ contracts (under the law of a particular state),⁶⁷ self-regulation,⁶⁸ and others. What all these have in common is the absence of the constitutional and other formalities that accompany treaties,

⁶⁴ The literature is replete with sovereign states and federated states that have become insolvent, yet rose later to financial health. Michael Waibel, SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS, 3 – 19 (2011).

⁶⁵ Many liberal democracies, such as Germany, have elevated universal social welfare to a constitutional principle. Grundgesetz [GG][Basic Law], Art. 20(1), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (establishing the so-called *Sozialstaatsklausel*, or social state principle which obliges the government to provide the minimum core ESC rights so that people can live with dignity.) (Bundesverfassungsgericht) [BVERFGE][Federal Constitutional Court] May 29, 1990, 1 BvL 20, 26, 184 & 4/86 (Ger.) (interpreting this minimum core to include essential foodstuff, housing, clothing and healthcare.) This has given rise, among other things, to a constitutional entitlement to a minimum of benefits, as decided by the Federal Administrative Court. See BVERFGE 1, 159 1954.

⁶⁶ Non-Paris Club creditors, for example, typically enter into bilateral agreements with debtor states, either under the HIPC or independently of it. Numerous bilateral agreements have been concluded in this manner whether as treaties or MoU. See IMF, *Enhanced Heavily Indebted Poor Countries Initiative – Status of Non-Paris Club Official Bilateral Creditor Participation*, HIPC Initiative ¶ 7 – 11 (Oct. 2007). In Case C-258/14, *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others* ECLI:EU:C:2017:448, ¶ 36 (Jun. 1, 2017) the CJEU came to the conclusion that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under art 267(1)(b) TFEU, and hence susceptible to interpretation by the Court.

⁶⁷ A large number of transnational agreements include an English law governing clause, for part or all of the contract. See Michael Joachim Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles* 23 UNIF. L. REV. 15 (2018). Moreover, even closed systems, such as Islamic finance, are generally open to concurrent choice of law clauses in pertinent agreements, namely English and Islamic law. See, e.g. *Sanghi Polyesters Ltd India v. The International Investor KFCF (Kuwait)*, [2000] WL 389643 1 NIQB.

⁶⁸ E.g. Handelsgesetzbuch [HGB][Commercial Code] §346 of the German Commercial Code states that “due consideration shall be given to prevailing commercial custom and usages concerning the meaning and effect of acts and omissions among merchants”. See also Michael D. Bordo & Anna J. Schwartz, *The Performance and Stability of Banking Systems under Self-Regulation: Theory and Evidence* (1994) 14 CATO J.

thus allowing government departments to enter into these agreements without the need for parliamentary scrutiny or approval.⁶⁹ While these mechanisms have been the cornerstone for bypassing national parliaments in order to push through the back door severe austerity measures against indebted states,⁷⁰ they can also serve a useful purpose in order to establish a parallel global financial order. Clearly, such mechanisms rely on a good deal of trust, interdependency, and in some cases an imbalanced and asymmetrical power relationship between the participating stakeholders.

At present, there are several binding instruments in the form of treaties that oblige states to retain and succumb to the existing neoliberal financial architecture. These consist of the various World Trade Organization (WTO) agreements; commitments undertaken on the basis of the Articles of Agreement of the World Bank Group, chiefly the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF); and finally bilateral or regional agreements on investment, trade, commerce etc. The WTO agreements effectively dictate that states must eliminate all barriers (subject to exceptions) to the free flow of cross-border trade, while commitments under the World Bank agreements concern monetary stability but do not otherwise entail extensive positive obligations on the part of member states.⁷¹

Investment agreements typically require that host states provide certain guarantees to foreign investors, such as fair and equitable treatment, full protection and security, as well as other stipulations in the relevant treaties.⁷² Of the three categories of agreements identified above, the first (WTO) and last (investment agreements) effectively inhibit states from realizing their developmental potential, but it should be emphasized that if these operated on

⁶⁹ Bordo & Schwartz, *supra* note 68 at 453.

⁷⁰ In *BCB Holdings Ltd and Belize Bank Ltd v Attorney-General of Belize*, a newly elected Belize government repudiated a tax concession granted to a group of companies by means of a settlement deed negotiated by its predecessor because it had not been approved by the Belize legislature, was confidential (hence non-transparent) and was manifestly contrary to the country's tax laws. The Caribbean Court of Justice argued that whether or not the concession violated public policy should be assessed by reference to 'the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize' as well as international public policy. The tax concession could only be considered illegal if it was found to breach 'fundamental principles of justice or the rule of law and represented an unacceptable violation of those principles.' It should be noted that BCB and the Bank of Belize bypassed the CCJ by seeking to enforce the award in New York and ultimately succeeded. *BCB Holdings Ltd. v. Gov't of Belize*, 650 Fed. Appx., 17 (D.C. Cir. 2016).

⁷¹ Ilias Bantekas, *Sovereign Debt and Self-Determination in ILIAS BANTEKAS & CEPHAS LUMINA SOVEREIGN DEBT AND HUMAN RIGHTS* 267 (2018). Trade liberalization encompasses tariff barriers and non-tariff barriers. As far as the former is concerned, the term tariff is broad and includes practices such as duties, surcharges and export subsidies. Non-tariff barriers include licensing requirements, quotas and manufacturing standards, among others. In the 1970s developed countries were allowed to grant preferential tariffs to imports from LDCs, a system known as Generalized System of Preferences (GSP), which constituted an exception to the most favored nation (MFN) principle, itself a cornerstone of GATT and later the World Trade Organization (WTO). This was formalized in 1979 through an instrument known as the Enabling Clause, arts. 1, 5 and 7. See Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Tokyo Round Agreements, Nov. 28, 1979. This remains in force under General Agreement on Tariffs and Trade 1994, WTO art. 1(b)(iv), (Jan. 1, 1995). See Sonia E. Rolland, *Developing Countries Coalition at the WTO: In Search of Legal Support* 48 HARV. INT'L L. J. 487 (2007).

⁷² ILIAS BANTEKAS, AN INTRODUCTION TO INTERNATIONAL ARBITRATION 308-17 (2015).

a human rights-based approach, they have all the attributes to make trade and investment the true cornerstones of global development.

Following the political mobilization of like-minded states, certainly at regional level (and perhaps beyond), it is important to establish the level of commitment under the three types of agreements identified above and then plan ahead to either re-negotiate⁷³ them (as a group) or denounce them in accordance with the procedures laid down in these agreements. It is beyond the narrow confines of this paper to examine all the particularities of this eventuality, but it suffices to say that even a procedurally lawful exit from a treaty does not release a state from obligations existing prior to its denunciation.⁷⁴ But certainly, obligations arising from prior asymmetric relationships, and which are antithetical to the financial and developmental interests of a state, suffer from illegitimacy and odiousness; a key aim of the suggested parallel financial system is to denounce them as odious and illegal on the basis of general principles of contract law.⁷⁵

Once all the appropriate denunciations, clarifications, and (possible) re-negotiation have been made, or are on the way to being finalized, the coalition can then put into place its own framework agreement. This, of course, will have been planned in advance. We have already elaborated on the fact that its foundation will be its human rights-based approach and the developmental value to its end users. A disclaimer should perhaps be made at this point, this paper makes no assumptions about the governance quality of the participants. It is assumed

⁷³ Tanzania recently repudiated some of its BITs and rescinded certain long-standing concessions that profited solely its concessionaires, but not the state and its people. See Peter Kasanda et al., *Regulatory Changes in Tanzania's Mining Sector* (Mar. 4, 2019), <https://www.mondaq.com/mining/787932/regulatory-changes-in-tanzania39s-mining-sector>.

⁷⁴ Article 42(2) of the Vienna Convention on the Law of Treaties (VCLT) posits the sensible rule that removing one's consent to be bound is regulated by the treaty in question or general international law as codified in articles 42ff VCLT. See Vienna Convention on the Law of Treaties, Art. 42, Jan. 27, 1980, 1155 U.N.T.S. 331. In investment arbitration, it is not uncommon when host states denounce a bilateral or multilateral investment treaty for investors to fear hostile actions by the host state. As a result, even those investors that had considered initiating arbitral proceedings as a result of a breach will rush to submit a notice of arbitration. Bolivia officially denounced the ICSID Convention on 31 October 2007. In *E.T.I. Euro Telecom Int'l N.V. v. Bolivia*, ICSID Case No. ARB/07/28, Requirements for the adoption of provisional measures, ¶ 86 (Oct. 31, 2007), which was submitted to ICSID arbitration but subsequently withdrawn, the question was whether the six-month period in Article 71 ICSID Convention commenced from the date of the actual denunciation or whether it required an acceptance (additional to Bolivia's offer) by ICSID. Two cases were submitted against Venezuela during the six-month period but in respect of breaches committed prior to its denunciation. See *Saint-Gobain Performance Plastics Europe v. Venezuela*, ICSID Case No. ARB/12/13 (Dec. 12, 2019) and *Valle Verde Sociedad Financiera SL v. Venezuela* ICSID Case No. ARB/12/18 (Jul. 5, 2012). Awards are still pending.

⁷⁵ At this point it is important to note that English law as the governing law of contracts is prevalent in commercial transactions. It is also becoming common in non-treaty agreements between states with other states, or with non-state entities. English contract law is notorious for its deference to the arm's length principle and the absence of good faith (unless the parties specifically requested it), which is the key ingredient for odious, unconstitutional and illegal agreements that are detrimental to the developmental potential of weak signatory states. English contract law is equally rather indifferent to the foundational rule 'gross disparity' in the vast majority of jurisdictions, whereby the existence of a gross disparity in a contractual relationship that leads to a severe detriment for the weaker party is sufficient reason for the termination of the contract. That is why exceptional cases such as *Yam Seng Pte v. International Trade Corp. Ltd.*, [2013] QB ¶EWHC 111, 119-54 (Eng.), attempt to make very neat inroads against entrenched doctrines, but hardly attract universal support. In the case at hand, the Court made the point that in long-term contractual relationships the parties cannot simply refuse to act in good faith as reliance on good faith must be presumed in such contracts.

that if a coalition of indebted states truly infuses human rights based and developmental approaches in every aspect of this scheme, most aspects of poor governance and lack of transparency will be eliminated.⁷⁶ By definition, these qualities require strong civil society, inclusiveness, enhanced governance, and mobilization of domestic resources, both natural and financial resources, as well as human capital.

It is important that the coalition reaches consensus on the type of instrument and associated mechanism in respect of their parallel architecture. A treaty may take a long time to negotiate and ultimately be watered down in order to accommodate the individual desires of all participants, ultimately leading to fatigue and abandonment. It is advisable that the parties choose a flexible instrument by which to express their political will, but in a standard-setting manner comprised of institutions and mechanisms that are readily available and functional.⁷⁷ A key function of the coalition's standard-setting goals must be to connect and interface with the neoliberal architecture and find ways of working towards development and social justice. It is in no way suggested in this paper that parallel architecture should become an isolated island. On the contrary, standard-setting mechanisms are set up to evolve antiquated practices and institutions, interaction with neoliberal institutions is key to this goal. Overall, a 'soft' instrument expressing strong political resolve, with clear and identifiable objectives, and an emphasis on established principles of international law and international human rights will not be taken lightly.⁷⁸

The next step, which will hopefully bring the other camp to the negotiating table, is the mobilization of all pertinent resources.⁷⁹ A political declaration clad in a 'soft' instrument that simply declares debts odious and illegal will not go far, and at some point, will simply either blow up or sink under pressure. It is of the utmost importance for the coalition to demonstrate its resolve to human rights-based approaches to development and finance, and the best way to convince others of its sincerity in the matter – and that this is not simply a façade for unilateral absolution of otherwise good debt – is by committing its own resources

⁷⁶ International aid is typically nowadays channeled to recipients (both states and non-state entities through independent trust mechanisms, which ensure transparency and good governance. See Ilias Bantekas, *The Emergence of the Intergovernmental Trust in International Law*, 2011 Brit. Y.B. Int'l L. 81,224.

⁷⁷ Although regional solidarity is rare because of poor economic and political integration, it is not uncommon. The African Union rallied against the indictment of former Sudanese dictator, Al-Bashir, following his indictment by the ICC and in fact set up a special chamber in the African Court of Justice to handle the complementarity requirements arising from the 1998 Rome Statute of the ICC. See THE INTERNATIONAL CRIMINAL COURT AND AFRICA (Charles Chernoh Jalloh & Ilias Bantekas, eds., 2017).

⁷⁸ The SDGs constitute an excellent example of a political commitment that was unlikely to transform itself into a treaty, but which culminated in countries largely honoring their financial commitments. See FINANCING DEVELOPMENT: THE G8 AND UN CONTRIBUTION (Michele Fratianni, John J. Kirton & Paolo Savona, eds., 2016); Abdel Hamid Bouab, *Financing for Development, the Monterrey Consensus: Achievements and Prospects* 26 MICH. J. INT'L L. 359-69 (2004).

⁷⁹ National resource mobilization is key to good governance, maximization of resources, local ownership and attraction of co-financing. See, e.g., Charles C. Fonchingon, Lotsmart N. Fonjong, *The Concept of Self-Reliance in Community Development Initiatives in the Cameroon Grassfields* 12 NORDIC J. AFR. STUD. 196 (2003); Organisation for Economic Co-operation and Development, *Development Co-operation Report 2014 Mobilising Resources for Sustainable Development*, 2014 CHAIR DEV. ASSISTANCE COMM. 1, 421, <http://dx.doi.org/10.1787/dcr-2014-en>.

to the cause. I am only going to offer a sketchy account of how this may be achieved, but much research is needed in order for a detailed plan to be set out.

My starting point is that most developed countries outside of Europe are resource-rich. If a regional or near-continental grouping of such states coalesces towards a common purpose this will culminate in the concentration of 'real' wealth, as opposed to monetary (cash or cash-like) wealth, which requires that raw material are converted into patentable finished products.⁸⁰ It is not suggested that the coalition of indebted states halt its sale of raw materials to its industrialized counterparts, or that it stops extracting said resources until it reaches such a level of technological expertise⁸¹ that allows it to make its own industrial use of its raw materials. There is no guarantee as to when such expertise will be acquired, if at all, and, in any event, the aim of the coalition is to re-adjust the key tenets of the existing global financial architecture, not to rediscover the wheel and make deadly enemies. Two strategies are available once the coalition achieves a unanimous voice among a critical mass of member states, as follows:

- a) Making access to natural resources contingent on true global co-operation between rich and poor in such a manner that exporting states are 'paid' in development, in conformity with the HDI and the Sustainable Development Goals (SDGs). By 'payment' we mean a comprehensive strategy that allows for extensive technology transfer, extensive capacity building, human development of the highest level, and governance building (both at the public and private level).
- b) Commitment – as supplemented by a concrete, independent mechanism – to use natural resources to bring the coalition's developmental strategy into full action. This will require a common policy on all taxes involved and more importantly it will entail an audited trail of how much is produced, its price and where it is spent.⁸² This is a process in which the input of foreign investors is crucial, and it is in the interests of all stakeholders that an independent mechanism exists so that all proceeds are accounted for and used in line with the developmental plan.
- c) Member states will still require access to international finance, particularly as regards infrastructure development until such time that they possess sufficient

⁸⁰ The Democratic Republic of the Congo (DRC) produces almost 90 per cent of cobalt. Cobalt is not only the key component of lithium-ion batteries used in laptops and mobile phones, but increasingly it is being used to replace petrol and diesel engines in electric cars. Clearly, Cobalt is more precious than gold and its prices is predicted to soar. Yet, the DRC is one of the poorest nations on the planet. See Nat'l Minerals Info. Ctr., *Cobalt Statistics and Information*, USGS Science for a Changing World, U.S. GEOLOGICAL SURV. (2021), www.usgs.gov/centers/nmic/cobalt-statistics-and-information.

⁸¹ Most, if not all, resource-rich countries in the Global South do not possess the expertise, capacity, and finance to undertake the entire gamut of upstream and downstream operations required for the extraction of natural resources. Regional project finance that is capable of financing the entire, and long-term, cycle of large infrastructure projects is clearly a game changer. See ROBERT J. CLEWS, PROJECT FINANCE FOR THE INTERNATIONAL PETROLEUM INDUSTRY (2016).

⁸² The oil-price wars between Saudi Arabia and Russia during early 2020, which led to the collapse of the oil market with negative prices is a good indication why an OPEC-style consensus is necessary.

industrial capacity to reap the benefits of their natural resources.⁸³ However, members must declare a common policy whereby no financial arrangement may contain conditions that affect their developmental plans or the enjoyment of human rights as set out above.

The list can certainly be more detailed, but the object of this brief exercise is simply to provide the fundamental building blocks of the suggested parallel regional financial architecture. The final part of this paper will discuss the idea of a holistic developmental plan, through which all domestic and international commitments will be filtered.

VI. FILTERING FOREIGN INVESTMENT THROUGH A HOLISTIC DEVELOPMENT STRATEGY

In this final section the aim is to show how a holistic developmental plan can permeate and dictate every aspect of a state's, or coalition of states', public policy. So far, we have only provided fragments of how such a general policy may operate, in lieu of reliance on external funding. We have already stated, however, that the objective is to build maximum possible capacity and render universal wellbeing the ultimate goal. In this section we demonstrate how this can be achieved through a development-oriented policy, which at present is effectively divorced from any human rights or developmental imperatives. If BITs are unable to bring about developmental objectives, then they can, and should, be replaced by investment laws that, on the one hand, offer sound investment guarantees, while on the other set out clearly their developmental agenda. The benefits for investors currently found in BITs may just as well be served by sufficient exhibition of 'credible commitments' in domestic laws.⁸⁴ There is no conclusive qualitative or quantitative evidence in the existing literature concerning a binary effect between BITs and increased FDI flows.⁸⁵ It is also natural and undoubted that BITs were neither designed with a view to being, nor are necessarily conducive to, sustainable development. Kollamparambil cites Robert Keohane's interpretation of diffused reciprocity⁸⁶ and argues that there is an existence of "issues with

⁸³ This will require a mega-developmental bank that has sufficient capital of its own, as well as access to private finance. This is quite different from the current organization of regional development banks in Africa and Asia. Nathaniel Lee, *How Negative Oil Prices Revealed the Dangers of the Futures Market*, CNBC (Jun. 16, 2020, 9:49 AM), <https://www.cnbc.com/2020/06/16/how-negative-oil-prices-revealed-the-dangers-of-futures-trading.html>.

⁸⁴ On 'credible commitments', see Jay Dixon & Paul Alexander Haslam, *Does the Quality of Investment Protection Affect FDI Flows to Developing Countries? Evidence from Latin America*, 39 *THE WORLD ECON.* 1080, 1083 (2016).

⁸⁵ See Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?* 3 *WORLD DEV.* 31, 1567-1585 (2005); Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation* in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS*, 395 (Karl P. Sauvant & Lisa E. Sachs eds., 2009); Umakrishnan Kollamparambil, *Bilateral Investment Treaties and Investor State Disputes* (Econ. Research S. Afr., Working Paper 589, 2016, https://econrsa.org/system/files/publications/working_papers/working_paper_589.pdf).

⁸⁶ Robert O. Keohane, *Reciprocity in International Relations*, 40 *INT'L ORG.* 1 (1986).

diffused reciprocity imbibed in BITs leading to the unequal distribution of rights and obligations between countries.⁸⁷

All the more reason for arguing in favor of replacing BITs with strong and development-oriented investment laws is the bitter experience of many developing countries with investment guarantees in BITs that effectively curtailed, if not wholly inhibited, their regulatory power as regards the environment and sustainable development.⁸⁸ India, for example, has argued that the necessary regulation of many aspects of sustainable development, such as drinking water, health care standards and environmental law were challenged by foreign investors as violations of its existing BITs.⁸⁹

The claim set forth in this piece for reforming the existing BITs-based system of foreign investment with a development-oriented framework is not new to international law. The contribution of investments to the economic development of host states was one of the criteria set out in the *Salini* case by an ICSID tribunal,⁹⁰ even if it has since fallen from grace. If human development is to become the key performance criterion in the investment laws of developing host states, it is necessary that the role of investors and how such a role is to be measured and quantified is made clear.⁹¹ For purposes of consistency, the pursuit of human development should be predicated on the Right to Development Declaration and the HDI, but this still leaves much space for the precise requirements demanded of investors.⁹² As far as this author is aware, there is no blueprint for a Developmental Impact Assessment (DIA), although human rights impact assessments are now commonplace in international development assistance agreements, as well as in the obligations of states operating through IFIs and inter-governmental organizations.

General Comments by treaty bodies emphasize the obligation of states to carry out Human Rights Impact Assessments (HRIAs) in the context of budgeting, business activities, trade and investment agreements and the privatization of public services, including potential

⁸⁷ See Kollamparambil, *supra* note 85, at 13.

⁸⁸ Tarcisio Gazzini, *Bilateral Investment Treaties and Sustainable Development*, 15 J. WORLD INV. & TRADE 929, 936, 938 (2014); see also Rodrigo Polanco, Joelle De Sèpibus & Kateryna Holzer, *TTIP and Climate Change: How Real Are Race to the Bottom Concerns?*, 3 CARBON & CLIMATE L. REV. 206, 207, (2017) (who refer to negative effects on sustainable development caused by compromises during discussion on the TTIP).

⁸⁹ See Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. 1, 3 NW J. INT'L & Bus 1, 5, (2017).

⁹⁰ *Salini v. Morocco*, ICSID Case No. ARB/00/04, Decision on Jurisdiction, ¶ 52 (Jul. 23, 2001).

⁹¹ The precise formulation of entrenched human rights norms has become much easier with the introduction and extensive use of human rights indicators and benchmarks in respect of all human rights. See David McGrogan, *Human Rights Indicators and the Sovereignty of Technique*, 27 EUR. J. INT'L L. 385, (2016). Of course, DIAs are generally un-explored in both the literature and practice, but existing indicators constitute a sound blueprint, albeit each DIA, as is the case with HRIAs need to be personalized.

⁹² The South American experience with BITs and investment arbitration, for good or bad, has been particularly negative. Countries like Ecuador have not only denounced most of their BITs and withdrew from ICSID, but moreover set up citizens' commissions to audit the BITs, finding these to have only benefited investors. This led to a new Model BIT initiative, which among others insists on a more precise definition of 'investment' and 'profit', safeguards the ability of host states to regulate in the public interest and gives increased weight to human rights and environmental protection. See Cecilia Olivet, *Why Did Ecuador Terminate all its Bilateral Investment Treaties?*, (May 25, 2017). www.globalresearch.ca/why-did-ecuador-terminate-all-its-bilateral-investment-treaties/5604340.

extraterritorial-human rights impacts.⁹³ Most inter-governmental organizations oblige their organs and sub-entities to undertake HRIAs through internalized guidelines. This is true, for example, in respect of the EU whenever its organs adopt legislation or enter into international agreements.⁹⁴ The CJEU has, in fact, emphasized the importance of such HRIAs in the adoption of primary and secondary EU legislation.⁹⁵ In one case, a complaint was made to the EU Ombudsman, arguing that in the context of the EU-Vietnam Free Trade Agreement the EU Commission refused to prepare a HRIA, despite the fact that such agreements produce a significant impact on populations emerging from non-market economies, as was the case with Vietnam. The Ombudsman found such a failure to constitute an instance of mal-administration.⁹⁶

The proliferation of HRIAs among states and inter-governmental organizations has given rise to several common criteria and indicators.⁹⁷ A leading commentator and current UN Independent Expert on the impact of foreign debt on human rights, has described these as follows:

The purpose and steps for carrying out a HRIA based on classic impact assessment approaches are also well-established. These include: a) preparation and screening of possible human rights impacts in consultation with affected groups; b) scoping; c) evidence gathering and data collection using qualitative and quantitative methods; d) analyzing impacts; e) development of recommendations aimed at preventing adverse human rights impacts or to ensure that they are mitigated; f) reporting and presentation of the findings; and g) ongoing evaluation and monitoring of actual impacts.⁹⁸

It is on the basis of HRIAs that DIAs can be elaborated and developed as annexes to host states' domestic laws. Although it is beyond the scope of this article to explain in any detail the exact contents of a DIA, they should in general set out a balanced quantitative and qualitative account as to what may be expected of investors, but equally how the host state

⁹³ Gen. Comm. on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, Comm. on Economic and Social Rights, U.N. DOC., ¶ 17, 21-22 E/C.12/GC/24 (Aug. 10, 2017); Gen. Comm. on Public Budgeting for the Realization of Children's Rights, Comm. on the Rights of Children ¶ 47, U.N. Doc. CRC/CG/19 (Jul. 10, 2016)

⁹⁴ European Commission, OPERATIONAL GUIDANCE ON TAKING ACCOUNT OF FUNDAMENTAL RIGHTS IN COMMISSION IMPACT ASSESSMENTS (May 6, 2011), SEC (2011) 567 Final (May 6, 2011).

⁹⁵ Joined Cases C-92/09 & C-93/09, *Schecke & Eijfert v. Land Hessen*, 2010 ECR-I-1063. Case Nov. 9, HRIAs are also required through two EU instruments, namely: the Directive on Public Procurement and the Directive on Non-Financial Information Disclosure. Under the latter, companies with over 500 employees are required to disclose information on policies, risks and results as regards their respect for human rights.

⁹⁶ European Ombudsman, Case No. 1409/2014/MHZ, European Comm'n (Mar. 26, 2015).

⁹⁷ Even so, recent research indicates that there is an almost absolute absence of ethical standards and regulation of the HRIA industry.

David McGrogan, *The Population and the Individual: The Human Rights Audit as the Governmentalization of Global Human Rights Governance*, 16 INTL. J. OF CONST. 1073 (2019); see also Frank Vanclay, James T. Baines & C. Nicholas Taylor, *Principles for Ethical Research Involving Humans: Ethical Professional Practice in Impact Assessment Part 1*, 31 Impact Assessment and Project Appraisal, 243 (2013).

⁹⁸ Juan Pablo Bohoslavsky, *Guiding Principles to Assess the Human Rights Impact of Economic Reforms?* Yes, SOVEREIGN DEBT AND HUMAN RIGHTS. 402, 414 (Ilias Batenkas & Cephas Lumina eds., 2018)

is to capitalize from the investor's presence.⁹⁹ Developmental needs differ as does the capacity and expertise of each investor, but one may cite the need for enhanced technology transfer, training of local workforce, emphasis on educational opportunities, environmental and energy efficiency capacity building, emphasis on the hiring of women or disadvantaged populations and many others.¹⁰⁰ A crude example, and one not predicated on a structured and well thought-out investment law was the Volkswagen Group's investment in Rwanda in the form of a plant for compact cars. This investment was part of joined scheme between the company and the two governments (i.e., Rwanda as the host State and Germany as the home State) to implement a system of modern infrastructure, especially involving the introduction of e-mobility and car sharing to the African market.¹⁰¹ Although it is too early to tell how this project will fare, it is important to highlight the introduction of modern technology in the country, infrastructure development and cost-effective transport permeating all levels of society through a single investment. This investment will further provide meaningful employment opportunities for a good part of Rwanda's educated generation, which will in turn stem the country's brain drain, in addition to reinforcing the secondary economy.

VII. CONCLUSION

For far too long, developing states have grappled with their unsustainable debts on the basis of mechanisms offered to them under extreme pressure from international development banks and lending states. Such mechanisms and their attendant conditionalities effectively forced said states to privatize their most valuable assets and/or offer concessions to foreign investors that made no financial sense whatsoever.¹⁰² Yet, despite the fact that so-called bail out programs only served to fuel and augment the debt, leading to more poverty, underdevelopment and loss of fiscal self-determination, developing nations struggled to improve their status quo through these mechanisms and the institutions that maintained them. This irrational state of affairs existed even though many developing nations are resource-rich beyond imagination, and hence, there was absolutely reason why said states should be poor, let alone privatize their invaluable natural resources sectors.¹⁰³

Sovereign debt resembles the interrogation of two accomplices to a crime. Interrogators naturally want to isolate the two so as to secure non-corroborating accounts. In this manner, the two are not united in power and, not knowing what the other has recounted, the interrogators may use psychological techniques to convince them that other has confessed

⁹⁹ Ilias Bantekas, *The Human Rights and Development Dimension of Investment Laws: From Investment Laws to Development-Oriented Investment Laws*, 31 FLA. J. INT'L L 339, 359 (2021).

¹⁰⁰ See RuiMoura & RosaForte, *The Effects of Foreign Direct Investment on the Host Country Economic Growth: Theory and Empirical Evidence* 58 SING. ECON. REV.

¹⁰¹ M. Ndianaefo, *Rwanda: Volkswagen invests in Local Expansion*, <https://www.cp-africa.com/2017/01/04/rwanda-volkswagen-invests-into-local-expansion/> (last visited Oct. 2018).

¹⁰² See Noel G. Villaroman, *The Loss of Sovereignty: How International Debt Relief Mechanisms Undermine Economic Self-Determination* 2 J. POL. & L. 3 (2009).

¹⁰³ The so-called resource-curse is far too simplistic to explain why some resource-rich countries flourished, while others did not. Nowhere in this theory is there any serious attempt to discern the negative role of IFIs and foreign investors. Jeffrey A. Frankel, *The Natural Resource Curse: A Survey*, (Nat'l Bureau of Econ. Resch., Working Paper No. 15836, 2010).

about their common participation. Lenders and international development banks act in more or less the same manner. They do not allow indebted states to coalesce and none of the bail out measures adopted in the last forty years have lifted any indebted country out of poverty. If anything, indebted states have become even poorer.

This article argues that instead of accepting their individual aid and debt-relief packages, all of which are tied to deleterious conditionalities, indebted states should coalesce and set up their own regional finance mechanisms. This will allow them to attract sufficient project finance, allowing them to fully partake in the upstream and downstream operations of their natural resources rather than waiting for meager royalties. This is by no means an easy transformation and no doubt there will be a significant backlash against such an eventuality because the Global North relies on cheap raw materials from the Global South to fuel its industries. However, it is time for the Global South to take its debt crisis into its own hands and reap the benefits of its abundant riches. In order for this to be achieved, it is necessary for strong regional leadership to emerge, along with robust institutions that are driven by human rights-based agendas. At present, the scholarship is content with the suggestion that IFIs should incorporate human rights in their operations,¹⁰⁴ with IFIs throwing some human rights breadcrumbs here and there to appease their detractors. Yet, none of their policies and practices exhibit, let alone incorporate, human rights into their debt sustainability and aid programs; quite the contrary. Under the guise of intergovernmental organizations with an anti-poverty and development mandate, they operate as true commercial and investment banks. This means that it is futile to demand of them human rights-based, including fiscal and economic self-determination, lending. Only one or more parallel systems of international finance can ensure that debt sustainability is predicated on universal human rights and constitutional values and ensure that peoples are able, even indirectly, to exert influence on the relevant processes. At present, IFIs are self-serving and effectively override national constitutions and the wills of their people. That debt sustainability has been divorced from constitutional and human rights processes is an astonishing achievement. It is not contended that parallel systems of finance will serve as a panacea for the ills described in this article. However, if they are established with the particular aim of human rights being embedded into relevant debt and financing processes that are open to public debate (and perhaps even some degree of justiciability), as is the case with the EU institutions, then the outcomes will be far more different than what they currently are. Hopefully, this modest proposal will find some adherents that appreciate its radical, yet sensible, message.

¹⁰⁴ RECONCEPTUALISING GLOBAL FINANCE AND ITS REGULATION (Ross P. Buckley, Emiliós Avgouleas & Douglas W. Arner, eds., 2016). See also Rosa. M. Lastra, *Global Financial Architecture and Human Rights*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK, 137 (Juan. Pablo Bohoslavsky & Jernej Letnar Černič, eds., 2016) (who argues that the IMF could recommend human rights reforms).