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CONTENT

Data Protection Principles, and Customary International Law

ALI, SANAR SHAREEF*

ABSTRACT *Given the rapid technological advancement and cross-border nature of data flows, data protection has become a critical issue of global concern. The absence of a unified, binding global framework has exacerbated the complexity of this issue. Existing legal instruments are either inadequate, non-binding, non-comprehensive, or regional with limited geographical scope. Given the urgent need for international standards in data protection, this article examines the possibility of Customary International Law (CIL) addressing Data protection principles (DPP). The author posits that widespread state practice, combined with existing international and regional legal frameworks, provides a strong basis for the emergence of customary international rules governing DPP.*

KEYWORDS *Data Protection Principles, Customary International Law, State Practice, International Frameworks.*

List of abbreviations

(OECD) The Organization for Economic Co-operation and Development
(APEC) Asia-Pacific Economic Cooperation Forum
(GAG) General Assembly Guidelines for the Regulation of Computerized Personal Data Files
(GDPR) General Data Protection Regulation
(ECOWAS) Economic Community of West African States
(DPP) Data protection principles
(CCPA) California Consumer Privacy Act
(PIPL) China's Personal Information Protection Law
(CETS) The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data"
(ILA) International Law Association
(CIL) Customary International Law
(ICJ) International Court of Justice

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Introduction

There are no unified, universal rules regarding data protection. International human rights treaties like the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) contain very limited privacy provisions, which are not sufficient to cover the complicated area of digital data. Guidelines, such as those issued by the Organization for Economic Co-operation and Development (OECD)[1] and the Asia-Pacific Economic Cooperation Forum (APEC),[2] the General Assembly Guidelines for the Regulation of Computerized Personal Data Files (GAG);[3] are non-binding and lack comprehensiveness. Other frameworks, like the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS),[4] the General Data Protection Regulation (GDPR),[5] and the Personal Data Protection within Economic Community of West African States (ECOWAS),[6] are regional treaties with limited geographical scope.

The problem of the study lies in the absence of comprehensive, binding universal rules governing one of the most complicated, rapidly developing, cross-border areas: data protection in the digital age. The rapid development of technology has posed significant challenges and has exacerbated the complexity of the current landscape. Consequently, in the absence of binding international rules, it is imperative to explore alternative legal frameworks, particularly CIL, to see the extent to which CIL has developed alongside the development of technology, and to evaluate whether it has sufficient rules to effectively regulate this area.

To this end, several pivotal questions are posed: what are the component elements of international custom? Does the existence of one element suffice for the establishment of CIL? Does the adoption of DPP by national laws and international frameworks contribute to the formation of CIL? Do these laws and international frameworks suffice for the establishment of CIL governing the DPP? To address these questions, the study will be divided into two chapters. The

[1] "Guidelines on the Protection of Privacy and Transborder Flows of Personal Data." Came into effect in September 23, 1980. Organisation for Economic Co-operation and Development (OECD). https://doi.org/10.1787/9789264196391-en.

[2] "APEC Privacy Framework." Issued in 2015. Asia-Pacific Economic Cooperation. https://www.apec.org/docs/default-source/Publications/2017/8/APEC-Privacy-Framework-%282015%29/217_ECSG_2015-APEC-Privacy-Framework.pdf.

[3] "Guidelines for the Regulation of Computerized Personal Data Files." Adopted in December 14, 1990. General Assembly resolution 45/95. https://digitallibrary.un.org/record/105299?v=pdf.

[4] "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" (CETS). opened for signature January 28, 1981. Council of Europe No. 108. https://rm.coe.int/1680078b37.

[5] "General Data Protection Regulation 2016/679." Came into force in May 25, 2018. The European Parliament and the European Council. https://gdpr-info.eu/

[6] "Personal Data Protection Within ECOWAS". Adopted in February 16, 2010. Supplementary Act of Economic Community of West African States (ECOWAS). https://www.statewatch.org/media/documents/news/2013/mar/ecowas-dp-act.pdf.

first chapter will be dedicated to discussing the principles of DPP as reflected in state practices and various international frameworks, and the second chapter will examine the concept of CIL.
The study holds great significance as it aims to identify possible legal rules governing a complex transborder area that currently lacks unified, universal rules.

1. First Chapter: DPP in practice

Given the novelty of cyberspace, legislation on state action in this area is still in its infancy.[7] Prior to the late 1990s, few countries had comprehensive data privacy laws, and existing laws were mostly local.[8] However, technological developments have since accelerated legislation in this area.
The US Freedom of Information Act (FOIA) 1967[9] and the Data Protection Act 1970 of the German state of Hesse,[10] followed by Sweden's data protection law of 1973 (*Datalagen*),[11] were among the first data protection laws established decades before the Internet and the World Wide Web became ubiquitous.[12] These laws, alongside the adoption of the OECD Privacy Guidelines in 1980 and the implementation of the APEC Privacy, all the way to the GDPR in 2018, contributed significantly to the development of DPP. The number of data laws continues to rise. Currently, 137 out of 194, or 71% of countries have enacted data protection and privacy legislation. An additional 9% have draft legislation pending, while 15% have no data protection legislation at all.[13] Each country has different levels of data protection laws. Some, such as Europe have very robust

[7] Gary Brown, and Keira Poellet, "The Customary International Law of cyberspace," *Strategic Studies Quarterly* 6, no. 3 (2012): 129, https://apps.dtic.mil/sti/pdfs/ADA584414.pdf.
[8] Dowling Jr Donald C, "International Data Protection and Privacy Law," 2009, 2, accessed June 3, 2024. https://intellicentrics.ca/wp-content/uploads/dlm_uploads/2014/09/article intldataprotectionandprivacylaw v5-1.pdf.
[9] "A Brief History of Data Protection: How Did It All Start?," INPLP, accessed July 11, 2024. https://inplp.com/latest-news/article/a-brief-history-of-data-protection-how-did-it-all-start/.
[10] Germany, Hesse. 1970. Data Protection Act [HE 1970]. Law and Ordinance Gazette Hesse. 625. https://starweb.hessen.de/cache/GVBL/1970/00041.pdf.
[11] "Data Protection in Sweden," GDPRhub, accessed July 11, 2024. https://gdprhub.eu/Data_Protection_in_Sweden#History.
[12] Fredric D. Bellamy, "U.S. Data Privacy Laws to Enter New Era in 2023," Reuters, accessed July 11, 2024. https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01.
12/#:~:text=In%201970%2C%20the%20German%20state,World%20Wide%20Web%20became%20ubiquitous.
[13] "Data Protection and Privacy Legislation Worldwide," UN Trade and Development, accessed July 19, 2024. https://unctad.org/page/data-protection-and-privacy-legislation-worldwide.

policies protecting personal information, while others, such as some countries in Africa and South America, have very limited ones.[14]
In this study, we will examine several major data protection frameworks at the international and regional levels, in addition to two main frameworks at the domestic level, namely the Personal Information Protection Law (PIPL) of China and the California Consumer Privacy Act (CCPA) of the United States.[15] These laws, along with the GDPR, were chosen as their respective jurisdictions collectively account for 90% of global trade.[16]We will also explore international frameworks such as those developed by the OECD, APEC, and the ECOWAS. By analyzing these regulations, we aim to demonstrate the convergence of DPP across different jurisdictions and assess the potential for these similarities to contribute to shaping CIL governing DPP. DPP include several key concepts such as lawfulness, fairness, Transparency, Purpose limitation, Data Minimization, Retention period, and Accuracy, among others.

1. 1 Lawfulness, fairness

There are several grounds for lawfulness, including consent, which is recognized at the international, regional and national level.

1. 1. 1 Consent

Art. 6 of the GDPR, Art. 13 of the PIPL, Article 5(2) of CETS, and Article. 23 of the ECOWAS require consent as the primary legal basis for lawful processing. While CCPA does not specify legal basis for data collection, it allows consumers to opt out of data sales, requiring explicit permission from companies to proceed.[17]Principle 1 of GAG emphasizes that personal information must be collected and processed fairly and lawfully.

1. 1. 2 The requirement of consent when transferring data outside the country

Under Article 39 of the PIPL, the transfer of personal data outside China requires separate consent. In contrast, Article 49 of GDPR considers consent itself a valid

[14] "Data Protection Laws Around the World," Databasix UK, accessed July 19, 2024. https://www.dbxuk.com/blog-2023/data-protection-laws-around-the-world.
[15] California. 2018/2020. California Consumer Privacy Act of 2018 as amended by California Privacy Rights Act 2020. Adopted 28 June 2018. https://cdp.cooley.com/ccpa-2018/
[16] Lauren Kyger, "Data localization" and other barriers to digital trade," hinrichfoundation, accessed august 8, 2024, https://www.hinrichfoundation.com/research/tradevistas/digital/data-localization/
[17] "Data Protection Laws and Regulations USA 2023-2024," International Comparative Legal Guides, last modified July 20, 2023. https://iclg.com/practice-areas/data-protection-laws-and-regulations/usa.

ground for the transfer of personal data as a derogation from the main grounds for cross-border data transfer. The CCPA does not explicitly address transfer mechanisms but, like Article 36 of ECOWAS conditions transfers to third parties on providing the same level of protection for consumer rights.

1. 2 Transparency

Both the GDPR (Recital 39 and Article 7) and PIPL Article7 require clear disclosure of processing rules, purposes, methods and scope. The CCPA (Section 1798.100(a)) requires businesses to inform consumers of the categories and purposes of personal information collected and whether it is sold or shared. Likewise, ECOWAS Article 27 and CETS (Article 8 and Article 5(3)(a)) require data controllers to inform data subjects about the processing of their personal data, ensuring that processing is conducted fairly and transparently.

1. 3 Purpose limitation

The GDPR (Recital 39 and Article 89) requires the collection of personal data for specified, explicit and legitimate purposes. The PIPL (Article 6 and 14) requires processing for specific and reasonable purposes, minimizes the impact of individual rights, and requires re-obtaining consent if the purposes change. The CCPA (Subsections (a)(1) and (a)(2)) focuses on disclosure of the categories and purposes of information collected, and prohibits additional collection or use without notice. The OECD Article 9 and CETS (Article 5(4)) emphasize identifying the purposes when collecting. The GAG in Principle 3 emphasizes defining purposes, maintaining relevant data, and requiring consent for non-compliant use.

1. 4 Processing sensitive personal information

Article 28 of the PIPL and Article 9 of the GDPR define sensitive personal information, provide stricter rules, and allow its access and processing only for specific purposes. Likewise, Section 30 of the ECOWAS lists sensitive personal information and prohibits its processing with some exceptions, and Section 140 (a) and (c) of the CCPA require businesses to use sensitive personal information only for specific purposes.

1. 5 Data Minimization

Article 5(1)(c) of the GDPR, OECD Principle 8, Article 6 of the PIPL, and CCPA Section 1798.100(c), emphasize data minimization, collection, use and retention of personal data. Information on what is necessary for specific, legitimate purposes to mitigate the risks associated with excessive data collection and misuse. The CCPA focuses on the necessity and proportionality of data collection and use by businesses. PIPL aligns closely with the GDPR by prohibiting excessive collection. At the same time, OECD Principle 7 emphasizes the quality

and relevance of data. Principle 3 of the GAG emphasizes that the personal data shall be relevant and sufficient for the specified purposes.

1. 6 Accuracy

The GDPR Article 5(1)(d), Recital 39; PIPL Article. 8; CCPA 1798.130 (a)(1), and ECOWAS Article 26, emphasise the importance of ensuring that personal data is accurate and up-to-date, with provisions for prompt correction or deletion of inaccurate data. Similarly, Principle 8 of the OECD and Principle 2 of the GAG emphasise the need for data to be relevant, accurate, complete and regularly updated."

1. 7 Retention period

Article 5(1)(e) of the GDPR states that personal data shall only be retained for as long as is necessary for identification purposes, with exceptions for archiving, research or statistical purposes under Article 89(1) with appropriate safeguards. Article 19 of the PIPL requires that the retention period be the minimum necessary to achieve the purpose of processing, with exceptions permitted by other laws. CCPA 1798.100 (a)(3) requires companies to disclose retention periods or the criteria used to determine them, ensuring that data is not retained for longer than necessary. Likewise, CETS Article 5(4) and Principle 3 of the GAG affirm that retention periods shall not exceed what is necessary to achieve the specified purposes.

1. 8 Integrity, Confidentiality, and Security

Article 32 and 5(1)(f) of the GDPR, highlight the responsibilities of data controllers and processors to ensure data security. Article 9 of the PIPL requires personal information processors to secure the data they handle. CCPA Section 1798.100(e) requires appropriate security measures tailored to the nature of the personal information. The OECD guidelines call for data to be protected through reasonable security safeguards. Likewise, Article 28 of ECOWAS, Article 7 of CETS, and Principle 7 of the GAG emphasize the adoption of adequate security measures to protect against various risks, including accidental or unauthorized access, loss, misuse, or disclosure.

1. 9 Accountability

The GDPR provides a detailed framework, including penalties of up to €20 million or 4% of annual global turnover (Article 83). While the CCPA does not explicitly recognize accountability, it does hold primary data collectors responsible for compliance, including third-party obligations (1798.100(d)(4)).[18]

[18] OneTrust, *Comparing Privacy Laws*, 38.

The PIPL imposes fines and establishes third-party accountability (Article 66). Article 29 of ECOWAS requires data controllers to select data processors with adequate safeguards and ensure compliance with security measures. Principle 8 of GAG provides for neutral and independent authorities to oversee data protection and impose sanctions for violations.

1. 10 Conditions applicable to child's consent in relation to information society services

Section 1798.120(c) of the CCPA prohibits the sale or sharing of personal data of those under the age of 16, and it requires direct consent of teens between the ages of 13 and 16 and parental consent of children under 13 for such actions. In contrast, Article 8 of the GDPR allows Member States to set the age between 13 and 16 years, with parental consent required for younger children for any processing activities. The PIPL, under Articles 31 and 32, consider children's data to be sensitive information, and it requires parental consent for children under 14 years of age.

1. 11 Data Subjects' Rights

Each of the GAG (Principles 4), PIPL (Articles 44–48), CCPA (Sections 1798.105, 106, 110, 115, 120), GDPR (Articles. 15–22), and the OECD (Article 13), ensure the right to access, correct, and delete personal information.

1. 12 Notification

Each of the CCPA Section 1798.100, PIPL Article 17, and GDPR Article 13. mandates disclosure of the identity and contact details of the controller or processor, the purposes of processing, the legal basis for processing, recipients of the data, and individuals' rights regarding access, rectification, erasure, and data portability.

DPP also covered by other international and national legal frameworks. The APEC Privacy Framework includes DPP that are consistent with those in the GDPR, specifically in Articles 15 to 25 of the Framework.

In addition to the legal frameworks mentioned above, Data Protection Principles (DPP) have been adopted by other legislations. For example the Saudi Data Protection System,[19] the India Digital Personal Data Protection Act 2023,[20]

[19] Saudi Arabia. 2020. *Personal Data Protection System.* *https://moi.absher.sa/wps/wcm/connect/moi/42553296-b7d1-46aa-a5f7-32515dda570f/%D9%86%D8%B8%D8%A7%D9%85+%D8%AD%D9%85%D8%A7%D9%8A%D8%A9+%D8%A7%D9%84%D8%A8%D9%8A%D8%A7%D9%86%D8%A7%D8%AA+%D8%A7%D9%84%D8%B4%D8%AE%D8%B5%D9%8A%D8%A9.pdf?MOD=AJPERES&CVID=oqdvjlc*.

[20] "What Data is Protected by the India Digital Personal Data Protection Act 2023? A Comprehensive Guide to the India Data Privacy Law," secureprivacy, accessed July 7,

Canada's National Standard for the Personal Information Protection Model Act,[21] the Privacy Act and its Australian Privacy Principles ('APPs'),[22] the Russian Federation Federal Law on Personal Data,[23] and Data Protection Act 2018 of UK.[24]

1. 13 Conclusion

The worldwide adoption of DPP at the national, regional, and international levels indicates that individual states recognize these principles as essential. Though there are minor deviations in details, the main ideas remain consistent, and the core concepts are present. Therefore, it necessitates questioning whether this worldwide adaptation of these principles could lead to them becoming part of CIL. To answer this question, it is vital to examine the concept of CIL, and assess the current status of DPP to determine whether they qualify to be considered part of CIL?

2. Second Chapter

2. 1 CIL and DPP

The uniqueness of data protection lies in its inherently trans-border and dynamically evolving nature. Due to the ease with which data crosses national borders, traditional domestic legislations are inadequate for complete governance, unlike many other legal domains. Consequently, the absence of unified, universally binding treaties addressing the topic fosters various issues stemming from its transnational character. In light of this, it is necessary to investigate alternative legal framework options to tackle this issue. Among these, CIL stands out as a potential source to govern data protection. Customary international law is of great importance as it reflects universally accepted practices and principles that bind states, even in the absence of formal treaties.
To this end, several critical questions must be posed: What constitutes CIL? How is it established? To what extent can the existence of analogous DPP in the

2024. https://secureprivacy.ai/blog/india-digital-personal-data-protection-act-2023-guide-protected data#:~:text=The%20India%20Digital%20Personal%20Data%20Protection%20Act%202023%20(DPDPA)%20is,data%20of%20individuals%20in%20India.

[21] Canada. 2000. Personal Information Protection and Electronic Documents Act. https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/FullText.html.

[22] "Australia – Data Protection Overview, October 2023," DataGuidance, accessed July 19, 2024. https://www.dataguidance.com/notes/australia-data-protection-overview.

[23] Russian. Federal Council. 2006. *Federation Federal Law on Personal Data*. https://www.dataguidance.com/sites/default/files/en_20190809_russian_personal_data_federal_law_2.pdf .

[24] United Kingdom. 2018. *Data Protection Act.* https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted.

domestic laws of various countries contribute to the formation of CIL? How can regional declarations and agreements aid in the formulation of CIL? Is it possible for one of the two CIL elements alone to create a customary rule? How do acquiescence and persistent objector rule contribute to the formation of CIL regarding DPP?

According to traditional positivist and individualist interpretations, states are bound by international law only through consent, emphasing sovereignty. However, this view is challenged by the shift towards international solidarity, where law is seen as essential to peace and cooperation.[25]

The disagreements over the nature and relative significance of the custom components lead some to believe that custom is expected to demise.[26] However, this is not true for crucial domains like human rights duties, as custom has grown in importance as a source of this law. As early as 1946, the French delegation to the United Nations commission on human rights representing the majority of opinion, stated that "the question of human rights was a matter no longer of domestic, but of international concern."[27]

2. 1. 1 What is CIL?

We can find the classic formulation of the term "custom" in Article 38 of the statute of the International Court of Justice (ICJ), which defines custom as "general practice accepted as law". According to this definition, there are two constituent elements contributing to the formulation of CIL. The first one is general practice, and the second one is the *Opinio Juris*.

Since the late nineteenth century, international legal scholars have drawn from domestic law the idea that legally recognized custom, as opposed to purely social custom, is composed of two distinct elements, one objective (material), the other subjective (psychological).[28]

There is some agreement among scholars of international law that both elements of CIL, state practice and *Opinio Juris sive necessitas*, or the objective and subjective aspects, are necessary for the formation of a rule of CIL. The ICJ, in the Continental Shelf (Libya v. Malta) case, states that it is also axiomatic that the substance of CIL is to be looked for largely in the actual practice and *Opinio Juris* of States.[29]

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[25] Hilary CM Charlesworth, "*Customary International Law and the Nicaragua case*," (Australian Year Book of International Law 11 1984-1987), 2–3, https://heinonline.org/HOL/Page?handle=hein.journals/ayil11&collection=journals&id=23&startid=23&endid=54.

[26] Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *The American Journal of International Law* 95, no. 4 (2001): 757, https://doi.org/10.2307/2674625.

[27] Lori Lyman Bruun, "Beyond the 1948 Convention-Emerging Principles of Genocide in CIL," *Md. J. Int'l L. & Trade* 17 (1993): 214. http://digitalcommons.law.umaryland.edu/mjil/vol17/iss2/4.

[28] Charlesworth, *Nicaragua case*, 4.

[29] Continental Shelf (Libya. v. Malta), Judgment, 1985 I.C.J. Rep. 3, ¶ 27 (June 3).

State practice is the easiest way to analyze the development of custom, as examining state actions is more visible and easily documented than motives.[30] According to the International Law Commission (ILC), state practices can take many forms, including physical and verbal actions, and even inaction under certain circumstances. They include but are not limited to conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference, legislative and administrative acts; and decisions of national courts.[31]

2. 1. 2 Time and Frequency Criteria for CIL

For the practice to serve as a rule of CIL, it must be widely accepted. The ICJ referred to "general acceptance" or "widespread" state practice as necessary.[32]Although rare, there are cases in which a rule of behavior may arise from a single precedent without repetition.[33]
A customary rule does not need to be "old" or long-standing to be legally recognized.[34] The ICJ noted in the North Sea Continental Shelf Cases that a short time frame does not preclude the establishment of a new rule of CIL, provided that State behavior is widespread and essentially homogeneous, especially of States with significant interests.[35]

2. 1. 3 Opinio juris

When governments follow a widespread and consistent practice out of a sense of legal obligation, this practice gives rise to CIL.[36] *Opinio Juris* concerns the expression of beliefs rather than actual beliefs.[37] For a global practice to develop into a customary norm of international law, it must be recognized by states as legally binding.[38]
Opinio Juris indicates that states must accept that a rule of international law already exists independently of their practices. This indicates that the rule

[30] Brown, and Poellet, "The Customary International Law," 129.
[31] International law commission, *Draft conclusions on identification of* Customary International Law *with commentaries* (ILC, 2018), conclusion 6, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.
[32] Charlesworth, *Nicaragua case*, 7.
[33] Grigory I Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law," *Calif. L. Rev*. 49 (1961): 419, https://heinonline.org/HOL/License.
[34] International Law Association, *Statement of Principles Applicable to the Formation of General* Customary International Law (London: ILA, 2000), section 12(b), 19, https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf
[35] North Sea Continental Shelf (Germany. v. Denmark and Netherlands), Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb 20).
[36] Brown, and Poellet, "The Customary International Law of cyberspace," 126.
[37] Roberts, "Traditional and Modern Approaches," 757–758.
[38] Tunkin, "Remarks on the Juridical Nature," 422–423.

precedes government practices and is not a product of them.[39] It is not necessary to have explicit evidence of a legal obligation (such as official statements); instead, it can be deduced from actions or inactions.[40]

2. 1. 4 Assessing the qualification of DPP as CIL

The application of the two criteria for CIL to DPP—namely, state practice and *Opinio Juris*—is a complex task. Prima facie, the widespread adoption of comparable DPP by numerous countries' laws suggests that the practice element predominates, while the second criterion, *Opinio Juris,* appears to be absent. As a result, one element is missing, leading to the failure of establishing CIL. Nonetheless, the reality shows something different, from which we can derive evidence to prove the existence of CIL governing DPP.

Therefore, it is crucial to delve deeper into this issue and examine whether the formation of CIL truly requires both elements, or if the presence of one element suffices. Additionally, it is important to determine whether the DPP genuinely lack the *Opinio Juris* element or if this element is manifested in other ways that have not yet been adequately recognized.

Despite the seeming agreement on the necessity of the two elements *Opinio Juris* and state practice, for the formation of CIL, they are frequently given distinct interpretations and weights.[41] According to the International Law Association (ILA), even in the absence of clear evidence that states believe they are legally bound to adhere to this practice, broad and consistent behavior among states may be enough to create a CIL rule.[42] This perspective represents a departure from a traditional test of CIL.

Professor Guggenheim argues that CIL should be based solely on consistent and general State practice without the subjective element of jurisprudence. He believes that including the need for states to recognize these practices as legally binding complicates the establishment of customary rules and diminishes the role of custom as an independent source of international law.[43] According to Kelsen, customary rules of international law are not created by the common consent of members of the international community but by the long-established practice of a large number of states, including those considered important in terms of power, culture, and other factors.[44]

The ICJ, in many cases, has relied solely on practice to derive customary rules**.** In the Fisheries case, the Court emphasized that the low-water mark – generally recognized in State practice – should be used to measure the territorial sea of a

[39] Tunkin, "Remarks on the Juridical Nature," 424.
[40] USA. Restatement § 102(b) (2).102 (b).
[41] Bhupinder S. Chimni, "Customary International Law: A third world perspective," *American Journal of International Law* 112, no. 1 (2018): 2. https://www.jstor.org/stable/10.2307/26568923
[42] International Law Association, *Statement of Principles*, section17. 40–41.
[43] Tunkin, "Remarks on the Juridical," 425–426.
[44] Tunkin, "Remarks on the Juridical," 425.

coastal State. Countries have traditionally chosen the low-water mark, rather than the high-water mark, or the mean between high and low tides, for the purpose of calculating the width of the territorial sea.[45]

The ICJ explained nationality by citing state practices.[46] The Court refers to state practice and numerous international instruments as the basis for designating legal entities of states for diplomatic protection.[47]

The ICJ cited State practice to demonstrate that the institution of the exclusive economic zone, together with the rule of entitlement based on distance, had been incorporated into CIL.[48]

On the other hand, Roberts presents two types of custom, traditional custom and modern custom, the latter is derived by a deductive process that starts with general statements of rules rather than particular instances of practice. This approach emphasizes *Opinio Juris* rather than state practice because it relies primarily on statements rather than actions.[49] The ICJ's ruling in the Nicaragua case serves as a noteworthy illustration of this deductive method. Although the Court ostensibly followed the traditional CIL test,[50] it took its cues from sources like General Assembly resolutions, which established norms like the non-use of force and non-intervention.[51] The Court decided that it was sufficient for conduct to generally comply with rule statements rather than closely scrutinising state practice, as long as instances of discordant practice were handled as violations of the relevant rule rather than as the creation of a new one.[52] In other words, the court requested very little evidence of actual practice in light of what it seemed to regard as unambiguous evidence of the opinion of the international community as expressed in documents such as the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[53]

This raises the question of whether DPP possesses the element of *Opinio Juris*. To explore this, we must examine the role of international frameworks in shaping this element and consider the implications of DPP adoption by many international frameworks for the formation of *Opinio Juris* and, consequently, the development of relevant CIL.

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[45] Anglo-Norwegian Fisheries Case (United Kingdom v. Norway), judgment, 1951 I.C.J. Rep. 116, 128 (18 Dec)

[46] Nottebohm Case (Liechtenstein. v. Guatemala), judgment, 1955 I.C.J. Rep. 4, 23 (April 6).

[47] Barcelona Traction, Light and Power Company (Belgium v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 70 (Feb 5).

[48] Continental Shelf (Libya. v. Malta), Judgment, 1985 I.C.J. Rep. 3, ¶ 34 (June 3).

[49] Roberts, "Traditional and modern approaches," 757–758.

[50] Roberts, "Traditional and Modern Approaches," 758–759.

[51] *Nicar. v. U.S.*, 1986, I.C.J. ¶ 186

[52] Roberts, "Traditional and modern approaches," 758–759.

[53] International Law Association, *Statement of Principles*, section 19 (b). 41.

2. 1. 5 Multilateral treaties and acts of international organizations

Besides the practices of states, international and regional frameworks have contributed significantly to strengthening DPP. Notable Examples include the GDPR, APEC, ECOWAS, OECD privacy rules, and the GAG.
Treaties and declarations, which they are statements about the lawfulness of activity, constitute *Opinio Juris.*[54] Multilateral forums, such as the United Nations General Assembly, the United Nations Security Council, regional organizations, and specialized international bodies, play a crucial role in shaping contemporary international law. Major developments often arise or gain support from proposals, reports and treaties discussed within these forums.[55] The ICJ refers to numerous international instruments as the basis for designating states entitled to provide diplomatic protection for corporate entities,[56]It took its cues from sources such as "the Charter of the United Nations and that of the Organization of American States" … to ascertain the content of the CIL.[57]
Roberts focuses on *Opinio Juris* above state practice, arguing that modern custom is derived through a deductive process that begins with general assertions of rules. Because this approach relies on statements rather than actions, modern customs can develop rapidly through multilateral treaties and declarations made by international bodies such as the General Assembly, which has the power to affirm, crystallize, and establish customs.[58]Historically, specific treaty provisions have been replicated in the practice of states outside the treaty, eventually becoming CIL.[59]
The actions of international organizations influence CIL, as demonstrated by the ICJ's consideration of the deposit practices of the UN Secretary-General and the military activities of intergovernmental organizations.[60] If this is the case, the data protection principles developed by various international organizations – such as the EU, OECD, APEC, and the UN General Assembly – can be considered manifestations of opinio juris. Consequently, these principles contribute to shaping CIL in the field of data protection.

2. 1. 6 Conformity and generality of a practice

Despite the fact that DPP have been adopted and codified by the laws of different countries in very similar terms, there are still some minor differences between

[54] Roberts, "Traditional and modern approaches," 757–758.
[55] Universal International Law Author(s): Jonathan I. Charney Source: The American Journal of International Law, Oct., 1993, Vol. 87, No. 4 (Oct., 1993), pp. 529-551 Published by: Cambridge University Press Stable URL: https://www.jstor.org/stable/2203615. 543–544
[56] *Belgium v. Spain*, 1970 I.C.J. ¶ 70.
[57] *Nicaragua v. U.S.A.,* 1986 I.C.J. ¶ 183.
[58] Roberts, "Traditional and modern approaches," 757–758.
[59] International Law Association, *Statement of Principles,* section 24 (a). 46.
[60] International Law Association, *Statement of Principles,* section 11. 19.

them. This raises the question of whether these differences have any impact on the establishment of customary rules.
According to the ICJ, state practices need not be perfect or strictly conform to a norm to be considered CIL. It is sufficient that the conduct of the state is generally consistent with the norm, and instances of inconsistency should be treated as violations rather than as recognition of a new norm.[61] If a state acts in a way that appears inconsistent with a recognized rule but justifies its actions by appealing to exceptions or justifications within the rule itself, then that behaviour, regardless of whether the justification is valid, serves to confirm the rule rather than to weaken it.[62]
As for the popularity, the same applies. Bodansky argues that CIL can be established not only on uniformities of state behavior but also on regularities in behavior. In other words, CIL is formed even when states do not fully comply with a particular norm.[63]
The Restatement in Section 102 (2) provides that for a practice to be considered general and consistent, it need not be universally followed. However, it should be widely accepted among countries participating in the relevant activity. The failure of a large number of important countries to adopt it could prevent this practice from becoming general CIL.[64]
Minor deviations from the General DPP do not diminish their basic consistency. Therefore, these deviations do not undermine the existence of widespread commitment to these principles.

2. 1. 7 The Persistent Objector Rule

Even if we assume that the DPP are not universally accepted, there is at least no significant objection to them. According to the persistent objector rule, a norm can still become established even if there are objections. If a norm can become CIL despite objections, it is even more likely to become accepted and qualify as a custom when there are no objections. Therefore, the lack of opposition to DPP indicates that these rules are more likely to be recognized as CIL. In other words, if DPP can evolve into a custom despite some objections, the absence of objections makes it even more likely for these principles to be accepted as CIL.
Regardless of a state's acceptance, CIL is viewed as universal, imposing rights and obligations on all of them. In contrast to treaty law, which binds only consenting states, CIL applies generally to all.[65] This is consistent with

[61] *Nicaragua v. U.S.A.*, 1986 I.C.J. ¶ 186.
[62] International law commission, *Draft conclusions*, conclusion 8 comment 7.
[63] Daniel Bodansky, "Customary (and not so customary) international environmental law." *Ind. J. Global Legal Stud.* 3 (1995): 105, https://www.repository.law.indiana.edu/ijgls/vol3/iss1/7.
[64] USA. Restatement § 102(b).
[65] Pierre-Hugues Verdier, and Erik Voeten, "Precedent, compliance, and change in Customary International Law: an explanatory theory," *American Journal of International*

consensual international law through the "persistent objector" principle.[66] This rule allows states individually or in small groups to avoid being bound by emerging CIL norms if they clearly and continuously object while the norm is forming.[67] However, historically, this type of opposition and exemption has been rare.[68]

The requirement to object continuously during the unclear period of norm formation makes the rule challenging to apply effectively. Moreover, persistent objection offers limited practical benefit since objecting states face significant international pressure to conform and risk being treated as violators. Instances of persistent objection are rare[69] and with limited practical importance.[70] For example, the United States initially objected to expanded fisheries and territorial sea zones but eventually conformed, and South Africa objected to the international law against apartheid but was ultimately forced to comply. The ICJ has referenced the rule in dicta but has not upheld it decisively in cases, indicating its weak support in state practice.[71]

2. 1. 8 The consent requirement

The adoption of DPP by many states, especially important ones, makes it unnecessary for all countries to adopt these principles individually. Some argue that individual states should accept the rule as law. But it is clear that acceptance is necessary only from the international community of countries together, and not from each country individually.[72] Article 102 of the restatement provides that rules of international law are those accepted by the international community of states as such.[73]

Law 108, no. 3 (2014): 390, https://www.jstor.org/stable/10.5305/amerjintelaw.108.3.0389.

[66] Charlesworth, *Nicaragua case*, 3–4.

[67] James A Green, *The persistent objector rule in international law* (Oxford University Press, 2016), 2, https://books.google.iq/books?hl=en&lr=&id=MiaPCwAAQBAJ&oi=fnd&pg=PP1&dq=Green,+James+A.+The+persistent+objector+rule+in+international+law&ots=S8Lb8lzfJL&sig=yYWBERVgQyHzniaaRvYTZyCF-NE&redir_esc=y#v=onepage&q=Green%2C%20James%20A.%20The%20persistent%20objector%20rule%20in%20international%20law&f=false

[68] USA. Restatement § 102(b) (2).

[69] Jonathan I Charney, "Universal international law," *American Journal of International Law* 87, no. 4 (1993): 538–540, https://www.jstor.org/stable/2203615.

[70] Shelly Aviv Yeini, "The Persistent Objector Doctrine: Identifying Contradictions," *Chi. J. Int'l L. 22* (2021): 583, https://chicagounbound.uchicago.edu/cjil/vol22/iss2/4.

[71] Jonathan I Charney, "Universal international law," 538–540, https://heinonline.org/HOL/Page?handle=hein.journals/ajil87&collection=journals&id=539&startid=&endid=561.

[72] Charney, "Universal international law," 536.

[73] USA. Restatement § 102 (b).

Acceptance can be established by acquiescence. However, the acquiescence of states is often not equivalent to knowing and voluntary assent unless it is aware of the subject of the consent and must know that failing to protest will be taken as acceptance. Therefore, acquiescence, if it obliges, must be tantamount to actual consent, though it is a consent expressed by no action as opposed to action. It is evident from a review of the numerous assessments of the evolution of CIL that demonstrating that the failure to object to a developing norm of CIL constitutes consent is difficult and opaque.[74]

Moreover, authorities only take into account the activities of a few states – usually the largest, most well-known or most interested states – when reviewing the evidence required to establish CIL. The opinions and awareness of other countries that adopt a neutral position are rarely taken into account. Instead, decision- makers assume that the absence of opposition equals acquiescence when a critical mass of evidence is gathered. This assumption masks the fact that many states have not developed an opinion because they do not know the law is being made.[75]

The ICJ's examination of the custom in the Nicaragua case shows how precisely Sir Robert Jennings is that it is impractical to fully rationalize contemporary law solely on the terms of Article 38 of the Statute of the ICJ.[76]

Martti Koskenniemi argues that modern international practice often conceals an attempt to interpret custom in terms of bilateral justice. The ICJ has been ambiguous about the nature of the unwritten laws it recognizes. In cases such as Anglo-Norwegian Fisheries (1951)[77] and Fisheries Jurisdiction (1974),[78] the ICJ focused more on the specific interests involved rather than applying a general rule. This trend has continued in many cases of maritime borders. Moreover, in the Nicaragua case (1986),[79] the ICJ did not strictly justify its customary rules, such as non-use of force, non-interference, respect for sovereignty, and humanitarian rules, based on actual practice and *Opinio Juris.*[80]

The evidence historically used to establish new norms of international law is far less thorough and convincing than theoretical claims suggest. It is also far less than what is required to prove that all states genuinely or implicitly agreed to every new rule of CIL.[81]

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[74] Charney, "Universal international law," 537.
[75] Charney, "Universal international law," 537.
[76] Charlesworth, *Nicaragua case*, 27.
[77] Fisheries ((United Kingdom. V. Norway) Merits, Judgment, 1951 I.C.J. Rep. 116, 133 (18 December).
[78] Fisheries (Britain and Northern Ireland v. Iceland), Merits, Judgment, 1974 I.C.J. Rep. 3, ¶ 69-79 (25 July).
[79] *Nicar. v. U.S., 1986*, I.C.J. ¶ 97-115, 183–220.
[80] Martti Koskenniemi, "The Politics of International Law." *European Journal of International Law 1, no. 1* (1990): 4-32, 27. http://ejil.org/pdfs/1/1/1144.pdf
[81] Charney, "Universal international law," 538.

2. 1. 9 Acquiescence

Even if there is no universal belief that DPP has become mandatory, at least there is no outright rejection of the issue. Even those countries that do not explicitly recognize these principles either have yet to develop data protection laws or don't oppose such principles. Therefore, the pivotal issue lies in discerning the legal implications of the non-rejection of these principles by those countries.
The ICJ, in both Cases Fisheries[82] and Lotus,[83] asserts that governments' lack of formal objections indicated acceptance of practices under international law. In the first case regarding Norway's use of straight baselines for maritime delimitation, the absence of objections from states, despite their interests in North Sea fisheries, implied widespread acceptance of Norway's method as lawful under international norms. This tacit acceptance by multiple governments supported Norway's enforcement of its maritime boundaries using straight baselines, affirming an international consensus on its legality. Similarly, in the second case involving jurisdiction in maritime collisions, states' failure to protest foreign court proceedings suggested tacit consent to concurrent jurisdiction.
The lack of reaction could be interpreted as acquiescence. This concept is equivalent to implicit recognition demonstrated through unilateral actions, which the other party may interpret as consent.[84] Essentially, silence can matter, but only if the other state's actions necessitate a response,[85] and if the state had the knowledge, time, and resources to respond, i.e., if it was in a position to react. Under CIL, a state's inaction regarding a practice cannot be interpreted as acknowledgment of the practice if it was unaware of it or had not had enough time to react.[86]

3. Conclusion

In the absence of a comprehensive set of global regulations, the worldwide acceptance of DPP across various national, regional, and international frameworks calls for a thorough assessment of their standing under CIL.
Although there is a seeming agreement on the necessity of both belief and state practice to constitute CIL. Some argue that consistent tate practice alone may be sufficient, even without a general belief. According to the ILA, widespread and consistent conduct between states may be sufficient to establish a rule of CIL, even in the absence of clear *Opinio Juris*. The ICJ often relies on state practices to derive customary rules.

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[82] *United Kingdom v. Norway*, 1951 I.C.J. at 139.
[83] S.S. Lotus (French. V. Turkey), Judgments,1927 I.C.J. Rep.5, 29 (7 September).
[84] Delimitation of the Maritime Boundary in the Gulf of Maine Area Advisory Opinion, 1984 I.C.J. Rep. 246 ¶ 130 (20 Jan).
[85] Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge advisory opinion, 2008 I.C.J. Rep. 12 ¶ 121(May 23).
[86] International law commission, *Draft conclusions,* conclusion 10 comment 8.

Conversely, some call for a more stringent requirement for *Opinio Juris*. Multilateral forums and specialized international bodies play a major role in shaping contemporary international law. While the ICJ in the Nicaragua case ostensibly adhered to the traditional test of CIL, it pointed to sources such as General Assembly resolutions, which establish rules such as the prohibition of force and non-intervention. In other words, the court requested very little evidence of actual practice in light of what it seemed to regard as unambiguous evidence of the opinion of the international community in accordance with the Charter of the United Nations, and used other sources such as the Organization of American States to identify CIL. In the Barcelona Traction case, the ICJ cited international instruments to recognize the legal status of states with respect to diplomatic protection. Additionally, the actions of international organizations have a significant impact on CIL, as evidenced by the ICJ's consideration of the UN Secretary-General's Practice on the Deposit and Military Activities of Intergovernmental Organizations. Thus, international frameworks related to data protection, such as the GDPR, APEC, ECOWAS, OECD, and GAG, are crucial in establishing CIL on DPP.

The ICJ has been ambiguous about the nature of the unwritten laws it recognizes. In certain cases, the ICJ focused more on the specific interests involved rather than applying a general rule. This trend has continued in many cases related to maritime borders.

Challenges to the recognition of DPP as CIL include issues of consistency and generality of practice. CIL can be established even if states do not fully comply with a rule. The ICJ has held that state practice need not be exemplary to be considered CIL; it is sufficient that the conduct is generally consistent with the rule, with inconsistencies being considered violations rather than new rules. This view is supported by Restatement (III).

Even if DPP are not universally accepted, there is no fundamental objection to them. Under the persistent objector rule, a rule can still be created despite objections. If a rule can become CIL despite objections, it is more likely to be accepted and classified as customary when there are no objections. Therefore, the lack of opposition to DPP indicates that these rules are more likely to be recognized as CIL.

Additionally, cases of persistent objection are rare and of limited practical importance. The ICJ has referred to this rule in its rulings but has not decisively upheld it in cases, indicating weak support for it.

Moreover, even countries that do not explicitly recognize DPP, either have not yet developed data protection laws or do not oppose such principles. The ICJ, in the Fisheries and Lotus cases, confirmed that the absence of formal objections by governments indicates acceptance of practices under international law. This principle suggests that the silence of states towards evolving norms regarding DPP can be considered tacit agreement.

In sum, the two elements of custom, the practice and *Opinio Juris*, were not always present in the formation of CIL. Therefore, whether DPP is supported by state practice alone, as evidenced by the widespread adoption by various

countries, or by both legal belief and state practice, as evidenced by the adoption of DPP by numerous international frameworks, the establishment of customary rules is not significantly affected, and it is possible to develop customary rule with only one element. Additionally, the presence of some deviations from these principles does not undermine their standing, as state practices need not be perfect or completely consistent with the norm. Moreover, even if some countries consistently refuse to apply certain rules, these rules can still become CIL. Similarly, the absence of formal objections by governments toward a practice by others strengthens the argument that it has become part of CIL.

In conclusion, it is plausible that the DPP has already become part of CIL or is on the verge of achieving this status, as the rapid advancement of technology poses significant data challenges, leaving countries with little choice but to act quickly.

MFN Provisions and Related Issues in Bilateral Investment Treaties

MD ATEKUL, ISLAM NUR SHUVO*

ABSTRACT *MFN provisions have been interpreted in a broad manner allowing the stakeholders to bring in financially beneficial provisions from other BITs. Using this broad interpretation, the policy instrument gives the opportunity to the investor to shop around for suitable provisions of BITs during disputes. The orthodox application provides substantive protection under the forum of international trade law, but in the field of international investment law this provision is used for both substantive and procedural treatment in the area of the investor-state dispute-settlement mechanism. What makes it more challenging is when the investor or the state invokes the investor-state dispute-settlement procedure before a different international settlement forum. Interestingly, the investor and the state earlier agreed on dispute-settlement forums via their BITs, but there are a lot of examples where a state has tried to receive protection from their domestic court in an international matter. Besides, MFN provisions are used for bypassing various requirements for establishing formal international arbitration. So, due to lacunae in government mechanisms, political instability and the lack of knowledge on the BIT's binding nature, countries have to face legal and economic hurdles after signing it. In this article, the author has tried to discuss this broad interpretation of the MFN provisions of BITs by discussing existing cases of investor-state dispute settlement related to MFN provisions. The author has tried to focus on two basic subjects: a) MFN provisions and related issues regarding investment, and b) MFN provisions and jurisdiction.*

KEYWORDS *MFN Provision, BIT, Jurisdiction, Waiting period*

1. 1 Introduction

A Bilateral Investment Treaty (BIT) is an agreement between two countries to protect investments made by foreign investors. The first BIT was signed in 1959, since then 3271 such treaties have been signed between more than 179 countries.[1] Moreover, the commitments of states are essentially made by investment treaties, which are commonly labelled as international investment

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[1] "International Investment Agreements," accessed August 19, 2024, http://investmentpolicyhub.unctad.org/IIA.

agreements (IIAs), where they agree on a certain mechanism to enforce it.[2] Besides, by 2013, 568 investor-state dispute cases had been reported.[3] One of the core features of BITs is constituted by the most favored nation provisions. This provision prohibits the host states from discriminating between two foreign investors from two different states. In recent years, MFN provisions have attracted considerable attention in BIT disputes. This dissertation will focus on the interpretation of MFN provisions by arbitration tribunals. For centuries Most Favored Nation (MFN) clauses have been part of international economic treaties.[4] The obligation imposed by an MFN clause is conventional international law, whereas we can understand that international law emerged from customary laws and state practices.[5] Usually, state-to-state agreements use MFN clauses where the application of the MFN provisions is limited and allows access to the trading partners of the states.[6] Since the inception of international trade practices, MFN clauses have been there and later they have been coined within the scope of new bilateral and multilateral trade and investment treaties.[7] To be more clear, MFN treatment means that the recipient will not be treated less favorably than third parties in the same field of relations by the granting State.[8] The trade and investment benefits can be substantive or procedural. Regarding investment treaties, a few researchers have observed that access to an advantageous dispute settlement mechanism is the main bone of contention for foreign investors. Moreover, investors often invoke MFN clauses to secure procedural rights that might otherwise be denied them[9]. MFN clauses in Bilateral Investment Treaties (BITs) are there to expand the rights of investors.[10] In recent years, MFN provisions have attracted considerable

[2] Jeswald W. Salacuse, *The Law of the Investment Treaties* (Oxford: Oxford University Press, 2010), 1.

[3] "Recent Developments in Investor-State Dispute Settlement (ISDS)," accessed November 19, 2022, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

[4] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012), 206.

[5] Abby Cohen Smutny and Lee A. Steven, "The MFN Clause: What Are Its Limits?" in the Arbitration under International Investment Agreements: A Guide to the Key Issues, ed. Katia Yannaca-Small (Oxford University Press, 2010), 352.

[6] Ibid.

[7] Ibid 351.

[8] Ibid.

[9] Francisco Vacuna, "Bilateral Investment Treaties and the Most-Favored-Nation Clause: Implications for Arbitration in the Light of a Recent ICSID Case," in Investment Treaties and Arbitration, ed. Swiss Arbitration Association (Basel: Swiss Arbitration Association, 2002), [specific page number]. "Under most [bilateral investment treaties] ... the key of the protection of the investors lies not so much in the substantive provisions of the treatment accorded...but in the arrangements allowing for the submission of disputes to arbitration."

[10] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law, 2nd ed.* (Oxford: Oxford University Press, 2012), 206.

attention in BIT disputes, but MFN treatment is not required under customary international law,[11] and it becomes one of the core features of BITs. MFN provisions prohibit the host states from discriminating between two foreign investors from two different states. It is also the last resort for an investor to protect its investment by invoking the MFN clause when BITs are failed.[12] In 1952, the first decision related to an MFN clause was delivered by the ICJ in the *Anglo-Iranian Oil Company*[13] *case*. In this case, the bone of contention was whether the UK could rely on a treaty between Iran and Denmark to bring in more favorable provisions for its benefit.[14] The Court did not accept this contention on the ground that the treaties whose application was sought by the United Kingdom were simply excluded from the scope of Iran's declaration of acceptance of the Court's jurisdiction pursuant to Article 36, paragraph 2, of the Court's Statute.[15] Also, it described the operation of the most favored nation provision in the following terms:

"... in order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most favored nation clause contained in a treaty concluded by the United Kingdom and Iran, the United Kingdom must be in a position to invoke the latter treaty.The basic treaty between Iran and the United Kingdom actually created the juridical link to invoke third-party treaty provisions which Iran granted to another country. Since a third-party treaty is unique and isolated from the basic treaty, it cannot produce any legal effect as between the United Kingdom and Iran because it is *res inter alios acta*."[16]

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[11] Dolzer, *Principles of International Investment Law*, 206.

[12] Jeswald W. Salacuse, *The Law of the Investment Treaties* (Oxford: Oxford University Press, 2010), 252, 403.

[13] Anglo-Iranian Oil Co. (United Kingdom v. Iran), http://www.icj-cij.org/docket/index.php?sum=82&p1=3&p2=3&case=16&p3=5. accessed 4 April 2022.

[14] Anglo-Iranian Oil Co. (United Kingdom v. Iran), accessed April 4, 2022, http://www.icj-cij.org/docket/index.php?sum=82&p1=3&p2=3&case=16&p3=5.

[15] The two treaties containing the most-favoured-nation clause and relied upon by the United Kingdom were the Treaty concluded between the United Kingdom and Iran on 4 March 1857 and the Commercial Convention concluded between the United Kingdom and Iran on 9 February 1903. Iran's Declaration of acceptance of the Court's compulsory jurisdiction, signed on 2 October 1930 and ratified on 19 September 1932, provided in turn that such jurisdiction covered "any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration. Also, "If the United Kingdom is not entitled to invoke its own Treaty of 1857 or 1903 with Iran, it cannot rely upon the Iranian-Danish Treaty, irrespective of whether the facts of the dispute are directly or indirectly related to the latter treaty."

[16] Yas Banifatemi, "The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration," in Investment Treaty Law: Current Issues III, ed. British Institute of International and Comparative Law (London: British Institute of International and Comparative Law, 2009), 239.

And according to Nartnirun Junngam,[17] an MFN clause "should not be prohibited unless it jeopardizes the validity and enforceability of an award to be rendered."[18] Primarily, MFN clauses are widely used in international trade law as a protection for substantive rights but, in international investment law, MFN clauses are also used concerning procedural rights.[19] So, a controversy arises and it adds even more fuel to that controversy when Jurgen Kurtz[20] states that "transmutation of the MFN clause from trade into investment was made without any analysis of its implications."[21] Besides, a lot of disagreement arises when awards are granted on the basis MFN provisions, as it raises the question of applicability, while allowing substantive guarantees.[22] According to Alejandro Faya, "[a]t the negotiation level, nobody thought these provisions [an MFN clause] could ever pose a real problem but now it has become clear that MFN clauses do pose a real problem, especially related to dispute settlement provisions."[23] Day by day, using MFN clauses in dispute settlement in an international investment law context rather than in an international trade law context is becoming more and more complicated.[24] To support this, Professor Schurer stated that the applicability of MFN clauses to dispute settlement is the most contentious issue.[25] The same has been opined by several scholars like Norah Gallagher, Salacause.[26] So, it can be easily stated that the applicability of MFN clauses in BIT dispute settlement is still at a primary stage of development.[27]

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[18] Junngam, Principles of International Investment Law, 400. (referencing note 13)

[19] Ibid, 404.

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[21] Junngam, Principles of International Investment Law, 404. (referencing note 13).

[22] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law, 2nd ed*. (Oxford: Oxford University Press, 2012), 191.

[23] Alejandro Faya Rodriguez, "The Most-Favoured-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?," *Journal of International Arbitration* 25, no. 1 (2008): 89, 90.

[24] Ibid.

[25]"Standard of Investment Protection," accessed April 19, 2022, http://www.univie.ac.at/intlaw/93.pdf.

[26] Junngam, Principles of International Investment Law, 404. (referencing note 13)

[27] To support this view we can go through some arbitral decisions of 2012. Several decisions rendered in 2012 continue to show a significant divergence between different tribunals and among arbitrators sitting on the same tribunal. 1) The majority of the tribunal in *Teinver v. Argentina* concluded that the claimant could rely on the MFN clause found in the Argentina-Spain BIT to make use of the (more favourable) dispute resolution provisions contained in Article 13 of the Argentina-Australia BIT. The tribunal noted that the broad "all matters" language of the MFN clause was unambiguously inclusive. 2) On the other hand, the tribunal in *ICS Inspection v.*

1. 2 MFN Clauses in Bilateral Investment Treaties

Basically, MFN provisions are there to introduce a liberal system for international trade law where equal treatment and non-discrimination clauses will help to lower the tariffs.[28] Actually, by inserting an MFN clause into BITs, the parties thereto intended to show their liberal ideas about the equality of States, propagating a wide scope of international trade nurtured by the States.
A typical MFN provision in investment treaties provides that:
(1) neither contracting party shall subject investments in its territory owned or controlled by nationals or companies of the other contracting party to treatment less favourable than it accords … to investments of nationals or companies of any third State; and
(2) neither contracting party shall in its territory subject nationals or companies of the other contracting party, as regards their activity in connection with investments, to treatment less favourable than it accords … to nationals or companies of any third State.[29]

Argentina found that the MFN clause in Article 3 of the Argentina-UK BIT did not apply in such a way as to permit the claimant to avail itself of the dispute resolution provisions of the Argentina- Lithuania BIT. The tribunal first of all noted that "a State's consent to arbitration shall not be presumed in the face of ambiguity [and] where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined." Secondly, according to the tribunal, the term "treatment", in the absence of any contrary stipulation in the treaty itself, was most likely meant by the two Contracting Parties to refer only to the legal regime to be respected by the host State in conformity with its international obligations, conventional or customary, while the settlement of disputes remained an entirely distinct issue, covered by a separate and specific treaty provision. Thirdly, the reference to "treatment in its territory" in the MFN clause clearly imposed a territorial limitation, which consequently excluded international arbitration proceedings from the scope of the MFN clause. Finally, on the basis of the aggregate comparison of the entire dispute settlement mechanism in the two treaties at issue (Argentina-UK and Argentina-Lithuania BITs), the tribunal concluded that Lithuanian investors were not necessarily accorded more favourable treatment by Argentina as compared to the UK investor. 3) The majority of the tribunal in *Daimler v. Argentina* denied the use of the MFN clause to circumvent the local litigation requirement in the Argentina-Germany BIT. The majority determined that the language of the Argentina-Germany BIT's MFN clause was territorially limited, that "treatment" was intended by the parties to refer only to treatment of the investment, and that the BIT did not extend MFN treatment to "all matters" subject to the BIT. 4) On the application of MFN to substantive treaty obligations, the tribunal in EDF v. Argentina concluded that the MFN clause in the applicable Argentina-France BIT permitted recourse to the "umbrella" clause found in Argentina's BITs with other countries. In the tribunal's view, to ignore the MFN clause in this case would permit more favourable treatment of investors protected under Argentina's BITs with third countries, which is exactly the result that the MFN clause is intended to prevent.

[28]Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), 131.

[29]Article 2, Agreement between the Federal Republic of Germany and the People's Republic of Bangladesh Concerning the Promotion and Reciprocal Protection of

The basic objective of an MFN Clause in BITs is investment, but it looks like this provision is only there for the protection of investors.[30] In reality, this provision is there for both investors and investments, but some BITs only refer to investors.[31] If we look at the German BITs, then we can find that the MFN provisions of some treaties only cover the similar treaties.[32]

1. 3 Structure of the MFN Clauses in International Investment Treaties:

The MFN Clause of BITs is generally structured in the manner figured in the following diagram. Here, State A (granting the MFN) enters into an obligation vis-à-vis the beneficiary State B, where these two states will extend to each other the benefits of third state C's BIT to increase their rights and stakes. The diagram below shows that State B has the opportunity to claim all the benefits from State A which are granted by State A to State C because of the scope of the MFN clause included in the treaty between A and B. The treaty containing the MFN clause

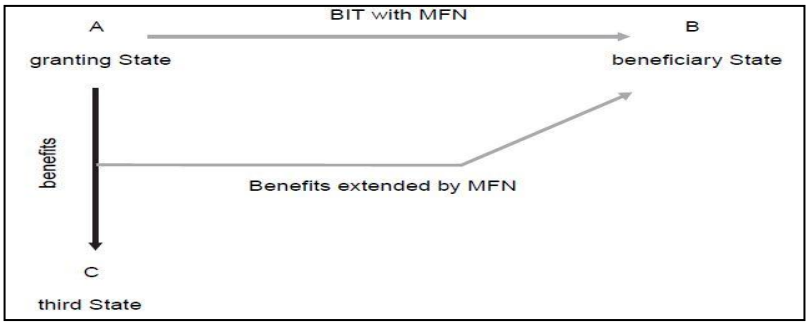

Fig: General function of MFN clause[33]
Fig: 1[34]

Investments, signed May 6, 1981, entered into force September 14, 1986, accessed April 15, 2024, http://investmentpolicyhub.unctad.org/Download/TreatyFile/264.

[30] Pia Acconci, "Most-Favoured-Nation Treatment," in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 370. Article 4 of Canadian Model BIT of 2004, accessed March 13, 2024, http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf. Article 4 of US Model BIT 2004, accessed March 13, 2024, http://www.state.gov/documents/organization/117601.pdf.

[31] Acconci, "Most-Favoured-Nation Treatment," 370.

[32] Article 2 of Germany BIT with Romania (1979), cited in Joachim Karl, "The Promotion and Protection of German Foreign Investment Abroad," *ICSID Review – Foreign Investment Law Journal* 11, no. 1 (1996): 13.

[33] Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), 127. (referencing note 29)

[34] Ibid.

agreed between A and B is designated as the "basic treaty", because it contains the basis for incorporating more favorable conditions granted in a third-party treaty into the treaty relationship between A and B. The third-party treaty (between A and C) does not, however, modify the relationship between A and B, the parties to the basic treaty. Also, it does not govern the relationship between the parties of the basic treaty as the applicable international treaty; rather, here, the content of the third-party treaty becomes operative because of the basic treaty's MFN clause. For this reason, MFN clauses do not break with the *inter partes* effect of international treaties.

1. 4 Draft Articles of the International Law Commission (ILC) on MFN Clauses

A multi-year project was initiated in 1964 to study MFN clauses, which led the ILC to adopt the culmination of that multi-year project as the Draft Articles on Most-Favored-Nation Clauses (Draft Articles).[35] Here, the ILC did not confine their work to one area, rather they explored the application of MFN clauses in as many as possible related areas.[36] But the United Nations General Assembly did not adopt it and did not take substantive action on the draft articles.[37] The main aim of the draft articles is to ensure equal treatment without any bias. On reviewing Article 31.1 of the Vienna Convention on the Law of the Treaties, we can come to a conclusion that, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' So, a beneficiary is entitled to claim all the rights and favors (given under an MFN clause) extended by the granting state to a third state.[38] Besides, the parties can limit, in their BIT, the extent of the favors that may be claimed by the beneficiary state; therefore, if the MFN clause contains restrictions, then the beneficiary state's claim cannot go beyond that restriction.[39] The other important principle attached to the Draft Articles on MFN Clauses is the *ejusdem generis* rule. Under this rule, an MFN clause can be applied to the matters belonging to the same subject matter to which the MFN clause relates.[40] Specifically, Article 9 states that the beneficiary State can acquire "only those rights which fall within the [subject matter of the [MFN] clause", while Article 10 provides that the beneficiary Stae

[35] Jarrod Wong, "The Application of Most-Favoured-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties," *Asian Journal of WTO & International Health Law and Policy* 3, no. 1 (2008): 171, 176.
[36]"Most-Favoured-Nation Treatment in International Investment Law," OECD Working Papers on International Investment 2/2004 (2004): 8, accessed May 10, 2024, https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid., 177.

acquires the right to MFN treatment "only if the granting State extends to a third State treatment within the limits of the subject matter of the clause."[41]

1. 5 Motivation and Reasons for choosing the topic:

Currently, an MFN clause is used by both the investor and the host state in their respective BIT's. As BITs are independent treaties, there is no scope for including any other matter after their implementation. Interestingly, MFN Clauses have been dragging along third countries' BIT provisions, especially jurisdictional provisions, increasing waiting periods for BIT claims in International Tribunals. BITs are binding international agreements where the host state gives extra privileges to particular countries' investors to invest in the host state and, because of these, investors invest mainly in those countries to develop their countries, although nowadays it happens vice-versa. And, for this reason there are many legal complications when a conflict of interest arises. Furthermore, because of these BITs, economically developing countries are getting a benefit (not true for every context) and they have a huge role to play in the developing world. Because of lacunae in expertise and experiences, both investors and the host state have to face some unwanted problems. Mainly, in the case of disputes, several unlawful ultra vires actions have taken place, primarily endangering the security of investments by investors. The latest example is ***Saipem v. Bangladesh***[42], where the Bangladesh High Court interrupted the international procedure after a mass rebellion took place as simple xenophobia against capitalism upsurged and made things difficult. Moreover, we also observe that some tribunals have come up with a new idea to resolve the problem, however, without maintaining or referencing proper international law, just coming up with new ideas like Salini Test in the ***Salini v. Morocco***[43] case. Besides, the other side of BITs is Foreign Direct Investment (FDI), directly contributing to developing countries and making them financially strong. In 2014, South Asia[44] FDI rose to 41 billion USD, with India receiving the most of it (34 billion) and the second place shared by Bangladesh, Iran and Pakistan (2 billion each).[45] The main reason is that South Asia

[41] Article 9 and Article 10, Draft Articles on Most-Favoured-Nation Clauses, 1974, accessed May 10, 2024, http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_3_1978.pdf.

[42] Saipem S.p.A. v. The People's Republic of Bangladesh, Award, accessed November 19, 2022, http://www.italaw.com/cases/documents/953.

[43] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction, accessed November 19, 2022, http://www.italaw.com/cases/documents/959.

[44] UNCTAD, World Investment Report 2015. South Asia consists of eight countries: Afghanistan, Bangladesh, Bhutan, India, Iran, Nepal, Pakistan, and Sri Lanka.

[45] "India Leads FDI in South Asia with $34 Billion Investment in 2014: Report," Economic Times, accessed August 19, 2024,

(excluding Iran, but including the Maldives) has 204 BITs and 41 other Investment Agreements (IIAS).[46] Though, almost 42% of those BITs have been signed by India. Actually, this is the main reason and inspiration that motivates me to work on this topic. Now, the main question arises: do MFN Clauses have the ability to extend to procedural issues just like they are widely used for substantive issues between two countries? Also, do they have the capability to drag the third-party BIT provisions into a dispute settlement mechanism in the same way as the BIT concluded between the two parties?

2. 1 MFN and Related Issues regarding International Investment

An MFN provision is introduced to put a bar on discrimination against stakeholders from different nations and maintain equality. To ensure this, several issues arise when an MFN provision is being invoked in the process of settling the dispute related to an investment treaty. The MFN provision is related to both procedural matters and substantive treatment of BITs. In international trade law, there is no scope for traders to bring any BIT claim against the states, rather it should be solved by the states even if the stakeholders are suffering loss.[47] For that reason a controversy arises concerning whether this clause should also extend to dispute settlement procedures in international trade law. With respect to international investment law, the application scope of the clause can be divided into two categories: (1) substantive protection and (2) procedural protection (dispute settlement). But it has been universally accepted that MFN clauses only apply to the protection of substantive rights. Meanwhile, controversy arises when this clause is applied for procedural protection.[48]

There are some distinctions between substantive and procedural protection and, in the ***Renata 4 SVSA v. Russian Fedaration***[49] case, the respondent state argued that the MFN clause applies only to protection of substantive rights and not to procedural protection. And in this case, it has been found that this argument made by the respondent state is rather unpersuasive and should not be

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http://economictimes.indiatimes.com/news/economy/foreign-trade/india-leads-fdi-in-south-asia-with-34-billion-investment-in-2014-report/articleshow/47806243.cms.

[46] "International Investment Agreements Navigator," accessed May 14, 2024, http://investmentpolicyhub.unctad.org/IIA.

[47] Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BEATs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," *Harvard International Law Journal* 46, no. 1 (2005): 67, 88.

[48] Nartnirun Junngam, "An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration By Reference," UCLA Journal of International Law & Foreign Affairs 15 (California): 403.

[49] Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation, SCC No. 24/2007, accessed August 12, 2024, http://www.italaw.com/cases/915.

upheld.[50] The reason provided was that there is a scope for discrimination being committed in the context of both substantive and procedural rights. If we look at the past, then we can easily see that, because of the substantive nature of issues, we looked for substantive protection, but nowadays, for the perfect application of the clause, we should allow it to function properly in accordance with the varying conditions.[51] Actually, substantive and procedural protection are very closely connected and, therefore, it is very difficult to establish the distinctive nature of both types of protection.[52] Overall, "in a positivist conception of law in which rights exist only to the extent that they are enforceable, the distinction between substantive and procedural rights may be of no practical significance and thus a reading of treatment that included one and not the other could be seen as arbitrary."[53]

2. 2 Substantive Protection

Usually, an MFN clause in an investment treaty deals with the way how a state deals with foreign goods and persons when they enter the territory of the host country.[54] Mainly in the field of foreign investors and/or investments during the post-establishment phase, the issue of MFN clauses arises when the association between the host state and foreign investors becomes inimical and a dispute takes place.[55] Mainly for this reason, the functioning of the MFN treatment is evaluated by arbitration tribunals.

The ***AAPL v. Sri Lanka***[56] is the first case where MFN clauses have been discussed in the ICSID tribunal and the tribunal has considered an MFN clause in relation to liability standards. The tribunal considered the case based on the UK-Sri Lanka BIT. The case took place because of the claim for damages filed by the investor against the respondent State Sri Lanka, where there were civil conflicts going on. The claimant invoked the MFN clauses of the BIT and stated that the Sri Lanka – Switzerland BIT provides for a more favorable standard of liability than the UK – Sri Lanka BIT. Also, they sought the protection granted in the Sri Lanka – Switzerland BIT. Nevertheless, the arbitral tribunal rejected

[50] Ibid., paras. 98–101.
[51] Junngam, Principles of International Investment Law, 509. (referencing note 2).
[52] Yannick Radi, "The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'," *European Journal of International Law* 18, no. 4 (2007): 757, 762, fn. 474.
[53] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford: Oxford University Press, 2015), 359.
[54] Pia Acconci, "Most-Favoured-Nation Treatment," in *Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 381.
[55] Ibid.
[56] AAPL v. Sri Lanka, ICSID Case No. Arb/87/3, Award of June 27, 1990, ICSID Reports 4 (1990): 246 ff., accessed August 25, 2024, http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf.

the claim. It stated that '....it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favorable than this provided for under the Sri Lanka/UK Treaty, and hence, Article 3 of the latter Treaty cannot be justifiably invoked in the present case.' On the other hand, in the case of ***CMS v. Argentina***,[57] the claimant relied upon the MFN treatment included in the USA – Argentina BIT to maintain that the liability standards incorporated in other Argentinean BITs could apply, as they were more favorable than those contained in the US-Argentina BIT. The main reason behind this claim was that all other BITs concluded between Argentina and other countries did not include exception clauses to MFN treatment but such a clause is included in USA-Argentina BIT. On the other hand, the tribunal rejected the assertion and stated that it is 'not convinced that the clause [had] any role to play in this case.'[58] The tribunal also established that such an assertion 'would in any event fail under the *ejusdem generis*[59] rule, as rightly argued by the Respondent.'[60] Here the tribunal did not explain the reasoning behind its conclusion about the *ejusdem generis* rule. Besides, the tribunal also did not deal in more depth with the issue of the *ejusdem generis* rule.

Furthermore, by analyzing case-law, it is easily found that the standard of fair and equitable treatment is also connected with the standard of MFN treatment.[61] Actually, the relation between the standards of fair and equitable treatment and that of MFN treatment are parallel in nature and there is absolutely no hierarchy.[62] So, fair and equitable treatment should not be looked on as an outsmart standard where there may be a scope for the inclusion of other protective standards.[63] For the last few decades, the approach has shifted toward including MFN treatment instead of fair and equitable treatment. Therefore, it can be easily said that a modern-day typical standard of international trade is now common in international investment law. This is occurring mainly because

[57] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award of April 20, 2005, accessed August 22, 2024, http://www.italaw.com/cases/288#sthash.jxGNIXAe.dpuf.

[58] Ibid., para 377.

[59] "Ejusdem generis" refers to a principle of legal interpretation used to limit the scope of general terms in legislation or legal documents by constraining them to the same class or category as the specific terms mentioned. For example, if a law refers to "cars, trucks, and other vehicles," the general term "vehicles" would be interpreted to include only those types of vehicles similar to cars and trucks, not, for instance, airplanes or boats.

[60] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, para. 377.

[61] Pia Acconci, "Most-Favoured-Nation Treatment," in *Oxford Handbook of International Investment Law,* ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 382.

[62] Ibid.

[63] Stephen Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice," *British Yearbook of International Law* 70 (1999): 99–149.

of the increasing significance of foreign investments in the process of global economic integration. Also, the growing complementarity between trade and investments is creating continuous competition between states to attract investors and there is a sign of transparency in the international legal framework in the area of foreign investment.[64] Remarkably, MFN treatment has become quite relevant due to the rapid changes which have taken place in many developing countries and due to the progressive liberalization which those countries have been undergoing, even through concluding investment treaties *inter se*.[65] For that, the issue of applying the MFN standard to substantive matters of treatment in connection with the fair and equitable treatment standard can arise.[66] In 1995, the BIT treaty between Pakistan and Turkey did not expressly include fair and equitable treatment, but in the case of **Bayindir v. Pakistan**[67] there was a successful attempt to link the fair and equitable treatment standard with the most favored nation treatment provided in the BIT of the respective countries. The claimant argued that it was entitled to get fair and equitable treatment through the Most Favored Nation treatment which is included in the BIT between Pakistan and Tukey. Later, the ICSID[68] tribunal accepted that argument and upheld its jurisdiction although Pakistan vehemently objected to it. Also, the tribunal concluded that Pakistan has an explicit fair and equitable principle clause in other BITs signed by the government of Pakistan.[69] In considering the claim that a selected tendering process was held to favor the locals to replace *Bayindir* in the completion of the investment[70], the court found that there was a direct violation of the Most Favored Nation treatment and the court also upheld its jurisdiction.[71] There was an allegation of violation of the MFN clause and it had to be dealt with by the tribunal. In this regard, the tribunal noted that the MFN clause was not limited

[64] Pia Acconci, "Most-Favoured-Nation Treatment." In *Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 383.
[65] Ibid., 81.
[66] Stephen Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice," *British Yearbook of International Law* 70 (1999): 106. Vasciannie emphasizes that "one effect of the growing network of bilateral investment treaties incorporating the most-favorable-nation standard has been to generalize the applicability of the fair and equitable standard among States."
[67] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Award, accessed August 29, 2024, http://www.italaw.com/cases/documents/133#sthash.Sk1JTTNm.dpuf.
[68] International Centre for Settlement of Investment Disputes (ICSID), "Home," accessed August 22, 2024, https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx.
[69] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Award, paras 230-31, accessed August 29, 2024, http://www.italaw.com/cases/documents/133#sthash.Sk1JTTNm.dpuf.
[70] Ibid., paragraph 208–210.
[71] Ibid., paragraph 219–2221, 223–224.

to regulatory treatment, but also applied "to the manner in which a state concludes an investment contract and/or exercises its rights thereunder".[72] On the contrary, in the case of ***Telenor v. Hungary,***[73] the claimant failed to achieve a similar conclusion. Although an MFN clause was included in the basic treaty of 1991 between Hungary and Norway, the claimant failed to achieve its goals. Also, an expropriation claim arose and both parties had to agree to submit to ICSID arbitration. There was an allegation that the host state had breached the fair and equitable treatment afforded by the BIT and, in support of this, Telenor pointed out the procedural link by referring to the MFN clause. For this reason, a very broad dispute resolution clause emerged.[74] Hungary objected to this claim by contending that the 'most favoured nation clause [was] limited to substantive rights and could not be invoked to extend the jurisdiction of the tribunal beyond that conferred by…. the Hungary-Norway BIT.'[75] The *Maffezini,*[76] *Siemens,*[77] *Gas Naturals*[78] *and Suez*[79] cases were also mentioned by the ICSID tribunal as examples where a broad construction of the most-favored-nation provision was given.[80] There arose also situations where the tribunal took a narrower approach to deal with the MFN clause, for example, in the cases of *Salini*[81] and *Palma.*[82] Because of ambiguity in the language of the BITs of the respective parties concerning 'the intention of the parties', the tribunal adopted the same approach as the *Palma* tribunal and attributed absolute relevance to the intention being clearly expressed by the contracting states.[83] Here, in this

[72] Ibid., paragraph 222.
[73] Telenor Mobile Communications A.S. v. The Republic of Hungary, Award http://www.italaw.com/cases/documents/1094 accessed 02 October 2024.
[74] Ibid., paras 20, 41 and 52.
[75] Telenor Mobile Communications A.S. v. The Republic of Hungary, Award http://www.italaw.com/cases/documents/1094. accessed 02 October 2024.
[76] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, accessed August 13, 2024, http://www.italaw.com/documents/Maffezini-Jurisdiction-English_001.pdf.
[77] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, accessed August 13, 2024, http://www.italaw.com/cases/1026#sthash.09l2l69d.dpuf.
[78] Gas Natural SDG, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/10, accessed August 13, 2024, http://www.italaw.com/cases/476#sthash.1LHRvHb0.dpuf.
[79] Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, accessed August 13, 2024, http://www.italaw.com/cases/1048#sthash.T3NHRUIt.dpuf.
[80] Telenor Mobile Communication AS v. Hungary, ICSID Case No. ARB/04/15, Award of June 22, 2006, paras. 85-88. In this case, the claimant particularly referred to the Maffezini and Siemens cases in support of the proposition.
[81] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, accessed August 14, 2024, http://www.italaw.com/cases/954#sthash.b0xqkXIA.dpuf.
[82] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, accessed August 14, 2024, http://www.italaw.com/cases/documents/858#sthash.7Rks3DId.dpuf.
[83] Ibid., paras 90–91.

situation, the tribunal also referred to Article 31 of the *Vienna Convention of the Law of Treaties of 1969,*[84] stating that, as already underlined by the *Palma* tribunal, '….the effect of the wide interpretation of the MFN clause is to expose the host state to treaty shopping by the investors…..'[85] and that '….the wide interpretation of the MFN clause generates both uncertainty and instability….,'[86] and that '… what has to be applied is not some abstract principle of investment protection in favor of a putative investor who is not a party to the BIT…., but the intention if the States who are the contracting parties,' as the tribunal's '…. task is to interpret the BIT….'[87] Where the basic treaty clearly limis arbitration to expropriation claims, then it is inevitable that the tribunal will have jurisdiction over it.[88] The same things happened in the *Telenor* case where there was an alleged breach of the treaty obligation to provide fair and equitable treatment.[89]

2. 3 Procedural Protection

After going through the decision of several tribunals regarding MFN clauses, it is accepted that there are no constant rules for dealing with MFN treatment, rather all the decisions are separate from each other. Also, these decisions have received different justifications from the judges of the respective tribunals as to why they are relying on the MFN provisions. Like in the case of tribunals, scholars' views on these issues are also different and not unanimous. Besides, some of the scholars who served as judges used several academic forums for further development of their views on these issues.[90] If we go through the general meaning of arbitral jurisprudence, we will find that there is room for including more favorable treatment by using an MFN clause, but when the investors try to establish or to expand the jurisdictional basis to cover 'Investor - State' arbitration based on a broader consent to arbitration in third-party BITs, it does not allow to do so.[91] Additionally, present BIT practices of parties (especially the United States) partly disapprove the application of MFN clauses

[84] Ibid., para 92.
[85] Ibid., para 93.
[86] Ibid., para 94, https://unctad.org/system/files/official-document/unctaddiaeia2011d6_en.pdf.
[87] Ibid, para 95
[88] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, accessed October 02, 2024, http://www.italaw.com/cases/documents/858#sthash.7Rks3DId.dpuf.
[89] Ibid., 102.
[90] Junngam, Principles of International Investment Law, 480. (referencing note 2)
[91] Dana H. Freyer and David Herlihy, "Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How 'Favored' is 'Most-Favored'?" *ICSID Review* 20, no. 1 (2005): 58.

to dispute settlements.[92] Several authors both approve and disapprove the applicability of an MFN clause to dispute settlements.[93] Many writers pointed out this issue and remind participants in international law to recognize it.[94] Applying the clause in dispute settlement provisions will extend the globalization and harmonization of dispute settlement provisions. The president of *Maffezini* argued in that manner.[95] Also, allowing a dispute to come before an international tribunal is more important than a set of substantive protections. Moreover, he believed the exclusion of dispute settlement from the operation of the MFN clause seemed unreasonable in the absence of the parties' intention.[96] Another scholar named Jurgen Kurtz argued that, unless otherwise stated, the operation of the clause should cover procedural matters.[97] In addition, this clause should be applied to dispute settlement to the extent it does not contravene other fundamental policies in the same BIT.[98] The MFN clause has been termed as a *Trojan Horse* by Yannick Radi,[99] who believes that by reason

[92] Stephan W. Schill, The Multilateralization of International Investment Law (Cambridge: Cambridge University Press, 2009): 151. Recent US and Canadian BIT practice concerning MFN treatment in BITs and Free Trade Agreements (FTAs) now includes attempts to deliberately limit MFN treatment to substantive investment protection. Thus, the United States introduced a clause in some subsequent negotiations that specifically intended to exclude the application of MFN clauses to investor-State dispute settlement. See Article 10.4(2), footnote 1, Draft of the Central America–United States Free Trade Agreement, January 28, 2004 (stating that the parties agree that the MFN clause they include in their treaty "does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter and, therefore, could not reasonably lead to a conclusion similar to that of the Maffezini case").

[93] Junngam, *Principles of International Investment Law*, 480.

[94] Ibid.

[95] Ibid 481., Francisco Orrego Vicuna, F*oreign Investment Law: How Customary is Custom?* (American Society of International Law, 2005): 97, 100.

[96] Francisco Vacuna, "Bilateral Investment Treaties and the Most-Favored-Nation Clause: Implications for Arbitration in the Light of a Recent ICSID Case," in Investment Treaties and Arbitration, ed. (Basel: Swiss Arbitration Association, 2002): 142.

[97] Jurgen Kurtz, "The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: Maffezini v. Kingdom of Spain," in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties, and Customary International Law,* ed. Todd Weiler (London: Cameron May, 2005): 523, 530.

[98] Jarrod Wong, "The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties," AJWTO & IHLP 171 (2008): 177-79.

[99] Yannick Radi, "The Application of the Most-Favored-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse,'" *EJIL* 18, no. 4 (2007): 761. Dr Yannick Radi is an Assistant Professor in International Law at the Grotius Centre for International Legal Studies of Leiden University and a Guest Professor at the University of Lille where he lectures on the philosophy of International Law.

of the *effet utile*,[100] the MFN clause always applies to the dispute settlement mechanism unless it can be demonstrated through a systemic interpretation that the parties have intended otherwise.[101] Besides, some scholars have the view that the application of the MFN clause in dispute settlement should be more limited, for instance, it should be discussed when there is a need for it.[102]

However, some scholars are against permitting MFN clauses to be used for more favorable procedural protection. They believe that it does not seem correct to extend the MFN clause to arbitration because there is no government action involved in the dispute settlement.[103] According to these scholars,

'...Treaties specify procedures. Consequently, an MFN does not control, absent ambiguities. They further argue that arbitration is consent-based between national parties; therefore, the operation of the MFN clause should not challenge or revise procedures that govern arbitration. If the MFN clause did challenge the original procedures, the new arbitration procedures would no longer reflect the government's consent, and would become contrary to the intent of the parties.'[104]

Also, there are opinions according to which when states are including the MFN provision to attract foreign investment, it may be politically motivated, so, it does not actually show the true consent of states.[105] The fear behind this opinion is that if an investor is allowed to draw more favorable treatment from other BITs rather than the host state's BITs then they may cherry-pick from all the

[100] *effet utile* or the effectiveness of European law. The development of *effet utile* is usually studied as a concept of EU law within the framework of the interpretative methods and legal principles developed by the Court. "The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-accession Case Law of the Court of Justice of the EU", https://www.ejls.eu/18/209UKhtm. accessed 18 August 2024.

[101] Junngam, *Principles of International Investment Law*, 481.

[102] Ibid, 482. "[T]treaty was, after all, drafted precisely in order to give expression to the intentions of the parties, and must be presumed to do so. Accordingly, this intention is, *prima facie*, to be found in the text itself, and therefore the primary question is not what the parties intended by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended. It may be quite true, as Judge Anzilotti said in the *Night Work* case, that 'the words have no value except as an expression of the intention of the parties'; but it is no less true that it was precisely in order to express that intention that the words were chosen, and for this reason, and in that sense, they have value and significance in themselves, without reference to anything extraneous."

[103] Junngam, *Principles of International Investment Law*, 482.

[104] Ibid.

[105] Brigitte Stem, "ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case," in *Law in the Service of Human Dignity: Essays in Honor of Florentino Felciano*, ed. Steve Charnovitz, Debra P. Steger, and Peter Van den Bossche (Cambridge: Cambridge University Press, 2005): 246.

BITs of the respondent's parties. Therefore, Professor Sonarajah[106] was very cautious in his article regarding the application of MFN provisions so that it does not lead to an unplanned result and that reasonable care must be taken while applying the provision.[107] So, some scholars like professor McLachlan and others also disagree with applying an MFN clause to dispute settlement; they rather prefer the *Palma* approach over *Maffezini*[108] and they also urge that, when the MFN clause is being applied in a dispute settlement process, it must be made sure it will not have any effect of fundamentally subverting the carefully negotiated balance of the BIT in question.[109]

Besides, some scholars, giving their views on the application of the MFN clause in dispute settlement, disapprovingly stated:

The lack of evidence of an intention that the MFN would apply to dispute settlement; that the application of an MFN would disrupt the balance achieved in the treaty and lead to treaty shopping; the need for clear and unambiguous consent; and the practice of states such as the UK that have expressly provided for MFN treatment to cover dispute resolution.[110]

Finally, use of MFN provisions in international investment law is totally different from international trade law. In international trade law, the MFN provisions are only used for substantive matters, on the other hand, in the area of international investment law, the MFN provisions can be used for both substantive and procedural issues. For this, using MFN provisions in the international investment law arena is controversial because it does not have any limitations like where to stop or start. To remove this confusion, several scholars and judges of independent arbitral tribunals have made comments on and delivered judgments for and against such use of MFN provisions in both substantial and procedural circumstances in investor - state dispute settlement provisions, but still there is no standard or set of rules to interpret existing MFN provisions.

3. 1 MFN Provisions and Jurisdiction

Over the past years, the interpretation and application of MFN provisions has been discussed by the International Court of Justice and several international tribunals. Primarily, these tribunal and court decisions have a deep relevance to understanding the application of MFN provisions in specific circumstances. Besides, the MFN clause is depended on to bring out a benefit which is not

[106] M. Sornarajah, The International Law on Foreign Investment, 2nd ed. (Cambridge: Cambridge University Press, 2010): 308.
[107] Ibid, 236.
[108] Junngam, Principles of International Investment Law 483.
[109] Campbell McLachlan QC, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2008): 254.
[110] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment, "Historical Development of Investment Treaty Law"* (Kluwer Law International, 2009): 205, 218.

usually available in general circumstances.[111] Some cases had a huge impact when a BIT dispute arose.

The case of the *Anglo-Iranian Oil Company* is a common case which has been cited in several investment treaty dispute settlements and arbitration in recent times.[112] Next, in the case of ***Rights of US Nationals in Morocco (France v. United States of America),***[113] it was decided that the application of MFN treatment depends primarily on two sets of treaties, namely, the basic treaty and the third-party treaty, if one is to establish the content of the treatment allowed under the MFN clause.[114] In this case it is explained by the ICJ that, in order to invoke the rights under MFN treatment given in the basic treaty and the third-party treaty, both treaties must be valid and in force.[115] In the *Rights of US Nationals in Morocco (France v. United States of America)* case, the question was raised as to whether the United States would get the 'privileges with regard to consular jurisdiction' that Morocco had granted to Spain and the United Kingdom in other BITs. The United States further reasoned and claimed that they were entitled to a decision on jurisdiction on the basis of a treaty concluded with Morocco in 1936, where Morocco agreed that 'whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them.'[116] The ICJ rejected this claim of the United States. The Court, further examining the treaties of Morocco with Spain and the United Kingdom, found that the 'intent of the parties was to treat each other with equality at all times, and therefore the Court held that once Spain and the United Kingdom had renounced the privileges at issue, the basis of those privileges ceased to exist, and the United States accordingly could not invoke the MFN clause to continue the claim.'[117] Furthermore, another widely cited case in investment treaty arbitration is the ***Ambatielos***[118] case. This case was decided by an *ad hoc* Arbitration Commission in 1956. Greece invoked the MFN clause of 1886 Anglo-Greek Treaty of Commerce and Navigation, because Greece believed that Mr. Ambatielos, a Greek citizen had suffered a denial of justice in respect of a

[111] Abby Cohen Smutny and Lee A. Steven, "The MFN Clause: What Are Its Limits?" in *Arbitration under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small (Oxford: Oxford University Press, 2010): 352.

[112] This case is discussed in the introductory part of this article.

[113] *Rights of US Nationals in Morocco (France vs United States of America)* http://www.icj-cij.org/docket/files/11/1927.pdf accessed 20 August 2024.

[114] Smutny and Steven, "MFN Clause," 360.

[115] Ibid.

[116] Ibid.

[117] Ibid 361.

[118] The Ambatielos Claim (Greece v. United Kingdom), International Court of Justice, http://www.icj-cij.org/docket/index.php?sum=81&p1=3&p2=3&case=15&p3=5. (accessed August 27, 2024).

dispute brought before the English courts.[119] On the other hand, the United Kingdom argued that Greece did not bring a valid claim because the MFN clause related to commerce and navigation and did not relate to the administration of justice.[120] The court rejected the claim and stated that "the effects of the most favored nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the rights of persons engaged in trade and navigation."[121] To resolve the case the arbitration commission used the *ejusdem generis* principle and stated that the 'clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.'[122] 'Moreover, the commission found that this 1886 Anglo-Greek Treaty encompassed the administration of justice, at least in respect of the intended beneficiaries under the treaty.[123] The commission also found that the administration of justice was included in the scope of the 1886 Anglo-Greek Treaty, because the clause broadly referred to "all matters relating to commerce and navigation."[124] Nevetheless, the Arbitration Commission reached the verdict that Mr. Ambatielos had not suffered a denial of justice and rejected the claim of Greece. However, this proposition of the Arbitration Commission is not universally accepted.[125]

The following discussions will focus on later cases related to jurisdictional issues regarding an MFN clause.

3. 2 The Applicability of MFN Clauses in Matters of Jurisdiction

RosInvest v. Russia[126]

For the first time the jurisdictional issues were discussed in this case and the court ruled that the 'clause could entitle an investor to ignore a dispute settlement mechanism in its BIT and enjoy one drawn from another BIT'.[127] Also, in this case, the MFN clause invoked articles from the UK-Soviet BIT and the Denmark-Russia BIT, to establish the jurisdiction of the tribunal. The aggrieved party claimed that they can bring the MFN clause from the Denmark-Russia BIT. On the other hand, the defendant stated that the aggrieved party cannot cherry-pick from the other BIT's clauses as this BIT was carefully

[119] Abby Cohen Smutny and Lee A. Steven, "The MFN Clause: What Are Its Limits?" in Arbitration under International Investment Agreements: A Guide to the Key Issues, ed. Katia Yannaca-Small (Oxford: Oxford University Press, 2010): 361.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Ibid, 362.
[124] Ibid, 362.
[125] Ibid., 362.
[126] RosInvest v. Russia, SCC Case No. Arbitration V. 079/2005, Award on Jurisdiction (October 2007), http://ita.law.uvic.ca/documents/Roslnvestjurisdiction-decision_2007-10_00 I.pdf. (accessed August 3, 2024).
[127] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Cambridge University Press, 1986): 439.

negotiated and had a narrow scope. Furthermore, the defendant submitted that the narrow and broad clause from the Denmark-Russia BIT was in no position to relocate the original grant of jurisdiction. In addition, the respondent also argued that the MFN clause of the United Kingdom - Russia BIT was only concerned with substantive standards.[128] Later the tribunal found regarding the occurrence or validity of an expropriation that, under Article 8 of the United Kingdom and Soviet BIT, it had no jurisdiction. The jurisdiction under Article 8 of United Kingdom and Soviet BIT was limited only to disputes concerning amounts or payment of compensation or any other matters consequential to an expropriation.[129] The facts of the case are as follows:
Russia challenged the jurisdiction of the Tribunal because Rosinvest claimed that the Russian Federation had taken discriminatory and expropriatory decisions against them after they had bought 7 million shares in Yukos during November and December 2004.

The Tribunal's reasoning regarding jurisdiction
Here the tribunal took the wider definition from the Denmark-Russia BIT and did not take into account Article 8 of the UK-Soviet BIT by stating that this article did not grant jurisdiction to the tribunal regarding expropriation. Also, Article 8(1), is not sufficient to resolve the issues related to expropriation and determining compensation. So, there should be a separate basis for jurisdiction.
However, the proposition was rejected by Russia as they stated that only substantive and not procedural protection was granted by the MFN clause.

In the case of ***Renta 4 SVSA v. Russian Federation,***[130] where interestingly it was accepted by the tribunal that MFN clauses may extend to the tribunals' jurisdiction and jurisdiction based on the treaty may be disregarded,[131] a majority of the *Renta 4* tribunal ultimately decided that the specific MFN clause in the Spain–Union of Soviet Socialist Republics BIT (as it is linked to FET) could not be read as to expand the competence of the tribunal. In this case, under Article 10 of the Spain - USSR BIT, disputes may be arbitrated if they are related to the amount or method of payment of the compensation following nationalization and expropriation.[132] Here, in this case, the tribunal heavily

[128] RosInvest v. Russia, SCC Case No. Arbitration V. 079/2005, Award on Jurisdiction, 87-88, 99 (October 2007), http://ita.law.uvic.ca/documents/Roslnvestjurisdiction-decision_2007-10_00 I.pdf.
[129] Ibid.
[130] Renta 4 SVSA v. Russian Federation, SCC Case No. 24/2007, Award on Preliminary Objections, March 20, 2009, http://www.italaw.com/cases/915. (accessed August 25, 2024).
[131] Ibid, paras. 80–101.
[132] Ibid, paras 19–76.

relied on the *Ambatielos*[133] award, where it was unanimously forwarded as a general proposition that the MFN clause might be construed to encompass dispute settlements.[134] The Tribunal did not believe in the idea that access to different types of dispute settlements mechanisms should not be considered subject to MFN treatment because it would lead to forum shopping:

The use of the expression "forum shopping" in a derogatory sense is but the assertion of an opinion. It does not deal with the countervailing consideration to the effect that dispute resolution mechanisms accepted by a State in various international instruments are all legitimate in the eyes of that State. Some may be inherently more efficient. Others may be more reliable in a particular context. Having options may be thought to be more "favoured" for MFN purposes than not having them. It is not convincing for a State to argue in general terms that it accepted a particular "system of arbitration" with respect to nationals of one country but did not so consent with respect to nationals of another. The extension of commitments is in the very nature of MFN clauses.[135]

The tribunal of this case also stated that it was the duty of the tribunal to determine whether arbitration clauses in third-party treaties contained more favorable treatment or not; and the tribunal should determine it when there was no explicit provision regarding the extension of the MFN clause or the exception was absent in the treaty.[136]

3. 3 The Inapplicability of MFN Clauses in Matters of Jurisdiction

On the other hand, there are cases where an MFN clause was invoked in terms of jurisdictional issues but it was not accepted by the tribunal. Such are:

Salini v. Jordan[137]**,** in which case the claimant tried to broaden the respondent's consent which was present in the dispute settlement clause of the Italy - Jordan BIT of 1996. To show that the respondent consented, the claimant sought an umbrella clause from a third-party BIT to include in this BIT. Here the ICSID tribunal rejected the argument made by the claimant. The ICSID tribunal simply stated that the MFN clause stated in the BIT of Jordan and Italy did not have reference to 'all matters governed by the agreement', rather, the scope of the

[133] The Ambatielos Claim (Greece v. United Kingdom), International Court of Justice, http://www.icj-cij.org/docket/index.php?sum=81&p1=3&p2=3&case=15&p3=5. (accessed August 27, 2024).

[134] Nartnirun Junngam, "An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration By Reference," *UCLA Journal of International Law & Foreign Affairs* 15 (2009): 452.

[135] Renta 4 SVSA v. Russian Federation, SCC Case No. 24/2007, Award on Preliminary Objections, March 20, 2009, http://www.italaw.com/cases/915. (accessed August 25, 2024) para 92.

[136] Ibid.

[137] Salini Costruttori S.p.A. v. Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction (November 15, 2004), http://ita.law.uvic.ca/documents/salini-decisionO000.pdf. (accessed August 25, 2024).

provision was more limited and narrower compared to the MFN clause allowed in the *Maffezini* case.[138]

The final conclusion in this case was that '[t]he outcome in Salini is justified not on the basis of the Tribunal's presumption that MFN clauses do not apply to dispute settlement mechanisms, but rather because of the fundamental rule of international law, that the jurisdiction of an international tribunal is based on consent.'[139]

In the case of ***Berschader v. Russia***,[140] "each Contracting Party guarantees that the most favored nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty, and in particular in Articles 4, 5 and 6, with the exception of benefits provided by one Contracting Party to investors of a third country on the basis of its participation in a customs union or other international economic organizations, or & of an agreement to avoid double taxation and other taxation issues."[141]

After going through this clause, actually, most of them opined that the main objective of the tribunal was to reveal the intent of the contracting parties of the BIT.[142] Whereas most of the tribunal held different views from the *Palma* Tribunal.[143] Also, it may be questionable to what extent the MFN clause should extend to invoking provisions from third-party BITs, therefore, most of them try to limit the use of an MFN clause in procedural protection unless there is clear and unambiguous evidence.[144] So, the tribunal found that it lacked competence to hear the claim either through the original arbitration clause or through the MFN clause because of the practice of the Soviet Union.[145]

In the case of ***Tza Yap Shum v. Peru,***[146] the tribunal rejected the aggrieved party's application to use the MFN clause from the China-Peru BIT as a ground

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[138] Pia Acconci, "Most-Favoured-Nation Treatment," in Oxford Handbook of International Investment Law, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 394.

[139] Scott Vesel, "Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties," Yale Journal of International Law 32, no. 1 (2007): 125, 184-85.

[140] Bersehader v. Russia, SCC Case No. Arbitration V. 080/2004, Award (April 21, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf (accessed August 26, 2024).

[141] Ibid para 47.

[142] Abby Cohen Smutny and Lee A. Steven, "The MFN Clause: What Are Its Limits?" in *Arbitration under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small (Oxford: Oxford University Press, 2010), 351, 377.

[143] Ibid.

[144] Bersehader v. Russia, SCC Case No. Arbitration V. 080/2004, Award (April 21, 2006), paras. 180-81, http://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf (accessed August 26, 2024).

[145] Ibid., para 208.

[146] Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009), http://italaw.com/documents/TzaYapShum-DecisiononJurisdiction_002.pdf (accessed August 27, 2024).

to establish jurisdiction to resolve the dispute. The tribunal stated that the specific wording "should prevail over the general wording of the MFN clause". In the case of ***Palma Consortium v. Bulgaria,***[147] the tribunal also did not allow the claimants to import dispute resolution provisions from third-party treaties[148] and the reasoning was also the same, namely, that the MFN clauses in the latter case were much narrower in scope than the MFN clause in the former case.[149] Actually in this case, the claimant tried to submit its dispute to the forum which was not specified in the agreed BIT between Cyprus and Bulgaria. The claimant tried to put the case to the ICSID forum that arbitration was agreed in the Cyprus and Bulgaria BIT. Here the claimant gave two separate grounds as an indication for the respondent's consent to ICSID arbitration, namely: a) Respondent's consent to ICSID arbitration and Respondent consent to Energy Treaty Charter (ETC) and b) the MFN clause of the respective BIT signed between Cyprus and Bulgaria. Also, the claimant argued that the MFN clause must be construed as importing any more generous dispute settlement contained in the other BITs like the Bulgaria - Finland BIT. The claimant also argued that the respondent had given the positive nod to submit to ICSID arbitration by providing an MFN Clause in the BIT.[150] But the respondent rejected the argument forwarded by the claimant. The tribunal stated in an *obiter dictum* that the MFN clause could not be used to replace the agreed arbitral proceedings with ICSID arbitration although under Article 26 of the Energy Charter Treaty, the tribunal established its jurisdiction.[151] The Tribunal also rejected the idea that the clause may be construed as the respondent's consent to arbitrate, here the tribunal followed the rules which were established in the *Salini* case. Mainly, tribunal argued and tried to distinguish substantive rights from those of

[147] Plama Consortium v. Bulgaria, ICSID Case No.ARB/03/24, Decision on Jurisdiction (Feb 8, 2005), http://ita.law.uvic.ca/documents/plamavbulgaria.pdf. Accessed 28 March 2023. Global Arbitration Review reported that the August 27, 2008 Award in Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24) was selected as the Best Award and the Most Surprising Award of 2008 in a survey of participants in the international arbitration on-line discussion forum OGEMID. The Award is the first ICSID award on the merits under the ECT from among more than 10 ECT cases registered with ICSID to date, and it reaches many interesting conclusions. It was issued by a tribunal composed of Carl F. Salans (President – appointed by ICSID), Albert Jan van den Berg (claimant's appointee) and V.V. Veeder (Bulgaria's appointee). https://kluwerarbitrationblog.com/2009/02/11/plama-consortium-limited-v-republic-of-bulgaria-the-best-and-most-surprising-award-of-2008/ .

[148] Jeswald W. Salacuse, The Law of Investment Treaties (Oxford: Oxford University Press, 2010), 254.

[149] Ibid.

[150] Nartnirun Junngam, "An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration By Reference," *UCLA Journal of International Law & Foreign Affairs* 15 (2009): 459.

[151] Ibid., 459.

a procedural nature.[152] In paragraph 209 of the *Palma Consortium v. Bulgaria* decision on jurisdiction, the tribunal stated that:
"It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by the parties with an entirely different mechanism."
In ***Telenor v. Hungary,***[153] the Suez case was not followed. Also, the BIT between Norway-Hungary was extraordinarily precise as this BIT had limited their consent regarding specific categories of dispute but there was a scope for widening the jurisdiction.[154]
In 2013, there were decisions continuing to give different propositions regarding the widening of jurisdiction using the MFN clause. The bone of contention was whether dispute settlement clauses could be rectified by using an MFN clause or not. In the case of ***Garanti Koza v. Turkmenistan,***[155] it was agreed by the majority of the judges that the MFN clause can be applied to all dispute settlement scenarios. But there was a twist where one arbitrator did not agree with the majority and stated that the foreign investor "*must first be in a* dispute settlement relationship *with the host state*. In the light of the dissenting arbitrator from the ***Garanti Koza v. Turkmenistan*** case, we can come to the conclusion that the ICSID tribunal did not have jurisdiction over that particular case and there was a scope for UNCITRAL arbitration as it was provided by the BIT.
The ***Kilic v. Turkmenistan***[156] tribunal did not allow MFN provisions to be applied to the dispute settlement process.
In ***Sanum v. Laos***[157], a narrow-worded MFN clause was not allowed to extend to the jurisdiction. The arbitrator of that tribunal stated that "to read into [the MFN] clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties' consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses."

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[152] Ibid, 461.
[153] Telenor Mobile Communication AS v. Hungary, ICSID Case No. ARB/04/15, Award (September 13, 2006), http://ita.law.uvic.ca/documents/TelenorvHungaryAward_001.pdf. (accessed August 2, 2024).
[154] Ibid, para 98.
[155] Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, http://www.italaw.com/cases/2176#sthash.YYB5PsHm.dpuf (accessed August 24, 2024).
[156] Kiliç v. Turkmenistan, ICSID Case No. ARB/10/1, http://www.italaw.com/cases/1220#sthash.j3qnTFgz.dpuf (accessed August 2, 2024).
[157] Sanum Investments Limited v. Lao People's Democratic Republic, UNCITRAL, PCA Case No. 2013-13, http://www.italaw.com/cases/2050#sthash.X5x6GU36.dpuf. (accessed August 24, 2024).

To sum up, there is no fixed set of regulations for interpreting MFN provisions. Therefore, judges in several tribunals came up with new ideas to resolve the investor-state dispute. The claimant and judges, depending on MFN provisions related to dispute settlement, invoked the procedural provisions of third-party BITs related to jurisdiction. Nevertheless, it can easily coin that there is a trend going on in the area of BIT dispute settlement where aggrieved parties are prone to create an indirect relation or consent[158] "deducing consent of a host state party to the dispute by relying on not only the BIT in question but also on the other treaties concluded by the state concerned by extending the nature, meaning and scope of the MFN principle."[159]

[158] Nartnirun Junngam, "An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration By Reference," *UCLA Journal of International Law & Foreign Affairs* 15 (2009): 447.

[159] Suriya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (London: Hart Publishing, 2008), 176.

A Review of the Jordanian Framework Governing Foreign Workers

AYA, AL DABBAS*

ABSTRACT *As Jordan continues to experience an increasing influx of foreign workers in the country due to political issues arising in neighbouring countries and Jordan's strategic position, it was deemed necessary to provide a review of the current framework governing foreign workers and to demonstrate any issues in the current legislation. In this article, the authorused the descriptive analysis approach to provide a summary of the labor migration status in Jordan,The International framework that Jordan adheres to, the national laws and regulations in place to regulate foreign workforce, in addition to providing a critical analysis of the Kafala system in Jordan and reflecting on the issues it raises. The author concluded that Jordan's current laws prohibit foreign workers from forming trade unions, or take leadership positions in any trade unions, contradicting the international guarantees provided by human rights conventions, additionally the author has shed a light on the consequences of implementing the Kafala (sponsorship) system.*

KEYWORDS *Migrant Workers, Jordan Labor Law, Labor Migration, AlKafala System, Labor Migration in Jordan*

Introduction

The Hashemite Kingdom of Jordan (Jordan) is a country in the Middle East that is home to many migrant workers, forced migrants, and refugees. That is due to its location and ongoing instability in the Middle East region in comparison to neighbouring countries. Despite not being a wealthy nation, Jordan offers relatively higher wages, and more employment opportunities compared to many of its neighbours and offers a wide range of sectors for migrant workers to take part in,domestic and agricultural. Thus, labour migration and foreign workforce have become a crucial aspect of Jordan's socioeconomic landscape. In consideration of the variety of foreigners in Jordan having settledin the country due to different circumstances, the term "foreign workforce" is used rather than the narrower classification of "migrant workers".

Labor migrants and foreign workforce are generally vulnerable to exploitation, poor working conditions, and harsh treatment and it became crucial to shed light on the many issues they face and the structure of legal regimes that govern them.

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The author aims to use the descriptive analysis approach to provide an overview of current trends of migration in Jordan, the framework governing foreign workforce and labor migrants and lastly, discuss the "Kafala" system, which has sparked concern for its impact on the employer-worker relationship in recent years. The author in concluding this article shall identify and recommend pathways for the Jordanian legislator to improve the protection and the rights of the foreign workforce in Jordan.

1. Migration Trends in Jordan

During the 1970s, many Jordanian workers began migrating to Gulf Countries to work in oil production industries, resulting in a labor shortage. This opened the door to a high influx of foreign labor force to fill the gap.

The bloom of the garment sector in Jordan has also attracted foreign labor. In 1998, an agreement between Jordan and the United States of America granted Jordan the privilege to export clothing to the U.S. without being subjected to customs duties or taxes. Thus, a high influx of foreign labor force was needed to fill jobs in the garment sector. Recent statistics show that the Qualified Industrial Zones in Jordan have a workforce of approximately 58,057 migrant workers.[1]

Furthermore, Jordan has witnessed big waves of forced migration due to its strategic position and the political situation in neighbouring countries, such as Palestine and Syria. Accordingly, Jordan has become a host to an approximate number of 3.5 million migrants and refugees, consisting of 31.5% of its population. [2] Due to the political and financial circumstances in the region and Jordan's position, Jordan's labor market hosts a great number of foreign workers, whether they come for labor migration, such as Egyptian workers, or forced migration such as Palestinians, or entering as refugees, such as Syrians. According to the Ministry of Labor, the foreign workforce counts for more than 333 thousand registered foreign workers. Whereas Egyptian labor represents the highest percentage at (54.1%), followed by Bangladeshi labor at (12.9%), and Syrian labor ranks third at (8.5%).[3]

A high percentage of the jobs undertaken by the foreign workers in Jordan are not considered "high-skilled jobs." Rather, they take up employment mostly in low-skilled jobs requiring physical labor. This can be attributed to educational and qualificationissues, as noted in a study conducted in 2014, the vast majority

[1]Tamkeen for legal aid and human rights, "Conditions of Migrant Workers in Qualified Industrial Zones," (2023), 5. https://dashboard.tamkeen-jo.org/wp-content/uploads/2024/01/Conditions-of-Migrant-Workers-in-Qualified-Industrial-Zones.pdf.

[2] United Nations Economic and Social Commission for Western Asia, "Analysis of international migration in Jordan," (2023), 11. https://www.unescwa.org/sites/default/files/pubs/pdf/analysis-immigration-situation-jordan-2023-arabic.pdf.

[3] Economic and Social Council of Jordan, "The Fourth Industrial Revolution and the Jordanian Labor Market," (2023), 102. https://www.esc.jo/ReportView.aspx?Id=156.

of foreign workers hold only a secondary education (high school) diploma or less[4]. Concentration for foreign labor force in Jordan is found in the garment, agricultural, construction, tourism, and domestic industries. Thus, it is found that the immigration phenomenon of Jordan is rooted in the availability of a foreign workforce willing to accept jobs not favorable to Jordanians due to low wages, poor working conditions, and minimal requirements[5].

As Jordan hit high unemployment rates due to the high influx of foreign labor force, this led to the adoption of a protection policy in 2007[6]. A National Employment Strategy[7] was adopted and reflected the need to effectively change the situation of relying on foreign laborers, the nationalization of jobs and using foreign workers as a complementary workforce only in specific sectors, such as the garment and domestic sectors.

Accordingly, Jordan has limited specific professions to nationals under the category of "Closed Professions" such as office and secretary jobs. Those strategies can be seen in many decisions taken by the Jordanian government, for instance, the Prime Ministry decision limiting foreign recruitment except for domestic workers, workers in the agricultural and garment sectors, and specialized professions.[8]

2. National Migration Policies and Framework in Jordan

Officially, Jordan does not have a national policy on labor migration. This can be attributed to the fact that migration to Jordan is considered temporary and is merely a response to the needs of the national economy, which is protected from foreign competition in general, as discussed and indicated in this article previously.

All matters relating to the entry and stay of foreign workers are regulated in accordance with Law No. 24 of 1973 on Residence and Foreigners' Affairs, other matters concerning the issuance of work permits are regulated depending on the sector or the nationality of the worker as the case may be, in accordance with:

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[4] Ababneh, Abdallah and others, "Foreign Labor in Jordan: Analysis of Reality and Replacement Policies," Natioanl Center for Human Resources Development, (2024), 23, http://www.almanar.jo/ar/documents/Foreign%20workers%20study.pdf.

[5] International Labor Organization, "The Jordanian Labour Market: Multiple segmentations of labour by nationality, gender, education and occupational classes," (2015), 4. https://www.ilo.org/publications/jordanian-labour-market-multiple-segmentations-labour-nationality-gender.

[6] International Labor Organization, "Migrant Domestic and Garment Workers in Jordan: a baseline analysis of trafficking in persons and related laws and policies," (2017), 1 https://www.ilo.org/publications/migrant-domestic-and-garment-workers-jordan-baseline-analysis-trafficking-0.

[7] National Employment Strategy (2011-2020) https://www.nchrd.gov.jo/NEStrategy_En.aspx.

[8] Prime Ministry of Jordan Official Website, (2023). https://pm.gov.jo/Ar/NewsDetails/anews601.

i)*The Instructions for Conditions and Procedures for the Employment and Recruitment of Non-Jordanian Workers for 2012 and their amendments, ii) Instructions for the Conditions and Procedures for the Recruitment of Non-Jordanian Workers in Qualifying Industrial Zones for the year 2007 and their amendments, iii)Instructions for the Conditions and Procedures for the Employment of Non-Jordanian Workers of Syrian Nationality for the year 2020 and their amendment*s, in addition to *iv)The Regulation of Work Permit Fees for Non-Jordanians for the year 2019 and its amendments*.

As demonstrated above, the regulations concerning the foreign labor force in Jordan are fragmentedamong different laws, regulations, and instructions. In this part, the author will provide an overview of the legislations that govern the relationship between foreign workers and their employers based on the work type.

2. 1 The Jordanian Labor Law

The key regulation governing the relationship between foreign workers and their employers is the Jordanian Labour Law[9]. The law applies to both national and foreign workers without distinction. The law previously excluded domestic and agricultural workers from its application. However, in 2008 an amendment came into effect and stipulated their inclusion under the provisions of the law,[10] although, in accordance with Article 3 paragraph (b) of the law, their employment is subject to provisions that govern it, namely "Regulation No.90 of 2009 and its amendments for domestic workers, cooks, gardeners and similar categories". Concerning foreign workforce, the labor law stipulates in article (12) that employing foreign workers requires issuing a work permit for the worker subject to approval from the Ministry of labour in accordance with the relevant instructions and regulations.

The labor law does not require a written work contractaccording to the definition used in the law, a work contract can be written or oral and can be proven in any way.

As for the rights of foreign workers, the labor law does not distinguish between them and national workers. Therefore the rules concerning: work contracts, working hours, dismissal, annual leaves, sick leaves, access to justice, and all other provisions in the law and rights afforded apply to foreign workers.

In case of violation of the workers' rights, access to justice and judicial remedies are guaranteed to all workers, including foreign workers who areexempted from legal (court) fees and expenses for the litigation process in accordance with article (137) of the law. However, workers still have to endorse paying for legal representation fees if an attorney is appointed.

[9] The Jordanian Labor Law No.8 of 1996.

[10] Zoë Jordan and others, "EFFEXT Background Papers – National and international migration policy in Jordan," Chr.Michelsen Institute, (2023). https://www.cmi.no/publications/8872-effext-background-paper-jordan.

The law stipulates that if the worker does not understand or speak Arabic, then a copy of the employment contract must be made in a language the worker understands[11] and guarantees the protection of minimum wages. Currently, foreign workers and nationals are both subject to the same "minimum wage" in accordance with the decision issued by the Tripartite Committee for Labor Affairs regarding setting the minimum wage for workers in Jordan for 2023, which concluded that the minimum wage is set at 260 Jordanian Dinars (Approximately 234 euros). However,, the decision excludes workers in the Qualified Industrial Zones (QIZ) in the garment sector, and domestic workers and their likes.

The labor law also allows foreign workers to join trade unions but notably, does not allow them to form a trade union or to take leadership roles.

The social security law No. 1 of 2014 applies to all workers who are not under sixteen years of age without any discrimination as to nationality, and regardless of the duration or form of contract, the nature and amount of wage[12] provided that the wage is not below the minimum wage stipulated in accordance with the law. Thus, including all foreign workers subject to the labor law as previously addressed. However, the social security law stipulates an exemption from application for domestic workers and those alike. The social security provides different types of insurance such as insurance against work injuries, insurance against old age, maternity insurance, insurance against unemployment and health insurance, and counts for retirement benefits.

The law also imposes penalties on any employer who engages in wage discrimination or forced labor, including the use of coercion, threat, fraud, or force against workers, and for confiscating travel documents.[13]

2. 2 Agricultural Workers

The employment of agricultural workers is governed by a specific regulation titled "Agricultural Workers Regulation No. 19 of 2021". The regulation applies to both foreign workers and national workers and does not distinguish between them.

The regulation sets outworking hours, annual vacation days, overtime compensation, and other matters similarly to the Labor Law. Furthermore, the regulation stipulates that all agricultural workers are subject to the social security law, provided that the employer has 3 or more workers.[14] The regulation, similarly to the labor law, forbids employers from practicing any use of coercion, threat, fraud, or force against workers, in addition to forbidding confiscation of travel documents. In case the employer violates any worker's rights or the articles of the regulation, the Minister of Labour shall impose restrictions preventing the

[11] Article 15, Jordanian Labor Law.
[12] Article 4, Social Security Law No. 1 of 2014.
[13] Articles 53 and 77, Jordanian Labor Law.
[14] Article 12, Agricultural Workers Regulation.

employer from recruiting or transferring a non-Jordanian agricultural worker to work for him for the period specified by the Minister.[15]
The regulation refers to the labor law for all matters not stipulated in the regulation.[16]Therefore the right to join trade unions applies to foreign workers in the same manner stipulated in the labor law as previously discussed.
In addition to the aforementioned regulation, a complementary set of instructions was introduced in 2021, namely "Instructions for inspection procedures for agricultural activities". As agricultural activities are not the type of jobs most nationals opt for and a high level of foreign workers are concentrated in this sector, it was crucial forthe Ministry of Labor to ensure adherence to laws and regulations. These instructions enable labour inspector to gain access to the agricultural facility or agricultural holding to inspect:
i) working requirements.
ii) the working environment.
The working requirements include inspecting that the employer is adhering to the rules governing the conditions for employing workers in terms of age, gender and nationality and the requirements for employing non-Jordanian agricultural workers, along side working hours and ensuring wages are being paid.

2. 3 DomesticWorkers and Their Likes

Regulation No.90 of 2009 and its amendments, which covers domestic workers and their alikes, provides a definition for the term "worker" for the purposes of the regulation as "*the domestic worker, cook, gardener, patient's companion, or the like who works in the service of the homeowner on an ongoing bases*".
The regulation stipulates that the work contract shall be "written" according to the form provided by the Ministry of Labour and ensures that a contract in the language of the worker is provided. Furthermore, it imposes obligations on the employer when employing foreign workers such as issuance of a work permit for foreign workers, providing a travel ticket at the employer's expense for the non-Jordanian worker from his country to Jordan, and obtaining prior approval from the worker's ministry in case of moving to another country temporarily.
Working hours and vacation days are stipulated in the regulation and must be respected by the employer to ensure that the worker is not overworked. Accordingly, the worker is entitled to a day off during the week, in addition to 14 days of paid annual vacation. Furthermore, inspections can be carried out to ensure adherence to the regulation by an appointed inspector from the Ministry of Labour in case of any complaints raised.
In comparison to the Labour Law and the Agricultural Workers Regulation, it is noted that this regulation does not provide for the right to join trade unions or any similar assemblies, nor any articles concerning forced labor. Even though domestic workers are the most vulnerable category to "passport confiscation" as a security to ensure the worker does not leave or run away as explained by

[15] Ibid.
[16] Article 16, Agricultural Workers Regulation.

employers and recruitment agencies.[17]But, the regulation does not include any provisions on this matter, unlike in the other regulations. Nonetheless, the act of confiscating passports without legal grounds is prohibited under the Passport Law in Jordan.[18] It does not empower the position of the workers that the legislator included a provision in the regulation requiring the worker to inform and obtain permission from the homeowner (employer) before going out or leaving the house. Additionally, it is noted that the regulation does not stipulate the enrollment in social security for this category of workers nor does it mention the applicability of the Social Security Law. In addition to the aforementioned, the author notes that a legislative gap has deprived domestic workers and other similar categories from further labor rights, specifically; aribtirary dismissal, overtime, working during holidays compensation and end of service gratuity.[19] The regulation does not stipulate explicitly that the Jordanian Labor Law shall be applicable to all matters that were not sitipulated in the regulation, unlike in the Agricultural Workers Regulation. Therefore the only right arising for domestic workers are those expclitly stipulated in the regulation only, and since the regulation does not mention the topic of arbitrary dismissal and overtime compensation nor the end of service gratuity, then they do not have the right to claim these rights. This interperation of the law and regulation is deprived from the Jordanian Courts Precedents, including a recent decision in 2024 which rules that "Since the rights claimed by the plaintiff, namely the end-of-service gratuity, compensation for arbitrary dismissal, notice allowance, and compensation for work during religious and official holidays, are not addressed by this regulation, then such rights are not granted to the employee, based on the fact that this regulation defines the rights of persons covered by its provisions, the plaintiffs' claims for these rights are therefore dismissed due to lack of entitlement."[20] The author here criticises this interpretation of the law and the regulation, and from their point of view, the articles of the Jordanian Labor Law shall apply to them since they are not excluded from the proivisions of the law and therefore, they shall be entitled to all the labor rights afforded in the law, specifically considering that domestic workers are more vulnerable to exploitation and are more likely to be forced to work overtime.

Furthmore, the regulation explicitly prohibits offering shelter to any worker who has left their employer or economically exploiting any worker.[21] While the author

[17] Bayt AlOmal, "The Jordanian Legislative Framework for Migrant Workers' Rights: Unionization, Social Security, Occupational Health and Safety, and Labor Inspection (A Case Study on Agricultural and Domestic Workers)," (2023), 46. https://files.cdn-files-a.com/uploads/3837866/normal_654769e86ab6c.pdf.

[18] Article 23 para.2, The Jordanian Passport Law of 1969.

[19] The Jordanian Labor Law in article (32) stipulates that "An employee who is not subject to the provisions of the Social Security Law and whose service ends for any reason is entitled to an end-of-service gratuity at the rate of one month's salary for each year of actual service".

[20] Judgment No. 2842 of 2024 – Jordanian Court of Cassation in its Civil Capacity

[21] Article 11, Domestic workers, cooks, gardeners, and their alikes regulation.

of this article endorses legal protection against economic exploitation, they highlight a concern with the first part of the article, which imposes challenges for organizations or anyone trying to protect domestic workers from abuse. Often times, domestic workers facing severe abuse have no alternative but to flee, yet the article prohibits anyone from sheltering them.

3. AlKafala System in Jordan

AlKafala (Sponsorship) system is a legal framework used in Jordan, Lebanon and Gulf Cooperation Countries to control the recruitment and hiring of migrant workers and ties the worker to a sponsor (employer) whom they depend on, which often leads to workers abuse and exploitation.
The legal basis of this system stems from The Jordanian LabourLaw that prohibits the recruitment or employment of any foreigner without the issuance of a work permit[22] and The Instructions for Conditions and Procedures for the Employment and Recruitment of Non-Jordanian Workers for 2012 stipulates the procedures for the issuance of the work permit, whereas the employer shall submit an application to the Ministry of Labor for the issuance of the permit and pays the associated fees for the work permit calculated depending on the sector and profession. Accordingly, the foreign worker shall only be tied to one employer.
The instructions restrict the mobility of the worker and changing their job during their work with the employer in accordance with article (12) of the instructions which impose the following:

After the expiration of the work permit
i)recruited and/or employed domestic workers are not allowed to switch to any other sector.
ii) Agricultural workers may switch to another employer in the same sector.

During the term of the work permit:
i) workers in the construction and agricultural sector may switch employers by agreement between the employer and the new employer subject to the Ministry's approval. In this case, the new employer shall cancel, issue, and pay for a new work permit.
ii) Recruited workers in the other sector may change employers only after six months of working for the employer, subject to the employer's approval and the new employer shall cancel, issue, and pay for a new work permit.
iii) Employed workers may switch employers without any restrictions, subject to the employer's approval. The new employer shall cancel, issue, and pay for a new work permit.

Initially, the author notes that the worker's "approval" is not necessary to faciliate this switch, as it is not explicitly implied. Practice has shown that, specifically in

[22] Article 12, Jordanian Labor Law.

the case of domestic workers, employers „sponsors" transfer the employer from one sponsor to another, with no regards to the workers approval. According to a published news report, many domestic workers have faced this issue, and to quote one story "*She entered Jordan on July 31, 2018, to work for her sponsor, "Lily" (a pseudonym), and worked in her house for three years. The sponsor then transferred her sponsorship to "Raya" (a pseudonym) in exchange for receiving an amount of 3,000 Jordanian Dinars. After one year of working in the second sponsor's household, the sponsor transferred the worker's sponsorship to her sister, "Amina" (a pseudonym), in exchange for 3,000 Jordanian Dinars, without the worker, "Rand's" consent in both instances. This was due to the worker's passport being withheld by the sponsor and threats of reporting her to the authorities as a "runaway worker*."[23] Such restrictions increase the possibility of economic exploitation of the worker. In many cases, if the worker wants to change jobs, they might have to bribe the employer to obtain their permission to facilitate the process as per the requirements in the instructions.[24] The author further notes that a distinguishment between "recruited" and "employed foreign workers" exists, whereas recruited workers may only be allowed to switch employers after six months of working for the employer, whereas employed workers do not have that restriction. Having many restrictions on the movement of foreign workers and their right to change employers also endangers the workers in another aspect, for instance, an international issue migrant workers often face is false recruitment, in which a recruitment agency gives false information to the recruited worker concerning the job they will be doing, the wages, and other matters, and then the worker finds themselves recruited for a job they did not initially agree to, hoping to change it later on, but eventually finding out that their right to transfer their employment during the term of the work permit is restricted. Due to this issue, some bilateral agreements were signed to ensure the protection from this issue, such as "The Principles and Controls for Regulating the Recruitment and Employment of Filipino Domestic Workers between Jordan(Ministry of Labor) and the Philippines(Ministry of Labor and Employment) for the year 2012" which stipulates that Philippine agencies are obligated to provide a written declaration from the Filipino worker, including his consent and acceptance to work as a domestic worker. This ensures that the worker is aware of the job they are recruited for, through authorized recruitment agencies, and ensures their approval of the work to be done, in addition to other aspects related to their employment. From the author's prespective, this is a fortunate step forward that both countries have taken to ensure the protection of the migrant workers and limit trafficking of workers.

[23] Roya News "Investigative Report: Runaway Domestic Workers in Jordan, Complaining Sponsors, and Agencies Under Scrutiny" (2023). https://royanews.tv/news/303652.

[24] Daniel Coleman, "Systemic Vulnerability: Migrant Workers in Jordan" Heinrich-Böll-Stiftung, (2022). https://ps.boell.org/en/2022/08/11/systemic-vulnerability-migrant-workers-jordan.

However this as demonstrated, this is a bilateral agreement, and thus, it does not apply to all nationalities.

Other forms of exploitation are found in the employer's right to cancel the work permit at any time, leading to the deportation of the worker, which leaves the worker at the mercy of the employer. Workers facing abuse at work do not have the opportunity to leave the job as they wish. As the employer has the right to inform the police of the worker's "absconding," subjecting the worker to administrative penalties that include fines, administrative detention, and deportation.[25]

Among the other issues that the Kafala system creates, is that workers can not renew or issue the work permit by themselves, and only the employer is allowed to initiate the process. If the employer does not, then the employee may be subject to deportation. In addition to this, failure by the employer to renew or issue work permits leads to monetary penalties, for instance, a late fine amounting to (50%) of the work permit fee imposed if the work permit period expires and is not renewed within ninety days from the expiration date.[26] This also affects the worker's ability to renew their residence permit which imposes fines on them for each day of delay. Furthermore, foreign workers may only access their and obtain their entitlement from social security, before departure, after obtaining a no-objection certificate from the ministry, in the case that the work permits were not issued or renewed as per the law, the employee has no other choice but to pay all fees and penalties retroactively for the entire period so that the no-objection certificate is issued. Although, the The Instructions for Conditions and Procedures for the Employment and Recruitment of Non-Jordanian Workers for 2012 and their amendments stipulate that each employer that wants to recruit /employ a foreign national must submit a monetary bank or judicial guarantee in an amount depending on the number of foreign workers, the purpose of this guarantee, is to liquidate it in the event that the employer fails to comply with any of the obligations imposed on him under the law and the regulations issued pursuant thereto or these instructions, in order to guarantee the rights of his workers.[27] However it does not appear that in practice that this guarantee protects the workers from having to pay those amounts in the case of the employer's failure to renew the work permit on time. However, the author notes that it is possible for the worker to claim the amounts he has paid tothe employer if they choose to go through a litigation process proving their right to this claim.

4. Compliance with International Guarantees for Foreign Workers Rights in Jordan

Jordan has ratified seven of the core international human rights treaties: *International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention against Torture and Other*

[25] Ibid.
[26] Work permit fees for non-Jordanians Regulation No. (142) of 2019.
[27] Article (5) of the Instructions.

Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of Persons with Disabilities and Convention on the Rights of the Child[28], However, it has not ratified the main UN instrument for the protection of migrant workers known as The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Jordan has also been a member of the International Labor Organization (ILO) since 1956, and has ratified 26 of the ILO conventions,[29] including seven of the fundamental conventions; *Forced Labour Convention Right to Organise and Collective Bargaining Convention, Equal Remuneration Convention, Abolition of Forced Labour Convention, Discrimination (Employment and Occupation) Convention, Minimum Age Convention and Worst Forms of Child Labour Convention.* However, it is noted again that the country has not ratified any of the conventions concerning migrant workers, namely, The Migration for Employment Convention and The Migrant Workers (Supplementary Provisions) Convention, nor has it ratified the Freedom of Association and Protection of the Right to Organise Convention which greatly affects the rights of migrant workers.

In practice and based on the studying of the national regulations, the author concludes that one step forward for ensuring more protections for foreign workers in Jordan would be the ratification and implementation of the Migrant Workers Conventions, both UN convention and ILOs conventions. For example, as stipulated previously, domestic workers who are reported to have "absconed" may face administrative detention. The author notes that such a behaviour does not constitute a crime, and therefore, placing the worker under detention violates their rights, "*There is no article in the residency laws about imprisoning them. There's nothing about prison for someone who decided to break their work contract*" says the director of a legal centre for migrant rights in Jordan.[30] The UN convention on migrant workers and their families explicitly stipulates that migrant workers and their families shall not be subjected individually or collectively to arbitrary arrest or detention. Furthermore, the right to join trade unions, or form them, is also protected by the Migrant Workers Conventions, more specifically article (40) of the UN Convention. In any case, the author encourgares the recognition for domestic workers' right to join trade unions to be stipulated in the regulation, so as not toleave domestic workers out of this right, as stipulated previously in this article. Furthermore, according to a report

[28] United Nations, "United Nations Human Rights Mechanisms: Jordan's Engagement," (2021).

[29] Ratifications for Jordan - International Labor Organization Data Base.

[30] The Guradian, "Migrant domestic workers in Jordan run the gauntlet between abuse and jail," https://www.theguardian.com/global-development/2017/mar/27/migrant-domestic-workers-jordan-abuse-jail.

by Tamkeen,[31] there is a legislation gap between the rights afforded according to the Convention on Civil and Political Rights, and national practice and regulations. The convention stipulates that "every one shall be free to leave any country including his own". However, if the worker was not able to renew his residence permit on time due to the failure of the employer to renew the work permit, then the worker accumulates delay fees on residence renewal and stipulating them as "illegal" in the country, and in practice, when deciding to leave the coutrny, the worker will not be able to leave without paying the fees, and may be detained until doing so. This circles back to the issues the Kafala system raises and produces and how it affects the access to international human rights afforded to all humans.

The matter of studying Jordan's compliance with international standards and relevant human rights convention requires independent research. However it can be seen that in the case of migrant workers, there are some gaps between the conventions and national law, and in this aspect the author encourages the Jordanian legislator to ratify relevant migrant workers conventions and transpose their principles into its national laws.

Conclusion

In this article the author has accumulated a summary of the status of foreign workers in Jordan, the international framework Jordan adheres to, national regulations, and an overview of the Kafala system in Jordan and the implications it imposes. The author concludes that with respect to the labor law regulations governing the relationship between the foreign worker and the employer, the Jordanian legislator afforded them similar rights without any discrimination or distinguishment, including the minimum wage applicable. However, the author notes that in regard to trade unions, the Jordanian legislator has failed to adhere to international standards by restricting foreign workers from forming any trade unions or taking any leadership roles. For instance, the International Covenant on Civil and Political Rights Article (22) stipulates that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of theirinterests. Therefore, the exclusion of foreign workers from taking leadership roles may affect their ability to voice their concerns through a trade union. The author recognises that there is a gap between the rights afforded in accordance with International Laws and Conventions and National Laws and practices. Therefore, the author calls for the legislator to re-evaluate current laws and regulations and ensure compliance with international standards.

Additionally, the author has highlighted the many conesquences the workers have to endorse due to the application of the Kafala system. Furthermore, the author notes that concerning domestic workers, which sector is mainly occupied by

[31] Tamkeen Center for Legal aid and Human Rights, "The Weakest Link - Migrant Labor in Domestic and QIZ Sectors in Jordan 2010," (2011), https://www.tamkeen-jo.org/download/the_weakest_link.pdf.

foreign worker, certain rights afforded in the labor law do not apply, due to a gap in the legislation, and the current interperation of the law by Jordanian Courts has deprived these workers from compensation for overtime, arbitrary dismissal and end of service gratuity. In this aspect, the author encourages the Jordanian legislator to amend the regulation and ensure that the provisions of the Jordanian Labor Law apply to those workers, by explicitly stipulating so.

In addition to the aforementioned, the author encourages the Jordanian legislator to take measures to protect the foreign worker from the consequences resulting from the employer's failure to pay for work permit fees or renewal, as that directly affects the worker and their rights. The author notes that although the law has placed the burden of paying such fees on the employer, the worker is the only one facing the consequences of that failure. Furthermore, the author encourages the Jordanian legislator to remove any "detention" measures against the employee resulting from leaving work, as this leads to an increase in arbitrary detention and/or falls under the umbrella of forced labour if they choose to stay with the employer to avoid detention, which is a violation of human rights.

The Legal Framework for Cybersecurity in Protecting E-Government Services

BAUMMAR, MAEL*

ABSTRACT: This paper examines the legal framework for cybersecurity in protecting e-government services, focusing on the sufficiency of European and German legislation. The analysis indicates that while German law effectively addresses a wide range of cybercrimes, it lacks specific provisions for enhanced penalties targeting attacks on e-government entities. The European Union's legislative framework has contributed significantly to harmonizing cybersecurity regulations across member states, however, additional advancements are necessary to address the unusual challenges faced by e-government services. Finally, the research reviews the crucial role of critical infrastructure operators.

KEYWORDS: *Cybersecurity - E-government - Cybercrimes*

1. Introduction

The governments worldwide have adopted digital services to enhance public sector efficiency, improve service delivery, and streamline administrative processes, prompted by digital development. However, ensuring that this transformation upholds the integrity of public service systems and established legal frameworks remains a critical concern.

As governments transition to digital platforms, their reliance on Information and Communication Technology (ICT) exposes them to various cyber threats, such as data breaches, hacker attacks, and malware. Technological advancements in e-services are paralleled by the rise of cybercrime, making cybersecurity an urgent priority.

1. 1 General Context and Significance of the Study

The digital transformation taking place in most aspects of contemporary life presents governments with a critical challenge and requires significant efforts to keep up with this development. Public expectations are rising for governments to provide electronic services with the same efficiency and effectiveness they receive from the private sector.[1] Baummar[2] notes that technological

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[1] Michael E.Milakovich, *Digital Governance: Applying Advanced Technologies to Improve Public Service* (New York: Routledge, 2021): 19.

[2] Mael Baummar, "Modernising Public Administration: Reimagining Public Administration for the Digital Age." *Közigazgatási és Infokommunikációs Jogi PhD Tanulmányok* no. 5.1 (2024): 6.

advancements, particularly in the fields of artificial intelligence and data analytics, hold great potential to transform the way public services are delivered. Additionally, Baummar posits that for public administration to effectively address the challenges and seize the opportunities of our increasingly digital age, digital technology must be embraced as a core component of governance. By reimagining the role of the state in the digital age, governments can foster a more efficient, responsive, and citizen-centric public administration, ensuring a sustainable, inclusive, and equitable future for all.[3]

On the other hand, Hassan, R. G. et al. indicated that access to e-government services and information must be guaranteed to individuals with the requisite legal authorisation.[4]

Kumar & Panchanatham, stated that to ensure cybersecurity in e-government-related operations, it is essential to prove the identity of all system users.[5] Milić et al., also pointed out some examples, such as the application of biometric identity verification for users of electronic government services as a unique means of authentication and permission. If citizens' identity and tax identification numbers are stolen, it can cause significant harm to the users. Biometric identity verification helps in avoiding unauthorized access in such cases.[6]

From this point of view, it can be argued, that the importance of providing public services online is as significant as the services themselves. As a result, disruptions in e-government services can have serious consequences, including the interruption of essential public services. This emphasises the critical need to ensure the stability and security of online public services, making it essential to study the cyber threats that target e-government infrastructures. Consequently, the value of cybersecurity in e-government stems directly from the vital role of public services.

Some researchers posit that the simplest means of avoiding cyber threats in online services is to refrain from utilising such services. As Schechter stated, the potential risks can be avoided by abstaining from risky activities. An example provided by Schechter of risk avoidance is the use of traditional paper ballots instead of electronic voting in general elections. This approach is inconsistent with the central objective of government, which is to serve the public effectively and efficiently. However, unlike optional risks, avoiding e-government services

[3] Baummar, "Modernising Public Administration," 9.

[4] G. Hassan, Rasha and Othman O. Khalifa. "E-Government—an Information Security Perspective." *International Journal of Computer Trends and Technology (IJCTT)* 36, no. 1 (2016): 2.

[5] Kumar D, and Dr. N. Panchanatham, "A Case Study on Cyber Security in E-Governance." *International Research Journal of Engineering and Technology (IRJET)* 2, no.8 (2015): 273.

[6] Milic Petar, Dragana Kolarić, Kristijan Kuk, Stefan Kartunov, and Brankica Popovic, "The Importance of Secure Access to E-Government Services," in *International Scientific Conference "Archibald Reiss Days": Thematic Conference Proceedings of International Significance*, ed. Dragana Kolarić (2016), 315.

entirely is not a practical solution. It is not feasible to avoid governmental activities and services entirely.[7]

Additionally, since the public sector seems to be more vulnerable to spearphishing attacks, according to previous studies,[8] therefore, if governments do not invest in cybersecurity at the same level as the development of their services, it can lead to grave breaches.[9] This is also confirmed by Halchin stating that, without feathered cybersecurity efforts, cyberattacks could negatively affect public services and ICT infrastructure.[10]

The lack of sufficient policy measures not only affects the extent of damage caused by cyberattacks but can also lead to a slowdown in technological innovation and thus increased economic costs.[11] In some cases, countries such as Germany, the United States, China and Japan have suffered losses of 200 billion US dollars. Similarly, cybercrime in Italy resulted in $875 million in losses, with the cost of recovery and alternative opportunities rising to $8.5 billion.[12]

Accordingly, when it comes to e-government, cybersecurity represents a very important topic.

1. 2 Research Problem and Objectives

This research aims to highlight the need for effective legal frameworks that ensure the protection of cybersecurity for e-government services while maintaining a balance between security and accessibility. To achieve this, the focus will be on the research problem concerning to what extent the current cybersecurity laws provide legal support for e-government. How do the experiences of countries like Germany shape more effective legal policies? The goal is to provide a critical analysis of the legal frameworks for cybersecurity and evaluate their adequacy in ensuring e-government services.

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[7] Stuart Edward Schechter, Computer Security Strength and Risk: a Quantitative Approach (PhD diss. Harvard University, 2004), 28.

[8] Symantec (2014), "*Symantec Internet Security Threat Report*," https://docs.broadcom.com/doc/istr-14-april-volume-19-en: 36.

[9] Global Cybersecurity Index (GCI) (2018), https://www.itu.int/en/ITU-D/Cybersecurity/Pages/Publications.aspx.

[10] L. Elaine Halchin, "Electronic Government: Government Capability and Terrorist Resource," *Government Information Quarterly* 21, no.4 (2004): 407.

[11] David Burt, Aaron Kleiner, J. Paul Nicholas and Kevin Sullivan, "Cyberspace 2025 Today's Decisions, Tomorrow's Terrain. Navigating the Future of Cybersecurity Policy," *Microsoft Corporation* (2014): 31.

[12] Center for Strategic and International Studies. 2014. "Net Losses: Estimating the Global Cost of Cybercrime." Report, June 2014: 18. https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/attachments/140609_rp_economic_impact_cybercrime_report.pdf.

1. 3 Definition of *e-government*

Hu et al.[13] state that the term "e-government" is globally used, with variations in interpretations among individuals. This suggests that there is no unified definition of the term.

In the context of this article, the term refers to the use of information technology in the administration sector. Its main goal is to provide services to citizens while improving the efficiency and effectiveness of administrative tasks in terms of cost, quality and time.[14]

The definition of e-government as outlined by the United Nations also encompasses the provision of government services to citizens via the Internet. It is defined as "utilizing the Internet and the World Wide Web for delivering government information and services to citizens".[15] Moreover, Jaeger introduced additional terms that expand upon this definition, including database, networks, discussion support, multimedia, automation, tracking and tracing, and personal identification technologies.[16]

Similarly, Yildiz highlighted that the definition of e-government should not be limited to specific technologies, service providers, or associated entities. Instead, it is a concept defined by the overarching goal of enhancing government information and providing services to citizens and businesses.[17]

From another perspective, the e-government scientific community does not necessarily need a unified model but relies on a shared identity. This representation embodies how members of the field perceive it, rather than prescribing how they should think about it.[18]

Some researchers incorporate the concept of security into the definition of e-government. According to the analysis conducted by Hu et al., the commonly accepted definition of e-government includes several elements that comprise the concept of e-government. These elements include, among other things, initiatives aiming to enhance service quality and security, communication processes, policy-making, security, and overall service quality.[19]

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[13] Guangwei Hu, Wenwen Pan, Mingxin Lu, Jie Wang, "The Widely Shared Definition of e-Government: An Exploratory Study," *The Electronic Library* 27, no.6 (2009): 6.

[14] Mete Yildiz, "E-government Research: Reviewing the Literature, Limitations, and Ways Forward," *Government Information Quarterly* 24, no.3 (2007): 650.

[15] United Nations (UN). 2002. "Benchmarking E-government: A Global Perspective," 16. Available at: https://desapublications.un.org/file/790/download

[16] Paul T Jaeger, "The Endless Wire: E-government as Global Phenomenon," *Government Information Quarterly* 20, no.4 (2003): 323–331.

[17] Yildiz, "E-government Research," 654.

[18] Rajiv Nag, Donald C. Hambrick, and Ming-Jer Chen, "What is Strategic Management, Really? Inductive Derivation of a Consensus Definition of the Field," *Strategic Management Journal* 28, no.9 (2007): 950.

[19] Hu, et al, "The Widely Shared Definition of e-Government," 9.

2. The Legal Relationship Between E-Government and Cybersecurity

Krishna and Sebastian assert that the growing cybersecurity challenges, driven by the rapid development of e-government services, are pushing governments to establish and implement cybersecurity guidelines and standards. This, in turn, enhances the efficiency of e-government services. Thus, cybersecurity must keep pace with digital advancements to ensure resilience in cyberspace. Furthermore, Hassan and Khalifa highlight that e-government services require integrity to prevent any form of tampering with information and data, ensuring they remain in their original, valid state.[20]

2. 1 Understanding E-Government Services

To stay within the research scope, cybersecurity can be categorized into two types: the first pertains to measures that users of electronic services must follow to protect their data. These include safety and cybersecurity practices imposed on users of electronic services, including government services. This category encompasses cybersecurity laws and cybercrime regulations that users can rely on when facing threats or cybercrimes, covering reporting, prosecution, litigation, as well as the right to privacy and data protection. The second type concerns cybersecurity measures adopted by governments to protect their electronic services. While these two types overlap significantly, this research focuses on cybersecurity laws related to e-government services.

To understand the nature of e-government services, it is essential to distinguish between four types of government interactions: Through Government-to-Citizen (G2C), as Alshehri and Drew explain, citizens can conveniently and instantly access government information and services from anywhere, anytime.[21] The Government-to-Business (G2B) system, similar to G2C, is beneficial, as Moon (2002) notes, in enhancing the efficiency and quality of services and transactions within the business sector, promoting equity and transparency in government contracts and projects.[22] Government-to-Government (G2G), as mentioned by Alshehri and Drew, has the primary objective of improving the organizational processes between authorities by improving cooperation and coordination.[23] The last type is the Government-to-Employee (G2E) system: as for the relationship

[20] Hassan and Khalifa. "E-Government—an Information Security Perspective," 3.

[21] Mohammed Alshehri, and Steve Drew. "E-Government Fundamentals." *IADIS International Conference ICT, Society and Human Beings*. 2010: 36.

[22] Jae Moon, "The Evolution of E-Government Among Municipalities: Rhetoric or Reality." *Public Administration Review* 62, no. 4 (July 2002): 424–433. https://doi.org/10.1111/0033-3352.00196

[23] Alshehri and Drew, "E-Government Fundamentals," 36.

between government and employees, some researchers view it as an internal component of government operations, distinct from e-government.[24] According to W Seifert, the purpose of this relationship is to serve employees by providing online services such as applying for annual leave, checking leave balances, and reviewing payroll records, among others.[25]

According to Millard, the most significant operational challenge facing e-government is undoubtedly cybersecurity, encompassing threats to identity, privacy, and data systems[26]. Specifically, e-government must address security challenges, such as information interception, manipulation, denial of services, theft of system resources, faking of information, tampering and forgery.[27] These threats impose substantial financial burdens on governments, with their impact likely to escalate as cybercrime risks and sophistication grow.[28] Moreover, e-government services must store citizens' data, inherently vulnerable to cyberattacks that could result in illegal theft or alteration of this information.[29]

2. 2 Challenges of E-Government: Cybersecurity

Cybersecurity law, as stated by Kumar and Panchanatham (2015), is a law that addresses issues within the virtual world, such as data and information privacy. It also includes rules defining cybersecurity crimes and compensating for damage that may result from them. From the perspective of e-government, the mentioned challenges related to e-government security, the threat of cybersecurity can come from government employees, clients, or users of electronic governance programs. Threat sources can also be external, originating from hackers or organized criminal entities.[30] According to Fuster et al. the term "cybersecurity" has various

[24] B.T Riley, "Electronic Governance and Electronic Democracy: Living and Working in The Connected World," *Commonwealth Centre For Electronic Governance, Brisbane Australia* no. 2 (2011) Cited in Alshehri and Drew, "E-Government Fundamentals," 36.
[25] W Seifert, *A Primer on E-Government: Sectors, Stages, Opportunities, and Challenges of Online Governance. Congressional Research Service: The Library of Congress* (2013), Cited in Alshehri and Drew, "E-Government Fundamentals," 36.
[26] Jeremy Millard, "The Global Rise of E-Government and Its Security Implications," in *Cybersecurity: Public Sector Threats and Responses*, ed. Kim J. Andreasson (Boca Raton, FL: Taylor & Francis, 2011): 5.
[27] Zhitian Zhou, and Congyang Hu, "Study on the E-Government Security Risk Management," *International Journal of Computer Science and Network Security* 8, no.5 (2008): 208–213.
[28] David Maimon and Eric R. Louderback, "Cyber-Dependent Crimes: An Interdisciplinary Review," *Annual Review of Criminology* no. 2 (2019): 191–216.
[29] Singh, Shailendra, and D. Singh Karaulia, "E-governance: Information security issues," in *International Conference on Computer Science and Information Technology (ICCSIT'2011) Pattaya* (2011): 121.
[30] Kumar D and Dr. N. Panchanatham, "A Case Study on Cyber Security in E-Governance," 272.

dimensions from the European Union's perspective. It includes cyber resilience, cybercrime concerns, cyber defence, and global cybersecurity.[31]
The Cybersecurity Act of the European Union, Article 2(1) introduces the following legal definition: "*The term 'cybersecurity' means the measures necessary to protect network and information systems, the users of those systems, and other persons affected by cyber threats.*"[32]
The Term is defined in the International Standard ISO/IEC 27002:2005 as the confidentiality, integrity and availability of information.[33] Other researchers defined information security as "the protection of information and its critical elements, including the systems and devices that use, store, and transmit that information."[34]

3. Legal Framework of Cybersecurity

The government should be committed to implementing comprehensive technical measures and closing security loopholes to protect personal data. However, some researchers contend that merely providing technical protection and eliminating digital vulnerabilities is insufficient for ensuring the security of the digital environment. Consequently, they propose an additional framework for addressing this issue. In their 2016 study, Hassan and Khalifa introduce the concept of "binding force," which posits that legal obligations can serve to bolster cybersecurity protection. According to the principle of legally binding force, cybersecurity can be ensured and improved by establishing rules, conditions and regulations that have legal force, as well as coherent terms of use, for example, by establishing legal requirements that must be complied with when using electronic services, and also by establishing strict requirements for user identity documentation by requiring valid legal proof of the user's identity.[35] Milic et al. come to a similar conclusion and agree that suitable legal procedures and regulation of the digital environment can help prevent cyberattacks.[36]
Cybersecurity encompasses a set of legislations aimed at protecting digital infrastructure, sensitive data, and electronic systems in both public and private sectors. These legislations are comprehensive, addressing the needs of various industries and domains. This paper focuses on examining these legislations in the context of e-government services, allowing for an in-depth exploration of their effectiveness in safeguarding such platforms. The research will centre on

[31]Gloria González Fuster and Lina Jasmontaite, "Cybersecurity Regulation in the European Union: the Digital, the Critical and Fundamental Rights," *The Ethics of Cybersecurity* (2020): 97–115. https://doi.org/10.1007/978-3-030-29053-5_5.
[32] Regulation (EU) 2019/881 (Cybersecurity Act, Article 2, paragraph 1).
[33] International Standard ISO/IEC 27002 (2005). ISO/IEC 27002: Information technology — Security techniques — Code of practice for information security management 2005, 2.5.
[34] Michael E Whitman, and Herbert J. Mattord. Principles of Information Security. 6th *ed. Boston, MA: Cengage Learning,* 2018: 11.
[35] Hassan and Khalifa. "E-Government—an Information Security Perspective," 2.
[36] Milić, et al. "The Importance of Secure Access to E-Government Services," 315.

challenges such as information interception, manipulation, denial of services, theft of system resources, faking of information and tampering and forgery.

3. 1 The European Legal Framework for Cybersecurity

In the 1990s, the EU directives related to cybersecurity were not binding. Rather, they were merely recommendations aimed at encouraging countries to adopt their national legal procedures on cybersecurity and to make legislative proposals in support of cyber protection. In 2005, the Council of the European Union adopted Council Framework Decision No. 2005/222/JHA of 24 February 2005, which is considered to be one of the first legally binding acts of the European Union on attacks on information systems. This decision obliges Member States to investigate cases of unauthorised access to data and information systems and classify them as criminal offences. The decision emphasises the need to establish 24/7 contact points to issue warnings at the EU level in the event of cyber-attacks.[37]

A review of the decision reveals that it aims to standardise legislation across EU member states concerning attacks on information systems. This will facilitate the ability of e-governments to address cross-border cyber threats and ensure the safety of sensitive data and systems used in the provision of electronic public services.

This decision is highly significant as it strengthens the protection of digital infrastructure that governments use to deliver services to citizens. This includes safeguarding government information systems from cyberattacks such as hacking, viruses, and malware, which could disrupt the continuity of public services and national security.

Additionally, as mentioned earlier, e-government is not limited to the online delivery of public services (government to citizen); it also encompasses the management and regulation of digital infrastructure and the interaction between various governmental entities (government-to-government). Accordingly, the coordination between authorities to address cybercrimes can be considered part of e-government activities.

To provide a framework for the categorisation of EU regulations relevant to the field of cybersecurity, we can draw upon the report by Niethammer et al.:

3. 1. 1 The Directive on measures for a high common level of cybersecurity across the Union (NIS 2 Directive): This directive entered into force in early 2023 and stipulates that EU member states are required to incorporate its rules into their national laws by 18 October 2024.

The NIS 2 Directive also does not explicitly address e-government, nevertheless, it indirectly impacts it by focusing on the protection of essential digital infrastructures, including those used by governments to deliver services. While the directive targets sectors such as energy, transport, healthcare, and water,

[37] Filip Radoniewicz, "Cybersecurity in the European Union Law," *Cybersecurity in Poland: Legal Aspects* (2022): 67.

which are deemed vital, it also encompasses digital services, of which e-government services are a key component. While e-government is not explicitly referenced, the safeguarding of government-operated digital systems and sensitive data represents a pivotal element of the directive. A comprehensive examination of the text thus demonstrates that the NIS 2 Directive plays a pivotal role in reinforcing the cybersecurity framework that underpins the continuity and security of e-government services across the EU.[38]

3. 1. 2 The Digital Operational Resilience Act (DORA): This regulation entered into force at the beginning of 2023, and will be applicable as of January 17, 2025. The regulation includes specific resiliency requirements for financial entities and ICT service providers.
The Digital Operational Resilience Act (DORA) is aimed at enhancing the stability of the financial system within the European Union by ensuring that financial institutions can withstand and manage digital risks and technological crises. It includes provisions focused on protecting digital infrastructure, securing data, and ensuring business continuity in the face of cyberattacks and technological disruptions.
From an overview of the provisions of the regulation, it can be inferred that the legislation is primarily targeted at financial institutions. However, it also establishes requirements pertaining to the resilience of digital systems, as well as the adoption of cybersecurity best practices across a number of sectors, including, for instance, those involving government systems that process financial transactions or that rely heavily on digital infrastructure.[39]

3. 1. 3 The Cyber Resilience Act (CRA): The European regulation, known as the Cyber Resilience Act (CRA), has been designed to enhance the cybersecurity of digital products. It places a particular emphasis on the protection of both hardware and software against cyber risks, with a specific focus on those that could potentially impact critical infrastructures. As the CRA is primarily concerned with the security of digital products across a range of industrial and commercial sectors, its relevance to e-government is indirect. The act does not address the specific challenges or frameworks associated with e-government services in a dedicated manner. Nevertheless, the provisions of the CRA related to the cybersecurity of digital infrastructure and the resilience of products used within these sectors may have a secondary impact on the protection of e-government services. The CRA contributes to the enhancement of the cybersecurity posture of e-government systems by ensuring the security and resilience of the hardware and software utilised by government agencies, despite

[38] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (Text with EEA relevance) https://eur-lex.europa.eu/eli/dir/2022/2555/oj.
[39] The Digital Operational Resilience Act (DORA).

not being explicitly designed for this purpose. Consequently, while not targeting e-government directly, the CRA may influence the security of digital public services by strengthening the broader digital ecosystem in which they operate.
In addition to the above, the Cybersecurity Act strengthens the European Union's cybersecurity capabilities by establishing the European Union Agency for Cybersecurity (ENISA) and creating a framework for the certification of digital services. While these laws do not specifically target e-government, they provide a fundamental legal and regulatory framework that indirectly impacts the protection of e-government services by enhancing security standards for digital systems, critical infrastructure, and data protection across both the public and private sectors. Therefore, their provisions are crucial for improving the security of e-government infrastructures within the European Union.
The objective of this section is not to provide an exhaustive analysis of the details of European Union cybersecurity legislation and regulations. Instead, it aims to present an overview of the EU's cybersecurity laws from the perspective of their relevance to e-government. The adequacy of this legislation is dependent on the manner in which the EU's legislative acts are formulated, their binding nature, and the extent to which they encompass legal aspects in comparison to local laws. Consequently, the following section will analyse the cybersecurity legislation in Germany to assess the appropriateness of the current legislative framework.

3. 2 The Legal Framework for Cybersecurity in Germany: An Example of National Implementation

Criminal law is the main legal framework for addressing cybercrime. However, legal responses to more specific matters also fall under other laws, such as civil and administrative law. Each legal system has defined objectives and guarantees for cybersecurity.[40]

3. 2. 1 Cybersecurity under German law

This section offers an overview of the main provisions related to cybersecurity in German laws and the strengths and weaknesses of the German approach.

3. 2. 1. 1 Cybercrimes

The principal matters addressed in this research are encompassed within the scope of cybercrimes as delineated by German legislation, outlined as follows:[41]
The act of gaining unauthorised access to a computer system, including the use of hacking and illegally gaining unauthorized access to data, falls within the

[40] Steven Malby, Robyn Mace, Anika Holterhof, Cameron Brown, Stefan Kascherus, Eva Ignatuschtschenko, "Comprehensive Study on Cybercrime." *United Nations Office on Drugs and Crime, Tech. Rep* (2013): 51–52.
[41] ICLG. 2024. "Cybersecurity Laws and Regulations – Germany." In *Cybersecurity Laws and Regulations 2025*, ed. Edward R. McNicholas (London: Global Legal Group) https://iclg.com/practice-areas/cybersecurity-laws-and-regulations/germany.

scope of criminal law and is punishable. Furthermore, the individuals attempting to delete or render data unusable may face imprisonment, particularly when the target is a public authority. Also, phishing for unauthorized access to data is prohibited. Additionally, falsifying technical records is a criminal offence. The creation or distribution of tools for cybercrimes is prohibited. This encompasses the sale of software or devices designed for such purposes, as well as incitement to commit cybercrimes and intentional and unlawful assistance in committing cybercrimes. Identity theft, contingent on the methodology employed, may constitute fraud, computer fraud, or document forgery. In addition, the use of another individual's identity may be considered forgery of documents or data. Additionally, breaches related to employees, such as the exploitation of trust by current or former employees, can result in prosecution. Other cybercrimes include unauthorised handling, interception, violation of confidentiality of communications, computer sabotage, breaches of the GDPR, and falsification of digital evidence.

It can further be concluded that German criminal law does not differentiate between cybercrimes targeting e-government entities and those targeting private sector entities. Nevertheless, an examination of these crimes from the perspective of e-government reveals that they inherently affect e-government practices as a matter of course.

For example, unauthorised access to a computer system, including hacking and the illicit acquisition of data, can directly impact users of e-government services. It may be more appropriate to impose more severe penalties when such crimes target e-government systems, given the harm they cause, not only to users but also to trust, the quality and infrastructure of governmental services. In accordance with the extant legal provisions, those who perpetrate such crimes are liable to punishment under Sections 202a and 202b of the German Criminal Code, which may entail a term of imprisonment of up to three years or a fine.

This viewpoint is corroborated by the observation that numerous countries' legislation imposes more stringent sanctions when the affected party is a governmental entity. Research undertaken in 2013 by the United Nations Office on Drugs and Crime (UNODC) revealed that in excess of 50% of the national laws examined provided for special protection by increasing penalties for unauthorised access to computers managed by governmental authorities or connected to the operation of critical infrastructure.[42]

Conversely, in the case of a denial-of-service (DoS) attack, the German Criminal Code, under Section 303b, prescribes a penalty of up to three years' imprisonment. The penalty can be extended to five years if the target is a government authority.

3. 2. 1. 2 Cybersecurity legislation

Cybersecurity legislation is not limited to criminal law; it also includes several other regulations such as the Federal Office for Information Security Act (BSI

[42] Malby et al. "Comprehensive Study on Cybercrime," 85.

Act - BSIG), the Federal Data Protection Act (Bundesdatenschutzgesetz BDSG), as well as sector-specific regulations like the Telecommunications and Telemedia Data Protection Act (TTDSG), the Telecommunications Act (Telekommunikationsgesetz), and other laws applicable to banking (Kreditwesengesetz), energy industry (Energiewirtschaftsgesetz), securities trading (Wertpapierhandelsgesetz), and the Federal Trade Secrets Protection Act (Gesetz zum Schutz von Geschäftsgeheimnissen).
Additionally, informal guidelines are provided through documents such as the BSI Guide for Information Technology Security. Compliance with international standards, such as ISO/IEC 15408, the ISO/IEC 27000 series, and the Information Technology Control Objectives and Related Technologies (COBIT), is considered crucial. Furthermore, the European Cybersecurity Act grants the European Union Agency for Cybersecurity (ENISA) the authority to issue cybersecurity certifications, which companies may voluntarily obtain to demonstrate compliance with cybersecurity regulations.

3. 2. 1. 2 The strengths and weaknesses of the German approach

One of the prominent strengths of the German legal approach is its coverage and inclusiveness of a wide range of potential cybercrimes, allowing for the handling of a broad spectrum of cybersecurity threats. This demonstrates that German law is aligned with technological developments and highly adaptable to the evolving nature of these crimes, keeping pace with the various forms of cyber threats, such as hacking, data theft, system manipulation, and cyber sabotage. The legal framework enables the handling of different methods that may be used by perpetrators of cyberattacks, thereby reinforcing the ability to confront the growing issue of cybersecurity.
However, there are some gaps in this approach, especially when it comes to cybercrimes targeting the public sector. Since cybercrimes can also target government entities, these attacks pose a significant threat to public institutions, and the impact of such attacks may be more pronounced on government infrastructure. An attack could disrupt essential services relied upon by citizens or steal sensitive data, which could undermine public trust in services, along with increasing costs for the public sector. The provision of eGovernment services is characterized by a high degree of confidence that transactions are adequately protected without compromising their security. This is achieved by securing both the technical and non-technical infrastructure to ensure the stability of transactions and strengthen citizens' trust. The aspect of trust, as mentioned by Milić et al., helps the government enhance its electronic services and leads it to success.[43]
In this context, it may make sense to impose more stringent penalties for such cases, given the potential widespread impact of these attacks. This would justify stricter penalties to deter such crimes and protect the state's critical infrastructure. Moreover, tightening penalties in this context would ensure consistency across

[43] Milić et al., "The Importance of Secure Access to E-Government Services," 315.

all types of cybercrimes and their corresponding punishments within this framework.

4. Regulation of Basic Infrastructure Operators

Following a review of cybercrimes and associated legislation, this section seeks to elucidate the measures, regulations, obligations and sanctions that govern the conduct of operators of basic infrastructure. Despite there being no exclusive government operators of such infrastructure in the European Union, and despite infrastructure operators not providing their services solely to the public sector, these measures and regulations are considered in this research from the perspective of e-government.

4. 1 The regulations that govern operators of basic infrastructure facilities

Infrastructures include facilities, like energy, communication network, public roads, public health, safe water supply, food security, and sanitation. They are of great significance to the functioning of society, as their failure or weakness may lead to material shortages or risks to public safety.[44]
Regardless, the list of essential infrastructures was extended to cover retail outlets, hospitals, data centres, banking and financial services and derivatives transactions, among others, with the second amendment to the ordinance (BSI-KritisV, Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSI-Gesetz).[45]
Niethammer et al. stated that infrastructure operators are obliged to undertake all reasonable regulatory and technical efforts by implementing the latest security measures, which have recently been tightened under Article 8a (1) and (1a) of the BSIG (Gesetz über das Bundesamt für Sicherheit in der Informationstechnik), to avoid service interruptions and to ensure the integrity, security and confidentiality of their information technology systems. Moreover, operators of critical infrastructures are required:
- to prove compliance with BSI requirements to the BSI at least every two years through security audits, inspections or certifications;
- to register with the BSI, give notice to the authorities and provide a contact point to the BSI within the first working day after the designation as critical infrastructure, and this contact point has to be available around the clock seven days a week; and
- to report incidents to BSI through the designated contact point.
Beyond this, critical infrastructures are subject to the requirements of NIS 2, whereby they are considered essential facilities. The new Directive on the Resilience of Critical Entities (RCE), presented at the same time as the NIS 2 Directive, updates the conditions for critical entities, for example, concerning risk

[44] ICLG, "Cybersecurity Laws and Regulations – Germany."
[45] Ibid.

assessments and obligations to report. Member states must implement the RCE Directive into national law by October 18, 2024.[46]

4. 2 Reporting to authorities

Under German and European law, there are special reporting obligations for incidents:[47]

4. 2. 1 The essential facility subject to NIS 2 must, in the event of significant incidents, notify the competent authority appointed by the national law. The responsible authority in Germany is the BSI.[48]

This reporting requirement contains a set of measures, including the early warning to the CSIRT (computer security incident response teams) within 24 hours, notifying the incident within 72 hours, and the final and interim report upon request within one month of the date of the report of the incident.

4. 2. 2 According to Section 8b of the Federal Office for Information Security Act (BSIG), operators of critical infrastructures must immediately report certain disruptions to the availability, integrity, authenticity, and confidentiality of the IT systems, components, or processes to the BSI. The report must contain information about the disruption, possible cross-border consequences, and the technical conditions, specifically, the suspected or actual cause, the affected IT systems, and the type of system affected.

4. 2. 3 Under the provisions outlined in the Digital Operational Resilience Act (DORA), financial entities are obligated to categorise incidents and notify competent authorities about significant ICT-related incidents, as per Article 17 and subsequent articles. The reporting of noteworthy cyber threats may also be voluntary. The initial notification and subsequent reports must furnish the competent authority with comprehensive information to facilitate the assessment of the significance and potential cross-border ramifications of the major ICT-related incident. The specified timeframe for reporting, initially perceived as: without undue delay or within the business day, is slated to be established by the Joint Committee of European Supervisory Authorities by July 17, 2024.

4. 2. 4 Controllers are obligated to inform the relevant Data Protection Authority about personal data breaches under Article 33 of the GDPR, unless the security breach is deemed unlikely to pose a significant risk to the rights and freedoms of the data subject. This notification must be submitted promptly and no later than 72 hours after discovering the breach. The report should include a comprehensive account of the incident, specifying the category of the affected data, identifying the concerned data subjects, and providing a detailed overview of the measures implemented to rectify or alleviate any adverse consequences. Additionally, the notification to the competent Data Protection Authority should outline the anticipated repercussions of the personal data breach and detail the actions taken

[46] Ibid.
[47] Ibid.
[48] Federal Office for Information Security (BSI).

by the controller to mitigate the impact. Furthermore, the data protection officer's name and contact information must be included in the notification.
4. 2. 5 Public telecommunications networks or service providers are obligated, as per Section 168 of the Telecommunications Act, to promptly inform the Federal Network Agency and the BSI of any disruptions to telecommunications networks and services that result in or have the potential to result in significant security breaches. The notification must encompass details regarding the disruption, including the technical aspects, specifically the suspected or actual cause and the information technology affected.
4. 2. 6 Reporting to Affected Individuals or Third Parties:
In the event of an incident involving a breach of personal data that poses a significant threat to the rights and freedoms of individuals, controllers must notify the data subject of the breach without undue delay under Article 34 of the General Data Protection Regulation.
Furthermore, financial entities subject to DORA law are required to promptly notify their clients of any information technology and communication incidents that affect their financial interests (Article 19). This includes reporting the measures taken to mitigate the negative impacts of such incidents. In the case of a significant cyber threat, financial entities must, as necessary, notify their potential clients of the appropriate preventive measures they can take.[49]

4. 3 Sanctions

The NIS 2 Directive establishes the authority for Member States to impose fines on essential entities, amounting to a maximum of €10 million or 2% of the total annual worldwide turnover, as outlined in Article 34. For important entities, fines may reach up to €7 million or 1.4% of the total annual worldwide turnover, with the higher of the two being applicable. These figures are subject to potential increases under national legislation. Moreover, the German law on administrative offences (OwiG) permits the doubling of fines under specific circumstances.
A notable change introduced by the NIS 2 Directive, detailed in Articles 32(6) and 33(5) of NIS 2, emphasizes management responsibility. The directive provides the option of temporarily removing management, as specified in Article 32(5)(b) of NIS 2.
Fines under the Digital Operational Resilience Act (DORA) are determined by the competent authority and national legal framework, under Article 50 and related provisions. The specific sequence of proceedings depends on the contextual circumstances.
Concerning fines under the German Information Technology Law (BSIG), Article 30(2) of BSIG outlines fines ranging from €100,000 to €20 million. These fines can be levied if a critical infrastructure subsidiary fails to adhere to requirements or submit the necessary documents. The Federal Office for Information Security (BSI) has established typical thresholds for fines, such as up to €20 million for the violation of security flaw processing, up to €10 million

[49] ICLG, "Cybersecurity Laws and Regulations: Germany."

for failure to submit evidence, up to €10 million for non-implementation of technical and organizational measures, up to €500,000 for non-registration with BSI, up to €500,000 for failure to report incidents, and up to €100,000 for the absence of a dedicated contact point.
Article 83 of the General Data Protection Regulation outlines fines for non-compliance with specified requirements, reaching up to €10 million or 2% of the total annual worldwide sales, depending on the type of data protection violation. In terms of implementation, examples of actions taken in cases of non-compliance with the aforementioned requirements are not provided in the recent precise regulation issued by the BSIG group, as of the preparation date of this report. Nevertheless, German data protection authorities have continued to impose administrative fines on companies that do not comply with Articles 32 and 30 of the General Data Protection Regulation. For instance, in 2022, an automotive manufacturing company in Lower Saxony was fined €1.1 million for the failure to document technical and organizational security measures during the testing of the driver assistance system.
A review of the regulatory framework for critical infrastructure in the context of cybersecurity in the European Union and Germany reveals an increasing focus on enhancing cybersecurity. Organisations responsible for critical infrastructure are obliged to implement robust security measures in order to comply with regulations such as NIS 2, DORA, and BSIG. These rules are in place to protect the confidentiality, integrity, and reliability of the services that these infrastructures provide. Furthermore, penalties and fines are imposed on those who fail to comply with these regulations, which demonstrates the seriousness with which the authorities regard the protection of cybersecurity and encourages businesses to improve their technological infrastructure in order to meet these standards.

5. An Analysis and Discussion of the Challenges in Cybersecurity

In light of the increasing reliance on digital infrastructure to provide public services, cybersecurity for e-government systems has become a significant concern. Governments face serious challenges in ensuring cybersecurity, particularly because cybersecurity issues transcend national borders, necessitating coordination and collaboration among nations. This requires unified mechanisms, joint bodies, and appropriate authorities to address cyber threats effectively. Consequently, the inconsistency between local and international regulations directly impacts cybersecurity measures.
Obiso and Fowlie assert that discrepancies and incongruities in national and regional legislation substantially compromise the efficacy and efficiency of cybersecurity measures, thereby intensifying the threats posed by cyberattacks and online criminal activities. The absence of international harmonisation in cybercrime legislation engenders complications in investigations and prosecutions, as criminal activities are categorised in divergent ways across

different countries. In light of the global nature of the Internet, a unified approach is imperative to ensure its security.[50]

For the European Union, cybersecurity directives and decisions aim to tackle these challenges by harmonizing cybersecurity laws. These directives provide member states with guidelines on unifying their legislation and coordinating their efforts. Additionally, they establish coordinating and supervisory bodies to enhance cooperation and consistency among member states in the realm of cybersecurity.

One of the primary challenges facing nations in the field of cybersecurity is the ability of legislation to keep pace with technological advancements and to effectively address cyber threats. Germany has demonstrated notable progress in aligning its cybersecurity laws with these developments. Its legislation covers cybercrimes and threats comprehensively and ensures that EU directives are enforceable at the national level. Similarly, EU legislation addresses cybersecurity challenges, including initiatives such as the Artificial Intelligence Act. However, these laws require continuous review and revision, leading to lengthy and complex legislative processes. This may result in delays that risk the delivery of secure public services.

For instance, despite the significance of the subject of artificial intelligence and the associated risks posed by its misuse in various fields, as outlined in the draft law, the debate surrounding the European Artificial Intelligence Act, which commenced in April 2021 with the presentation of the European Commission's initial proposal, has since undergone numerous phases of evolution. This process included discussions in the European Parliament and the Council of the European Union, as well as contributions from the private sector, academic experts, and civil society. Most of the rules of the AI Act will come into force on 2 August 2026. Exceptions are made for prohibitions of AI systems deemed to present an unacceptable risk, which will already apply after six months, and the rules for so-called general-purpose AI models, which will apply after 12 months.[51]

It is essential to reconsider existing legislative mechanisms and develop faster processes that align with the rapid pace of technological innovation. This includes revisiting traditional legislative procedures, integrating technology-based approaches, and conducting ongoing research and discussions to refine legislative mechanisms and enact laws effectively. By doing so, public services can remain secure and efficient in the digital era. Furthermore, in the event that neither novel measures are devised nor the ongoing advanced threats still need to be addressed, and a successful attack occurs, there will inevitably be political pressure to enact reactive legislation aimed at addressing the perceived cause of the attack as

[50] Marco Obiso and Gary Fowlie, "Toward a Global Approach to Cybersecurity," in *Cybersecurity: Public Sector Threats and Responses,* ed. Kim J. Andreasson (Boca Raton, FL: Taylor & Francis, 2011): 84.

[51] European Commission. (n.d.). European Artificial Intelligence Act comes into force. ec.europa.eu. https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4123.

argued by Teplinsky.[52] Such legislation may be expedited, resulting in ineffectual policies prioritising mere compliance over the actual protection of interests.[53]
On the other hand, the novelty of e-government services, the seriousness of cyber threats, and the delay in issuing legislation related to e-governance make the progress of electronic services cautious and slow, which is not in line with the rapid pace of technological development. This highlights the necessity and importance of adopting a legislative framework for cybersecurity that is suitable to address any threats accompanying technological advancement and provides governments and legislators with the confidence to develop e-government services.
An opposing perspective warns against the introduction of burdensome regulations that fail to consider economic implications. Burt et al. argue that striking a balance in drafting technology-related regulations is essential to harness the benefits offered by modern states, such as cost reduction, enhanced e-government, and improved well-being. Failure to achieve this balance, while neglecting economic considerations, may lead to the imposition of overly restrictive compliance measures that hinder technological innovation and diminish economic growth.[54]
However, cyber threats and electronic crimes have become a source of concern among users of electronic services. This concern makes users hesitant and cautious when utilizing e-government services, which often require the submission of highly sensitive and private personal data. This hesitation impacts the quality of services provided by e-governments and highlights the growing importance of cybersecurity. As Millard asserted, the establishment of adequate privacy and data protection, along with the trust they facilitate, is paramount to the full realisation of the advantages offered by e-government.[55] Likewise, Seifert observes, that the realm of information security, often termed cyber security or computer security, represents a significant challenge within the context of e-government. This is due to its role as a crucial element in the establishment of trust between citizens and the government.[56]
It is not only the lack of trust among users that affects e-government services. The lack of clarity in legislation, users' unfamiliarity with how to apply laws or report electronic crimes, and the ambiguity surrounding jurisdiction further complicate the matter. This understanding aligns with what Sutherland

[52] Melanie J Teplinsky, "Fiddling on the Roof: Recent Developments in Cybersecurity." *American University Business Law Review* 2, no. 2 (2013): 315–392. Cited in Chris Laughlin, Cybersecurity in Critical Infrastructure Sectors: A Proactive Approach to Ensure Inevitable Laws and Regulations are Effective (2016). *Colorado Technology Law Journal* 14, no. 2 (2016). SSRN: https://ssrn.com/abstract=2871452: 262.
[53] Laughlin, "Cybersecurity in Critical Infrastructure Sectors," 362.
[54] Burt et al., "Cyberspace 2025 Today's Decisions, Tomorrow's Terrain," 47.
[55] Millard, "The Global Rise of E-Government and Its Security Implications," 6.
[56] Jeffrey W Seifert, "A Primer on E-Government: Sectors, Stages, Opportunities, and Challenges of Online Governance," *Washington DC, USA* 16 (2003). cited in Alshehri, Mohammed, and Steve Drew. "E-Government Fundamentals," *IADIS International Conference ICT, Society and Human Beings* (2010): 38.

highlighted in his study "Governance of Cybersecurity – The Case of South Africa", where he noted that the ability to address and investigate cybersecurity breaches, as well as to prosecute individuals, seems a distant prospect. This is due to the necessity of providing training for police officers, prosecutors, and judges.[57] Therefore, it is crucial to consider this issue along with the traditional procedures that are more familiar to the public. This will assist in developing more transparent and accessible processes, while also ensuring the effectiveness of these procedures.

Similarly, Norris et al. reached the conclusion in their study, entitled "Cyberattacks at the Grassroots Level: American Local Governments and the Need for High Levels of Cybersecurity," that the lack of awareness regarding cybersecurity issues represents a significant challenge that must be addressed. In order to address this challenge, the authors proposed some general recommendations: the establishment and maintenance of a culture of cybersecurity; end-user training; the implementation of cybersecurity best practices; and the elimination of the "lack of knowledge."[58]

To address these challenges, countries are establishing specialized centers responsible for handling complaints, clarifying jurisdiction, and enhancing tools to respond to cyber threats and crimes. For instance, in the United States, Castro states that to assist victims of cybercrimes, the FBI, the Office for Victim Assistance, and the National White Collar Crime Center collaborated to create the Internet Crime Complaint Center (IC3). This center serves as a single hub for collecting data on internet-related crimes and referring cases to the appropriate authorities.[59]

Likewise, the European Cybercrime Centre (EC3), part of Europol, coordinates efforts to combat cross-border cybercrimes among EU member states and acts as a technical expertise hub in this field. Additionally, Europol provides an online platform for reporting cybercrimes, allowing individuals to submit their reports through designated national websites in their respective countries.[60]

At the national level, there are national cybersecurity agencies. In Germany, the responsibility for cybersecurity issues primarily falls on the German Cybersecurity Agency (BSI), which is part of the Ministry of the Interior. The BSI serves as the central body coordinating national cybersecurity policies and works to protect critical infrastructure and government information systems.

[57] Ewan Sutherland, "Governance of Cybersecurity – The Case of South Africa," *The African Journal of Information and Communication* no. 20 (2017): 89.

[58] Donald F. Norris et al. "Cyberattacks at the Grass Roots: American Local Governments and the Need for High Levels of Cybersecurity," *Public Administration Review* 6, no. 79. (2019): 7.

[59] Daniel Castro, "U.S. Federal Cybersecurity Policy" in *Cybersecurity: Public Sector Threats and Responses*, ed. Kim J. Andreasson (Boca Raton, FL: Taylor & Francis, 2011): 134.

[60] Europol. "European Cybercrime Centre (EC3)." Accessed December 20, 2024. https://www.europol.europa.eu/about-europol/european-cybercrime-centre-ec3.

Germany also strives to ensure compliance with European regulations related to cybersecurity, such as the European Cybersecurity Directive (NIS Directive).[61]

6. Conclusion

This paper examined the cybersecurity framework with a focus on the sufficiency of European and German legislation from the perspective of e-government. The European Union's legislation has been instrumental in harmonizing cybersecurity regulations across member states and promoting cooperation among them. However, continued efforts are necessary to address the challenges faced by e-government services. While significant progress has been made, legislative measures remain slow and often fail to keep pace with the rapid technological advancements. The traditional multi-stage legislative processes further hinder timely adaptation, necessitating a comprehensive review of these procedures to ensure they are more agile and responsive to emerging cybersecurity threats.

On the other hand, the German legal framework demonstrated reasonable alignment with evolving cybersecurity threats, covering a wide range of cybercrimes. Nonetheless, a gap was identified due to the absence of specific provisions that increase the consequences for cyberattacks targeting e-government entities. Addressing these shortcomings requires not only the introduction of specific measures but also a shift toward more proactive and flexible legislative mechanisms capable of responding effectively to the dynamic nature of cybersecurity risks.

The research highlighted the crucial role of operators of critical infrastructures in ensuring the resilience of e-government systems. Moreover, the research underlined the complexities arising from the intersection of national and international cybersecurity frameworks. The challenges associated with achieving a unified approach to cybersecurity, particularly in light of the rapid pace of technological advancements, were discussed.

In conclusion, this research contributes to the ongoing discourse on cybersecurity for e-government services. By identifying the strengths and weaknesses of existing legal frameworks, this study offers valuable insights for policymakers and practitioners seeking to enhance the security and resilience of e-government systems. Although this paper represents a contribution to the reduction of the gap in the scholarly literature on e-government cybersecurity, it is evident that further work is required. It would be beneficial to conduct follow-up surveys to gain a deeper understanding of cybersecurity practices and outcomes at the practical level.

[61] Federal Office for Information Security (BSI). "Cybernation," *Bundesamt für Sicherheit in der Informationstechnik (BSI)*. Accessed December 20, 2024. https://www.bsi.bund.de/DE/Das-BSI/Cybernation/cybernation_node.html.

The Importance of Time in Criminalistics

FENYVESI, CSABA*

ABSTRACT *Monographs and studies found in Hungarian academic literature on criminalistics cover numerous fields and aspects of the theory of this discipline. The focal point of this study stems from the fact that in the professional literature however, there is no writing about the time dimension of criminalistics. One of the seven basic questions from the author's pyramid model, namely "when it happened" is a really important fact in all criminal cases for all parties, such as investigators, prosecutors, defence counsels and finally for the judges.*

KEYWORDS *alibi, gold questions, investigation, justizmord, miscarriage of justice, pyramid model*

The working of scientific researchers in present time is driven by their curiosity. Some raise questions based on their concerns. Some search – sometimes for a lifetime – for possible answers. Ultimately, the aim is to find the right answer for each question. Asking questions is one of the most difficult tasks, let alone asking the right questions. These questions in scientific research should be simple, clear and straight to the point. One that does not avoid the need for a fair, rigorous and useful answer.

As a new science of investigation,[1] forensic science has been formulating its essential questions for over a hundred years. Answering these questions realistically can provide the basis for subsequent judicial determination of the facts and for the assertion of the state's criminal claims.

I could also say that the seven basic questions of 'my' pyramid model[2] (what, where, when, how, who, with whom, why?) have been raised to the level of a principle.

I can state, as a principle, that anyone who knows the exact answers to the incriminated offence, and who is aware of the past events, is able to draw the correct legal conclusions from the facts. Let us not forget about the wisdom of

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[1] Jenő Cholnoky called geography the "Golden Bridge", using the analogy of the Balaton, because he believed it was a natural link between the natural and social sciences. This is how I see the function of criminology on an almost artistic level. It is a discipline that combines and uses the ever-expanding achievements and research results of the two major scientific disciplines to great effect. In: Jenő Cholnoky, *Cholnoky Jenő Önéletírása* (Veszprém: Pesti Kalligram, Művészetek Háza, 2021), 317.

[2] Csaba Fenyvesi, "A kriminalisztika piramismodelljének második változata," *Belügyi Szemle* 62, no. 9 (2014): 32–43.

Roman law: 'da mihi factum, dabo tibi ius', that is, give me a fact, I will give you law. The question of fact always precedes the question of law, and one cannot act as a lawyer or legally qualify a case without knowing the statement of facts.[3] The opposite can also be true, i.e. one who does not know the answers to the questions, one who has a vague view of the past, cannot formulate a statement of facts and therefore cannot qualify the case. Fact-finding always precedes the legal work.

Among the seven "golden questions" already cited, it is no coincidence that the question "WHAT?" is the first one. The essential answer to "what happened?" is the initial answer. It is also the starting point for deciding whether the authorities really need to act in a criminal matter or in an administrative, labour, misdemeanour or other area. In the case of a criminal response, the apparatus, expertise, methodology and tools to be deployed will immediately change and the other fundamental questions will immediately become active. I underline the word 'immediately' in the sentence, because the question of time immediately becomes a live issue. Not only because of the need for speed in the investigation and fact-finding, but also because the question of "when?" is brought to the fore. Only after the question "what" do the questions "where-when-how?" come up. Almost simultaneously and urgently, the sub-questions arise, to which we need to provide the most precise answers possible in the shortest possible time, because without them we are unlikely to be able to search for answers to the further questions (who-with whom?).

In this study, I will examine the "when?", the time dimension, which is a key question in almost all criminal cases, I do this without any hope for the complete processing of this topic[4]. My train of thought begins with the word "crime-chaser" (law enforcer or investigator in Hungarian). Unfortunately, this already shows that the investigator is constantly following, chasing after events or occasionally dashing after them.[5] He is at a time-line disadvantage to the criminal in the performance of his terribly difficult task. His behaviour is always an afterthought.

The detective is forced to look to the past. The reconstruction of an event in a timeline that no longer exists is demanded of him by his own discipline, his leader, his supervisor, the prosecution that oversees ("directs") the investigation and ultimately, the court evaluating the facts and the related evidence that looks into the past.

The time dimension of an architect can seem enviable in the eyes of an investigator. Given an empty plot of land on which he has to create a house,

[3] In my view, this statement applies to non-criminal facts, i.e. to all areas and branches of the legal profession of law.

[4] I think a similar analysis can be done for all the main questions. Since, as I put it, after (or in parallel with) the (WHAT?) the relevant questions are WHERE?, HOW? and of course the perpetrator(s) (WHO?) and their motivation and purpose.

[5] Only in crime prevention is there a pre-action, in time a prior act of authority, a proactive behaviour as opposed to a reactive one.

palace, museum, theatre, bridge, road, etc. [6] for the future in the present. Who has an easier job? Both need imagination and the ability to create images. Think of the hypotheses and versions (anything absurd can happen in life). It is not easy to see the past because it has already passed, and for the architect the invisible future that has never been realised. The quality of the engineering work will be given by the stability of the building. Similarly, the investigator is judged on the solidity of the facts and evidence he has revealed, which becomes relevant in court.

When processing the time aspect, another theoretical question can be raised: can the past be seen? After all, the fate, the freedom, and the lives of people in some countries depend on it. If the answer to this philosophical question was no, then I can safely say that criminal justice (and the science of criminology) would not make much sense. The theoretical, principled scientific answer is therefore: the past can be known however, we may have limited vision. Looking into the past is only possible though, through distorting mirrors. Take for example the mass of erring, mistaken witnesses either during the confession procedure or at the point of confession. The margins of error, methodological weaknesses and uncertainties in expert opinions, not to mention the often deliberate misleading behaviour and testimony of the accused, often alter circumstances of evidence attempts in order to gain an admission.[7]

What is the co-discipline, the co-study that examines the past? In the short term (centuries, millennia), it is archaeology; while in the longer term (millions of years), it is palaeontology. What are the consequences if they are wrong in answering the question of when? There is almost no serious disadvantage to anyone. Nevertheless, the mistake of a forensic scientist can be fatal for some individuals or groups. It does not matter when the crime was committed and how it was recorded. A wrong finding can often lead to a miscarriage of justice:

[6] Of course, in the architect's job, you may also have to rebuild an old building, in which case you may need to know the past. This is a rare case.

[7] Here I emphasise that it is not by accident that I have used the word 'attempt' in both reconstruction and recognition. Indeed, in the course of my seven years of academic research, which ended in 2021, I came to the conclusion that the current name for the dual – criminological and criminal procedural – presentation of recognition itself may be suggestive, or even influential. The word 'presentation' in itself encourages the person who has to make a confession, most often the witness of a crime victim, and who is often seeking to satisfy the authorities, to choose between the persons presented (objects, sounds, photographs, video recordings, etc.). Make sure you choose! And the compulsion to comply can take a dangerously justicidal turn.

I also suggest the word 'experiment' because recognition is often situational. The circumstances must then be adapted to the criminal situation. As in the case of an attempt at proof, the aim here must be to make the crime as similar as possible to the original situation, since only then can the authorities check whether the face, movements, clothing, etc. of the perpetrator can be recognised or made out at all. See in more detail the author's Comparison of the recognition attempt with other acts of evidence. See: Csaba Fenyvesi, “A felismerési kísérlet összehasonlítása más bizonyítási cselekményekkel,” *Magyar Rendészet* 21, no. 3 (2021): 43–56.

the authorities wrongly declare that the accused could have been present or was present/attending/residing at the scene of the crime. When in fact he was not there at the time the crime was committed.[8]

In what time dimension does the doctor who also assists the criminologist work? He examines the patient in the present. He makes a diagnoses. He tries to find out what caused the present situation in the past and after the diagnosis, he proposes a treatment for sometime in the future. The forensic scientist also tries to deduce the history from the data of the present time field inspection (traces, material remains, electronic data, documents), and witness statements. The detective's therapy is the investigation itself and, ultimately, assists the judicial system. The term "reconstructing the past" is used in Anglo-Saxon literature[9] and it is apt in terms of rebuilding the past, to see it again in the present. When an antique vase breaks, its colourful pieces are scattered across the floor. Archaeologists try to put the pieces of the mosaic back together. Investigators do the same. First, they work to find the (relevant) pieces that match the vase (for example, in an inspection). Only the puzzle pieces that belong to the original ornament survive the filtering system. Any pieces that do not fit must fall through the hole in the grate. The original pieces then have to find their proper place in the puzzle. The one, completely rebuilt, reconstructed vase may be taken to court. The past, completely reconstructed from the pieces that surely belong there, which is complete and intact. If there are cracks, gaps, time gaps, for example, the past will not be appropriately or accurately reconstructed. For the court there is, of course, both the right and the duty of the 'escape route'. A fact that is undoubtedly not proven cannot be assessed against the accused. The in dubio pro reo does not allow for prosecution, the court that has the final say in the endgame of the criminal chess game, to give inaccurate answers to the seven basic questions, including the question: "WHEN?".[10]

How far into the past should the criminal investigator look? The law gives the answer: until the statute of limitations. (The case of the Pécs Palahegy murderer in 1974 can no longer be investigated by investigative methods, because there is no criminal law framework for it, the perpetrator is no longer punishable.[11]) Some crimes are never statute-barred. They must always be observed, they cannot be forgotten.

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[8] The Mór bank robbery, which left eight people dead, took place around 12 noon on 9 May 2002. At the time, Ede K., who is serving a life sentence, was in Budapest and nowhere near the scene. See more details: Lajos Kovács, *A MÓR megtette…* (Budapest: Korona, 2009).

[9] James W. Osterburg, Richard H. Ward, *Criminal Investigation: A method for reconstructing the past* (Chicago: Anderson, 1998), (6th ed.) LexisNexis, Anderson Publishing, New Providence, NJ, 2010.

[10] Viktor Bérces, *A büntetőeljárás reformja és a bizonyítás alapkérdései (*Budapest: ELTE Eötvös Kiadó, 2021), 91–93.

[11] Csaba Fenyvesi, "Az 1974-es pécsi palahegyi emberölés kriminalisztikai fordulatai," *Belügyi Szemle* 68, no. 4 (2020): 89–96.

Does the ability to see in the distance increase? Is the sharpness of images of the past improving today? The answer is a resounding yes. The ability to 'see into the distance', to 'sharpen' distant images, is a constant desire and requirement for forensic science. The methodology and tools of forensic science meet this requirement. I argue that the closer the past image, the more distant the dream of a perfect crime without a trace becomes. I cite the Ötzi case as an example. In 1991, in a glacier in the Austrian-Italian Alps, the remains, skeleton, clothing and utensils of the man 'Ötzi', named after the place where he was located, were found preserved in a cool and relatively intact state. It is precisely with the tools used in forensic methodology, with expert methods of fact-finding, that they have been examined on several occasions over the last 20 years by various teams of experts. Each time we have learned more and more about him. First of all, the man, who died aged 45-46, had been lying in his natural grave for 5,300 years, led a hunting lifestyle, grew to 159 centimetres, weighed 40 kilos - with gallstones, joints and good teeth - and fed on cereal grains, deer and goat meat. Finally, we can also talk about a possible criminal case: the message from the remains of the substances is that he was killed, shot with an arrow in the back. At the second major examination, they found the fatal arrowhead fragment – "ineradicable" – on his back, firmly and deeply embedded in the skeleton.

After 5,300 years of occult research and answering criminological questions, the case of Jack the Ripper, who killed at least six London prostitutes between 1883 and 1886, seems particularly close. In 2000-2002, an American forensic laboratory manager conducted an investigation with the help of his colleagues, and during the two years of data collection he was able to gather more data and evidence, which, using 21st century techniques, also allowed for identification. He collected letters allegedly written by the Ripper and examined the saliva content of the stamps on them. He did this 120 years after the original events.[12] The fragments of "partisan" material, offered mitochondrial identification content. In six cases, they were found to match the DNA content of the saliva of an English painter who was alive at the time. The famous artist's correspondence has also been preserved in art history, so there was plenty of comparable stamp fibre. In addition, the research revealed several other indicia and group identification results, including, for example, the watermarks on the papers of the two types of correspondence were identical, as were the written characters.[13]

Successes in detecting homicides committed twenty years ago are no longer rare anywhere in the world. Countless examples could be cited from all over the world, but instead I will simply point out that the horizons have grown, the tools

[12] For more on this, see Patricia Cornwell, *Portrait of a Killer. The case of Jack the Ripper is closed* (New York: Berkley Books, 2002).

[13] From which it is not reasonable to conclude that painter Walter Sickert committed the mutilation murders, but only that he wrote mocking Jack the Ripper-signed letters to the police.

of forensic science are becoming ever more far-reaching and ever more sharply focused.

One might ask: what is the reason for this sharpening of the image, this increase in the ability to look into the past?

In my view, it is above all the almost daily increase in the efficiency of the tools of forensic technology. The tools and techniques developed by the basic sciences and by forensic science itself are such that an increasingly accurate picture is emerging, even at a distance.[14] We can see better in all directions. The sky (space), land and water are becoming more transparent, more familiar. The sky and space are explored by telescopes, satellites,[15] planes, helicopters; the land by aerial photography, satellites and ground-penetrating radars, magnetometers,[16] drones; the water by divers and water probes. With these and similar tools, the forensic scientist collects and searches for relevant data, objects, micro- and sub-micro (nano) material residues and traces in increasingly varied and refined forms.

The truly relevant data in real crime cases include the answer to the question "when did it happen?". In other words, to determine the time of the crime, and to define the time of the crime as precisely as possible. Nevertheless, it is not only a specific date, but also the duration that can be decisive. As well as the chronology of events.

It is not uncommon for the correct definition of the time of the offence to be a clue, to the discovery of the perpetrator. In that case, there could only have been

[14] Some examples of state-of-the-art instruments and methods: scanning electron microscopy, chromatography TLC (drugs, dyes, inks, etc.) GC (blood alcohol, residues of petroleum products), HPLC (drugs, dyes, etc.)) GC-MS (narcotics), spectrophotometry including FTIR, Raman, UV-VIS (micro)spectrophotometry, isotope mass spectrometry (narcotics), fluorescence capillary electrophoresis, projectile muzzle velocimetry.

[15] One forensic example of image sharpening, of overcoming distances in space, is the Russian satellite image obtained in the O.J. Simpson case, which in the 1994 Los Angeles double homicide case showed a photograph of the defendant's vehicle in front of the victim's house at the time of the crime.

[16] The ground penetrating radar sends a short electromagnetic pulse into the ground and, if an object is there, it gives off a distinctive reflection, which is detected by the instrument and displayed on a monitor showing the pattern of the pulses. There is also a technique called lidar (Light Detection and Ranging), which emits pulses of laser into a target area and measures the arrival time of the pulses reflected from the target.

The magnetometer is held at a specific distance from the soil surface, thus recording the magnetic variations of the iron-rich soil. If, for example, a buried body is lying in a particular part of the soil, there will be fewer iron particles than in the surrounding area.

With a soil resistivity meter, the user penetrates the soil with two probes, passes an electric current between them and measures the resistance. This is lower in wet soil than in the dry, stony part, given that water is an excellent conductor of electricity. It is useful for searching graves, as the resistance of the soil around the grave is lower because there is more moisture. However, it can also be the opposite, i.e. too high if the grave has been filled with stones by the perpetrators or if the body has been hidden in some kind of tightly sealing material such as plastic bags.

one person at the scene, no other potential suspect. If you know the detection of a fixed time or period, many more persons of interest could be ruled out. They may have alibis that can be checked and verified.

In 1989 a four-year-old girl was brutally murdered in Komlo. To be precise, she disappeared between 17.15 and 17.30 on 15 September (Friday). The subsequent medical expert opinion also determined the execution on the evening of that day. The young man, who was quickly in sight, produced ten witnesses (indices), lived nearby and had hostile feelings towards the victim, but still fell through the system. He was not in Komlo at the time, but on a train to Budapest. He was able to present his train ticket and the conductor he called as a witness, remembered the passenger, who had been on the express train at the time.[17]

The court also acquitted a middle-aged man accused of armed robbery in the lottery shop in Alkotmány Street, Pécs, between 8.10-15 a.m. on 19 July 2005. He was captured at the car showroom on the other side of town. He took his car to the garage, where, according to the clock and video camera, he arrived at 8.24 a.m. After walking out of the lottery shop at 8.15 a.m. and hurrying to his car, parked behind a convenience store across the road, there was no time to cover the eight kilometres across so of the city. This was measured by the police with the charged defender in their car. It was not possible for the accused to have been at the scene of the offence at 8.15 a.m.

I note here that in time-based proof experiments, it is the negative result that is really valuable. The positive one only gives possibility, not certainty. Also acquitted was the case of a homicide in a village in Baranya, in which the authorities (including the court) used an attempt to model that the young accused man, who was agile, could have run under the gardens to the scene of the crime at the time of the crime after he had got off the bus in the middle of the village. This alone was insufficient to convict the accused as there was no other evidence.

The authorities closed the investigation in which they tried to establish that the suspect could not have reached the Tettye district of Pécs from his apartment in Pécs-Vasas, 11 kilometres from the crime scene, at the time of the crime. After getting up in the morning, he switched on his computer. No one else could have done so in the locked room. Based on this, the investigators knew when he was definitely at home. From his premises, he could have arrived at the scene of the crime at the time of the crime neither by running, cycling nor immediately calling a taxi (or other car). It was physically impossible.[18]

In the 1986 manslaughter case against János Magda, a time and duration investigation of several acts was carried out at the scene with the help of witnesses who had been interviewed earlier. Anomalies, errors in recollections

[17] Csaba Fenyvesi – Ferenc Kodba, "Kisgyermek sérelmére elkövetett brutális emberölés nyomozása," *Belügyi Szemle* 38, no. 4 (1990): 106–113.

[18] Csaba Fenyvesi – József Orbán, "Az elektronikus adat, mint a 7–5–1–es kriminalisztikai piramismodell építőköve," *Belügyi Szemle* 67, no. 2 (2019) 45–55.

and contradictions between individual statements and reality were quickly revealed.[19]

The passage of time does not favour the investigation. The passing of time (tempus fugit) erodes both physical and memory traces. The Ebbinghaus curve, well known in the literature, is also evident in the case of identity parades. In my latest research, completed in 2021, I discovered the following time-related errors.

a) In the case of recognition of missing objects and photographs, failure to draw attention to the fact that: after time, the perpetrator's appearance (hair colour, hair length, hair shape, facial hair, skin) may have changed or may look slightly different in the photographs.

b) Unjustified delays in identification (fading of witnesses' memories.)

c) The personal identification was carried out ahead of time, when the person to be identified could not have had any knowledge of the fact that he or she was under investigation.

d) The "red flags" of (eyewitness) testimonies were not taken into account or not noticed by the authorities. Such warning signs may include information indicating that the witness's memory, ability to anticipate and recall, or intentions may be wrong (influenced). For example: the perpetrator may have been observed by the recogniser for a very short period of time and in poor visibility conditions (very little opportunity to observe).[20]

The investigator's experience of homicide investigations is that the first few months must yield results. It is not possible to give a fixed time span in general, but if the first three months do not yield results, the "deadlock" is an ominous reality. It is said that the greatest policeman in such cases is chance and as the eternal French saying goes "cherchez la femme", that is, look for the woman! After being beaten up again by the man (despite his pious vows and oath), the perpetrator's partner revealed to the police the terrible crime of Oszkár Nyéki.[21]

An example of a (lucky) coincidence is the 2002 prostitute murder in Pécs, which came to a dead end after nearly three months. The period of monitoring the phone stolen from the victim was almost over when the device signalled that it had been activated. This led to a search for the perpetrator, who was later sentenced to 14 years in prison.[22]

Timing is also worth mentioning in relation to time aspect. Especially in the field of criminal tactics. Just think of well (or badly) chosen acts of evidence, concealed devices, realisations, or coercive measures (searches, frisking). Acts

[19] See more details on this Géza Katona, "Még egyszer Magda János bűnügyéről," *Belügyi Szemle* 34, no. 8 (1986): 96–104.

[20] Géza Katona, "A felismerésre bemutatások hibái," *IUSTUM AEQUUM SALUTARE* 17, no. 4 (2021): 25–39.

[21] See in more detail Csaba Fenyvesi, "Masni a szilvafa árnyékában. Az utolsó baranyai halálra ítélt ügyének kriminalisztikai tanulságai, *Belügyi Szemle* 71, no. 4 (2023): 625–635.

[22] Csaba Fenyvesi, "Védőügyvédi tanulság egy emberölés nyomán," *Ügyvédek Lapja* 61, no. 6 (2022): 38–41.

carried out too early or unjustifiably too late can be fatal to the effectiveness of the investigation and to the unbiased answering of forensic questions.
The term "urgent investigative measures" is not an accident. Because of the “periculum in mora,” the risk of delay, certain means must be deployed immediately and in any case as quickly as possible. The first strike (der Erste Angriff in German, First Strike in English) cannot be delayed. In my view, it is a collection of all the primary measures, including data collection, that the authorities take or must take as soon as possible and as quickly as possible after the crime has come to the attention of the investigating authorities, in order to effectively establish the facts and answer the seven basic forensic questions. Professional promptness is also of paramount importance here because experience in the field of criminology has shown that those who miss the opportunity and chance of a “first strike” have little chance of providing an accurate response later on. The same is true on the positive side: those who take advantage of the “first strike,” who are quick and thorough, and who meet the “double pressure”[23] of our modern age (speed and thoroughness at the same time), have a good chance of success in the future. I can also say without any particular risk that a “hot lead” always gives a better chance of finding the relevant data, including the identity of the perpetrator, than a “cold”, already “cold”, long-established one, remote in time and space. And this is also true for the retrieval of “memory traces” in the human psyche. For the closer the human memory is to the event in question, the easier it is to remember and recall it, and conversely, the more distant in time we are from the past event, the more difficult it is to keep an undistorted mirror of events (for example, the more mistakes witnesses make).
The immediacy and speed of the 'first strike' is also a tactical requirement for crime, because it can catch the perpetrator, who may already be in the picture, unawares. He may be stunned and shocked by the speed of the action, confronted with what he has done. The shortness of time does not give him the possibility of a conscious, calm and elaborate defence, and it is much easier to obtain a confession that can be used as direct evidence and is still valuable today.
There is no doubt that the on-site inspection is the key element of the “first strike”. We know this from the fact that national and international statistics show that so-called “crime scene crimes” account for around 60-70% of crimes of unknown perpetrators. Where it is worthwhile to carry out a site inspection, where there is something to look for, to search for, to “comb”, where the building blocks, the traces and material remains can be found, which I have

[23] In addition to the duo of speed and thoroughness, we can also speak of several “double pressures” in forensics. Thus, they form occasional 'pairs': planned and improvised, legalistic and result-centric, and the requirement of objectivity is pitted against the investigation, imagination and intuition of subjective individuals, while, on a slightly broader scale, there is a tension between increasing crime, more skilful criminality and the strengthening of the rights of the accused.

already indicated in my above-mentioned pyramid of identification. Primary crime scene investigation is a priority for forensic scientists all over the world, because everywhere – whether on the European continent or in the Anglo-Saxon states, including Australia, as well as in Asian countries – the crime scene is a "repository of data", an "open book to be read." In my view, there is no such thing as a site free of traces or material remains, it is just a matter of finding and exploring the often invisible changes[24] left behind (with appropriate interpretations and meanings.) I mention here that equally valuable are the so-called "negative traces",[25] i.e. what is not there and should be there, or what is not there and had been there. In many cases, the non-existent, missing trace says more than the present one.

Finally, the dynamics of the on-site inspection must not obscure the requirement for parallelism. In other words, as soon as there is sufficient data for a conditional explanation of the past, for the construction of a version or versions, data collection in the other direction must begin. I can also say that the other important component of the "first strike", which I consider to be the most important one, the so-called "hot pursuit", coordinated (not specified here) actions should be taken. These components give substance to the principle and practical requirement that coordinated steps be taken by the commanding officer and his team of 3-100 people – as soon as possible after the crime has been committed – to gather evidence and apprehend the perpetrator, when the "lead" is still "hot".

To summarise: it is necessary to carry out a rapid search for traces and material remains at a level (material or memorabilia) that will stand the test of time, from the laboratory to the courtroom. ("From crime scene to the courtroom.") In a rational time – frame, all tactical and technical means available at the time and place must be used to achieve this, based on the results of the natural and social sciences as well as forensic science.

[24] The American tactics suggestion warns against the forensic scientist starting the field evidence collection with high and imagined expectations. "A good evidence collector will not approach a scene with a predetermined expectation or what can be found," Peter Moore, *The Forensic Handbook* (New York, Barnes and Noble, 2004.): 34.

[25] János Dobos, "Negatív körülmények a helyszínen," *Belügyi Szemle* 12, no. 1 (1964): 54–59.

Migration and Crime: Does Migration Really Effect on Increasing State Crime?

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ABSTRACT *Migration has become a global issue for the last few years. Immigrants from the third-world country are tending to get into countries of Western Europe and America. With this increasing number of immigrants, the debate also arises that the higher level of immigration led to a higher level of crime. However, the connection between migration and crime is not so simple to be shown. The immigrant policy of the state for documentation and legalization of immigrant residents also has an impact on establishing the connection between their behavior and the state they have migrated in. This study aims to find out how far migration is responsible for the increasing crime rate. There will be also discussed the behavioral differences between documented and non-documented immigrants in terms of obtaining work and legal wages. Besides, immigrant victimization also will be focused.*

KEYWORDS *Migration, crime, immigrants, employment, immigrant victimization*

1. Introduction

Migration is the most frequently mentioned topic faced by policymakers in the advanced world. The debate about connecting the increasing crime rate with migration has a continuing tradition even in the public mind of native citizens. However, one part of the debate is always misinterpreted by accusing that higher level of immigration lead to higher level of crime. However, the clear answer to the question whether immigrants are more likely to be involved in crimes compared to the natives is yet to be found. Although the evidence based on so much a empirical research shows that establishing a connection between immigration and crime is not so simple, the legislation process and status of immigrants have played a vital role in increasing crime rates. Discussing the connection between migration and crime gives rise to some more questions about whether the migrants are thought to be more criminal before they migrate or after settling down in the new country or become criminal through the migration process itself.[1]

The fact is that Western societies are concerned about a possible relationship between the rising number of immigrants and the level of crime and violence. The incident of 9/11 brought immigration and religion in the context of terrorism

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[1] Dr. Gavin Slade, *Reorganizing Crime* (Oxford University Press,2013), 9–12.

in the public mind. After that incident, many countries started to refuse immigrants for the sake of the safety of their nations. The perception of immigrant criminality is even non-persistent in cross-cultural practice in the global context. The reason for migration may also have an effect on the activity or behaviour of the immigrants such as circumstances of ethnic cleansing, genocide, or being stateless. These reasons may have an effect on the immigrants' participation in a wide range of criminal activities. However, indicating that immigrants participate in any given crime at a higher rate than native citizens is not a proven statement. In this paper, the links between migration and crime in a global migration context will be discussed. The behavioral difference between documented i.e. legal migrants and undocumented i.e. illegal migrants and the process of deportation as punishmens for foreigners with the idea of victimization of immigrants will be focused on in this study. In the last part, there will be the author's opinion on how the policymakers should act in making flexible the tension about the nexus of immigrants and crime in favor of globalization in the recent advancement of the world.

The main message of the author here is that, it should not be appropriate to put a simple link between immigration and crime. Rather, a deep observation is needed. Most of the studies and statistics have found that a higher immigration wave in an area is not associated with violent crime, although there might be very weak effects on property crime. However, immigrant people who get insufficient wages and face fewer job opportunities in the labor market mostly tend to be involved in committing property crimes. But this is also true for the disadvantaged native people. The policymakers therefore should be focused on improving the functioning labor markets based on worker's skills as a crime-reducing benefit. It is also important to ensure that immigrants can obtain legal work in receiving countries where the legalization process would not be an obstacle because studies show that immigrants possesing legal status tend to less involve in criminal activity.

2. Global Migration

Generally, it can be said that because of urbanization people are gradually shifted to the urban areas from the rural areas for living an advanced life. Many low-income or developing countries have had a substantial population increase during the past few decades along with urbanization, but the state machinery could not provide enough public services to keep up with this growth in time.[2] The infrastructure required for the new areas of the city is currently lacking in many developing country cities. Approximately one billion people currently reside in urban slums or informal settlements, according to some forecasts. They reside in places like train stations, bus stops, ports, rivers, deserted markets, parks, abandoned buildings, stairways, and other places where they can find cover.

[2] Joanne van der Leun, *Looking for Loopholes: Processes of Incorporation of Illegal Immigrants in the Netherlands* (Amsterdam University Press, 2003), 35–55.

Global migration has become one of the most important problems nowadays associated with increasing of crime. Along with continuing large-scale movements based on postcolonial linkages from the latter half of the 20th century. During the 21st century, the United States and Western Europe have been the top destinations for immigrants. Currently, the United States is obtaining 20% of the world's migrants, who make up nearly 320 million citizens.[3]

The Immigration and Nationality Act of 1965 eliminated quotas favoring immigrants from Europe, which marked the first significant change in immigration patterns to the United States during the 20th century. The main immigration source to the United States quickly changed after the Act. The majority of migrants currently migrated to the US as authorized economic migrants from South- East Asia, particularly from China, India, and Bangladesh, looking for jobs as workers, entrepreneurs, and students.

Over the time period of 2002-2009, a study/analysis presents an estimation of the effect of immigration on crime in England.[4] In Europe, the impact of violent and property crime has occurred in two big flows of migration during the above-mentioned years. The first one is the recent migrant flow of refugees or asylum seekers as a result of dislocation in the early 2000's from Syria, Iraq, Somalia and Afghanistan's ongoing conflicts give rise to a disfavored situation for immigrants in the political discourse all over the continent.[5] The second large flow resulted in 2004 from the expansion of Europe including A8 countries, such as Poland, Hungary, Czech Republic, Slovakia, Slovenia, Estonia, Latvia, and Lithuania. The UK government played a vital contribution to granting citizens from these countries the benefit of access to immediate and unrestricted entry into the labor market. Although it can be argued that focusing on these two migration flows has estimated an identification of the impact of immigration on crime but it must also be recognized the considerable variation of migrant people within these two flows. It deserves to pay close attention that the individuals seeking asylum were dispersed and relocated around the UK by a central agency with no reference of choice of the individual applicant. So, this can be a direction toward an explanation that relocation of asylum-seekers should not be the right way to establish a correlation with state crime.

In the case of the A8 wave, migrants had the freedom to choose their destination for relocation. However, studies have shown that future migrants always tend to choose the prior settlement areas of communities from the same nationality or ethnic group. By assuming that earlier settlement pattern is not linked to

[3] Daniel L.Stageman, "Immigrants and Crime." *Oxford Research Encyclopedia of Criminology*. 30 Jul. 2020; https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-563.

[4] Brian Bell, Franseco Fasani, and Stephen Machin, "Crime and immigration: Evidence from large immigrant waves," *Review of Economics and Statistics* 95, no. 4 (2013): 1278−1290, http://www.mitpressjournals.org/doi/pdf/10.1162/REST_a_00337.

[5] Margo De Koster and Herbert Reinke, "Migration as Crime, Migration and Crime," *Crime, History and Societies* (2017): 63–76, https://www.jstor.org/stable/44984300.

determining crime rate, then it is possible to use the prior settlement distribution of A8 migrants across the region to estimate crimes that occurred in variable areas with the level of the population annually.[6] The data of a casual report shows that neither asylum-seekers nor the migrants from A8 wave had any effect on violent crime but very little or less in a number of property crimes. The findings of the report suggest that when the percentage of asylum seekers in one area goes up by 1%, the property crime rate of the same area increases by 1.09%. On the other hand, with the similar rate of increase in A8 migrants led to a decrease in the property crime rate of 0.39%.

The noticeable migration happened in the United Arab Emirates mainly from South Asia as contract laborers. The very recent migration of Rohingya refugees into Bangladesh from ethnic cleansing in Myanmar took place with a large number of immigrants.

Global migration driven by economic disparities is presumed to create criminal propensities of immigrants by natives and the immigrant groups are considered as undesirable or culturally inferior with a criminal mind.[7] Critical criminologists define crime and its severity by examining immigrants' activity in social harm. The traditional measures of crimes by immigrants as survival crimes have a minimal level of social harm. But the comprehensive proof of the relationship between immigrants and crime is yet to be found and also rarely addressed by policymakers worldwide.[8]

3. Connection between Migration and Crime

Immigrants frequently settle in regions perceived as being more chaotic; they encounter with several cultural and social obstacles in their attempts to assimilate into a new state; they also carry with them their own values and cultures that may be very different from the prevalent values of native people. While some immigrant groups have been found to engage in some types of criminal behavior, others continually display incredibly low rates of criminal conduct. Even though some young immigrants join youth gangs, they don't always act criminally.[9] There are many different kinds of immigrant groups as different generations or age groups, different areas of countries group and their activities and behaviors are also very different. But that should never be concluded the contribution of immigrants to overall increasing of crime.

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[6] Bell, Fasani, and Machin, "Crime and immigration: Evidence from Large Immigrant Waves*,"* 1278−1290.

[7] Bernadette Hanlon, Thomas Vicino, *Global Migration: The Basics* (Routledge Publication, 2014.), 52–79

[8] Daniel L. Stageman, "Immigration and Crime," City *University of New York- Critical Criminology, International Crime* (2020), DOI: 10.1093/acrefore/9780190264079.013.563.

[9] Timothy J. Hatton, *Global Migration and World Economy: Two Centuries of Policy and Performance* (MIT Press, 2006), 243.

Immigration is one of the most important issues which is frequently discussed in advance economies. There is a very commonly expressed concern about immigrants harming the job market prospects of natives. This concern received very substantial, sometimes controversial attention in labor economics academics. This public attitude towards this issue has larger reflected labor market outcomes and social aspects as well. The competitive mindset among natives and immigrants regarding education, health services, housing demand, cultural identity is more relevant in this aspect. A poll conducted through the United States, Netherlands, Italy, Great Britain, France and Canada by the German Marshal Fund of USA has clearly shown that natives' thoughts are almost similar for immigrants taking jobs, reducing native wages, increasing crime, burden on social services like education and health. The negative view of natives on immigrants is particularly strong when it is about illegal immigrants but the public attitude is not enough to put a connection between crime and immigration.

There are two important principles in which crime patterns between natives and immigrants may differ. One is varying outcomes or relative returns for legal or illegal activities. For example, if immigrants experience fewer job outcomes with everything else being equal e.g. living cost, and housing, that might lead to a higher criminal behavior. Another reason involves the differences in detection and punishment if immigrants are more frequently caught and given harsher penalties than natives, that might lower their incentive to commit crimes. Although, both principles or reasoning play vital roles in immigrant-native crime differences, this part of the article focuses on the first one due to a lack of solid evidence on the second. To examine the differences in immigration and crime in local areas within a country, consider two local areas: A and B. The number of immigrants or foreign-born population is higher in A than in B. If the crime rate also went higher in A than in B, then strategically it can be said that immigrants increase the crime rates. However, it is not very simple to make that statement because there could also existother reasons which can influence the higher crime rate. For example, social deprivation in high-density areas with poverty also has a high chance of high crime. The main part of the remaining problem will still be there because the method is all about establishing correlation rather than an exact causal effect. For example, if that happened that the crime rate is increasing in one area and at the same time natives are leaving that area then only it can be specifically said that immigrants are causing the crimes.

Understanding possible links or connections between immigration and crime requires knowing the number of immigrants entering and staying legally and illegally. illegal immigrants may tend to be involved in criminal activities more because of not having legal earnings or wages. another factor establishing the connection between these suggests a difference between immigrants and immigration. Immigration is the general movement of a whole group of people

flowing to indicated areas or countries.[10] While individual immigrants may have low self-control on stress or poverty and easily engage in criminal or illegal activities.

When we talk about crime, we typically refer to it as overall crime, individual crimes like homicide, assault, or burglary, as well as broad categories of crime like violent, property, or drug offenses. These can be distinguished from illegal immigration, which entails a character of particular crimes. Whether immigrants, species of immigrant groups, or immigration rates are related to total crime, or particular types of crime, or individual crimes is another factor linking up immigration and crime.

The statement that immigration increases crime can have a double indication that immigrants are more doing crime or immigrants are becoming victims of crime. Immigration may have two dimensions of the relationship with crime a greater level of offending by immigrants or a greater level of victimization among immigrants. In the first instance, policies might address the causes of increased crime as high proportions of immigrants who commit crimes or higher levels of exposure to the socioeconomic elements that influence immigrants to commit crimes. In the second scenario, policies might take the potential into account that rising victimization of immigrants is due to crimes committed by non-immigrants.[11]

In other words, even if we presume a connection between immigration and crime, we still need to know why it is there. Theoretical estimations are important because they may be used to organize the data already available on immigration and crime and to predict which of a wide range of possible reasons for a connection between the two is most plausible.

4. Documented and Undocumented Immigrants

One of the most determinant criminal activities by migrants relates to their legal status through documentation under immigration policy. Undocumented immigrants rarely avail to get legal employment and have considerably less potential to find legal jobs. Although this implies that illegal immigrants may have higher criminal propensities. It is hard to assess this observation because illegal immigrants are not typically visible in records.

The most important thing for any immigrant is having legal status in that country after migration. Immigrants, after migrating to a new country, start working unofficially for an employer and eventually acquire legal status by obtaining a work-related residence permit that is sponsored by the employer. There is a fixed number for issuing such permits every year among the applications. These

[10] Scot Wortley, "The Immigration-Crime Connection: Competing Theoretical Perspective," *Journal of International Migration and Integration* 10, (2009): 349–358, DOI: https://doi.org/10.1007/s12134-009-0117-9

[11] Daniel P. Mears, "Immigration and Crime: What's the Connection?," *Immigration Offences and Non-Citizen Offenders* 14, no. 5 (2002): 284–288, https://doi.org/10.1525/fsr.2002.14.5.284.

permits are issued on a first-come, first-served basis, and thousands of applicants are denied legal status simply because of their application timing. And because of the non-completion of documentation, they lost their jobs and earnings. The difference between two reports of having committed a serious crime before and after legalization for those who submitted their application for documentation within time limits and therefore became legal, on the other hand with those who missed the timeline of the application for documentation and therefore remained illegal, has a vast impact on their criminal behavior.[12] The credibility of this methodological approach is supported by the fact that the two groups look identical on observable characteristics prior to the application for a permit, and importantly, have the same crime rate before the legalization. Because after obtaining legal status they are considered under the concerned policy of the country and have fear losing their legal permit to stay.

For example, we can take the documentation process in Italy. In Italy, most undocumented immigrants start off as temporary employees of a company before getting a work-related residence visa, which is sponsored by the employer, to attain legal status. On specific pre-announced "click days" throughout the year, the employer must apply for these permits online at 8:00 am as there are annual quotas for their issuance. Permits are provided on a first-come, first-served basis, which is significant for the validity of the results. Thousands of applicants are refused legal status just because their company filed the application a few minutes or seconds after the deadline.[13]

In December 2007 there were 610,000 applications in all, which is roughly in line with estimates of the number of undocumented immigrants in Italy. The author obtains a credible causal estimate of the impact of legalization on criminal behavior by comparing the probability of being reported as having committed a serious crime before and after legalization for those who submitted their application just before the cutoff and therefore became legal with those who submitted just after the cutoff and therefore remained illegal. The fact that the two groups documented and undocumented have the same crime rate and are identical in terms of outward appearance prior to the application for a permit lends credence to the legitimacy of the methodological approach.

The statistics indicate that, in comparison to a baseline crime rate of 1.1% before legalization, lowers the crime rate of legalized immigrants by an average of 0.6 percentage points in the year after the click day. This is a significant 55% drop. Examining this effect in more detail reveals that it is caused by a decline in criminal activity motivated by economic gain among candidates with some of the worst employment prospects. Since they can now freely look for any job in the

[12] Brian Bell, Francesco Fasani and Stephen Machin, "Immigration and Crime: evidence from large immigration waves," *Review of Economics and Statistics* 95, no. 4 (2013): 1278–1290, http://eprints.lse.ac.uk/59323/

[13] Paolo Pinotti, "Clicking on Heaven's Door: The Effect of Immigrant Legalization on Crime," *American Economic Review* 107, no. 1 (2017): 138−168, https://doi.org/10.1257/aer.20150355.

Italian labor market, these immigrants' prospects in the employment market have significantly improved since their legalization.
The European Union (EU) immigration law enforcement statistics for 2022 show a picture of non-EU citizen's documentation and legalization scenario. It reveals that 141,060 applications of entry into the EU were refused, while a significant number of 1,081,200 individuals were found to be illegally present within the EU's borders. Although legal action led to 422,400 people being ordered to leave EU member states only 96,795 of those individuals returned by following such order. However, the data notes some limitations, as figures for certain countries, including the Czech Republic, Latvia, Portugal, and Romania, were based on the report of 2021.
The evidence shows that in a year, legalization reduces the crime rate of legalized immigrants on average, compared to the overall Crime and immigration crime rate. It has been identified by the evidence of surveys of legalized migrants that 75% of respondents were in favor of saying that legal status makes it easier to find their job and helps them develop and promote in their current work. Furthermore, the wages in terms of legal status holders seem to be higher by 15-20%.
Searching for more rooted findings, it is shown that it is driven by a reduction in economically motivated crimes amongst applicants who have some of the poorest labor market opportunities. Legalization for these immigrants dramatically improves their labor market prospects as they are now free to search for any job in the labor market in the new country. Because of the Immigration Reform and Control Act 1986, there is a penalty provision for employers if they hire any illegal immigrants.[14] By following the path of IRCA, the annual number in each county found an increase of one percent of legalized immigrants, which also helps reduce the crime rates both in violent and property crimes.

5. Immigrant Victimization

Immigrants are extremely susceptible to violence, abuse, and exploitation, and this is especially true with undocumented immigrants. Ironically, it appears that the laws and policies implemented in response to fears that immigrants pose a threat to society contribute to their victimization by making immigrants and other members of their communities afraid of approaching law enforcement or otherwise drawing attention. Due to the lack of protection from the criminal justice system, immigrants particularly become targets for victimization.
Immigrant victimization also set up a link between crime and immigration but in a positive way. In this way, immigration barely has any impact on reported crime. Rather immigrants themselves may be disproportionately victims of crime. This possible positive association between crime and immigration rates in a region indicates an increase in crime committed against immigrants rather than by immigrants themselves. Self-reported victimization rates or police victim reports

[14] Scott R. Baker, "Effects of immigrant legalization on crime," *American Economic Review* 105, no. 5 (2015): 210−213.

are the primary data sources used in the majority of research on this topic. In this discourse, the most significant challenge is the difficulty to separate the real difference in victimization between natives and immigrants from the reported case if immigrants have different reporting rates than natives possibly because the natives are more cautious in having contact the authorities. Self-reported crime victimization probability models have been estimated using data from crime surveys.

It was discovered that immigrants are less likely to report being victims of crime than natives after controlling for a wide range of individual factors. This statement remained true for all immigrants as well as for the two waves of immigration that the study focused on such as migrants from asylum applicants and the other regions of the world.[15] The intriguing topic of why immigrants seem to be less reported in crime is raised by this analysis. One explanation can be that the immigrants have settled in areas with high protection against crime especially if the crime committed by immigrants against other immigrants is seen as socially unacceptable.

Another study that gathered information on violent crime reports against foreigners discovered significant differences between the violent tendencies in Eastern and Western Europe, with the incidence of anti-foreigner crime being higher in the former East and rising with distance from the former West.[16] According to a research on the experience of immigrants in Sweden, it suggests that immigrants are more exposed to violence and threats of violence than native Swedes. Interestingly, immigrants of the second generation seem to be the most vulnerable. Taking personal traits into account, second-generation immigrants are 30% more likely than native Swedes to face violence.[17] The disparity is brought on by higher rates of interpersonal violence against women as well as violence in the streets and other public areas.

Contrary to that, in Switzerland, however, it has been noted that victimization rates for immigrants and locals are largely comparable. This may be because there are fewer immigrants living in impoverished areas than in some other nations. There doesn't seem to be a similar pattern of victimization of immigrants across nations.[18] It does appear, though, that violence against immigrants is considerably more likely to occur in impoverished areas where immigrants have quickly turned into a sizeable and noticeable minority in once-homogeneous communities. It

[15] Bell, F. Fasani and Machin, "Immigration and Crime: evidence from large immigration waves," 1278–1290.

[16] Alan Krueger, and Steffen Pischke, "A statistical analysis of crime against foreigners in unified Germany," *Journal of Human Resources* 32, no. 1 (1997): 182−209. http://www.jstor.org/stable/pdfplus/146245.

[17] Peter L Martens, "Immigrants, Crime and Criminal Justice in Sweden," *Ethnicity, Crime and Immigration: Comparative and Cross-National Perspective* 21, (1997): 183–255. https://www.jstor.org/stable/1147632.

[18] Martin Killias, "Immigrants, crime, and criminal justice in Switzerland," in *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives*, ed. Michael Tonry (University of Chicago Press, 1997), 375–405.

must be noticed that the neighborhood or the living areas of immigrants are significant in case of being victimized.[19]

6. Research Gap and Limitations

Even with the collection of empirical research mentioned earlier, the evidence supporting the link between immigration and crime is still shockingly weak. This is partially due to the necessity of resolving the challenging identification problem. If there is a connection between immigration and crime, is it due to immigrants contributing to the rise in crime, or do they move to areas where crime rates are already increasing, perhaps because housing has become more affordable in those locations? The studies that this article focuses on give this problem special consideration and, as a result, offer more reliable evidence.
The importance of labor market opportunities has been highlighted by the few studies that have concentrated on specific immigrant groups rather than assessing the average effect of immigration on crime. Research on this topic is probably going to continue, even in nations with relatively diverse immigrant populations. Furthermore, consideration should be given to other facets of the criminal justice system. A greater comprehension of the relative chances that native-born people and immigrants may be detained, accused, found guilty, and given sentences for certain offenses will be part of this. However, it is likely that data problems will make a lot of these studies difficult and unresolvable.

7. Some Way-Out to Fix the Confusion

The labor market is a significant predictor of criminal behavior among immigrants, according to research. This is similar to what locals experience. There is substantial evidence that poorly educated, low-skilled indigenous will be more likely to commit a crime than otherwise identical high-skilled, stable-employed natives. Thus, policies that focus on enhancing the employability of workers — both natives and immigrants – will have the additional benefit of lowering crime.
Policymakers can use two additional strategies to address immigration and crime: Firstly, legalizing immigrants has a positive impact on crime rates, which is a rarely addressed component of such initiatives. Secondly, the adoption of point-based immigration systems allows governments to select the qualities of immigrants for granting residence who really deserve them. For instance, Canada and Australia both use point-based immigration programs that distribute points to prospective immigrants based on factors including age, work experience, education, and employment plans.[20] Then, in order to permit legal immigration,

[19] Marjorie S. Zatz and Hilary Smith, "Immigration, Crime and Victimization: Rhetoric and Reality," *The Annual Review of Law and Social Science* 8, (2012): 141–159. https://doi.org/10.1146/annurev-lawsocsci-102811-173923
[20] Paul W Miller, "Immigration policy and immigrant quality: The Australian points system," *American Economic Review* 89, no. 2 (1999): 192−197.

a certain number of points must be obtained. These systems enable nations to modify the qualities of immigrants by adjusting the threshold for admittance or the points granted for specific traits.
Based on the points acquired, governments may choose to provide preference to applicants with higher skill levels, job offers, and higher wages in the international immigration market, thereby mitigating their concerns about the potential impact of immigration on crime. In any event, several nations are pursuing this course of action for various other reasons.

8. Conclusion

In the past, major themes in the rhetoric surrounding US immigration policy have included the demonization and racialization of immigrants. The public perception of undocumented immigrants is that they are particularly hazardous since they enter the nation illegally, commit crimes, and take jobs. However, due to the high crime rates in local neighborhoods, immigration actually performs a protective function, as shown by the studies. Our brief discussion of the connections between immigration, crime, and victimization outside of the United States has generated more questions than it has solutions. The questions of whether the strictest immigration rules are located in new immigration destinations, where there may be the greatest racial threat, and if they protect immigrants from victimization while also lowering crime remain unclear.
Perhaps immigration and crime have some existing links but for the sake of the effectiveness of crime control policy, we need to evaluate the positions and possibilities of immigrant relevancies. At least any statement should not be given or assumed about the links. ather more reliable and accurate data research should be held for interpreting such links.

Data collection resource online:

Bell, Brian, Crime and immigration, IZA World of Labor (2019), Institute of Labor Economics (IZA), Bonn. DOI: https://doi.org/10.15185/izawol.33.v2 ; This Version is available at: https://hdl.handle.net/10419/193414

Analysis of the Legal Framework for Combatting Human Trafficking in Kenya

KATUNGATI, SABASTIAN MUTHUKA*

ABSTRACT *Human trafficking remains a critical issue in Kenya, serving as a source, transit, and destination country for trafficking victims. Despite various legal initiatives, including the enactment of the Counter-Trafficking in Persons Act of 2010, the persistence of human trafficking indicates significant gaps in the country's legal and enforcement mechanisms. This study offers a comprehensive analysis of Kenya's current legal framework, identifying critical deficiencies that undermine efforts to combat human trafficking effectively. Through a qualitative research methodology, including document analysis and case studies, the study explores how effective Kenya is the in the field of anti-trafficking laws and in combating human trafficking. The findings underscore substantial weaknesses in enforcing these laws, largely due to systemic corruption, insufficient resources, and a lack of sufficient specialized training among law enforcement agencies. Additionally, the research highlights the socio-economic and cultural factors that exacerbate the vulnerability of specific groups, particularly women and children, to trafficking. These factors, coupled with inadequate victim protection measures, hinder the effectiveness of Kenya's legal framework in addressing the root causes of human trafficking. The study concludes by offering targeted recommendations for strengthening Kenya's legal response to human trafficking. These include enhancing victim protection services, imposing stricter penalties on traffickers, allocating more resources to enforcement agencies, and fostering better coordination among stakeholders, including government, local civil society, and international partners. By addressing these issues, Kenya can significantly improve its efforts to combat human trafficking, safeguard the rights of victims, and fulfill its international obligations under the Palermo Protocol.*

KEYWORDS *Human trafficking, Kenya, legal framework, victim protection, Palermo Protocol.*

1. Introduction

The first part of this study provides a global overview on human trafficking, underscoring it as a severe human rights violation affecting millions worldwide, including those in Kenya. It highlights Kenya's unique challenges as a source, transit, and destination country for trafficking victims, emphasizing the need to evaluate the effectiveness of existing legal measures in combating this issue.

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The study then explores the current state of human trafficking in Kenya, including trends, statistics, and victim profiles, before assessing the international and national legal frameworks designed to address the problem. It also identifies key challenges and gaps that hinder the effectiveness of these frameworks, such as limitations in law enforcement and socio-economic factors, and concludes with recommendations for strengthening Kenya's legal response through reforms, better enforcement, and enhanced victim protection.

2. Global Overview of Human Trafficking

Human trafficking is a form of modern slavery that violates human rights. It entails exploiting people who have been duped, coerced, or forcibly removed from their homes or countries and subjected to harsh and exploitative living conditions, often for forced labor or sexual exploitation.[1]
According to the Global Slavery Index (2023) report, there were an estimated 50 million people worldwide in modern slavery, that is a 10 million increase since 2016, with around 24.9 million in forced labor (compared to 12.3 million in 2010) and 15.4 million in forced marriage.[2] Similarly, the United Nations Office on Drugs and Crime (UNODC) report on human trafficking depicts that the prevalence of human trafficking in Sub-Saharan Africa is increasing.[3] UNODC has also raised concerns on the escalating cases of human trafficking as a result of worldwide crises, conflicts, and climate emergency is aggravating trafficking risks as well. Persons without legal status, living in poverty, and who lack decent work are often the primary targets of traffickers.[4] Moreover, the United States Trafficking in Persons report (2023) revealed that human trafficking causes harm to society by undermining the rule of law, corrupting supply chains, exploiting workers, and inciting violence. It also disproportionately affects traditionally marginalised groups, such as women, LGBTQI+ individuals, people with disabilities, and ethnic and religious minorities.[5]

[1] "Awareness against Human Trafficking," Awareness Against Human Trafficking, accessed September 2, 2024, https://haartkenya.org/.
[2] The global slavery index 2023. Accessed February 22, 2024. https://cdn.walkfree.org/content/uploads/2023/05/17114737/Global-Slavery-Index-2023.pdf.
[3] Global report on trafficking in persons 2022 accessed February 22, 2024, https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf.
[4] "UN Calls for Urgent Action against Human Trafficking | UN News." United Nations. Accessed February 27, 2024. https://news.un.org/en/story/2023/07/1139282.
[5] "Trafficking in Persons Report - United States Department of State." U.S. Department of State, December 15, 2023. https://www.state.gov/reports/2023-trafficking-in-persons-report/.

2. 1 Overview of Human Trafficking in Kenya

2. 1. 1 Trends and statistics

Kenya, located in East Africa, is particularly vulnerable, functioning as a source, transit, and destination country for victims of human trafficking.[6] The government has made great attempts to solve this issue by enacting a variety of legal measures, including international treaties and domestic legislation.

Kenya has been designated as a source, transit, and destination country for victims of human trafficking. The country is ranked as a Tier 2 nation in the 2024 United States of America State Department Trafficking in Persons Report (US TIP Report), indicating that the government is attempting to meet the minimum requirements of the US Trafficking Victims Protection Act (TVPA). Although the government is making progress in combatting human trafficking, it has remained at Tier 2 for the past seven (7) years, indicating that significant work is necessary to attain the desired goals.[7] Similarly, the United States of America 2024 Trafficking in Persons Report indicates that the government stepped up its efforts to protect the victims of Kenyan trafficking abroad, particularly migrant workers in Gulf countries. The government routinely solicited feedback from survivors, particularly from those exploited in Gulf States, to enhance its anti-trafficking efforts. However, the government did not meet the minimum standards in several critical areas. Protection services for victims, particularly for adults, remained scarce and inconsistent in quality.[8]

Indeed, human trafficking in Kenya is pervasive, affecting both domestic and international victims according to the 2024 United States Trafficking in Persons report. The National Crime Research Centre (2022) reports that trafficking for labor accounted for 96% and 98.3% of cases in 2020 and 2021, respectively, with foreign trafficking being the most common case. [9]

2. 1. 2 Risk Factors Contributing to Human Trafficking in Kenya

Human trafficking in Kenya is deeply rooted in a complex web of socio-economic and cultural factors that create conditions for vulnerability for populations at-risk. Studies have consistently highlighted that socio-economic challenges, such as poverty, unemployment, and lack of education, are among the primary drivers of human trafficking in the country. A comprehensive study on child trafficking identified poverty, porous borders, and high levels of unemployment, retrogressive cultural practices, systemic corruption, and a lack of community awareness about child trafficking as key socio-economic

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[6] U.S. Department of State accessed September 2, 2024, https://www.state.gov/reports/2024-trafficking-in-persons-report/

[7] "Kenya - United States Department of State," U.S. Department of State, December 7, 2023, https://www.state.gov/reports/2023-trafficking-in-persons-report/kenya/.

[8] U.S. Department of State, accessed September 2, 2024, https://www.state.gov/reports/2024-trafficking-in-persons-report/.

[9] Ibid.

determinants that exacerbate the problem.[10] These factors create a fertile ground for traffickers to exploit individuals and communities, particularly those living in impoverished and marginalized areas.

Among the most vulnerable groups are women and children from economically disadvantaged backgrounds. Their desperate economic circumstances often make them prime targets for traffickers who offer false promises of better opportunities.[11] This includes prospects of employment or education abroad, which many perceive as a chance to escape poverty. Unfortunately, a lack of awareness about the dangers of trafficking further compounds their susceptibility to exploitation.[12] Victims are often unaware of the risks involved, thus in this way they will be exposed to manipulation and deception.

Cultural factors significantly contribute to the perpetuation of human trafficking in Kenya. Harmful traditional practices, such as early marriage and female genital mutilation (FGM), expose girls and women to heightened risks of exploitation.[13] These practices not only undermine their physical and psychological well-being but also contribute to a social framework that views them as commodities or subjects to male control.[14]

Additionally, entrenched gender norms that prioritize male authority limit women's agency, making it difficult for them to resist trafficking or seek assistance once they are trapped in exploitative situations.[15]

Similarly, environmental and conflict-related displacements have exacerbated trafficking risks. As climate change displaces individuals, traffickers take advantage of these vulnerable communities. Furthermore, organized criminal syndicates rapidly recruit through digital platforms, complicating law

[10] Sabastian Muthuka Katungati, " Social Economic Determinants of Child Trafficking in Kenya: A Case of Busia County," in Conference proceedings Volume 6. The collection of the presentations of the conference organized for the students of the Doctoral School of the University of Pécs, Faculty of Law, ed. Ákos László Bendes, Zsolt Gáspár, Balázs Gáti, Patrik Zsolt Joó, Nárcisz Projics, Dóra Ripszám and Dávid Tóth (University of Pécs, Faculty of Law, 2024), 166–183.

[11] Report-on-the-problem-of-human-trafficking-in-Kenya.pdf accessed March 8, 2024, https://www.crimeresearch.go.ke/wp-content/uploads/2022/11/Report-on-the-Problem-of-Human-Trafficking-in-Kenya.pdf.

[12] Rehema John Magesa, "Cultural factors associated with human trafficking of girls," Accessed August 19, 2024. https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1346&context=dignity.

[13]. HAART, "Impact," Awareness Against Human Trafficking, 2023, https://haartkenya.org/impact/.

[14] UNODC, "Trafficking in Persons," United Nations : Office on Drugs and Crime, 2024, https://www.unodc.org/unodc/data-and-analysis/glotip.html.

[15] UNODC, "UNODC Launches 2022 Global Report on Trafficking in Persons," United Nations : UNODC Country Office Nigeria, 2023, https://www.unodc.org/conig/en/stories/unodc-launches-2022-global-report-on-trafficking-in-persons.html.

enforcement efforts.[16]
To combat human trafficking effectively, it is essential to address these underlying risk factors. Comprehensive programs must be implemented to tackle the socio-economic and cultural conditions that traffickers exploit. Such initiatives should focus on poverty alleviation, education access, community awareness campaigns, and the empowerment of women and girls.[17] Strengthening border controls, enforcing anti-trafficking laws, and promoting community engagement are also crucial steps toward mitigating these risks and protecting vulnerable populations.

2. 1. 3 Types of Human Trafficking in Kenya

Human trafficking continues to target the weak, as evidenced by both long-standing and rising trends. According to the UNODC, girls and women continue to make up the largest proportion of recognised victims globally, accounting for 61% in 2022, and the majority are still exchanged for sexual exploitation, a long-standing trend. In parallel, the number of young individuals among acknowledged victims is swiftly and dangerously increasing, climbing by one-third in just three years. The number of females identified has risen by 38%. In certain areas, children are becoming the majority of trafficked victims.[18]
According to the United Nations Office on Drugs and Crime's (UNODC) Global Report on Trafficking in Persons (2022), labour trafficking has become increasingly common worldwide, surpassing sexual exploitation in certain places, notably Sub-Saharan Africa. This trend is echoed in Kenya, where forced labour accounts for the bulk of recorded trafficking cases, impacting both local and international victims, mainly in agriculture, domestic work, and the informal economy.[19] Human trafficking in Kenya includes a wide range of exploitative activities, such as forced labour, sexual exploitation, organ trafficking, and child exploitation. According to recent research, these forms of behavior have become more widespread due to socioeconomic issues, environmental disasters, and international criminal activity. Sexual exploitation is another form of human trafficking, particularly among women and adolescents trafficked for commercial sex work both domestically and internationally. HAART Kenya reports a rise in child sexual exploitation, highlighting children's vulnerability to traffickers.[20]
According to a recent report conducted by the National Crime Research Centre (2022), human trafficking is widespread in Kenya. Trafficking in the nation

[16] UNODC, Global report on trafficking in persons 2022, 2022, https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf.
[17] HAART, "Impact," Awareness Against Human Trafficking, 2023, https://haartkenya.org/impact/.
[18] "Trafficking in Persons," United Nations : Office on Drugs and Crime, 2024, https://www.unodc.org/unodc/data-and-analysis/glotip.html.
[19] Ibid.
[20] HAART, "Impact," Awareness Against Human Trafficking, 2023, https://haartkenya.org/impact/.

mainly occurred for work, sexual exploitation, and cultural purposes. Trafficking for labour accounted for 96% and 98.3% of all trafficking cases in 2020 and 2021, respectively. The report also found that foreign human trafficking was the most common case, accounting for 64.7%, followed by internal trafficking at 35.3%. The majority of victims in external trafficking were adults and young women aged 18 to 34. Children accounted for four out of every ten victims of domestic trafficking.[21]

2. 1. 4 Methods of Operandi of Human Trafficking in Kenya

Human trafficking in Kenya is characterized by increasingly intricate and adaptable tactics. Traffickers employ various deceptive recruitment methods, exploiting social, economic, and technological vulnerabilities to lure victims into exploitative situations. One common method involves deceptive recruitment practices, where victims are promised work, education, or a better life. Traffickers post fake job advertisements on social media, chat platforms, and job listing websites. The use of internet-based schemes has surged, targeting individuals desperate for employment. As reported by the National Crime Research Centre, typical tactics include fraudulent employment offers, manipulated contracts, and misleading marketing directed at economically disadvantaged women and children.[22]

Another method involves family involvement and community networks, where victims are recruited by close relatives or community leaders. This is prevalent in informal settlements, where economic hardships compel families to accept risky arrangements. Family complicity is often driven by ignorance or coercion by criminal networks.[23] The prevalence of poverty-related family breakdowns exacerbates this issue, underscoring the need for enhanced family support services.[24]

The use of recruitment agencies plays a significant role in international trafficking. Unscrupulous agencies often forge travel documents, obtain fraudulent visas, and provide falsified employment contracts, especially for those seeking work in the Middle East and Southeast Asia. Many of these agencies operate without proper legal authorization, taking advantage of weak regulatory frameworks.[25]

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[21] Report-on-the-problem-of-human-trafficking-in-Kenya.pdf accessed March 8, 2024, https://www.crimeresearch.go.ke/wp-content/uploads/2022/11/Report-on-the-Problem-of-Human-Trafficking-in-Kenya.pdf.

[22] Report-on-the-problem-of-human-trafficking-in-Kenya.pdf accessed March 8, 2024, https://www.crimeresearch.go.ke/wp-content/uploads/2022/11/Report-on-the-Problem-of-Human-Trafficking-in-Kenya.pdf

[23] HAART, "Impact," Awareness Against Human Trafficking, 2023, https://haartkenya.org/impact/.

[24]Ibid.

[25] UNODC, "UNODC Launches 2022 Global Report on Trafficking in Persons," United Nations : UNODC Country Office Nigeria, 2023,

In addition to these tactics, online and digital exploitation has become increasingly common with the rapid expansion of internet access. Traffickers leverage social media and online employment platforms to directly contact potential victims, bypassing traditional recruitment methods. The anonymity afforded by digital platforms allows traffickers to operate discreetly, which further complicates detection and enforcement efforts.[26]

Traffickers also utilize diverse transportation and movement tactics, employing both legal and illegal means to move victims. Some are trafficked across borders as ordinary travellers, while others are transported through covert routes. These operations often indicate the involvement of organized multinational crime syndicates.[27]

Despite Kenya's anti-trafficking legislation, policy and enforcement gaps persist. Corruption, insufficient resources, and poor interagency collaboration hinder the effective implementation of laws. Law enforcement agencies struggle to keep pace with the evolving strategies of traffickers, which highlights the urgent need for comprehensive and technologically advanced monitoring systems.[28]

2. 1. 4. 1 Profiles of Victims and Traffickers

Victims of human trafficking in Kenya range from children to adults, with many young women being lured abroad with false promises of employment. According to the National Crime Research Centre study (2022), it was observed that 40.3% of the Agency officials were familiar with cases of victims of domestic human trafficking in their localities while 44.2% knew of cases of victims of external human trafficking in their localities respectively.[29]Furthermore, the study established that main categories of victims of external human trafficking reported by at least one out of ten of either the members of the public or Agency officials were those of: women reported by 40.4% of the members of the public and 30.8% of the Agency officials); youth (reported by 21.7% of the Agency officials and 19.6% of the members of the public); men (reported by 20.8% of the Agency officials and 14.4% of the members of the public; and children (reported by 19.3% of the respondents.[30]

One study in the United States of America observed that, while there is no universal trafficker profile, traffickers frequently exploit a position of trust with their victims, either by taking advantage of a child's age or by using coercive

https://www.unodc.org/conig/en/stories/unodc-launches-2022-global-report-on-trafficking-in-persons.html.

[26] Ibid.

[27] Ibid.

[28] HAART, "Impact," Awareness Against Human Trafficking, 2023, https://haartkenya.org/impact/.

[29] Ibid

[30] Report-on-the-problem-of-human-trafficking-in-Kenya.pdf accessed March 8, 2024, https://www.crimeresearch.go.ke/wp-content/uploads/2022/11/Report-on-the-Problem-of-Human-Trafficking-in-Kenya.pdf

techniques.[31] In Kenya traffickers take advantage of victims both domestically and internationally, often through unregulated employment agencies and recruitment organizations. Traffickers exploit Somali women and girls in sex trafficking in brothels in Nairobi and Mombasa, bring children and persons with physical disabilities from Tanzania and other neighboring countries to exploit them in forced begging and often coerce foreign victims to serve as facilitators to further such trafficking schemes.[32]

2. 1. 5 Impact of Human Trafficking on Victims

Victims of human trafficking in Kenya suffer from a range of severe physical, psychological, and social impacts. Physically, victims often endure abuse, malnutrition, and severe health issues due to the harsh conditions they are subjected to during their exploitation.[33] Psychologically, they may experience trauma, depression, and anxiety, which can have long-term effects on their mental health. This shows that the victims of human trafficking are exposed to severe health hazards and thus require immediate support. Additionally, according to the National Crime Research Centre report ⟨2022⟩, the kinds of treatment and conditions which victims of human trafficking were subjected to were: sexual abuse and forced prostitution (reported by 25.4% of the members of the public); starvation and confinement in rooms without basic amenities (reported by 22.2% of the Agency officials and 17.6% of the members of the public); hard labor (reported by 22.2% of the Agency officials and 12.1% of the members of the public); assault (reported by 18.7% of the members of the public); and confiscation of travelling documents as reported by 15.1% of the Agency officials.

For instance, in 2018, an established businessman brought twelve Nepalese women and girls into Kenya. At another occasion, detectives from the Transnational and Organized Crime Unit of the Directorate of Criminal Investigations, with assistance from their Embakasi counterparts, recently rescued sixty victims of human trafficking aged 14 to 50 years at an apartment in Tassia Estate in Embakasi, Nairobi County, and arrested three Somali suspects on suspicion of being part of a larger human trafficking syndicate operating across the Horn of Africa.

The victims had been trafficked from two countries that borders Kenya with the aim of selling them as slaves overseas against their will and had been ferried

[31] Alyssa Currier Wheeler, "Trafficker profile according to US Federal Prosecutions," Anti. Trafficking Review 18 (2022): 185–198. https://doi.org/10.14197/atr.2012221813.
[32] Ibid.
[33] National Referral Mechanism for assisting victims of human ... Accessed August 19, 2024. https://www.socialprotection.go.ke/sites/default/files/Downloads/NRM-Guidelines-for-Kenya-law-res.pdf.

to the location.[34] Further victims are often driven to deserted hotels where they are forced to work in 'fraud factories.'[35]

3. Human Trafficking Legal Framework

3. 1 Key International Conventions and Protocols

Kenya has ratified several international treaties aimed at combatting human trafficking, including the Palermo Protocol, which supplemented the United Nations Convention Against Transnational Organized Crime. This means that by ratifying these international instruments, Kenya has committed to aligning its domestic laws with international standards. This includes implementing measures to prevent trafficking, protect victims, and prosecute offenders. The Palermo Protocol outlines measures for prevention and protection. Thus the United Nations Palermo Protocol, which became part of the United Nations' Crime Convention in December 2000, serves as the foundation for today's worldwide anti-human trafficking framework. Article 2 of the Palermo Protocol recognises its primary goals in the provision of protection to victims of trafficking, prevention, and fighting human trafficking. It is organised into four key areas of action: Prevention, Protection, Prosecution and Partnership.[36] The Palermo Protocol was adopted and opened for signature, ratification and accession by resolution 55/25 of 15 November 2000 of the UN General Assembly. Currently, a total 117 countries are signatories to and 182 are members of the Palermo Protocol since 2000 respectively.[37] The Palermo protocol has set proper modalities for the member states to ensure alignment of the policies and laws to combat human trafficking.

Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children define human trafficking as follow:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation,

[34] Mohamed Ahmed and Brian Ocharo, "Trafficked for Sex: How Nepalese Girls Are Lured into a Life of Slavery in Kenya," Nation, June 28, 2020, https://nation.africa/kenya/news/trafficked-for-sex-how-nepalese-girls-are-lured-into-a-life-of-slavery-in-kenya-179222.

[35] "East Africa's Youth Scammed by Promises of Overseas Work," ISS Africa, accessed September 8, 2024, https://issafrica.org/iss-today/east-africas-youth-scammed-by-promises-of-overseas-work.

[36] Annex II protocol to prevent, suppress and punish ..., 2021, https://www.unodc.org/res/human-trafficking/2021the-protocol-tip_html/TIP.pdf.

[37] "UN, United Nations, UN Treaties, Treaties," United Nations, accessed September 8, 2024, https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-a&chapter=18.

forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[38]

3. 2 National Legal Framework

3. 2. 1 The evolution of legislation on human trafficking in Kenya

Human trafficking in Kenya has a wide variety of implications for people's physical, emotional, and social well-being. Addressing human trafficking involves a holistic approach that takes into account survivors' health and psychological needs, as well as the social elements that contribute to the crime.
Prior to the Palermo Protocol and the passing of the Counter-Trafficking in Persons Act of 2010, Kenya dealt with human trafficking under the Children Act of 2001 and Sexual Offences Act of 2006. As a result, the crime of human trafficking was not fully defined and was considered as a serious organized crime.[39]
Kenya ratified the Palermo Protocol in 2004. In 2007, the Kenyan government collaborated with the International Organization for Migration (IOM) to prepare a national action plan to combat human trafficking in Kenya with prevention, protection, and prosecution being the primary cornerstones.[40] However, at the time, there was no legal mechanism in place to prosecute traffickers or enact rules. As a result of the absence of legal instruments, efforts to develop municipal laws to fill the vacuum increased between 2008 and 2010. Between 2008 and 2010, Kenya had a *dualist legislative system.*[41] After the promulgation of the new Constitution of Kenya 2010, as per Article 2(6), Kenya became *a monistic state*, by virtue of which international law would automatically become an integral part of the laws of Kenya from the time of ratification.[42] Therefore, domestication by means of a separate law is no longer necessary.[43] This evolution reflects a growing recognition of the complexity and seriousness of human trafficking.

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[38] United Nations, Protocol to prevent, Suppress and Punish Trafficking in Persons Especially Women and children, supplementing the United Nations Convention against Transnational Organized Crime | OHCHR, accessed March 2, 2025, https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons.

[39] "United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000).

[40] "Tackling Human Trafficking through a National Plan of Action," International Organization for Migration, accessed September 8, 2024, https://www.iom.int/news/tackling-human-trafficking-through-national-plan-action.

[41] "Legislating the counter-trafficking in persons act - ANPPCAN, 2015, http://www.anppcan.org/wp-content/uploads/2014/11/Legislating-the-counter-trafficking-in-persons-act.pdf.

[42] The constitution of Kenya , 2010 - Nairobi, accessed September 2, 2024, http://www.parliament.go.ke/sites/default/files/2023-03/The_Constitution_of_Kenya_2010.pdf.

[43] Ibid

The table below lists both national and international regulations used to safeguard against human trafficking in Kenya before the enactment of Counter-Trafficking in Persons Act, 2010.[44]

The Constitution of Kenya, 2010	
The Penal Code, Cap. 63 (Kenya Law, 1970)	The United Nations Convention Against Transnational Organized Crime, 2000 (UNODC,2000)
The Children Act, (Kenya Law, 2022)	Palermo Protocol (UN Protocol to Suppress and Punish Trafficking Persons, Especially Women andChildren (UNODC, 2000)
The Sexual Offences Act, 2006 (Kenya Law,2006)	The Protocol Against the Smuggling of Migrantsby Land, Sea and Air (UNODC, 2000)
The Witness Protection Act, 2006 (KenyaLaw, 2006)	Convention on Elimination of all forms of Discrimination against Women (CEDAW), 1979.(UN, 1979)
Refugee Act of 2006 (Kenya Law, 2006)	The UN Convention on the Rights of the Child(UNCRC), (OHCHR, 1989).
The Employment Act, 2007 (Kenya Law,2007)	ILO Convention 138: Concerning the minimum age for admission to employment, ILO, 1973)
The Victim Protection Act, 2014 (Kenya Law,2014)	ILO Convention 190: Concerning the prohibition and immediate action for elimination of the worstforms of child labour, 1999. ILO 1999)
The Constitution of Kenya 2010; (Kenya Law, 2010)	African Charter on Human and People's rights(OAU, 1981)
Kenya Citizenship and Immigration Act, 2011(No. 12 of 2011)	African Charter on the Rights and Welfare of the Child (ACRWC) of 1990. (OAU, 1990
Data Protection Act 2019	The East African Community Treaty (2006)

The Counter-Trafficking in Persons Act No. 8 of 2010 is the foundation of Kenya's domestic legal framework against human trafficking. The Counter Trafficking in Persons Act took effect on October 1, 2012 as announced in a gazette notice and established Counter Trafficking in Person Advisory Committees, which are responsible for giving advice to the Minister of Labor and Social Protection on inter-agency operations to combat human trafficking by implementing preventative, protective, and rehabilitative programs for victims. Additionally, the Act established the National Assistance Trust Fund for Victims

[44] "10 years of counter trafficking in persons act in Kenya," 2023, https://bettercarenetwork.org/sites/default/files/2023-08/10_years_of_counter_trafficking_in_persons_act_in_kenya_2010-2020_achievements_challenges_and_opportunities_06_07_2023_small.pdf.

of human Trafficking.[45] However, despite this clear strategy, not much has been done to fully implement the committee structures in every county to help in combatting human trafficking.
Under the Act, human trafficking is defined as follows:

Section 3(1) provides as follows:
"(1) A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of— threat or use of force or other forms of coercion; abduction; fraud; deception; abuse of power or of position of vulnerability; giving payments or benefits to obtain the consent of the victim of trafficking in persons; or giving or receiving payments or benefits to obtain the consent of a person having control over another person."[46]

Section 3(5) provide as follows:
"(5) A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.
(6) A person who finances, controls, aids or abets the commission of an offence under subsection (1) shall be liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life."[47]

Section 5 provides for the offence of promotion of trafficking of persons as follows:
"A person who—
(a) knowingly leases, or being the occupier thereof, permits to be used any house, building, or other premises for the purpose of promoting trafficking in persons;
(b) publishes, exports or imports, any material for purposes of promoting trafficking in persons; or
(c) manages, runs or finances any job recruitment agency for the purposes of promoting trafficking in persons;
(d) by any other means promotes trafficking in persons, commits an offence and is liable to imprisonment for a term of not less than twenty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life."[48]

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[45] Counter-trafficking in persons act, accessed September 8, 2024, https://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct_No8of2010.pdf.
[46] Ibid
[47] Ibid.
[48] Cap. 61 accessed September 8, 2024, http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.+61.

3. 4 Implementation and enforcement of Legal Framework

3. 4. 1 Responsible Institutions

Several institutions are tasked with combatting human trafficking in Kenya, including the National Police Service, the Judiciary, the Office of the Director of Public Prosecution and various non-governmental organizations. The Counter-Trafficking in Person Advisory Committee plays a central role in coordinating efforts.[49]

Studies have shown that enforcement of anti-trafficking laws remains challenging in Kenya. Factors such as corruption, lack of resources, failure of victims to testify and insufficient training hinder effective implementation.[50] Case studies reveal inconsistencies in the prosecution and conviction of traffickers.

3. 4. 2 Legal Protections and Support Services

Kenya has established several legal protections and support services for trafficking victims. For instance, the National Assistance Trust Fund[51] for Victims of Human Trafficking is designed to provide financial assistance and support services to survivors.[52] Nevertheless, these services are often underfunded and lack the necessary resources to be fully effective. Victims frequently face challenges in accessing these services due to bureaucratic hurdles, lack of awareness, and inadequate geographical coverage.[53]

3. 4. 3 Victim Assistance Programs

Victim assistance programs in Kenya are crucial for the rehabilitation and reintegration of trafficking survivors. At the same time, these programs often fall short of meeting the needs of victims. The reliance on civil society organizations to provide most victim services, including shelter, legal aid, and counseling, has led to inconsistencies in the quality and availability of support.[54] Moreover, the government's inadequate financial support for these initiatives further

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[49] Ibid.

[50] Kkienerm, "Trafficking in Persons & Smuggling of Migrants Module 9 Key Issues: Challenges to an Effective Criminal Justice Response, Trafficking in Persons & Smuggling of Migrants Module 9 Key Issues: Challenges to an Effective Criminal Justice Response," accessed September 8, 2024, https://www.unodc.org/e4j/zh/tip-and-som/module-9/key-issues/challenges-to-an-effective-criminal-justice-response.html.

[51] "National Referral Mechanism for assisting victims of human," accessed September 8, 2024, https://www.socialprotection.go.ke/sites/default/files/Downloads/NRM-Guidelines-for-Kenya-law-res.pdf.

[52] Counter-trafficking in persons act. Accessed August 19, 2024. https://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct_No8of2010.pdf.

[53] U.S. Department of State. Accessed August 19, 2024. https://www.state.gov/reports/2023-trafficking-in-persons-report/kenya/.

[54] Ibid.

undermines their effectiveness. Strengthening victim assistance programs through increased funding, better coordination, and capacity building is essential for improving outcomes for survivors.[55] In my opinion, the government has the responsibility to take the fore front to combat human trafficking in Kenya.

4. Challenges and Gaps in the Legal Framework in Combatting Human Trafficking

Kenya has made significant strides in the fight against human trafficking through the establishment of legal frameworks such as the Counter-Trafficking in Persons Act, 2010. However, various challenges and gaps continue to undermine the effectiveness of these laws.

4. 1 Identification of Gaps and Loopholes

Despite the enactment of comprehensive legislation to combat human trafficking, several gaps and loopholes remain. One notable issue is the narrow definition of trafficking, which may not encompass all forms of exploitation. For example, the Act predominantly focuses on trafficking for sexual exploitation and forced labor, potentially overlooking other forms such as organ trafficking and forced marriage. Additionally, the penalties prescribed under the law may not always be proportionate to the severity of the crimes. The United Nations Office on Drugs and Crime (UNODC) has highlighted that the inconsistent application of penalties in the handling of different cases can undermine the deterrent effect of the law.[56] Similarly, a study by Kenya Law Reform Commission concluded that the failure to implement Section 15(1) of the Counter-Trafficking in Persons Act has resulted in inadequate protection services for victims of trafficking.[57] According to the United States Counter-Trafficking Report, 2024, protective services provided to victims were insufficient, with non-governmental organisations stepping in to fill the gaps. Moreover, women are disproportionately affected by a lack of victim support and protection services.
Further Sections 3(5) and 3(6) of the Counter-Trafficking in Persons Act criminalise human trafficking (including for labour or sex) and impose really harsh penalties, but also allow an option for a fine and hence undermine the prosecution's intended goals. Article 3(5) reads as follows: “A person who traffics another person for exploitation commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.”

[55] Ibid.
[56] An introduction to human trafficking: Vulnerability, impact ..., 2021. https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf.
[57] Strengthening gender equality in law, 2024, https://www.klrc.go.ke/images/images/downloads/strengthening-gender-equality-in-law.pdf.

Under section 3(6), the offence of sexual exploitation attracts a penalty of 30 years imprisonment or a fine of at least Ksh 30 million (USD 296,300).[58] It should be noted that human trafficking is a well-coordinated organized crime. Additionally, the crime is lucrative and the option of fine provides a lee way for the traffickers as they are able to afford it and carry on with the illegal business. In my view this section should be repealed and it should remove the option of the fine.

4. 2 Challenges faced by criminal justice system agencies in combating human trafficking

Law enforcement agencies in Kenya face numerous challenges in effectively combatting human trafficking. The National Crime Research Report established that challenges to combat human trafficking included weak counter-trafficking legal and law enforcement frameworks; inadequate resources affecting counter-trafficking efforts; corruption among concerned public officials; economic challenges of unemployment,[59] high demand for cheap labor, and poverty and accompanying vulnerability; socio-cultural hindrances, particularly retrogressive cultural (including religious) beliefs and practices, lack of patriotism and/or selfishness/individualistic tendencies. These results show that the government and non-state actors have the role to strengthen the carnal justice system to operate properly in order to fight human trafficking.[60]

According to a US report on human trafficking in Kenya, the government lacks a centralized law enforcement data collection system for human trafficking, limiting its ability to collect and disaggregate national statistics. As an example, in 2023, the government increased its data collection efforts and reported on 22 cases; including fiver sex trafficking, five for labour trafficking, and 12 for other types of trafficking. This is in comparison to the government investigating 111 cases in 2022; however, the 2022 data may have included other crimes because the government did not provide disaggregated data. The government reported charging 19 trafficking cases, which included an unknown number of suspects—three sex trafficking cases, five labour trafficking cases, and 11 cases of unspecified types of human trafficking.[61]

Judicial courts also struggle with challenges that impede the effective prosecution of human trafficking cases. These include case backlogs, which delay the delivery of justice, and the lack of specialized knowledge on trafficking issues among judges and prosecutors. The complexity of trafficking cases, which often involve

[58] Ibid.
[59] Ibid
[60] Report-on-the-problem-of-human-trafficking-in-Kenya.pdf accessed March 8, 2024, https://www.crimeresearch.go.ke/wp-content/uploads/2022/11/Report-on-the-Problem-of-Human-Trafficking-in-Kenya.pdf.
[61] U.S. Department of State, 2024, https://www.state.gov/reports/2024-trafficking-in-persons-report/kenya/#:~:text=The%20government%20identified%20201%20trafficking,in%20unspecified%20forms%20of%20trafficking.

multiple jurisdictions and legal systems, further complicates the judicial process.[62] For instance, in 2023, the government reported securing the convictions of at least three individuals involved in forced labor trafficking. Two of the convicted traffickers were sentenced to five years in prison, with one also fined 30 million Kenyan shillings (Ksh) ($243,210), while the third individual was acquitted. Notably, no traffickers were convicted under the 2010 Anti-Trafficking in Persons Act, in contrast to 2022, which saw nine convictions, including three under the same law.[63] Courts continued to impose varying sentences on convicted traffickers, often offering the option of imprisonment or a fine.[64]

The conviction rates for human trafficking cases in the country remain disproportionately low compared to the number of reported victims. This underscores the need for all stakeholders to intensify efforts to combat human trafficking and to enhance support for criminal justice agencies.

5. Conclusion

This paper intended to reveal that while significant progress has been made, substantial gaps and challenges persist. The Counter-Trafficking in Persons Act 2010 provides a solid foundation, but its effectiveness is hampered by issues such as inadequate enforcement, limited resources, and socio-economic factors that exacerbate vulnerability to trafficking. To address these challenges, it is essential to enhance the legal framework through comprehensive reforms, including stricter penalties, better victim protection mechanisms, and increased funding for enforcement agencies. Additionally, there is a need for more robust training programs for law enforcement and judicial officials, improved coordination between national and international stakeholders, and greater public awareness campaigns to prevent trafficking.

In conclusion, I observe that combatting human trafficking in Kenya requires a multifaceted approach that integrates legal reforms, effective enforcement, and support for victims. By addressing the identified gaps and challenges, Kenya can strengthen its response to human trafficking and better protect its citizens from exploitation.

[62] "News / Articles," Anti-trafficking Judicial Bench Books in Uganda and Kenya - International Association of Women Judges, accessed September 9, 2024, https://www.iawj.org/content.aspx?page_id=5&club_id=882224&item_id=83956.

[63] U.S. Department of State, 2024, https://www.state.gov/reports/2024-trafficking-in-persons-report/kenya/#:~:text=The%20government%20identified%20201%20trafficking,in%20unspecified%20forms%20of%20trafficking.

[64] Ibid.

Logistic Regression Modelling of the Influence of Expert Evidence in Criminal Proceedings

KUHL, ANDREA*

ABSTRACT *The increasing reliance on forensic expertise in criminal proceedings is attributed to the inherent characteristics of scientific evidence, such as neutrality, objectivity and universality, which provide judges with greater certainty in their decisions. However, Act XXIX of 2016 restricts the role of forensic experts, emphasising that judges must assess cases independently, rather than simply adopting the conclusions of experts. This paper examines the delicate balance between the roles of judges and experts, highlighting the importance of distinguishing between issues of fact and law, and addressing concerns that judges may lose their discretion when faced complex technical issues. The evolving nature of expertise raises questions about its regulation and the implications for judicial decision-making. The relationship between judges and experts in legal proceedings is complex, as experts should provide objective assessments that complement but do not replace judges' authority. Expert opinions, which combine scientific and subjective elements, can significantly influence judicial decisions, especially in bankruptcy cases. This study uses logistic regression modelling to show how judges tend to favour expert opinions over raw financial data, reflecting a reliance on qualitative factors in their decisions. Two models are proposed to analyze the influence of expert opinions on judicial decisions, with the second model incorporating the expert's opinion leading to a higher predictive power regarding the judge's decisions. The findings suggest that judges may place more trust in expert opinions than in raw financial data, indicating a preference for qualitative assessments over quantitative indicators. The paper concludes by emphasizing the need for a clear distinction between the roles of the expert and the judge.*

KEYWORDS *Forensic expertise, scientific evidence, influence, judicial decisions, economic crimes*

Introduction

The inherent characteristics of scientific evidence, namely "neutrality, objectivity and universality" undoubtedly provide the judge with additional certainty in his decision.[1] It is for this reason that forensic expertise is gradually gaining ground

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[1] Jean-Raphaël Demarchi, "Les preuves scientifiques et le procès pénal," *Lextenso, LGDJ.fr: Bibliothèque des sciences criminelles* 55, (2012): 93.

in criminal proceedings.[2] It does so in such a way that the judge cannot delegate their powers and must assess the circumstances of the case to form their own opinion. The Hungarian Act XXIX of 2016 on forensic experts limits the role of the forensic expert in criminal cases. The forensic expert is playing an increasingly important role in criminal proceedings, as shown by the large number of studies on the subject.[3] This change is not without risk, however, in so far as the expert sometimes surpasses the judge, who is overburdened with technical questions and who adopts the expert's conclusions "word for word" or certain elements of the expert's opinion in his judgement and in his reasoning.
The paper explores the specific position of the expert and the judge in the context of the free exercise of judicial discretion and their role in criminal proceedings, in order to distinguish the questions that may be directed to the expert from those that fall within the scope of the judiciary's power. The study presents the expert opinion as a specific professional query and addresses the corresponding answer. It also highlights the judge's conviction and role, the scientific requirements for expert opinions, and certain aspects of using such opinions in relation to the distinction between questions of fact and questions of law.
The trend in expertise is evolving, which explains the growing number of texts on the subject. Although the expert's remit is broad, case law does not accept all forms of expertise. An expert opinion is a normatively neutral technical act, like the translation of an obscure text or the interpretation of a complex contract. Expert assessment does not include technical operations which are limited to establishing a clear fact and for which the expertise required is not in understanding and evaluating the facts but simply in handling technical tools. The practical growth in the use of expertise is not free from questions and doubts. Namely, will the judge retain his or her discretion to decide and interpret? Be that as it may, the growth of expertise is not only regulated by law but also encouraged by it.

1. The opinion as a specific response

The legal limitations of the expert's mandate dictate tha
t the expert's task is limited to answering a technical question set by the judge, which immediately limits the interpretation of the expert's opinion. The expert must advise the judge on a technical matter determined by the judge. From the perspective of criminal procedure, the defining characteristic of a technical or professional question is that it lies beyond the judge's competence. If the judge is confronted with a technical question in the course of assessing the facts of the case which is beyond his or her competence, they may appoint a forensic expert. The purpose of the expert opinion is therefore to shed light on an issue which the judge cannot resolve personally because it is "outside his competence or beyond

[2] Laurence Leturmy, "De l'enquête de police à la phase exécutoire du procès: quelques remarques générales sur l'expertise pénale," *Actualité Juridique Pénal*, (2006): 58.
[3] Tony Moussa and Serge Guinchard, *Expertise: matière civile et pénale* (Paris: Dalloz, 1983), 335.

his knowledge"[4] (medical, psychological, psychiatric and accounting expert opinions). In order to be considered as an expert opinion it must contain an interpretation of the expert's findings in a very specific area; otherwise it is merely a commentary.

This also applies to the opinion of a forensic accountant, where the expert must interpret the scientific result in a sufficiently comprehensive way to establish a material fact. The forensic accountant is also there to establish a material fact. The secondment of a forensic accountant may occur during an investigation or inquiry in the course of judicial proceedings. As evidence, an expert opinion sheds light on a fact that is both relevant and material to the case. As regards its probative value, it will be for the judge to determine this in the light of the circumstances of the case. It may be a clue to the case or, on the contrary, it may be irrelevant.[5]

It is essential that the issue is determined by the appointing authority. Above all, the legislature has limited the expert's response to the question posed by the judge or the investigating authority by requiring the judge, in the decision ordering the expert's opinion, to specify the technical or scientific matter on which the expert must opine. The legislature has also sought to confine the expert's response to that specific question. Another important consideration is that the mission or activities of experts in a given case are primarily determined by the decision ordering the expert opinion.

The expert's answer should be limited to the technical question posed by the judge. Consequently, the expert may not, under any circumstances, take a position on the guilt of the accused or assess the circumstances of the case, As it would exeed the mission and task entrusted to him.[6] The expert can never directly answer the question posed by the court. He can only comment on the likelihood of observing the clues under certain hypotheses, whereas the court wants to know whether the hypothesis itself is true in the light of the clues observed.[7]

For example, the supplementary forensic accounting opinion No. 13/2019 regarding a situation of imminent insolvency, the expert concluded that, although the member loans are essential for the company's operations, the timing and specific economic events related to the loans warrant further investigation. This should remain essentially a matter for the appointing authority to decide in which direction to pursue additional inquiries. It is not for the expert to direct or influence those inquiries beyond answering strictly technical questions. The expert should not make findings that would determine the legal outcome. The role of the expert can be limited to stating whether something is real, untrue, false, genuine, regular, irregular, etc., but cannot, for example, classify a transaction as

[4] Demarchi, "Les preuves scientifiques," 246.
[5] Tony Moussa, *Droit de l'expertise (édition 2020/2021)* (Paris: Dalloz, 2020), 313.
[6] Joëlle Vuille and Alex Biedermann, "Une preuve scientifique suffit-elle pour fonder une condamnation pénale? *Revue de droit suisse* (2019): 510, http://dx.doi.org/10.2139/ssrn.3507807.
[7] Vuille, "Une preuve scientifique," 510.

fictitious, or a management practice as fraudulent (as the Criminal Code states), it is for the relevant competent authorities to decide under the present legislation. Another example is the forensic accounting expert opinion No. 00020/2018 in which the expert's statements regarding the Accounting Act, whether the company has violated the statutory evidentiary rules prescribed by the Accounting Act or whether it has fulfilled its obligation to keep its books and prepare its accounts, fall within the scope of law, as do findings such as whether the company has made errors that materially affect a true and fair view, and whether it has failed to review or audit its financial position in relation to the financial year in question. According to the legislation, the expert may not qualify the facts of the case; it is for the competent authority or court to assess and legally qualify the professionally verifiable findings.
Therefore, the question put to the expert must be clearly defined, considered and relevant to the circumstances of the case. If this is not the case, the limits of expert evidence set by the legislator become porous, leading to a confusion of roles between the expert and the judge.

2. The scope of forensic expertise

To define the scope and limits of expertise, a clear distinction must be made between the probability of the hypothesis and the probability of the cause, since the expert is only required to express an opinion on the latter. In fact, there is a significant difference between, on the one hand, stating the probability of a hypothesis that there is a high probability that "X" was at the crime scene and not "Y", and, on the other hand, assessing the weight of evidence in the light of the hypothesis when stating that there is a high probability that the genetic fingerprint found at the crime scene belongs to "X" and not "Y".
The first hypothesis is based on the facts of the case and the high probability that „X" was probably at the scene of the crime. The second hypothesis expresses an opinion on the evidence interpreted in the context of a hypothetical framework indicating that there is a high probability that the genetic fingerprint found at the crime scene belongs to "X" rather than "Y".
Thus, while the first hypothesis expresses probabilities about a fact, the second one expresses probabilities about the evaluation of a clue in the light of hypotheses put forward by investigators, the judge or the parties. This distinction between the hypotheses advanced by the investigators and those put forward by the expert, which are completely different and falling within the expert's own competence, is important from both a scientific and a legal point of view. According to probability theory, the probability of causes is not equal to the probability of effects. In other words, the probability of hypotheses (causes) is not equal to the probability of evidence (effects) that support or refute them.[8]
An expert cannot comment on the probability of a hypothesis, they must only assess the relevance of the evidence in the light of those hypothesis. Any authority that considers the two to be equivalent would be in breach of its

[8] Vuille, "Une prevue scientifique," 510.

obligation that "the task of experts should be limited to the examination of technical matters.[9]

In fact, the expert's decision must be neutral and objective in answering a technical or scientific question that needs to be interpreted. If the expert expresses an opinion on the facts, for example stating that it is "difficult to rule out fraud", without any expert basis for what he says, undermines the requirement of neutrality and objectivity. At that point, the expert opinion ceases to address a purely technical question meant to inform the authority. It is not a technical question that is beyond the competence of the judges.

Secondly, the expert opinion may mention a hypothesis without being requested by the contracting authority as part of the expert evaluation. If no analysis is carried out to determine the probability of that hypothesis, then the expert opinion becomes a statement of fact rather than an evaluation of the evidence in the light of the hypotheses put forward by the authority. The expert opinion, however, should only answer the technical question specified by the issuing party, i.e. provide additional information to clarify the case.

Finally, it should be noted that the expert exceeds the mandate of the originally entrusted opinion in all cases where they do not deal exclusively with the question set out in the decision ordering the expert opinion. The same applies if, in addition to answering the scientific question, the expert comments on the circumstances of the case, for example, in the context of economic crimes by referring to the possibility of certain business outcomes.

3. The judge's sovereign assessment

The judge is free to assess the types of evidence submitted to them and discussed in the adversarial procedure, but this assessment must be based on rational reasoning. The evaluation of evidence can be defined as the act by which the presiding judge assesses the probative value of the available evidence and weighs the various means of proof to determine wether the factual elements necessary necessary for the application of substantive criminal law are present. This assessment, which is reserved to the presiding judge, is of course free, but it must nevertheless be rational.

Forensic examination also makes it possible to establish facts which, depending on the circumstances of the case, may be of clue or of minor value. It is for the judge to decide whether this fact is relevant, taking into account the other evidence in the case, a determining factor, and to make a judgment accordingly. It is therefore the judge's task to place the material fact in the circumstances of the case in order to assess its relevance to the corpus delicti, i.e. to make a sovereign assessment of the facts.

The appellate courts reserve this power, i.e. the sovereign assessment of the facts, exclusively for the trial judge. In France, for example, as the court that regulates

[9] Ibid, 511.

the law, the "Cour de Cassation" (Court of Cassation)[10] intervenes only in cases of infringement of the law by decisions of last instance taken by courts of first instance.[11] Its review is thus limited to assessing the legality of the decision taken, excluding any question of fact.[12]

Unless otherwise provided by law, offences may be established by any means of evidence and the judge will decide on the basis of their own personal conviction. The judge's freedom to assess the methods of proof is therefore sacrosanct, and the judge may base their decision only on the evidence presented in the course of the discussions and discussed in the adversarial procedure.[13] The judge is free to assess the evidence, as any type of evidence may be persuasive, provided that it is discussed before them in the presence of both parties and complies with the rules of evidence if it is provided by public authorities. The principle of discretion applies to all types of evidence, in particular scientific evidence. This means, among other things, that there is no minimum amount of evidence that must be submitted to establish a fact, that there is no hierarchy between the evidence presented to the judge, that there is no compulsory evidence the absence of which would prevent a conviction, and that even an innuendo can carry the court's verdict.[14]

In fact, the judge is free to decide to favour one piece of evidence over another one if they consider it more reliable. However, the probative value of the evidence must always be assessed in view of the specific circumstances of the case and the authority cannot prejudge one means of proof over another.[15] The judge must assess the probative value of the expert evidence in the light of the circumstances of the case, placing it in its factual context and in the overall context of the case in order to decide on its probative value.

Although the judge is free to assess the evidence discussed before him, his reasoning must be rational. The evaluation should be based on the rules of formal logic, the laws of reasoning, general life experience and, through the corroboration of expert evidence, technical and scientific rules. [16] Consequently,

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[10] The highest court in France, which does not rule on the merits but, if it annuls the contested decision on the grounds of the infringement committed, orders a new trial.

[11] Cathrine Labrusse-Riou, *Le droit saisi par la biologie, Des juristes au laboratoire, coll. Bibliothèque de droit privé* (Paris: Bibliothèque de droit privé, 1996), 351.

[12] Labrusse, "Le droit saisi par la biologie," 352.

[13] Joëlle Vuille, "Pour une redéfinition du principe de libre appréciation des preuves dans le cas des expertises scientifiques," *Justiz*, (2013): 3. https://www.researchgate.net/publication/277670533_Pour_une_redefinition_du_principe_de_libre_appreciation_des_preuves_dans_le_cas_des_expertises_scientifiques.

[14] Vuille, "Pour une redefinition du principe," 3.

[15] Ibid.

[16] Alex Biedermann et al, "Conclusions catégoriques dans les expertises forensiques: obstacles insurmontables ou cibles faciles pour la défense," *Revue de l'avocat*, (2012): 107. https://www.researchgate.net/publication/258859434_Conclusions_categoriques_dans_les_expertises_forensiques_obstacles_insurmontables_ou_cibles_faciles_pour_la_defense.

if the judge decides to overrule the expert's opinion, i.e. not to take it into account in his decision, they must give logical reasons for their decision, duly pointing out the uselessness of that opinion in the light of the facts. A genetic opinion, for example, is scientific evidence which, once it has been admitted into evidence, would assist the judge in his or her task of taking evidence. Thus, its rational assessment involves distinguishing between scientific evidence and judicial evidence.

Legal or forensic evidence has some characteristics that distinguish it from scientific evidence.[17] This can be explained by the difference in the purposes for which evidence is used. Unlike scientific evidence, forensic evidence is no longer aimed at the truth of a fact, but at the truth of a proof.[18] Therefore, the legislator has designated the judge as the sole holder of the power of decision And therefore empowered them to.[19] There is only one form of evidence in court, the judicial evidence derived from all the circumstances of the facts. Scientific evidence, by contrast, merely serves as an index value which, once admitted, helps form the judicial evidence that convinces or fails to convince the judge and thus underpins the judge's final decision. The distinction between scientific evidence and judicial evidence also leads to a distinction between the mission of the expert and the role of the judge. The role of the judge is to decide on the law, to settle disputes and to determine the guilt or innocence of the individual. Of course, this cannot be done effectively without a perfect knowledge of the facts[20].

This is why a forensic expert intervenes: to enlighten the judge on purely technical matters. The judge cannot therefore establish scientific evidence during the examination of the case, as this is the task of the expert. The judge does not have the necessary skills to give this scientific truth. Where the circumstances demand it, the judge must call upon an expert to interpret the scientific question. Likewise, the expert cannot claim to be in possession of the truth of the matter, since this is the sole task of the judge, who, in assessing the facts, places the scientific evidence in their proper context and, where appropriate, adds them to the evidence to reach a conclusion. If the expert "encroaches" on the role of the judge, there is a risk of delegation of powers.

The legislator has set limits on the mandate of experts in order to preserve the scientific legitimacy of their expertise as much as possible. The limitation to dealing only with technical matters also means that the judge is prohibited from delegating any powers to the expert. The importance of this will be discussed below.

If the judge calls in a legal expert, it is effectively because they admit that they are not competent to answer the technical, financial, medical or other scientific question that might shed light on the case once answered. This answer is

[17] Labrusse, "*Le droit saisi par la biologie*," 351.

[18] Frédéric Chavaud and Laurence Dumoulin, "Experts et expertise judiciaire: France XIXe et XXe sciecle," *Presses Universitaires Rennes*, (2003): 230, https://doi.org/10.4000/books.pur.8444.

[19] Demarchi, "Les preuves scientifiques," 246.

[20]Ibid.

necessary to enable the judge to assess all the evidence. However, the difficulty for the judge in assessing the scientific or purely technical aspect should not extend to other aspects of the facts. It is for the judge to decide on the probative value of the expert opinion and its scope in the light of the circumstances of the case.

Furthermore, the legislator set these limits on the mandate of experts in order to preserve the inherent characteristics of forensic expertise, its neutrality and objectivity. A forensic opinion is the result of a scientific interpretation which requires the contribution of a professional, the expert. For an expert opinion to be neutral and objective, the impartiality of the expert must first be preserved. The expert's task is to give an opinion based solely on purely technical data, and therefore they should not have access to the investigation file. The expert should only be informed of circumstances that are strictly necessary for the proper performance of the assessment. Otherwise, his impartiality may be called into question and the whole opinion may lose its substance because of the risk of bias, partiality or increased risk of bias.

Bias on the part of a researcher or research team is a tendency or bias introducing systematic error into the research process undermines the validity of the resulting work.[21] The phenomenon of bias includes the case where the researcher subjectively influences the result by favouring the outcome expected by the researcher. It is also a phenomenon of bias when the researcher seeks, interprets or favours information that confirms their preconceived ideas or hypotheses. This has a biasing effect on the interpretation of the results of the analysis. [22] In forensic, forensic science, and thus in the case of forensic experts, this risk can be very significant. It is present in scientific research when we evaluate a hypothesis, favouring information or interpreting the results of a study in a manner that confirms our hypothesis. It is in this context that a forensic scientist can fall victim to confirmation bias. This risk is even greater in sensitive areas where the biases are shared by an expert who, after all, also lives and works in a particular society. These biases can be personal, social, political or religious and can affect the interpretation of the results of scientific analysis.[23]

This is why it is critical to preserve the distinction between roles. In principle, the reliability of the expert opinion itself is called into question once the experts' statements are no longer neutral and objective, or are not derived from a scientific interpretation of a technical issue based on scientific expertise in accordance with universal standards, nor are presented or included in the grounds of a judgment or on which a judgment is based. Such statements cannot have that scientific legitimacy and would constitute a prohibited delegation of power. The fact that the judges have adopted the expert's reasoning in the grounds of the decision could also constitute an unlawful delegation of powers, since it is for the judge to

[21]Indria Nath et al, IAP – The Global Network of Science Academies, *Doing Global Science, A Guide to Responsible Conduct in the Global Research Enterprise* (Princetown: Pricetown University Press, 2016), 6.

[22] Nath et al, *Doing Global Science*, 6.

[23] Ibid.

assess the evidence submitted to them in the light of the circumstances of the case and should in principle decide on the basis of his own personal conviction. The expert's task is limited to dealing with a technical question which requires the expert's interpretation in the light of the specific hypotheses put forward by the judge or the defence.
The liability system imposed on experts also helps to ensure that "the expert involved in the proceedings is not seen as the outstretched arm of the authority and not as a person bound by the presumed impartiality of the accused and the defence, but as a person acting according to the rules of the profession, who is objective to the best of his or her ability, and in whom even a judge without expertise can have reason to trust".[24]
It is questionable whether and to what extent a judge can delegate legal - judicial tasks to a legal expert. Experts cannot exercise the functions of a judge: the power conferred on them is intended to inform the judge's decision, not formulate it. They add the knowledge necessary to reach a decision, the judgment; but but they do not themselves deliver that judgement.[25]
It follows that the judge cannot instruct the expert to give a legal opinion or to take over their role, nor may the judge pose legal questions to the expert. It is essential to distinguish between the power of the judge and the mission of the expert. Thus, if the expert's opinion is to have probative value, it must meet the established scientific criteria and the judge must assess it appropriately in the light of the circumstances of the case.

4. The expert's influence in criminal proceedings

The relationship between the judge and the expert is complex. Although it may sometimes seem that the expert merely acts as a judge in technical matters, he cannot replace the judicial role, nor can the judge transfer their judgement to the expert. Expert assessment is essentially objective. However, it may also have a subjective aspect. Interpretation of the results is also a crucial element of expert evaluation. It would be highly beneficial if second opinions were systematically made admissible, going beyond the requirements of Article 6 of the European Convention on Human Rights (ECHR) and the decisions of the European Court of Human Rights (ECtHR). In this way, peer review would be fully adversarial.
I mentioned that peer review is essentially objective but it can also have a subjective aspect. This has a particularly important role in the assessment of the fact-finding process. This is illustrated below through a theoretical scheme and a practical example. In my opinion, the starting point for an examination in this area can also be the content, current regulation and structure of the opinion. In criminal proceedings, the expert opinion includes information on the subject of

[24] Balázs Elek, "A büntetőügyekben eljáró szakértők felelősségének rendszere," *Büntetőjogi Szemle*, no. 1 (2022): 57, https://ujbtk.hu/elek-balazs-a-buntetougyekben-eljaro-szakertok-felelossegenek-rendszere/.
[25] Andrea Kuhl, "Az ítéleti bizonyosság és a szakvélemények értéke," *Miskolci Jogi Szemle* 18, no. 1, (2023): 97, https://doi.org/10.32980/MJSz.2023.1.90.

the investigation, the investigation procedures and instruments, changes in the subject of the investigation (findings), a brief description of the investigation method, a summary of the professional findings (professional statement of facts), the conclusions drawn from the professional statement of facts, and, in this context, the answers to the questions asked (opinion).[26]

The scientific, objective part of the expert opinion is the professional statement of facts, the findings given and supported by the examination method, while the subjective part is the expert's opinion, his/her opinion on questions, which is also based on their professional knowledge and experience. If we assume that the scientific part of the expert opinion is included in the reasoning part of the judgments, the evidence will meet, or at least, to put it cautiously, better meet the criteria of scientificity and credibility that the Act sets for expert opinions, so that the judgment will be based on evidence that is also scientifically sound.

If, however, we assume that the expert's subjective view appears in the reasoning of the judgement, we can still say that the judgment is based on a less scientific basis, taking the free system of evidence and the requirement of free discretion into consideration. Altough, although this is the primary expectation of an expert opinion.

The above can be easily modelled by examining the expert as a qualitative variable. As I have indicated in my previous writing, probabilistic expert opinions - although not categorical, i.e. not equal to probabilities 0 and 1 (no or yes) - are nevertheless considered and preferred in the application of the courts in the evidence, given their scientific nature. The use of co-sciences, therefore, gives judges greater certainty in their personal convictions, provides greater certainty in the procedure and in judicial decision-making and has and can have an impact on the way it is perceived by society.

In the judgment, the subjective and objective parts of the expert opinion can be easily identified. The appearance of the objective, scientific segment can be seen as a qualitative variable, in contrast to the expert's subjective interpretation of the scientific evidence i.e., the entire opinion itself. Yet, it is possible to examine which part of the expert's opinion is more likely to underpin or contribute to - if you like, influence - the judge's judgment.

Does the value of the objective element always contribute more to the certainty of the judgment than the subjective element, which might otherwise be helpful to minimise the formation of the judge's conviction, for example in view of the scientific criteria against the expert's opinion. The importance of this issue is also highlighted in the context of current trends, when we talk about big data, deep learning and similar concepts in connection with certain new evidence, even based on Artificial Intelligence, with the quantity and quality of the data underlying the algorithms fed in and the results that can be drawn from them as an important demarcation criterion. It certainly matters what kind of judgments are contained in the database on which the algorithms are based or what the value of the opinions is, whether they represent weak or strong probabilities, and in

[26] Ervin Belovics and Éva Tóth, *A büntetőeljárás segédtudományai II.* (Budapest: Pázmány Press, 2017), 419.

which legal system they are used, although we are talking about free evaluation of evidence.
Consider, for example, whether one seeks objective, material truth and prefers categorical opinions or whether it is sufficient to use an opinion representing a probability other than 0 without requiring an approximation to 1.[27] This has a major impact on the usability of this evidence and the usability of some AI or electronic data as evidence.

5. The weight of the forensic accountant in bankruptcy proceedings

Let us consider the idea introduced above in relation to the role of the expert in influencing the models set up in an example from the bankruptcy field[28]. This can be done along the lines of a logistic analysis, a probabilistic classification method that allows to take the combined effect of the financial determinants of the company into account to determine the degree of significance of the explanatory variables and to estimate the explanatory and predictive power of the model.
Let us illustrate the judges' decision in two models, one introducing the expert or opinion as a qualitative variable in the analysis of the bankruptcy situation of companies. The models are based on the deterioration of the financial situation of companies as the culmination of a series of progressive difficulties, the risk of insolvency based on financial statements and the techniques and indicators used in the financial literature.[29]
Following the line of reasoning of the previous section, the question is how the financial elements of forensic accountants' opinions affect the judges' decision[30] where $_i$ denotes individuals, α_0 is the coefficient associated with the constant, $\alpha_{1.....}\ \alpha_6$: the coefficient associated with each variable in the model , ε_i is the error.

Model 1:

$$\text{Judgement}_i = \alpha_0 + \alpha_1 \text{ Debt ratio}_i + \alpha_2 \text{ Nature of debt}_i + \alpha_3 \text{ Sector of activity}_i + \alpha_4 \text{ Age}_i + \alpha_5 \text{ Size}_i + \alpha_6 \text{ Accumulated losses/equity}_i + \varepsilon_i$$

In the second model (see below), we therefore integrate the forensic accountant's opinion while taking the elements on which their opinion is based into account, in addition to integrating the characteristics of the companies.

[27] Kuhl, "Az ítéleti bizonyosság," 98.
[28] Hamadi Mohamed Taieb et al. "Le manager face au juge lors du redressement judiciaire d'entreprise: un risque de manipulation à travers l'expert-comptable judiciaire," *Question(s) de management* 14, (2016): 28, DOI: 10.3917/qdm.163.0027.
[29] Meir Tamari, "Financial Ratios as Means of Forecasting Bankruptcy," *Economic Review* (1964): 15, http://www.jstor.org/stable/40226072.
[30] Multivariate discriminant analysis based on logit/probit model. Logistic regression analysis.

Model 2:

$Judgement_i = \alpha_0 + \alpha_1$ Expert $opinion_i + \alpha_2$ A $+ \alpha_3$ Debt ratio i $+ \alpha_4$ Business sector or activity $sector_i + \alpha_5$ $Age_i + \alpha_6$ $Size_i + \alpha_7$ Accumulated losses/equity $+\varepsilon_i$

The measurement variables are set up based on empirical research and forensic expert opinions. In the models, the judge's decision or ruling and the expert opinion are binary variables representing 0 and 1.
For the judge, the variable is 1 if they initiate liquidation proceedings or 0 if they initiate bankruptcy proceedings.
The impact of a forensic accountant's opinion on a judicial decision can be seen as a dichotomous variable. If it is 1, then the expert believes that the company should be liquidated, and if it is 0, then the expert believes that the company could remedy its situation without court intervention, i.e. (steers the judge's decision towards a settlement).
The role of the sector of activity is considered to have a negative impact on the decision to file for bankruptcy, i.e. firms in the industrial sector are more likely to be resolved on their own rather than to be subject to liquidation proceedings. The activity sector is 1 if the firm is in the industrial sector and 0 if it is not in the model.
There is a negative relationship between the debt ratio and a company's ability to pay its debts.[31] Therefore, it can be argued that the debt ratio has a positive effect on the decision to seek redress by companies in economic difficulties.

$$\textit{Debt ratio} = \frac{\textit{Total debt}}{\textit{Total assets}}$$

The type of debt, the nature of indebtedness, is a variable that expresses the trend in the indebtedness of the enterprise. This variable can be calculated as follows:

$$\textit{Debt type} = \frac{\textit{Short-term liabilities}}{\textit{Long-term passives}}$$

This variable suggests that a firm with a ratio greater than 1 is more likely to be insolvent than a firm with a ratio less than or equal to 1.
The age and seniority of the company has a positive impact on its restructuring potential. Size has a negative impact on the decision to seek redress for companies in economic difficulties.
By examining the models, the results will show whether the judge has more confidence in the accounting data than in the internal characteristics of the bankrupt firms. Whether or not they trusts the judgment of the professional accountant or forensic accountant more than the accounting data. Some

[31] James A. Ohlson, "Financial ratios and the probabilistic prediction of bankruptcy," *Journal of accounting research*, no. 18. (1980):109–131, https://doi.org/10.2307/2490395.

significant explanatory variables are also tested at a given level of significance in the first model, which, for example, does not include the opinion of the European Court of Justice (think of the preliminary decision procedure). However, this variable, if it is considered in the second model, which which incorporates the forensic accountant's opinion, becomes completely insignificant, meaning that the forensic accountant's opinion is the more decisive factor in the decision making.

The logistic regression of the models allows to identify the most significant determinants of judicial decisions. In the first model, most of the explanatory variables, except for sector of activity and firm size, have a positive and significant effect on the bankruptcy decision of distressed firms. However, these variables have different levels of significance. It should be noted, however, that even if there are variables that have a significant impact on the judge's decision, they explained only close to 40% of the variability of the bankruptcy decision in a given sample, i.e. this first model, even when taking the significant variables into account, remains weak as it cannot explain more than 60% of the variability of the judge's decision.

The results of the second model's logistic regression allowed the identification of explanatory variables that have a significant impact on the decision of distressed firms to enter liquidation proceedings. As in the results of the first regression, the debt ratio and the nature of the debt are variables that have a significant impact on the decision of the judge. In this sample and the related results, it is also found that the judge does not take the variables of sector of activity, ranking, size and the ratio of accumulated losses to equity into account when deciding whether to place a distressed firm into liquidation or bankruptcy.

The introduction of the forensic accountant's decision variable (a variable that has a positive and significant effect on the judge's decision at the 1% level) in the second model allowed for an explanation of almost 80% of the variability in the judge's decision, while in the first model, this rate was only close to 40%.

To determine the predictive power of the two models, it is necessary to define a probability threshold that facilitates estimating the probability of an error event. The observations are then classified according to whether they exceed a critical value set by the decision-maker. In this sample, the test associates each firm with a liquidation or an out-of-court settlement (bankruptcy arrangement) as follows. If the probability associated with each firm in the sample is greater than the arbitrarily set threshold, the firm is classified as a liquidation beneficiary (+), if not, it is classified as a settlement beneficiary (-). Thus, there will be correctly and incorrectly classified firms for a given Ranking, Ranking, R+ (or-) and observed Decision (D). The predictive ratio of the model is equal to the ratio of the sum of correctly predicted firms to the total number of observations. The quality of the two models is therefore different in terms of predictive certainty.

The relatively high level of misclassification rates for companies suggests that the financial and non-financial factors used to justify an opinion are effective indicators to diagnose the financial situation of a company, but still not sufficient to predict the judge's decision, confirming that an opinion is only as good as the

judge understands it.[32] The increase in the prediction rate of the judge's decision in the second model only indicates the importance of the forensic accountant's opinion in the judge's decision making process. The judge's decision gives greater weight to the expert's analysis of the financial factors underlying that opinion.[33]

Obviously, there are countless qualitative variables to be evaluated in this concept. In some countries, such as France for example, legislation has chosen the "accumulated losses/equity ratio" as an indicator of the degree of recovery or difficulty of the situation of the business on which the judge must base his decision. While the judge does trust numerical data (i.e., figures appearing in expert opinions), he appears to place even more reliance on the expert's judgement.

The concrete example of the observed Decision or Decision and the predictive power results of the second model show that the judge relies more on case law than on accounting data, i.e. they trust the assessment of the situation by another court (CJEU, ECtHR) more than the financial data reflecting it. These results also show that the use of parts of an expert opinion can lead to a judgment of greater or lesser "scientific" value, if the parts are included in an identifiable way in the reasoning part of the judgment.

When using regression modelling, it is also important to emphasise that this method has its limitations and that the results may be affected by, for example, sample size and representativeness. The timeliness of the data may also affect the validity of the results in terms of their added value for judicial practice. For example, if the data analysed is old, it may be less relevant to the judicial practice in today's world (laws, technological inventions, etc.) Also, of course, there may be different variables, some of which may not be that significant, but usually judicial experience, precedents have a huge impact on decisions. This selection of explanatory variables allows a schematic representation of the practice. However, the results indicate that the second model explains a greater percentage of the variability in judicial decisions, highlighting the weight of expert opinion in the decision-making process. The methodology suggests the need for a clear distinction between the roles of judges and experts and argues for the integrity and objectivity of expert opinions to ensure that they contribute effectively to judicial outcomes.

The judge may lose sight of the "objective" indicator, which may often seem meaningless to him due to its numerical complexity. He may, for example, place more trust in a legal assessment of the situation using the example of a preliminary ruling mechanism or previous case-law than in financial figures reflecting the situation. It is not difficult to see that as lawyers, they prefer the interpretation of case law to financial figures. Indeed, the expert's subjective opinion may also be preferred to the figures in judicial decision.

[32] Kuhl, "Az ítéleti bizonyosság," 108.
[33] Hamadi, "The Manager," 25.

Concluding thoughts

It is important to respect the distinction between the expert's role and the judge's role. In principle, the reliability of the expert opinion itself is called into question as soon as the experts' statements are no longer neutral and objective or fail to result from a scientific interpretation of a technical issue regardless of its technical nature in accordance with universal standards and cannot be presented or included in a judgement. Such statements cannot have the scientific legitimacy that would naturally be required in case of the expert opinion as scientific evidence and its result, and which would provide the judge with additional certainty in his decision.

The judge's job is to assess the evidence presented to them in the light of the circumstances of the case and, in principle, they should decide based on their own personal conviction. The forensic expert's findings should then be assessed in the light of the circumstances of the case to decide what probative value they have and whether they should subsequently be admitted into evidence. This power is reserved to the judge. The expert's task is limited to dealing with a technical issue which requires the expert's interpretation in the light of specific hypotheses put forward by the judge or the defence.

A forensic auditor's „decision" or opinion is a document prepared ideally by an independent and competent professional. However, the opinion is not understood as a monolitic block but as a whole made up of several units, occupies an important place in the decision-making process carried out by all of the partners of the company, in particular the judge. The judge can dissect, reorganise and reuse the information contained in the opinion in order to incorporate it into his decision-making process. The question arises as to which part of the expert opinion the judge uses for this purpose. In criminal proceedings, the expert opinion includes information on the subject of the investigation, the investigative procedures and means, changes in the subject of the investigation (findings), a brief description of the investigation method, a summary of the professional findings (professional findings), the conclusions drawn from the professional findings and, in this context, the answers to the questions asked (opinion).[34]

This is also important because, increasingly, the requirement of procedural fairness and compliance with Article 6 ECHR in expert evidence also raises the need for the use of adversarial, so-called counter-expert, forensic experts but the adjudicative certainty of expert opinions in such a system may be different in a procedure, not to mention the development and proliferation of new types of evidence (thinking of the quality of the data used as a basis for the input), in violation of the principle of equality of arms.

It can be seen that rather complex expert methods, such as multivariate discriminant analysis[35] or logistic regression analysis[36], recursive partitioning

[34] Ervin Belovics, "A büntetőeljárás segédtudományai," 419.

[35] Miklós Virág et al, "*Pénzügyi elemzés, csődelőrejelzés, válságkezelés*," (Budapest: Kossuth Kiadó, 2013): 288.

[36] Virág, "Pénzügyi elemzés," 288.

algorithm[37], or neural networks are used in economic crime cases. Their appearance in the judgment is unlikely so the judge departs from objective "indicators" relying on the expert's opinion instead, which they understand and prefer using existing case law in relation to an appropriate financial situation.
However, the presence of variables such as the quality of management of the company or certain external and internal factors that may affect the company's ability to continue as a going concern could improve significance, shedding light on the reality of the relationship between judicial practice (previous case law) and judicial judgments. The problems and functioning of company management (given the diversity of bankruptcy and related models and their rapid development), the judge and the forensic accountant should also be discussed. Such a study could provide more sophisticated information on the legal mechanisms that should be put in place to circumvent certain manipulations and to focus efforts on the effective recovery of companies.[38]

[37] Ibid.
[38] Hamadi Mohamed Taieb et al, "The manager before the judge during a company's receivership: a risk of manipulation through the forensic accountant," *Management issue(s)*, (2016): 29, DOI: 10.3917/qdm.163.0027.

Balancing the Space Economy and Sustainability: Legal Frameworks and Policy Initiatives for Responsible Space Activities

MEFTEH, BOUDOUR*

ABSTRACT *The potential for space exploration to drive economic growth and innovation is immense, but it must be done in a way that ensures the long-term sustainability of outer space. This involves considering the environmental impact of space activities and how to maintain economic benefits over time. This paper addresses the economic opportunities provided by space activities while mentioning the potential risk if space sustainability is not viewed as being as important as the benefits gained from the space mission. This study investigates the regulatory framework of sustainability, which merges legally binding and non-legally binding frameworks. Besides the above, initiatives balancing the space economy and sustainability are discussed.*

KEYWORDS *Space economy, space sustainability, space law, space debris, space policy.*

Introduction

Sustainability and economy are not only related to Earth's problems. Today, these terms are also extended to outer space and make so much sense. Seeking higher levels of sustainability is crucial for a range of reasons, including social, political, and global ones. At the same time, we cannot dispute the amazing advantages that space offers us on Earth, from navigation and communications to the special insight that satellite imaging and geospatial data bring to various business sectors. Moreover, researchers in newer mission areas, such as space medicine and in-orbit manufacturing, will bring many benefits for our lives back on Earth and new opportunities for space settlements and exploration.

All of these advantages are in jeopardy if space sustainability is not given dedicated international attention. Space debris and its increasing threat to space safety are the most urgent issues to handle because they pose a risk to services and activities conducted in outer space, which in turn puts the space economy at risk. As a result, future opportunities in space must be preserved by taking space sustainability into account in every facet of what nations and or private entities perform in outer space. It is worth noting that, while providing the potential to increase access to the advantages of space applications on Earth, the fast growth

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of commercial space operations also presents new obstacles to maintaining a safe and sustainable operating environment in orbit.[1]

Before diving into this topic, a definition of the main terms is necessary. When it comes to the expression "space sustainability," it is becoming more and more used in the space sector, and it has caught the attention of many, not only legal researchers but also scientists, technologists and businesses.

We can state that, until recently, there was no agreed meaning for this term, one of the reasons being that international space law and, specifically, the Outer Space Treaty (OST) does not mention the word "sustainability" expressly. Nevertheless, the Guidelines for the Long-term Sustainability of Outer Space Activities were released in 2018 by the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) in response to this problem. Among these recommendations was the first draft definition of space sustainability, which goes as follows: "*The long-term sustainability of outer space activities is defined as the ability to maintain the conduct of space activities indefinitely into the future in a manner that realizes the objectives of equitable access to the benefits of the exploration and use of outer space for peaceful purposes, in order to meet the needs of the present generations while preserving the outer space environment for future generations*."[2]

As regards the term "space economy", it is defined by the OECD as "*the full range of activities and the use of resources that create and provide value and benefits to human beings in the course of exploring, understanding, managing and utilising space. Hence, it includes all public and private actors involved in developing, providing, and using space-related products and services.* [3]

After clarifying the concept of "sustainability," it is important to give a further explanation to distinguish between the three pillars of sustainability: *from*, *in*, and *for* space. Nevertheless, as this term is frequently used, the risk of confusion and misunderstanding of these types is high, making it essential to clearly explain sustainability and its three different cornerstones.

Starting with "sustainability *from* space", this phrase describes the use of space as a platform to directly or indirectly deal with worldwide challenges. In this context, pillar 1 addresses how the space sector may contribute to sustainable development by providing space data or by adopting more proactive steps like using space to generate energy. The key idea here is space as a service to be used in fields such as fair commerce, equality and justice, urban development, and climate monitoring. The new space economy is relying more and more on domains like Earth observation, navigation, and communication. This concept

[1] Kevin M. O'Connell, "Space Sustainability as a Business and Economic Imperative," *Geospatial World* (2022) https://www.geospatialworld.net/prime/business-and-industry-trends/space-sustainability-business-economic-imperative/.

[2] United Nations Committee on the Peaceful Uses of Outer Space, *Guidelines for the Long-Term Sustainability of Outer Space Activities*, Fifty-fifth Scientific and Technical Subcommittee, Vienna, Austria, 2018, A/AC.105/2018/CRP.20.

[3] OECD, "Introduction," in *The Space Economy at a Glance 2011* (Paris: OECD Publishing, 2011), https://doi.org/10.1787/9789264113565-4-en.

revolves around the notion of "space as a service" wherein the utilisation of space technology turns into a need for resolving Earth's pressing sustainability problems.[4]

Secondly, "sustainability *in* space" means using space as a natural resource for development, research, and preservation. This type addresses sustainable space usage, the fundamental belief here being that space is a resource that may be employed for human advantage, preserved for political or scientific reasons, or researched to find out more about our role in the cosmos. This implies that it covers subjects like manufacturing in orbit, servicing in orbit, recycling in orbit, re-entry and demise, legal and regulatory matters, space safety, space environment management, detection and mitigation of space debris, and sustainable use of space resources.[5]

Thirdly, "sustainability *for* space" refers to mitigating the effects of space operations on the Earth's ecosystem. This final pillar addresses the sustainability of the space industry overall based on its impacts on the Earth's ecology. Raw material extraction, production, launch, data processing and exploitation, disposal, and socioeconomic repercussions are a few potential impact areas. They also cover a space mission's entire life cycle.[6]

Going beyond these three pillars, we can also mention the sustainability *of* space as a single overarching pillar that may be formed by combining pillar 2 (sustainability *in* space) and pillar 3 (sustainability *for* space). In terms of the orbital and the Earth's environment, this refers to the management of ecological or other sustainability implications resulting from space sector operations.[7]

All three of the sustainability pillars or types we identified in this paper may incorporate the idea of the space economy. Each of the mentioned pillars covers the following elements of the space economy: starting with sustainability *from* space, via offering data and technology that aid in addressing global issues, the space industry supports this pillar. For instance, Earth observation satellites offer vital information for resource management, disaster response, and climate monitoring, all of which promote Earth's sustainable development.[8] Regarding the second pillar, sustainability *in* space, managing and using space resources sustainably, this pillar directly affects space economy. This entails creating and upholding regulations for space operations, controlling space debris, guaranteeing orbital usefulness in the long term, and prudently using space resources to avoid contaminating or exhausting the space environment, with

[4] Andrew Ross Wilson and Massimiliano Vasile, "The Space Sustainability Paradox," *Aerospace Centre of Excellence, Department of Mechanical & Aerospace Engineering, University of Strathclyde* (September 14, 2023), https://doi.org/10.1016/j.jclepro.2023.138869.

[5] *Op. cit.*

[6] *Op. cit.*

[7] *Op. cit.*

[8] See National Aeronautics and Space Administration (NASA). "*Earth Observation for Sustainable Development Goals*." https://www.nasa.gov/mission_pages/sustainability/earth_observation_for_sustainable_development.html.

necessary control over economic activity.[9] As regards sustainability *for* space, that third pillar is also impacted by the space economy as it affects how space operations influence Earth. This entails reducing the negative effects of space missions on the environment, including emissions during launches, production procedures, and spacecraft disposal. This pillar benefits from initiatives to create greener technology and use resources in the space sector more effectively.[10]
Overall, sustainability is part and parcel of the space economy, entailing activities and industries involved with exploring, utilizing, and commercializing outer space. This connection arises because the further growth and success of the space economy depend on the responsible use of space resources and minimizing harm, both in orbit and on Earth. Space activities can be viable in the long term only if their principles and practices are responsible, with sustainability ensuring the space economy's growth without causing irreversible harm to orbital environments, celestial bodies, or Earth's ecosystems.[11]

This paper will explore this evolving topic by addressing the following questions: **How would sustainability in outer space impact the space economy and vice versa?** This emergent topic will be addressed by the paper, underpinned by a mixed-methodological approach. First, the paper will apply an empirical methodology to pinpoint tangible benefits and opportunities derived from activities in outer space. This methodology will be composed of a real-life data analysis that shows how the space economy develops due to variety and can be long sustainable because of sustainability principles **(1).** Second, the normative methodology will be used to analyse the legal and regulatory framework that governs sustainability in outer space. This paper will mainly focus on international treaties, in particular, the Outer Space Treaty, and the non-legally binding instruments. It will also identify the potential gaps and areas for improvement in the legal framework to make sure that economic growth is in line with the principles of sustainability **(2)**. Finally, it will highlight some policies and initiatives for balancing the space economy and sustainability **(3)**.

[9] See Secure World Foundation (SWF), "Ensuring the Long-term Sustainability of Outer Space Activities."
Online:https://www.unoosa.org/documents/pdf/copuos/stsc/2022/statements/4_SWF_ver.4_14_Feb_PM.pdf.
[10] NASA, "Green Propellant Infusion Mission: Advancing Sustainable Space Technology." *NASA*. Accessed June 5, 2024.
https://www.nasa.gov/mission_pages/tdm/green/index.html.
[11] Alessandro Paravano, Matteo Patrizi, Elena Razzano, Giorgio Locatelli, Francesco Feliciani, and Paolo Trucco, "The Impact of the New Space Economy on Sustainability: An Overview," *Acta Astronautica* 222 (2024): 162–173. online: https://doi.org/10.1016/j.actaastro.2024.05.046.

1. Overview of the Space Economy and Its Sustainability
1. 1 Proliferation of Space Economy Aspects

Before diving into the details of this part, it is crucial to mention that the proliferation of economic resources from space is also mirrored by the proliferation and constant growth of space economy actors, which reinforces the idea that the sector is experiencing a major shift. In contrast with formerly being "*the preserve of the governments of a few spacefaring nations*,"[12] it now involves a growing number of public and private players engaging in a diverse range of activities. New countries, the commercial sector, academia, and even private individuals appear among the actors, working to develop military and security intelligence, monitor climate change, improve navigational capabilities, and establish space tourism companies.[13]

1. 1. 1 Launch Industry

By far the most significant market category is the launch industry. After all, the space sector would not exist without rockets. Let us keep in mind that 1957 saw the first rocket launch into space, Sputnik I. Economically speaking, it is estimated that by the year 2024, the global space economy will be at US$600 billion and have a growth rate of about 8% annually.[14] Its increase underlines the the role of the space sector in terms of global economic growth. The volume of the space launch service industry alone attained 17.3 billion USD in 2023 and it plays as a major contributor. According to projections, this market will develop at a CAGR of 12% to reach $38.2 billion in 2030.[15] From a technological perspective, the last twenty years or so have seen enormous changes in this sector due to advancements in rocket technology. With its Falcon 9 rockets, SpaceX successfully developed and implemented reusable rocket technology, which profoundly affected the sector. Reusability challenged conventional disposable rocket models by enabling the use of the same parts for many missions, which

[12] ESA defines Space 4.0 as follows: "*Space 4.0 era is a time when space is evolving from being the preserve of the governments of a few spacefaring nations to a situation in which there is the increased number of diverse space actors around the world, including the emergence of private companies, participation with academia, industry and citizens, digitalisation and global interaction*."
https://www.esa.int/esatv/Videos/2016/11/United_Space_in_Europe/(lang)/es
[13] OECD (2012), OECD Handbook on Measuring the Space Economy, OECD Publishing. http://dx.doi.org/10.1787/9789264169166-en.
[14] Space Foundation, "The Space Report 2024 Q2." *Space Foundation*, July 18, 2024, https://www.spacefoundation.org/2024/07/18/the-space-report-2024-q2/.
[15] Cognitive Market Research, "Space Launch System Market Report 2024." *Cognitive Market Research* (2024). https://www.cognitivemarketresearch.com/space-launch-system-market-report.

not only decreased launch costs[16] but was also a significant step toward sustainability.

1. 1. 2 Satellite Industry

Satellites in the past were big, highly expensive machines using very advanced technology and requiring powerful rockets; hence, their cost was tens or hundreds of millions of dollars. All that has dramatically changed over the last two decades. With the significant development of electronic components and the reduction of launch costs per kilogram, satellite technology has been revolutionized. With these more compact, relatively affordable satellites, it is now possible for startups, academia, and almost anyone to participate in space missions and data gathering at a few thousand dollars. [17] Even students can design simple satellites at their universities, and some have begun doing so. We can be frank and say that the small satellites of today are the main players. Some businesses have deployed large constellations with a mindset of offering communications services, Earth observation, and internet coverage worldwide, among other uses. The numbers we are seeing now were not seen before. [18]

1. 1. 3 Benefiting from Satellite Data, Applications, and Services

The downstream industry has enormous potential to improve human lives, preserve the environment, and provide income. To what extent has the business sector been able to access this market? The scope is broad and noteworthy, but in this paper, we will talk mainly about two: Remote Sensing and Broadband.

Remote Sensing

Commercial stakeholders are using space technology insights more and more. Numerous businesses, including Planet, Maxar Technologies, and Airbus Defence and Space, have created and managed fleets of Earth observation satellites that provide government agencies with services in addition to providing commercial services to other businesses and customers. As space services are becoming more widely recognised and more usual, a growing number of businesses are turning to space for high-resolution photography and data

[16] Jeff Foust, "SpaceX Gaining Substantial Cost Savings from Reused Falcon 9," *SpaceNews*, April 5, 2017, https://spacenews.com/spacex-gaining-substantial-cost-savings-from-reused-falcon-9/.

[17]Bryce. *Launch Sites 2024*. Accessed June 15, 2024. https://elearningunodc.org/pluginfile.php/73502/mod_scorm/content/27/scormcontent/assets/Bryce_Launch_Sites_2024.pdf.

[18] UNOOSA, "Space Economy - Introduction to Space Economy," *UNOOSA*, accessed June 5, 2024, https://elearningunodc.org/course/index.php?categoryid=78.

analytics. Among the most popular uses are smart agriculture, raw resources and energy, urban planning, and climate action. [19]
In the next 10 years, we might expect thousands more satellites to help generate revenues not only in the downstream Earth observation market but also across the launch and manufacturing streams. Commercial companies are now procuring satellites and they are launching and operating them in space, focusing on the analytics of raw data that come from space, and engaging in both aspects, operating a satellite and analysing their own data in-house. Since the data analytics business model is well-established and highly regarded by investors and customers alike, it presents a strong commercial opportunity for both start-ups and established businesses.[20]

Broadband

When satellite internet first became accessible in the early 1990s, many of the early attempts failed, and the excessive cost prevented a sustainable industry from developing. Large constellations in low Earth orbit were the new method of broadband delivery that companies began to envision in the 2010s. Early on, observers were not sure if this would succeed, but the commercial sector is moving quickly forward. Despite advancements over the past 15 years, 2.6 billion people, according to the International Telecommunication Union, are still not online.[21] Thus, it is anticipated that the satellite connection industry will expand quickly through 2030. These are compelling reasons for the space industry to take control of the market. It still needs to be seen if it can provide its services at a cost that makes sense for the places it strives to serve.[22]

1. 1. 4 Space Tourism

We must keep in mind that the trend of commercial space travel is growing; SpaceX conducted the first-ever completely commercial mission to low-Earth orbit in September of 2021. The launch altitude for the Inspiration4 mission was 585 kilometres. Although the precise cost is unclear, it was proven to be less than $200 million for a crew of four. For USD 55 million per passenger, a start-up company called Axiom Space is offering commercial flights to the ISS.[23] These days, suborbital travel exists as well. Virgin Galactic and Blue Origin successfully launched their separate spacecraft in July 2021, setting new records

[19] UNOOSA, “Space Economy - Introduction to Space Economy.”
[20] UNOOSA, “Space Economy - Introduction to Space Economy.”
[21] International Telecommunication Union, “Facts and Figures 2024." Press release, November 27, 2024. https://www.itu.int/en/mediacentre/Pages/PR-2024-11-27-facts-and-figures.aspx.
[22] UNOOSA, “Space Economy - Introduction to Space Economy.”
[23] Vicky Stein and Scott Dutfield, “Inspiration4: The First All-Civilian Spaceflight on SpaceX Dragon,” *Chicago Tribune*, January 5, 2022, https://www.space.com/inspiration4-spacex.html.

for space tourism. For a Virgin Galactic voyage, the starting ticket price was around USD 200,000, but the price was later changed to USD 450,000. Blue Origin charges different fees.[24] While the rise of commercial space travel is unmistakable, it should also be underlined that, in most aspects, the regulatory framework for safety already exists as the FAA Commercial Space Launch Regulations[25] (U.S.) cover vehicle design, crew training, and safety zones for safe launches and re-entries; nevertheless, the regulations may require further refinement. But again, long-term viability will ultimately depend on market dynamics. Regulators should be cautious about intervening in market processes, especially within the U.S., where a free-market approach to the space industry is encouraged. Especially in the next ten years, commercial tourism is expected to grow at a relatively uneven rate. However, almost all the estimates are above USD 3 billion, creating an interesting opportunity.[26]

1. 1. 5 Space Resources

Space mining companies and states can extend their operations and generate new revenue streams by extracting precious resources from celestial bodies, such as water and rare metals. In fact, the space mining market is expected to increase at a Compound Annual Growth Rate (CAGR) of 20.48% to reach USD 5,068.06 million by 2029 from its value of USD 1,141.62 million in 2021, according to Data Bridge Market Research.[27] Also, if mining is already profitable on Earth, then colonizing other planets has the enormous potential to bring far higher profits. Building space mining colonies would open new possibilities for resource discovery and utilization, resulting in previously unheard-of technological advancements and economic growth, in addition to expanding the volume of resource extraction. Moreover, according to some experts, space mining colonies are just like "*establishing markets in space*".[28]

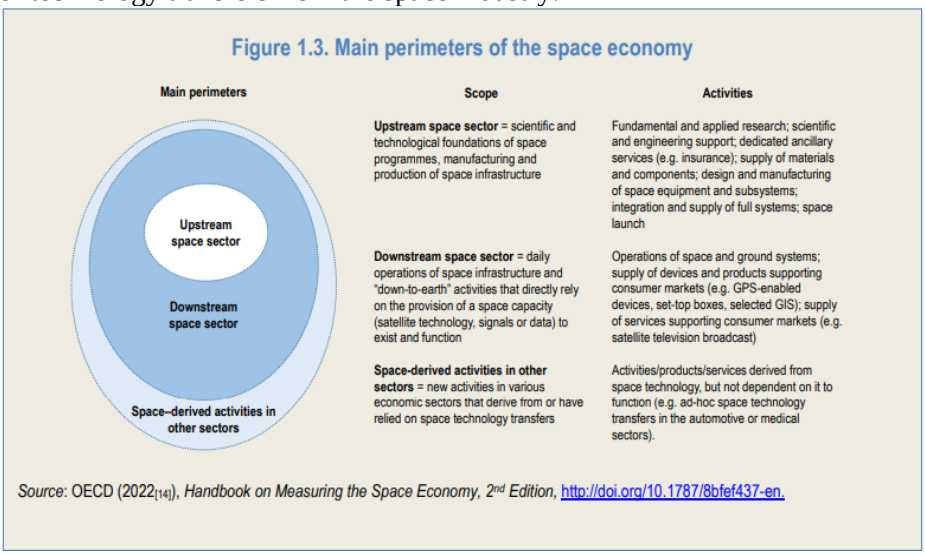
1. 1. 6 Classifying Space Economic Activities

At this stage, we can say that to benefit humanity as a whole, whether from an economic, social, cultural, or scientific perspective, the space economy is a complex and effective generator that combines components from multiple

[24] UNOOSA, "Space Economy - Introduction to Space Economy."
[25] Federal Aviation Administration. *Aerospace Forecast: Fiscal Years 2024-2044, Commercial Space,* U.S. Department of Transportation, 2024. https://www.faa.gov/dataresearch/aviation/aerospaceforecasts/commercial-space.pdf.
[26] UNOOSA Space Economy, *op. cit.*
[27] Data Bridge Market Research, "Space Mining Market Size, Share & Global Analysis by 2029," *Data Bridge Market Research*, 2023, https://www.databridgemarketresearch.com/reports/global-space-mining-market.
[28]Matthew Weinzierl, "Space, the Final Economic Frontier," *Journal of Economic Perspectives* 32, no. 2 (2018): 173–192, HTTPS://DOI.ORG/10.1257/JEP.32.2.173.

markets. Depending on what has been presented, these different activities that contribute to the creation of a strong space economic capability can be classified into three main segments.

1. The **upstream segment** includes research and development, space manufacturing and ground systems, launch, and space exploration.
2. The **downstream segment** involves activities related to the application and use of space-derived data and services on Earth. It concerns applying space-based technology to real-world problems (such as weather forecasting, remote sensing, Earth observation, communications, and location, navigation, and timing).
3. The **space-related segment** covers space applications, as well as products and services that are dependent on satellite technology yet are produced as spin-offs or technology transfers from the space industry.[29]



1. 2 The Intersection of Space Sustainability and Space Economy

In light of the above, it becomes crystal clear that the spreading of the different aspects of the space economy testifies to the rise in the economic value of the space sector. However, the question of sustainability cannot be set aside, first and foremost, because it has two facets: ensuring the sustainability of outer space itself while conducting economic activities and understanding how sustainability influences the durability of economic benefits derived from the space sector.

It is to be taken into account that sustainability in outer space involves critical areas such as space traffic management, mitigation of space debris, and space resource activities, all of which pose serious regulatory challenges. These range from the establishment of efficient traffic management systems, mitigation of debris, and responsible utilization of resources. Emphasizing these fields raises

[29] UNOOSA, "Introduction to The Guidelines for the Long-term Sustainability of Outer Space Activities (LTS Guidelines)," *UNOOSA eLearning Courses*, accessed September 5, 2024, https://elearningunodc.org/course/index.php?categoryid=74.

awareness of pressing issues that require international action and point to the need for proper legal regulation.[30]

First, let us start with a simple question: What is space debris? To answer this question, we can say that it is **"***All nonfunctional man-made objects, including fragments and elements thereof, in Earth orbit or re-entering the atmosphere*".[31] Space operations are becoming more and more important. Although these operations have numerous advantages, maintaining a sustainable and safe operating environment in orbital space presents challenges. Accidental collisions, breakups, and the intentional destruction of satellites have created millions of debris fragments, which, orbiting at a high speed in space, can damage or destroy any functioning spacecraft that crosses their path. This theory is further proved by the evidence stated by Don Kessler, a space debris expert at NASA: after a certain critical mass, the total amount of space debris would constantly grow because collisions would create more debris, [32] which in turn would cause more collisions. Later, the term "Kessler syndrome" was borrowed to describe such an incident specifically.[33]

From an economic point of view, space debris has multi-layered costs. The satellite operators have to undertake collision avoidance manoeuvres quite frequently, which uses up precious fuel and decreases the lifespan of the satellites. Also, the insurers charge higher premiums because of the increased risk associated with operation in orbits where there is a high population of debris. Such costs are passed on to end-users, increasing the expense of space-dependent services. In addition, the higher demand for, and hence the rarity of, available orbital slots in low Earth orbit (LEO) has considerably raised the costs of launching and operating new missions.[34] As private companies and national space agencies compete for these increasingly valuable orbital slots, taking the example of the race to deploy mega-constellations, such as Starlink and OneWeb, to meet the demand for global broadband connectivity has led to a sharp increase in the number of satellites in LEO. The increased financial pressures may discourage

[30] See Balázs Bartóki-Gönczy, Mónika Ganczer, and Gábor Sulyok, "Space Sustainability: Current Regulatory Challenges," *Hungarian Journal of Legal Studies*, 2024. https://doi.org/10.1556/2052.2024.00552.

[31] UNOOSA, "Introduction to The Guidelines for the Long-term Sustainability of Outer Space Activities (LTS Guidelines)."

[32] NASA, *Orbital Debris Quarterly News*, 2023, https://orbitaldebris.jsc.nasa.gov/quarterly-news/pdfs/odqnv27i1.pdf. NASA, *Orbital Debris Quarterly Review* 14, no. 2 (April 2010), https://orbitaldebris.jsc.nasa.gov/quarterly-news/pdfs/odqnv19i1.pdf.

[33]Donald J. Kessler and Burton G. Cour-Palais, "Collision Frequency of Artificial Satellites: The Creation of a Debris Belt," *Journal of Geophysical Research* 83, no. A6 (1978): 2637-2646.

[34] NASA. *Economic Development of Low Earth Orbit*. Washington, D.C.: NASA, 2016. https://www.nasa.gov/wp-content/uploads/2016/01/economic-development-of-low-earth-orbit_tagged_v2.pdf?emrc=d47202.

investments in new technologies and slow down the pace at which innovation in the space sector occurs.[35]

However, the relationship between the space economy and sustainability is complex and works both ways: the economic dynamics that may drive growth motivate innovation in sustainable technologies and policies.

In this respect, the space economy might contribute to sustainability in many ways by improving technology with a view to both mitigating space debris and increasing resource efficiency. For example, those private companies currently engaged in developing reusable rockets, such as SpaceX, show how cost-effective solutions can be environmentally friendly at the same time.[36] Moreover, reusable launch systems reduce not just the cost of access, but also the volume of debris resulting from the ditching of rocket stages. New satellite designs now use the concept of modularity and reparability, along with de-orbit materials for controlled de-orbit at end-of-life. Indeed, such innovation is often driven by economic incentives, including reduced operation costs and competitive advantages.[37]

Besides technological development, other economic mechanisms that undergird the space industry have the potential to spur responsible behaviour. Market-based schemes, such as "debris credits"[38] or financial liability, could give monetary incentives for companies to reduce the quantity of debris produced. Indeed, financial instruments like this are similar to carbon markets in environmental policy, where polluters have to pay a price for their greenhouse gas emissions while sustainable players are rewarded. If established, these could create a culture of responsibility in which all players take more care.

2. Overview of the Legal Frameworks

After presenting what is space sustainability and how space can be a source for the economy, it is important to mention the provisions in the law that protect space sustainability, as they are crucial for keeping the space economy going.

[35] J.-C. Liou, "An Active Debris Removal Parametric Study for LEO Environment Remediation," *Advances in Space Research* 47, no. 11 (2011): 1865–76. https://doi.org/10.1016/j.asr.2011.02.003.

[36] José Alfredo Pérez Martínez, "Study of commercial Reusable Launch Vehicles business model: case study of Terran R from Relativity," (Bachelor's thesis, Universitat Politècnica de Catalunya, 2024).

[37] Valerio Carandente and Raffaele Savino, "New Concepts of Deployable De-Orbit and Re-Entry Systems for CubeSat Miniaturized Satellites," *Recent Patents on Engineering* 8, no. 1 (2014): 2–12.

[38] V. Gopalakrishnan and S. Prasad, "Space Debris Remediation – Common but Differentiated Responsibility," In *Proceedings of the 64th International Astronautical Congress, Beijing, China*, vol. 14. 2013.

2. 1 UN Space Treaties and Space Sustainability

The term "sustainability" as such is neither defined nor addressed in any way in the UN space treaties. Yet, it would be inconsistent with the spirit of the UN space treaties to deny that they would incorporate any aspect of environmental concern that looks forward. Sustainability as such is not officially mentioned. Undoubtedly, the UN space treaties encompass the fundamental premise of the safe and sustainable use of outer space, which is the push towards usability, responsible behaviour, and risk limitations in space operations. Consideration should be given to the Outer Space Treaty's (OST) provisions in this discussion, as they are important and relevant to the current worldwide discussion on space sustainability.[39] The Preamble, for instance, speaks of the "*common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes*." Even if it is not a binding rule, the Preamble creates various legal implications.

Additionally, Article IX of the OST appears also to mirror the concept of space sustainability that can also be taken into consideration while conducting economic activities in outer space. From a certain viewpoint, Art. IX of the OST was enacted to address safety and environmental concerns in space "by creating a "*proscriptive positive legal obligation' for States to (1) avoid harmful contamination of celestial bodies and (2) undertake international consultations in advance before any potentially harmful interference may arise from their activities*".[40]

However, the provision is criticised for failing to be adequately specific regarding the type of degradation it shall prohibit and to what extent. It is especially felt that it would barely cover "*alteration of the topography and geology of a celestial body, which could be a consequence of large-scale human activities such as space mining*".[41] A more detailed view of Art. IX of the OST would reveal that the wording is ambiguous and ill-suited to serve the need for an efficient regime of environmental space protection, since no specific and legally binding regulations can be implied with respect to space sustainability as such.[42] For instance, Art. IX does not explain when contamination of the Outer Space, including the Moon and other celestial bodies, is harmful, whether all contaminations shall be considered as harmful, or what kind of adverse changes in the Earth's environment it is necessary to avoid.

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[39] V. C. M. Adilov et al., "Space Mining: What Will Be the Market and Technical Drivers for the Space Mining Industry?"

[40] Chung Gordon, "The Emergence of Environmental Protection Clauses in the Outer Space Treaty: A Lesson from the Rio Principles," in *A Fresh View on the Outer Space Treaty*, ed. Annette Froehlich (Cham: Springer, 2018), 95–112.

[41] Mahulena Hofmann and Federico Bergamasco, "Space Resources Activities from the Perspective of Sustainability: Legal Aspects," *Global Sustainability* 3 (2020), https://doi.org/10.1017/sus.2019.27.

[42] Minna Palmroth, J. Tapio et al., "Toward Sustainable Use of Space: Economic, Technological, and Legal Perspectives," *Space Policy* 57 (2021) http://dx.doi.org/10.1016/j.spacepol.2021.101428.

Simultaneously, the outer space treaty does not foresee any special liability regime for environmental damage as a general rule or for the damage that can occur as an outcome of the violation of Article IX.
Considering the hardship with which this rule could be used as a basis for the application of environmental recovery,[43] Art. IX of the OST has even been regarded "as an impotent provision because it fails to set standards in the field of the space environment or, at a minimum, entrust a regulatory body to do so".[44]
In theory, a general obligation derives from Art. IX. It could have been that, for example, Art. IX of the OST, aiming at the protection and preservation of the outer space environment, was set aside; however, contrarily to that, space actors co-operated in the development of common standards, in order to allow the practical implementation of the initial environmental concern of the OST.[45]

2. 2 The Role of Non-Binding Agreements in Regulating the Sustainable Economy of Space

Due to the fact that the UN space treaties do not include profound rules on how to develop the legal and behavioural mechanisms to implement the underlying principles of space operations, including sustainability, the latter are blurry. For the past couple of decades, the main idea underlying space sustainability has been how to reduce space debris; as a result, norms on responsible behaviour in space emerged. This realization of the fact that unregulated growth in space debris would adversely affect the operations of space for all players, governments, private companies, and new actors alike necessitates stronger regulations.[46]
The first step towards behavioural management was not the enactment of legislation, but rather the release of a non-binding set of technical recommendations, or guidelines, by the Inter-Agency Space Debris Coordination Committee (IADC).[47] These guidelines later served as the foundation for other, similarly non-binding documents, such as the COPUOS Space Debris Mitigation Guidelines.[48] The need to mitigate space debris has only gradually made its way

[43] Michael W.Taylor, "*Orbital Debris: Technical and Legal Issues and Solutions,"* (LL.M. Thesis, McGill University, 2006.)
[44] Gordon, The Emergence of Environmental Protection Clauses in the Outer Space Treaty: A Lesson from the Rio Principles."
[45] Anthi Koskina and Konstantina Angelopoulou, "Space Sustainability in the Context of Global Space Governance," *Athena: Critical Inquiries in Law, Philosophy & Globalization* 2 (2022): 29.
[46] V. C. M. Adilov et al., "Space Mining: What Will Be the Market and Technical Drivers for the Space Mining Industry?".
[47] IADC is an international forum of governmental bodies for the coordination of activities related to the issues of man-made and natural debris in space. The guidelines were first released in 2002 and then revised in 2007. The revised version of the guidelines was published on September 1, 2007.
[48] Committee on the Peaceful Uses of Outer Space, Space debris mitigation guidelines, 2007. Endorsed by the United Nations General Assembly as an annex to the International

into binding law with the development of modern national space laws. Appropriate space debris reduction techniques are becoming a usual requirement for licencing nongovernmental space operators under several nations' space legislation. As a result, national regulations frequently include different technical principles through references that are either more or less detailed. When a national law refers to a non-binding document as a "state of the art" requirement, there is a unique relationship between technical standards and positive legislation. In the context of space debris mitigation, in particular, a study by Soucek and Tapio highlights that the practical and legal issues that may arise from this coupling are not always anticipated.[49] It is remembered that after an extended debate on space debris, the general concept of "space sustainability" at last attracted intergovernmental attention in 2010 when the UN COPUOS[50] began debating the rules about space sustainability in a comprehensive way in a multilateral setting. It sparked a lively discussion and a process toward reaching a consensus on ideas that ought to result in a more sustainable and safe use of space for the first time in the space era.

The UN COPUOS adopted the Guidelines for the Long-term Sustainability of Outer Space Activities[51] (LTS Guidelines) in 2019 after a ten-year process that highlighted the political factors supporting space sustainability.[25] The LTS Guidelines address a range of topics related to space sustainability and, within this framework, define long-term sustainability as already mentioned above: "*the ability to maintain the conduct of space activities indefinitely into the future in a manner that realizes the objectives of equitable access to the benefits of the exploration and use of outer space for peaceful purposes, in order to meet the needs of the present generations while preserving the outer space environment for future generations*".[52] While several LTS Guidelines are more futuristic

Cooperation in the Peaceful Uses of Outer Space, December 22, 2007, UNGA Res A/RES/62/217.

[49]Alexander Soucek and Jessica Tapio, "Normative References to Non-Legally Binding Instruments in National Space Laws: A Risk-Benefit Analysis in the Context of Domestic and Public International Law," in *Proceedings of the International Institute of Space Law*, (Den Haag: Eleven International Publishing, 2019), 553–580.

[50] Committee on the Peaceful Uses of Outer Space, Report of the scientific and technical subcommittee on its 47th session, 2010. Vienna, February 8–19, 2010, A/AC.105/958, paragraph 181.

[51] United Nations Committee on the Peaceful Uses of Outer Space, Guidelines for the long-term sustainability of outer space activities, report by the committee, annex ii, 2019. A/74/20, July 3, 2019, http://www.unoosa.org/res/oosadoc/data/documents/2019/aac_105c_1l/aac_105c._1l_366_0_html/V1805022.pdf. The LTS Guidelines were "welcomed with appreciation" by the UN General Assembly in the yearly "omnibus resolution" pertaining to International Cooperation in the Peaceful Uses of Outer Space, UN General Assembly, Resolution adopted by the General Assembly on December 13, 2019, 74th session, A/A/RES/74/82.

[52] LTS Guidelines, Preamble, I Context of the guidelines for the long-term sustainability of outer space activities, para. 5.

inventions, others are compliant legally or represent common practice. Despite this, a number of people believe that significant topics remain unexplored, particularly those related to proximity operations and space debris management. These topics may still be included if the UN COPUOS settles on how to proceed with these unresolved matters.[53]

Nevertheless, the LTS Guidelines will, at most, add one more piece to the multitude of "soft law" rules that have developed since space activity treaty-making came to a stop in the 1980s. For the foreseeable future, a worldwide legal duty that can be enforced to achieve and preserve orbital sustainability will remain a pipe dream. That being said, this does not preclude laws and policies from being used in conjunction with other strategies to achieve the same goal. The best course of action for ensuring sustainable space operations going forward is to apply and enforce the non-legally binding instruments through national space laws, but not completely eliminate the chance of returning momentum to treaty-making.[54]

We have to mention that the 17 Sustainable Development Goals[55] (SDGs) are also applied in the space area to guarantee its sustainability and boost its economy. In 2015, the United Nations Member States approved the 2030 Agenda for Sustainable Development, which offers a common roadmap for promoting peace and prosperity for both people and the environment in the present and the future. The 17 SDGs and their 169 specific goals form the basis of the agenda. All nations must move quickly to fulfil the SDGs, which are the roadmap to a brighter and more sustainable future for all. In addition to addressing climate change and attempting to protect our seas and forests, they understand that measures to eradicate poverty and other forms of deprivation must also include measures to enhance health and education, reduce inequality, and promote economic growth. Current legal practices raise concerns about whether the best course of action is to interpret, apply, and enforce space sustainability through national legislation or whether uniform regulation and avoiding local solutions to a global problem require binding international regulation.[56]

III. 3. Initiatives Balancing Space Economy and Sustainability

Space actors, both public and private, are aware of the strong nexus between space sustainability and space economy, as one directly supports the other. In

[53] United Nations Committee on the Peaceful Uses of Outer Space, Guidelines for the long-term sustainability of outer space activities, report by the committee 2019, especially paragraphs 165–168; These paragraphs envisage the establishment of a dedicated working group, which is still in progress at the time of review of this article in November 2020.

[54] V. C. M. Adilov et al., "Space Mining: What Will Be the Market and Technical Drivers for the Space Mining Industry?".

[55] UN, Transforming Our World: the 2030 Agenda for Sustainable Development, https://sdgs.un.org/2030agenda.

[56] V. C. M. Adilov et al., "Space Mining: What Will Be the Market and Technical Drivers for the Space Mining Industry?".

other words, if space sustainability is neglected in conducting space activities, the area could no longer support such activities. As a result, no services could be offered from space; no economic benefits could be gained. This understanding has led to the creation of initiatives that aim to improve the balance between the space economy and space sustainability.

3. 1 ESA's Strategic Vision

3. 1. 1 The ESA Business Applications Programme

This initiative supports space-based services to develop into commercial opportunities, thus most significantly contributing to the space economy. Together with encouraging innovation, it underlines sustainability with projects utilizing minimal space debris and responsibly sourced materials. With the dual focus on space economy growth and minimizing its impact on the environment of space, ESA tries to balance economic development against environmental protection in space.[57]

3. 1. 2 ESA's Zero Debris Approach and Zero Debris Charter

This is another indicative of the proactive stance taken by ESA in issues relating to space debris management. As space debris is already becoming a real risk to satellite operations, the ESA has pursued policies for its mitigation and removal. Building on over ten years of ESA-wide collaboration, the Zero Debris approach is ESA's ambitious revision of its internal space debris mitigation requirements. It will boost the development of technologies needed to achieve debris-neutrality by 2030. To add to this approach and under the Zero Debris Charter, ESA works with international counterparts to establish standards for responsible satellite disposal and debris management; the Charter contains both high-level guiding principles and specific, jointly defined targets to get to Zero Debris by 2030.[58]

3. 1. 3 The ESA Report on the Space Economy 2024

The report summarizes recent developments in the space sector in Europe, focusing on economic growth linked to satellite services, telecommunications, and space exploration. However, ESA emphasizes the indispensability of sustainability for such development. According to ESA, it also needs to aim at space resources being recycled, reused, with efficient active management of space debris through a circular economy. This approach will ensure that the

[57] Alessandro Paravano, Matteo Patrizi, Elena Razzano, Giorgio Locatelli, Francesco Feliciani, and Paolo Trucco, The Impact of the New Space Economy on Sustainability: An Overview."

[58] European Space Agency. *Zero Debris Approach* and *Zero Debris Charter*. (Paris: European Space Agency, 2024).

development of the space economy is not at the expense of the space environment.[59]

3. 1. 4 The 2024 ESA Annual Space Environment Report

It reviews the growing risks associated with space debris and the impact space activities have on the environment of space. The report calls for international collaboration in the mitigation of debris and underlines the leadership of ESA in the same direction. Since space is getting crowded, managing debris is not simply an environmental concern but also one important question for the space economy, due to the fact that satellite operations may be jeopardized by collisions.[60]

3. 2 NASA's Multiple Research Projects

In 2022, NASA provided funding for three academic teams to work on studying the economic, social, and policy dimensions of space sustainability.[61] The first project developed an open-source model that forecasts the long-term growth of debris in space and evaluates the efficacy of different prevention mechanisms.[62] The so-called MIT Orbital Capacity Assessment Tool was introduced to the community at the December 2023 OECD Space Forum and presented to industry partners such as Privateer Space and the Aerospace Corporation. A second effort relates to the development of integrated assessment models, which link satellite orbit dynamics with the economic behaviour of space actors.[63] This tool will be used to assess various policy options contributing to the solution of the problem of orbital congestion, which is becoming increasingly important with multiplying constellations of satellites. A third research project investigated the public's willingness to pay for space debris mitigation. The study follows similar methodologies to that outlined in Chapter 3 of the OECD report on space

[59] European Space Agency. *The Space Economy in 2024: Market Trends and Growth Opportunities*. ESA Business Applications and Space Solutions Office, 2024. https://space-economy.esa.int/documents/b61btvmeaf6Tz2osXPu712bL0dwO3uqdOrFAwNTQ.pdf.

[60] European Space Agency. *ESA's Annual Space Environment Report 2024*. European Space Operations Centre, 2024. https://www.sdo.esoc.esa.int/environment_report/Space_Environment_Report_latest.pdf.

[61] N. Adilov, P. Alexander, and B. Cunningham, "An Economic 'Kessler Syndrome': A Dynamic Model of Earth Orbit Debris," *Economics Letters* 166 (2018): 79–82. https://doi.org/10.1016/j.econlet.2018.02.025.

[62] M. Undseth, C. Jolly, and M. Olivari, 2020. "Space Sustainability: The Economics of Space Debris in Perspective," *OECD Science, Technology and Industry Policy Papers*, no. 87. OECD Publishing, Paris. https://doi.org/10.1787/a339de43-en.

[63] European Space Agency (ESA). 2023. *Annual Space Environment Report 2023*. ESA Space Debris Office. https://www.sdo.esoc.esa.int/environment_report/Space_Environment_Report_latest.pdf.

sustainability and provides a good understanding of public support for funding space sustainability initiatives. These projects encourage international cooperation and collaboration between universities, space agencies, and private sector actors to increase comparability and policy relevance.[64] In so doing, such work attempts to contribute to the future of space governance by bringing together diverse perspectives on space debris and sustainability.[65]

3. 3 The OECD Project on the Economics of Space Sustainability

As highlighted by the OECD 2024 report entitled "*The Economics of Space Sustainability: Delivering Economic Evidence to Guide Government Action*",[66] in 2019, the OECD Space Forum of the Directorate for Science, Technology and Innovation launched a significant undertaking related to space sustainability, with a particular focus on the economics of space debris. This was supported by key members including NASA, the Canadian Space Agency, the UK Space Agency, CNES, and the German Aerospace Center in addition to several commercial satellite operators, to further bring on board a multitude of industry perspectives. Through Phase 1 (2020-2021), the Forum did the first comprehensive economic analysis of space debris. This resulted in the seminal report by Undseth, Jolly, and Olivari (2020) laying the foundation for further exploration of this issue. This call expanded in Phase 2 (2022-2023) to include global academic contributions, welcoming master's and PhD students, faculty, and researchers to provide thought leadership on three key questions: the value of space-based infrastructure, the economic consequences of space debris, and costs and benefits for various policy approaches. Combined, over the two phases, close to 30 research teams from 11 countries gave multifaceted views ranging from engineering to law, environmental management, and economics.[67]

Conclusion

In light of the above, while the emergent space economy offers great opportunities for technological development and economic growth, it is equally challenging to sustainability. The increasing proliferation of space activities, commercial and international, underlines the responsibility taken for the continuity of space as a viable domain for future generations. Sustainability in space is described not just as mitigating further space debris and preserving the

[64] P. Anz-Meador, J. Opiela, and J. Liou. 2022. *History of On-Orbit Satellite Fragmentations: 16th Edition*. NASA/TP-20220019160. NASA Orbital Debris Program Office. https://orbitaldebris.jsc.nasa.gov/library/hoosf_16e.pdf.

[65] OECD. 2024. *The Economics of Space Sustainability: Delivering Economic Evidence to Guide Government Action*. OECD Publishing. Paris. https://doi.org/10.1787/b2257346-en.

[66] OECD, "*The Economics of Space Sustainability: Delivering Economic Evidence to Guide Government Action*."

[67] OECD, "*The Economics of Space Sustainability: Delivering Economic Evidence to Guide Government Action*."

orbital environment but also in terms of long-term economic growth that does not compromise the environmental integrity of space. Ultimately, it requires integration on all levels in space operation and activities if the space economy is to develop sustainably without compromising the space environment: from regulatory measures that stimulate responsible behavior to technological innovations with minimum environmental impact and internationally coordinated management of the Common Heritage of Mankind. A balance between economic growth and environmental stewardship will be key to whether space exploration, commercialization, and settlement can continue to advance while making the benefits of space accessible for future generations.

Strategies for the Protection of Landmine Victims; A Restorative Justice Approach

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ABSTRACT *In the current context of criminal law, the rehabilitation and compensation of those affected by landmines pose significant difficulties that require a creative and comprehensive approach. The research paper, titled "Strategies for the Protection of Landmine Victims: A Restorative Justice Approach," aims to investigate and outline effective strategies that go beyond traditional punitive legal systems. Instead, the paper seeks to incorporate the principles of restorative justice into the rehabilitation of landmine victims. This study aims to examine current legal mechanisms and their limitations in effectively addressing the complex needs of victims. It endeavours to identify restorative practices that prioritize healing, compensation, and the reintegration of victims into society. By doing so, it intends to ensure the protection and well-being of victims. This paper presents a comprehensive model that utilizes restorative justice as a crucial instrument for safeguarding landmine victims. The model is supported by a variety of case studies, international legal precedents, and theoretical frameworks. This text critically analyzes the capacity of restorative justice to promote communication between victims and offenders, cultivate community backing, and enforce reparative actions that adequately tackle the physical, psychological, and socio-economic consequences of landmine injuries. The research discusses victim protection by using a multidisciplinary approach that includes legal analysis, victimology, and human rights advocacy. It aims to provide practical recommendations for policymakers, legal practitioners, and civil society organizations involved in the fight against landmines and the pursuit of justice and rehabilitation for the victims.*

KEYWORDS *Restorative Justice, Landmine Victims, Victimology and Landmines, International Humanitarian Law, Legal Frameworks.*

1. Introduction

The menace of landmines remains one of the most daunting and persistent challenges in post-conflict regions around the globe. Despite extensive demining efforts and international treaties aimed at curbing their use, the legacy of landmines continues to inflict harm on civilian populations, long after conflicts have ceased. The insidious nature of landmines lies not only in their

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capacity to maim or kill unsuspecting individuals but also in their prolonged impact on communities, hindering economic development and fostering a climate of fear and instability. As survivors grapple with the physical and psychological scars left by landmine incidents, the need for innovative legal and humanitarian responses becomes ever more critical. Against this backdrop, the concept of restorative justice emerges as a compelling framework, offering a pathway to healing and rehabilitation that transcends the limitations of traditional legal mechanism.[1] Originating within the realm of criminal justice as a means to repair the harm caused by criminal behavior, restorative justice facilitates dialogue and understanding among victims, offenders, and the community. It seeks to address the needs of victims, ensure accountability of perpetrators, and restore social harmony. In the context of landmine victims, restorative justice aligns with the principles of international humanitarian law and victimology, emphasizing a victim-centered approach that acknowledges the unique challenges faced by this vulnerable group.[2] The relevance of restorative justice to the plight of landmine victims is manifold. By focusing on the restoration of individuals and communities, this approach underscores the importance of acknowledging the suffering of victims, facilitating their physical and psychological recovery, and integrating them back into society. It also calls for a broader understanding of accountability, one that encompasses not only the direct perpetrators but also the entities responsible for the proliferation and use of landmines. Furthermore, restorative justice principles can guide the development of policies and programs that prioritize the well-being of victims, ensuring that legal and humanitarian efforts are tailored to their specific needs and circumstances. This paper posits that embedding restorative justice principles within the legal framework offers a nuanced and effective approach to addressing the complex needs of landmine victims.[3] It advocates for a comprehensive strategy that integrates restorative justice with international humanitarian law, aiming to enhance legal and humanitarian remedies available to landmine survivors. By doing so, it not only seeks to provide immediate support and relief to individuals affected by landmines but also to contribute to the broader objectives of peacebuilding and reconciliation in post-conflict scenarios. Through a detailed exploration of restorative justice principles, the plight of landmine victims, and the potential for integration with international humanitarian law, this paper underscores the transformative potential of

[1] Elmar G. Weitekamp and Stephan Parmentier, "Restorative Justice as Healing Justice: Looking Back to the Future of the Concept," *Restorative Justice* 4, no. 2 (May 3, 2016): 141–47, https://doi.org/10.1080/20504721.2016.1197517.

[2] Jo-Anne Wemmers, "Restorative justice for victims of crime: A victim-oriented approach to restorative justice," *International Review of Victimology* 9, no. 1 (2002): 43–59.

[3] Yana Priyana, Abdul Aziz Assayuti, and Muhamad Romdoni, "Exploring the Effectiveness of Restorative Justice Practice in Criminal Law System," *West Science Law and Human Right*s 1, no. 3 (2023): 107–114.

restorative justice in redefining legal and humanitarian responses to one of the most pressing issues of our time.

2. Restorative Justice: A Theoretical Overview Tailored to Landmine Victims

Restorative justice represents a paradigm shift in addressing the aftermath of criminal acts, focusing on the needs of the victims, the responsibility of the offenders, and the role of the community in facilitating healing. This approach diverges from traditional punitive justice systems, which primarily aim at punishing the offender, often leaving the needs of the victims and the community unaddressed. Restorative justice emphasizes healing the harm caused by criminal behavior and restoring the relationships affected by the crime, including the relationship between the victim and the offender, as well as the broader community. The principles of restorative justice — accountability, reparation, and engagement — are particularly relevant in the context of landmine victims.[4]

Historically, restorative justice has its roots in the practices of indigenous communities, where repairing the harm and restoring harmony within the community were prioritized over punishment. In modern times, it has been increasingly adopted in criminal law systems around the world, recognized for its potential to contribute to more meaningful justice processes. It focuses on dialogue and mediation between the victim and the offender, facilitated by community involvement, aiming to achieve a consensus on how to address the harm caused and promote reconciliation.[5]

The application of restorative justice principles to the rehabilitation of landmine victims requires a tailored approach. This involves not only addressing the immediate physical injuries but also providing psychological support, facilitating social reintegration, and ensuring economic empowerment. For instance, victim-offender mediation, a common restorative practice, might be adapted to include discussions with representatives of parties responsible for landmine laying, focusing on acknowledgment of harm and commitment to victim support. This shift in perspective requires reimagining legal frameworks to prioritize victim support and community restoration. It involves recognizing victims of landmines not just as passive recipients of aid but as active participants in the justice process. This participatory approach aligns with the core principles of restorative justice, fostering environments where victims can express their needs and have a say in the support and reparations they receive.

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[4] Guillermo Gorrin Castellano, "'as Long as There's Conflict, There Will Be Landmines': Comparing Technocratic and Community, Victim-Based Approaches to Landmine Action and Victim Identification in the Context of the Principles of Non-Repetition and Remedies," University Digital Conservancy Home, January 1, 1970, https://conservancy.umn.edu/items/c58db969-41ae-4cd0-80aa-e0622cb5af0d.

[5] Sigifredo Castell-Britton, "Speaking about restorative justice," June 21, 2024. https://doi.org/10.32388/4xo9q2.

Moreover, the emphasis on community involvement in restorative justice can significantly contribute to the destigmatization and reintegration of landmine victims. Community-based programs that focus on understanding the plight of victims, coupled with initiatives aimed at raising awareness about landmines, can foster solidarity and support for victims within their communities. Implementing restorative justice principles in support systems for landmine victims challenges existing legal and humanitarian paradigms. It requires a concerted effort from national governments, international organizations, and civil society to create legal frameworks that are flexible, victim-centered, and capable of addressing the complex realities of landmine injuries.

In conclusion, restorative justice offers a promising theoretical framework for enhancing support and rehabilitation for landmine victims. By focusing on healing, accountability, and community involvement, it provides a holistic approach to addressing the needs of victims, promoting their rights, and facilitating their reintegration into society. The integration of restorative justice principles into international humanitarian law and victim support systems represents a critical step towards achieving justice and dignity for landmine victims, paving the way for a future where the scars of conflict can be more fully healed.[6]

3. Understanding the Plight of Landmine Victims through Victimology

Victimology, with its focus on the study of victims and the impacts of victimization, serves as a vital lens through which to examine the plight of landmine victims. It not only highlights the immediate dangers posed by landmines but also delves into the multifaceted challenges victims face, encompassing physical trauma, psychological distress, social stigma, and economic hardship. This comprehensive view underscores the necessity for a nuanced approach to support and rehabilitation, one that extends beyond the immediate aftermath of injury to consider the long-term well-being of the victim.

3. 1 Landmine victims endure severe physical trauma, often resulting in debilitating injuries that necessitate amputations, ongoing medical treatment, and a challenging path to physical recovery

The abrupt transition to living with a disability profoundly affects victims, altering their sense of self and future prospects. However, the impact of landmines is not solely physical; psychological trauma also plays a significant role, with many victims grappling with PTSD, anxiety, and depression. These mental health challenges can be as incapacitating as the physical injuries, emphasizing the need for psychological support as a core component of the

[6] John Braithwaite, "Learning to Scale up Restorative Justice," *Restorative Justice in Transitional Settings*, February 12, 2016, 173–189, https://doi.org/10.4324/9781315723860-10.

rehabilitation process. Compounding the physical and psychological challenges are the social implications of landmine injuries. Victims frequently encounter social stigma and discrimination, fueling a sense of isolation and marginalization.

3. 2 Despite the clear need for holistic support, current legal and policy frameworks often fall short in providing adequate assistance to landmine victims

The gaps in support and protection are evident in the lack of coordinated efforts to address the complete spectrum of victims' needs, from medical and psychological care to social reintegration and economic empowerment. This inadequacy points to the necessity of a victim-centered approach in designing legal remedies and rehabilitation programs, one that is informed by the principles of restorative justice and prioritizes the specific needs of each victim.

3. 3 The principles of restorative justice, with their focus on healing, accountability, and community involvement, offer a promising path forward

A victim-centered approach grounded in these principles would ensure that rehabilitation programs are not only comprehensive but also tailored to the individual needs of landmine victims. This approach necessitates a shift in perspective among policymakers and humanitarian organizations, recognizing the inherent dignity and rights of victims and committing to their full rehabilitation and societal reintegration.
To effectively implement a victim-centered approach, it is crucial to involve landmine victims in the development and execution of legal remedies and rehabilitation programs. This inclusion ensures that initiatives are responsive to the actual needs of victims, enhancing their effectiveness and impact. Moreover, adopting a restorative justice-informed approach requires accountability from both the perpetrators and the international community, emphasizing collective responsibility in supporting victim assistance programs.

3. 4 Despite the potential benefits of a victim-centered approach, several challenges must be addressed, including securing adequate funding, developing specialized support services, and fostering inclusive policies

Overcoming these obstacles demands a concerted effort from governments, non-governmental organizations (NGOs), and the international community, underscoring the importance of prioritizing the needs and rights of landmine victims. In conclusion, a thorough understanding of victimology illuminates the complex challenges faced by landmine victims and the critical gaps in current support systems. By embracing a comprehensive, victim-centered approach informed by restorative justice principles, it is possible to provide meaningful support to landmine victims, facilitating their recovery, reintegration, and

empowerment. This approach not only aligns with moral imperatives but is also essential for achieving justice and healing for those affected by landmines, ultimately contributing to a more compassionate and inclusive society.[7]

4. Integrating Restorative Justice with International Humanitarian Law for Landmine Victims

Integrating Restorative Justice with International Humanitarian Law (IHL) for landmine victims represents a significant shift towards a more victim-centered approach in addressing the aftermath of landmine injuries. This integration seeks to harmonize the principles of restorative justice—focusing on healing, accountability, and community involvement—with the legal structures of IHL, which are designed to protect individuals in conflict zones and ensure their rights. The merger of these two frameworks offers a promising pathway to enhance the support mechanisms for landmine victims, providing a more holistic and compassionate response to their needs. Restorative justice, with its emphasis on repairing the harm caused by criminal acts, presents a unique approach to understanding and addressing the needs of victims. By applying these principles to the context of landmine injuries, the international community can foster a more inclusive and participatory process that not only acknowledges the suffering of victims but also actively involves them in the healing process. This approach contrasts with traditional legal frameworks, which often prioritize punitive measures over the rehabilitation and reintegration of victims.[8]

International Humanitarian Law, primarily concerned with the protection of individuals during armed conflicts, sets the foundation for the legal rights of war victims, including landmine victims. However, IHL often lacks the mechanisms to ensure the comprehensive rehabilitation of victims and their full reintegration into society. By integrating restorative justice principles into IHL, there is a potential to bridge this gap, creating a more responsive and adaptive legal framework that prioritizes the well-being of landmine victims. One of the key integration points between restorative justice and IHL is the emphasis on victim participation. Restorative justice encourages the active involvement of victims in the justice process, allowing them to express their needs and preferences directly. Restorative justice recognizes the role of the community in facilitating healing and reconciliation. Similarly, integrating this principle into IHL can promote community-driven initiatives aimed at supporting landmine

[7] Maxwell Kerley, "Achieving Zero New Victims of Landmines," *UN Chronicle* 46, no. 2 (April 17, 2012): 56–59, https://doi.org/10.18356/6bb28742-en.

[8] Elizabeth Salmón and Juan-Pablo Pérez-León-Acevedo, "Reparation for Victims of Serious Violations of International Humanitarian Law: New Developments," *International Review of the Red Cross* 104, no. 919 (April 2022): 1315–43, https://doi.org/10.1017/s1816383122000297.

victims, fostering a sense of belonging and collective responsibility towards their rehabilitation.[9]

However, integrating restorative justice with IHL presents several challenges. One of the main challenges is the complexity of implementing restorative justice principles in the context of international law, which requires coordination among various stakeholders, including states, international organizations, and civil society. This complexity is compounded by the diverse legal systems and cultural contexts in which landmine victims are situated. Moreover, there are concerns about the compatibility of restorative justice with the established norms and practices of IHL. The emphasis of restorative justice on dialogue and reconciliation may conflict with the more formal and structured processes of international law. Addressing these concerns requires a careful balancing of the informal, flexible nature of restorative justice with the formal legal procedures of IHL.

The potential benefits of integrating restorative justice with IHL for landmine victims are significant. This approach can lead to more tailored and effective support mechanisms, addressing the physical, psychological, and social needs of victims. It can also enhance accountability by involving not only those directly responsible for landmine deployment but also the broader international community in the support and rehabilitation of victims. Furthermore, integrating restorative justice into IHL can promote a shift in legal and humanitarian responses to landmine injuries, moving away from a solely punitive approach towards one that emphasizes healing and restoration. This shift has the potential to redefine how the international community views and responds to the needs of landmine victims, placing greater emphasis on their rights and dignity.[10]

The integration of restorative justice principles into IHL also highlights the importance of international cooperation and solidarity in addressing the challenges faced by landmine victims. By fostering a collaborative approach, states and international organizations can pool resources and expertise to develop more comprehensive and effective support systems for victims. To facilitate this integration, it is essential to develop guidelines and best practices that can be adapted to different legal and cultural contexts. These guidelines should emphasize the importance of victim participation, community involvement, and the holistic rehabilitation of landmine victims, ensuring that these principles are reflected in the implementation of IHL provisions related to victim support. Moreover, capacity-building efforts are crucial to equip legal professionals, policymakers, and humanitarian workers with the knowledge and

[9] Timothy L.H. McCormack, "M. Sassòli; A.A. Bouvier, Eds., How Does Law Protect in War?: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, International Committee of the Red Cross: Geneva 1999, 1492 Pp. ISBN 2-88145-110-1.," *Netherlands International Law Review* 49, no. 2 (August 2002): 291, https://doi.org/10.1017/s0165070x00000504.

[10] Nancy Montgomery, Hillary Hook, and Hilary Murphy, *Restorative Justice in Post-Conflict Areas* (Cedarville University, 2014).

skills needed to apply restorative justice principles within the framework of IHL. Developing comprehensive evaluation mechanisms that can assess the effectiveness of support programs and policies from a restorative justice perspective is essential for continuous improvement and adaptation of strategies to better meet the needs of victims.[11]

In conclusion, the integration of restorative justice with International Humanitarian Law for landmine victims represents a promising approach to enhancing support mechanisms and redefining legal and humanitarian responses to landmine injuries. Despite the challenges, the potential benefits of a more holistic, victim-centered approach are clear. By prioritizing the healing and rehabilitation of victims, fostering accountability, and promoting community involvement, this integrated approach can contribute significantly to the well-being of landmine victims and support their journey towards recovery and reintegration into society.

5. Case Studies: Applying Restorative Justice to Support Landmine Victims

Given the complexity and depth required to thoroughly analyze and discuss the integration of restorative justice principles into supporting landmine victims through case studies, a comprehensive exploration demands an examination that stretches beyond a simple overview. Let us delve into the nuances of this integration, dissecting its impact on victim support mechanisms, the inherent challenges faced, and the transformative potential it holds for redefining victim assistance at both the community and legal levels.[12]

5. 1 Colombia: A Beacon for Community-Based Rehabilitation Context and Implementation

In the wake of prolonged armed conflict, Colombia faced a dire challenge in addressing the needs of landmine victims scattered across its rural landscapes. The adoption of community-based rehabilitation programs, underpinned by restorative justice principles, aimed to address this challenge head-on. These initiatives, spearheaded by NGOs alongside local communities, emphasized not just the physical rehabilitation of victims but also their psychological well-being and social reintegration.

Effectiveness and Challenges: The effectiveness of these programs was observed in their holistic approach to rehabilitation, offering victims a platform to engage in their recovery actively. By incorporating victims into advocacy

[11] E. Christine Evans, "Right to reparations in international law for victims of armed conflict: Convergence of law and practice?" (Phd diss., London School of Economics and Political Science, 2010).

[12] Martin Chitsama, "Building Sustainable Local Capacities for the Assistance of Landmine Victims in Southern Africa: A Concept from the Minefields of the Zambezi Basin Escarpment," *Journal of Conventional Weapons Destruction* 6, no. 3 (2002): 6.

roles, these programs succeeded in empowering individuals, thus fostering a stronger sense of community solidarity. However, challenges such as inadequate funding, limited reach in remote areas, and the ongoing stigma against victims of landmine injuries posed significant barriers to their broader implementation.[13]

Outcomes and Lessons Learned: The primary outcome was a marked improvement in the quality of life for participants, evidenced by enhanced mobility, psychological recovery, and reintegration into community life. A key lesson was the critical importance of tailoring restorative justice initiatives to fit the cultural and social fabric of affected communities, ensuring sustainability and effectiveness. Recommendations for future strategies include increasing investment in community-based programs and enhancing public awareness campaigns to combat stigma against landmine victims.

5. 2 Cambodia: Pioneering Victim-Offender Mediation

Context and Implementation:

Cambodia, with its tragic history of landmine contamination, introduced victim-offender mediation sessions as a novel approach to address the aftermath of landmine incidents. These sessions involved not just the victims but also former combatants engaged in demining efforts, providing a platform for dialogue, remorse, and reconciliation.

Effectiveness and Challenges: The dual focus on psychological relief for victims and the reintegration of former combatants presented a nuanced approach to reconciliation. The effectiveness of this model lay in its ability to foster personal healing and communal harmony. However, the anonymity of mine layers and the logistical challenges of organizing mediation sessions in heavily mined regions presented significant obstacles.

Outcomes and Lessons Learned: The notable outcomes included improved mental health among participants and a decrease in community tensions. The initiative highlighted the importance of incorporating traditional and local practices in restorative justice efforts to enhance their acceptability and impact. The recommendation moving forward is to expand these mediation sessions through increased support and training for facilitators, ensuring a broader and more impactful implementation.

5. 3 Bosnia and Herzegovina: Legal Advocacy for Reparations

Context and Implementation

The post-conflict landscape of Bosnia and Herzegovina necessitated a shift towards securing legal recognition and reparations for landmine victims. This

[13] Sally Campbell Thorpe, “Integrated Mine Action: Lessons and Recommendations from Austcare's Program in Cambodia,” Global CWD Repository. 139, 2007. https://commons.lib.jmu.edu/cisr-globalcwd/139.

was pursued through strategic litigation and public advocacy, aimed at holding governments accountable and ensuring comprehensive support for victims.
Effectiveness and Challenges: These legal advocacy efforts led to tangible outcomes, including the establishment of compensation funds and enhanced governmental commitment to victim assistance. However, navigating the complex legal system and ensuring consistent government support remained challenging, highlighting the need for persistent advocacy and international support.
Outcomes and Lessons Learned: The success of legal advocacy in Bosnia and Herzegovina underscored the potential of restorative justice principles within legal frameworks to secure reparations and acknowledgment for victims. The lesson here is the power of legal advocacy in effecting systemic change, with a recommendation for similar strategies to be adopted in other post-conflict settings to ensure the rights and needs of landmine victims are adequately addressed.

5. 4 Redefining Support for Landmine Victims

These case studies exemplify the diverse applications and profound impact of restorative justice principles in supporting landmine victims. From community-led rehabilitation in Colombia to victim-offender mediation in Cambodia, and legal advocacy in Bosnia and Herzegovina, each case presents unique insights into the challenges and effectiveness of these approaches. The overarching lesson is the undeniable value of integrating restorative justice into broader strategies for landmine victim support. Recommendations for future initiatives include a greater emphasis on community involvement, expanded legal advocacy, and the incorporation of restorative practices into international humanitarian efforts.[14] By doing so, the global community can move closer to achieving comprehensive, compassionate, and effective support for victims of landmine injuries, paving the way for their healing and reintegration into society.

6. Strategies for Enhancing Legal and Humanitarian Support for Landmine Victims through Restorative Justice

Embedding restorative justice principles within legal frameworks offers a transformative approach to enhancing the support and protection of landmine victims. This requires a comprehensive revision of existing laws, policies, and practices to ensure they are victim-centered, holistic, and conducive to the healing and rehabilitation process. The development and implementation of such legal frameworks necessitate a multi-dimensional strategy, involving legislative revision, policy formulation, and the fostering of international cooperation, all aimed at improving the plight of landmine victims. Based on

[14] GICHD, “A Study of Local Organisations in Mine Action,” Global CWD Repository. 122, 2004. https://commons.lib.jmu.edu/cisr-globalcwd/122.

the discussed cases, the focus on increasing the protection of landmine victims through restorative justice should be include the following:

6. 1 Revising Legal Definitions

A critical starting point involves expanding legal definitions to encapsulate the multifaceted harm caused by landmines. This revision should reflect the physical, psychological, social, and economic impacts of landmine injuries, ensuring that legal remedies address all aspects of a victim's recovery. By acknowledging the comprehensive nature of the harm, legal systems can better cater for the holistic needs of victims, providing a foundation for more empathetic and effective support mechanisms.[15]

6. 2 Victim-Centered Legislation: Crafting or amending legislation to prioritize the rights and needs of landmine victims is paramount

Such laws should not only facilitate access to medical and psychological care but also ensure opportunities for vocational training, education, and social reintegration services. Legislation that embodies the ethos of restorative justice by placing victims at the heart of legal processes ensures that their voices are heard and their needs are adequately met. It is about shifting the legal perspective from a focus on punitive measures to one of healing and empowerment.[16]

6. 3 Reparations and Compensation: Legal frameworks must unequivocally mandate reparations and compensation for landmine victims

This includes not only financial assistance to cover medical expenses and lost income but also comprehensive support for rehabilitation and livelihood development. These reparations should be streamlined and made readily accessible to victims, reducing bureaucratic obstacles and ensuring timely assistance.[17] By legally enshrining the right to reparations, states acknowledge their responsibility towards victims and take concrete steps towards ameliorating their suffering.

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[15] Cordula Droege, and Eirini Giorgou. "How International Humanitarian Law Develops." *International Review of the Red Cross* 104, no. 920–921 (August 2022): 1798–1839. https://doi.org/10.1017/s1816383122000893.

[16] P. Preston Reynolds, "Landmines and Sustainability: Remaking the world through global citizenship, activism, research and collaborative mine action," in *Development in Crisis*, ed. Rae Lesser Blumberg and Samuel Cohn (Routledge 2015), 204–222.

[17] "What Rights for Mine Victims? Reparation, Compensation: From Legal Analysis to Political Perspectives - World." ReliefWeb, April 1, 2005. https://reliefweb.int/report/world/what-rights-mine-victims-reparation-compensation-legal-analysis-political-perspectives.

6. 4 Community-Based Rehabilitation: Legal recognition and support for community-based rehabilitation programs are essential

Laws and policies should endorse and facilitate initiatives that engage victims, communities, and even former combatants in the rehabilitation process. Such programs, grounded in the principles of restorative justice, emphasize the collective responsibility for healing and empowerment, fostering a supportive and inclusive environment for victims. Legal backing for these initiatives ensures they receive the necessary resources and recognition, enhancing their effectiveness and sustainability.[18]

6. 5 International Cooperation: The complexities of landmine contamination and victim assistance transcend national borders, making international cooperation crucial

Legal frameworks should promote and facilitate such collaboration, engaging a range of stakeholders including international organizations, donor countries, and NGOs. Through treaties, agreements, and collaborative projects, countries can pool resources, share expertise, and collectively enhance the support provided to landmine victims.

Implementing these strategies requires a concerted effort from all levels of government, the legal community, and international partners. By revising legal definitions, enacting victim-centered legislation, ensuring reparations and compensation, supporting community-based rehabilitation, and fostering international cooperation, legal frameworks can be aligned with the principles of restorative justice.[19] This alignment not only improves the legal and humanitarian support for landmine victims but also advances the broader goals of justice, healing, and reconciliation in post-conflict societies.

The roles and responsibilities of stakeholders in fostering a restorative justice approach for landmine victims are pivotal in the successful integration of these principles into legal and humanitarian frameworks. Each stakeholder, from national governments and international organizations to civil society and former combatants, plays a unique role in advancing the support and rehabilitation of landmine victims. By collaboratively working towards the common goal of enhancing victim support, these stakeholders can create a more inclusive,

[18] Heather Michelle Aldersey, Xiaolin Xu, Venkatesh Balakrishna, Maholo Carolyne Sserunkuma, Alaa Sebeh, Zambrano Olmedo, Reshma Parvin Nuri, and Ansha Nega Ahmed, "The Role of Community-Based Rehabilitation and Community-Based Inclusive Development in Facilitating Access to Justice for Persons with Disabilities Globally,"*The International Journal of Disability and Social Justice* 3, no. 3 (2023): 4–26.

[19] Christian Tomuschat, "Reparation in favour of individual victims of gross violations of human rights and international humanitarian law," in *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international*, ed. Marcelo Kohen (Brill Nijhoff, 2007), 569–590.

compassionate, and effective system for addressing the needs of those affected by landmines.

6. 6 National Governments: As the primary architects and enforcers of legal frameworks, national governments bear a significant responsibility in adopting restorative justice principles for landmine victim support

This involves enacting and implementing laws that prioritize victim rights and needs, ensuring adequate funding for victim support programs, and fostering an environment that facilitates the rehabilitation and reintegration of victims. Governments should also engage in international collaborations to adopt best practices and secure resources for victim assistance.[20] Moreover, creating national policies that encourage community participation and the inclusion of victims in the decision-making processes is crucial for a restorative justice approach.

6. 7 International Organizations: Organizations such as the United Nations, the International Committee of the Red Cross, and various UN agencies play a critical role in promoting restorative justice on a global scale

These entities can advocate for the adoption of restorative justice principles in member states, provide guidance and resources for implementing these principles, and facilitate international cooperation and funding. Additionally, international organizations can serve as platforms for sharing best practices, conducting research on effective victim support strategies, and raising global awareness about the challenges faced by landmine victims.[21]

6. 8 Civil Society: Non-governmental organizations (NGOs), community groups, and associations of landmine victims form the backbone of on-the-ground support for victims

These organizations are instrumental in delivering direct assistance, including medical care, psychological support, and vocational training. Civil society can also play a vital role in advocating for policy changes, raising public awareness, and mobilizing resources for victim support. Furthermore, these groups can

[20] Elizabeth Rushing, "Protecting the Innocent, the Land, and the Body: Traditional Sources of Restraint on Landmine Use," Humanitarian Law & Policy Blog, March 23, 2023, https://blogs.icrc.org/law-and-policy/2023/03/23/protecting-innocent-restraint-landmine/.

[21] Sia Lucio, "Restorative justice: An international perspective." Accessed October 6, 2024. https://www.educ.cam.ac.uk/research/programmes/restorativeapproaches/seminartwo/SiaLucio.pdf.

facilitate the engagement of victims in restorative justice processes, ensuring their voices are heard and their needs are addressed.[22]

6. 9 Former Combatants: Involving former combatants in restorative justice initiatives offers a pathway to reconciliation and community healing

Former combatants can participate in demining efforts, contribute to educational programs about the dangers of landmines, and engage in dialogue with victims as part of restorative justice processes. This engagement not only aids in the rehabilitation of former combatants but also contributes to rebuilding trust and fostering understanding within affected communities.
The collaboration among these stakeholders is fundamental to embedding restorative justice in support systems for landmine victims. Each stakeholder brings unique resources, perspectives, and capabilities to the table, making their cooperation essential for creating a holistic and effective approach to victim assistance.
Implementing restorative justice approaches for landmine victims is met with a variety of barriers, ranging from logistical challenges to deeply ingrained societal attitudes. Understanding these barriers is crucial for developing effective strategies to enhance legal and humanitarian support for landmine victims. Similarly, identifying solutions to overcome these challenges is essential for the successful application of restorative justice principles in supporting these individuals.[23]

6. 10 Lack of Awareness: One of the most significant barriers is the general lack of awareness about restorative justice principles among policymakers, legal practitioners, and the broader public

This lack of understanding can lead to a hesitancy to adopt restorative justice approaches within existing legal and support frameworks. Solution: To address this, comprehensive awareness campaigns are needed, along with education programs targeted at legal professionals, policymakers, and community leaders. Such initiatives should highlight the benefits of restorative justice for landmine victims and showcase successful case studies.

[22] Elizabeth Salmón and Juan-Pablo Pérez-León-Acevedo, "Reparation for Victims of Serious Violations of International Humanitarian Law: New Developments," *International Review of the Red Cross* 104, no. 919 (April 2022): 1315–43, https://doi.org/10.1017/s1816383122000297.
[23] Ana M.Nascimento, Joana Andrade, and Andreia de Castro Rodrigues, "The psychological impact of restorative justice practices on victims of crimes—a systematic review," *Trauma, Violence, & Abuse* 24, no. 3 (2023): 1929–1947.

6. 11 Insufficient Funding: Implementing restorative justice initiatives often requires substantial financial resources, which may not be readily available, particularly in post-conflict regions most affected by landmines

Solution: Overcoming this barrier requires innovative funding strategies, including international partnerships, public-private partnerships, and dedicated fundraising campaigns. Additionally, advocating for the allocation of government resources towards victim support programs that incorporate restorative justice principles can help secure necessary funding.[24]

6. 12 Integrated Support Services: Effective support for landmine victims must be comprehensive, addressing not just physical injuries but also psychological, social, and economic needs

Developing integrated support services requires a multidisciplinary approach, bringing together healthcare providers, social workers, vocational trainers, and legal advisors to create a coordinated support network for victims.

6. 13 Community Engagement: Successful implementation of restorative justice requires active community engagement and participation

Solution: Fostering community involvement can be achieved through public forums, community workshops, and the inclusion of community leaders in the planning and execution of restorative justice initiatives.

6. 14 Monitoring and Evaluation: To ensure the effectiveness of restorative justice-based programs, robust monitoring and evaluation mechanisms are essential

Solution: Implementing these mechanisms involves developing clear indicators of success, regular assessment of programs, and feedback loops that allow for the continuous improvement of support services.

6. 15 Innovative Funding Models: Traditional funding mechanisms may not adequately support the holistic and integrated approaches required by restorative justice

Solution: Exploring innovative funding models, such as social impact bonds or crowdfunding campaigns, can provide alternative sources of financial support for restorative justice programs.

[24] Jeffrey M Pavlacic, Karen Kate Kellum, and Stefan E Schulenberg, "Advocating for the Use of Restorative Justice Practices: Examining the Overlap between Restorative Justice and Behavior Analysis," Behavior analysis in practice, August 25, 2021, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8385698/.

6. 16 Advocacy and Policy Engagement

Engaging effectively with policymakers and advocating for the integration of restorative justice into legal frameworks can be challenging. Solution: Strategic advocacy efforts, including policy briefs, stakeholder meetings, and public campaigns, can help to influence policy and legislative changes.

6. 17 Tailoring Approaches to Local Contexts: Restorative justice initiatives must be sensitive to the cultural, social, and economic contexts of the communities they serve

Solution: This requires a participatory approach to program design, involving local communities in the development and implementation of restorative justice initiatives to ensure they are culturally appropriate and effective.
By addressing these barriers and implementing targeted solutions, stakeholders can enhance the support provided to landmine victims through restorative justice approaches. The final synthesis of this discussion brings together the insights gained from the exploration of embedding restorative justice within legal and humanitarian frameworks, the pivotal roles of various stakeholders, the barriers to implementation, and the array of solutions to overcome these challenges. This comprehensive approach underscores the transformative potential of restorative justice in enhancing support systems for landmine victims, paving the way for their holistic healing, empowerment, and reintegration into society.[25]

7. Conclusion

In the scholarly examination of enhancing legal and humanitarian frameworks to support victims of landmine incidents, the discourse has methodically navigated through the intricacies of integrating restorative justice principles. This comprehensive analysis has illuminated the substantive value and multifaceted advantages of a restorative justice approach, not solely for addressing the immediate and extensive needs of landmine victims but also for cultivating a more inclusive and compassionate societal and legal response. Central to this discourse is the emphasis on restorative justice, with its foundational focus on healing, empowerment, and communal reconciliation, offering a transformative paradigm for reevaluating the efficacy of existing legal and humanitarian mechanisms aimed at assisting those impacted by landmines. The advocacy for legislative reforms that encapsulate a wider recognition of victimization, alongside the call for a holistic approach to victim

[25] Guillermo Gorrin Castellano, "'as Long as There's Conflict, There Will Be Landmines': Comparing Technocratic and Community, Victim-Based Approaches to Landmine Action and Victim Identification in the Context of the Principles of Non-Repetition and Remedies," University Digital Conservancy Home, January 1, 1970, https://conservancy.umn.edu/items/c58db969-41ae-4cd0-80aa-e0622cb5af0d.

support that includes the active involvement of victims in their rehabilitation journey, underscores the imperative for a support system grounded in empathy and responsiveness. This perspective challenges conventional methodologies of victim assistance, advocating for a shift towards practices that address not only the corporeal injuries inflicted by landmines but also the social and psychological scars borne by victims.

Reflecting upon the integration of restorative justice within the ambit of international humanitarian law (IHL), it is manifest that such a confluence could markedly elevate the level of protection and support extended to landmine victims internationally. The infusion of restorative justice principles within IHL can engender a profound comprehension of victimhood, emphasizing comprehensive rehabilitation and the pivotal role of communities in the healing continuum. As this discourse reaches its culmination, the imperative to embrace restorative justice as a foundational principle in the development of victim support systems is unequivocally clear.

The path towards actualizing the potential of restorative justice in aiding landmine victims is undeniably complex, characterized by multifarious challenges. Nevertheless, the insights and strategic orientations delineated within this treatise offer a blueprint for advancement. It is through a collective dedication to the principles of restorative justice, an unwavering commitment to innovation, and a steadfast adherence to empathy and compassion that the aspiration to transform the lives of landmine victims can be realized. Let this scholarly endeavor serve as a clarion call: to champion restorative justice as the cornerstone of our methodologies in supporting landmine victims, ensuring a future where each individual afflicted by landmines is accorded the care, respect, and opportunities they unequivocally deserve.

The Aggrieved Party of a Contractual Breach: Its Position, Rights and Duties, Limits of Sacrifices Under Hungarian and Comparative Law Instruments

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ABSTRACT *A diligent and vigorous obligee may prepare for the performance or for the breach of a contract by its co-contractant, by applying measures appropriate to the circumstances, beginning from the precontractual phase, through complete or partial performance, or an accidental breach, right until the dissolution of the contractual relationship. The objectives of the entitled party are to foster performance or to find the less harmful outcome if a breach occurs. These objectives are promoted by the general principles of proportionality, the equilibrium and safety of obligations, and good faith. The aggrieved party has rights but obligations as well, not only to provide services but also to respect and protect the infringing party's interests. With allowances and sacrifices, if necessary. What are the rights and obligations of an aggrieved party, what kind of conduct to carry out, and what assistance is provided by Hungarian and comparative legal instruments such as the Civil Code, the CISG and the UPICC? These questions are subjected to examination in the paper.*

KEYWORDS *obligations, contractual equilibrium, breach of contract, system of remedies, limits of sacrifices by an aggrieved party, Civil Code, CISG*

1. What can an aggrieved party do?

The paper desires to provide a survey on the cases of breach of contract, with the examination of the entitled party's position, through the dispositions of three legal instruments. The mainstream of legal thinking focuses on the obligor, approaching it from the aspect of the interests of the obligee. This paper chooses the opposite direction, wishing to give incentives for more conscious contractual conduct. It places and assesses the instruments and possibilities available for the aggrieved party in their legal environment.
Questions of conclusion of a contract, topics which had gained independence as a separate branch of law, like the protection of consumers, public procurement, data protection as well as contracts of the digital world remain outside the scope of this paper.

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2. Obligations, contracts, interests

The situation of the aggrieved party in a contractual breach can be better understood by positioning it within the context of the obligations, the contract and the interests.

Obligations provide a broad framework for the ensemble of contractual rights and duties, as laid down in Section 6:1 of the Hungarian Civil Code. Their significant characteristics are the enforceability and satisfaction of interests, destination and purpose, and the equilibrium of interests.[1] The limits of the obligations are general social values and prohibitions, self-limitation for the purpose of belonging to a community, and the maintenance of equilibrium.

The notion of contract differs from country to country but, everywhere, it expresses an act arising from consensus which creates obligations. The contract belongs to the parties' private autonomy. Business will and consensus is needed for its establishment and formation. It is characterized by mutuality, the equality of the parties, the purpose, which is the satisfaction of interests. Parties must seek performance, in accordance with the principle of *pacta sunt servanda*. In this regard, the parties are standing on the same side. A decisive element in performance is the conduct of the contracting parties, to be interpreted in the light of all the circumstances. The contractual relationships of the digital world turn away from the traditional schemes and rules of contract law, establishing a grave asymmetry to the detriment of private interests through unidentified contractors who are hidden from the local public authorities. Neither a regulated type of contract nor the clients are identifiable, therefore, it is better to mention data manager and concerned person instead of parties, while mutuality has been replaced by one-sided subordination and defencelessness. The law finds its first reactions to this situation in the general principles of law and flexibility.[2]

Interests provide the driving force for the obligations, for the contracts, and for the law, as well. Interests exist and are interpreted in the context of social coexistence, in perpetual change, in the triangle of private person – society – public power, seeking equilibrium. The purpose-dependent research and assessment of interests may promote this aim.

3. The role of law concerning contracts. The norms taken as a basis for the examination

The role of the law is to explore the interests, to elaborate the aspects for their assessment and ranking, to shape the regulatory environment of the contract and, even broader, of the social frameworks of obligations. It offers solutions or renders such solutions imperative. The purpose of the law is to give inspiration and incentives for accomplishing the contracts and, also, to protect injured

[1] László Kelemen, *A szerződésen alapuló kötelem* (M. Kir. Ferenc József-Tudományegy. barátainak Egyesülete, 1941), 4–6.

[2] Attila Menyhárd, "A technológiai fejlődés hatása az alapjogok érvényesülésére," *Közjegyzők Közlönye* 26, no. 3 (2022): 10.

interests, based on elaborated methods, international tendencies and developments in comparative private law. Nevertheless, it cannot discharge the parties from seeking equilibrium and proportionality, from being sensitive to the others' interests, from continuously assessing and balancing their interests.

The paper invokes three legal norms, embedding them in their historical and legal context. These are the Hungarian Civil Code, the CISG and the UPICC, which three instruments present the first inconvenience for the aggrieved party: differences in terminology.

The Hungarian Civil Code is Act V of 2013 on the Civil Code (hereinafter: CC), having been in force since the 15th of March 2014, its Hungarian abbreviation is Ptk. During the codification, it could build on the systematization and contractual dispositions of the previous code of 1959, but also on the brave results of the codification of private law and commercial law before World War II, and comparative private law comprising the norms of the European Union.[3]

The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), with its date of adoption of 11th of April 1980 and entry into force of 1st of January 1988, - prepared with significant Hungarian legal contribution – is a unified private law instrument with its own rough terminology, a model for national and international private law codifications. It offers a coherent system, without lacunae, to manage the difficulties of performance of a contract, comprising foreseeability, a system of assessments, subsystems of consequences and remedies. The Convention bears a clear message inviting for performance and for a holistic mindset. The provision on fundamental breach – although it is to be evaded – takes its position in article 25, as a point of reference, right before the rules of basic duties and conformity, encompassing the whole norm. The CISG does not cover every contractual situation, leaving room for national legislations, and for other instruments of comparative private law. The CISG is flexibly binding, meaning regulated possibilities of excluding its application, in the Participating States or Contracting States, like Hungary, and between contracting parties.

The UNIDROIT Principles of International Commercial Contracts, abbreviated to: UPICC, are international restatements of the general principles of contract law,[4] which supplement the CISG. They provide detailed rules, with the objective of worldwide application. Following the first edition in 1994, the "Principles" were revised, the latest version was published in 2016.

[3] Ministerial interpretation of the CC, Miniszteri indoklás a polgári törvénykönyv tervezetéhez, Általános rész, III. fejezet, Hagyomány és újítás. Külföldi példák. 4.

[4] UNIDROIT International Institute for the Unification of Private Law, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Published by the International Institute for the Unification of Private Law (UNIDROIT), Rome, xxviii, https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf. The legal instruments used in this paper are not independent from each other and from other norms of comparative private law.

4. The injured party

The protagonist of this paper is a party to a contract who has suffered or may potentially suffer a contractual breach. In a synallagmatic legal relationship, within the framework of the ensemble of rights and duties, the party, who is entitled to a service, is bound to provide consideration at the same time. Its position is in continuous change between the obligee and obligor, depending on the circumstances. He must insist on the accomplishment of the obligations. His position is shaped and restricted parallelly with the whole obligation, by the circumstances.
Depending on the situation, its name by terminology is entitled, creditor, obligee, complaining party, aggrieved or injured party etc, compared to its co-contractor termed as the obligor, debtor, party in breach, infringing party, etc. Accomplishment is in the interest of the aggrieved party.
The breaching party is not 'patted on the shoulder', expressly *not* promoted by the civil law, however, its interests are not disregarded, the creditor is not allowed to ignore them.[5]
The entitled party's objectives are to foster performance in the first place and, in the second place, to find the less harmful outcome of an accidental breach. To achieve this, continuous monitoring and alignment with the changed situation is expected on its side, and a perpetual foresight of the unforeseeable.

5. A general overview of the aggrieved party's position

The party affected by a breach might trust in the obedience of all those concerned, in a conscious compliance for the sake of the accomplishment.[6] Its interests are qualified and ranked by the law, in adjustment to the already known or third parties, or those who might become third parties, like creditors of a debtor in bankruptcy.
The injured party's way of thinking is holistic, covering the type of contractual service, the sphere of concerned persons, the actual possibilities and dangers of performance, the allocated risks, accidental hardship and changes in circumstances. The injured party takes care of the equilibrium of colliding interests, keeps its own expectations reasonable, with a loyal regard to the co-contractant's interests.[7]
Among its express or implied duties, the entitled party is charged with some special obligations, namely, to vigorously facilitate performance, to prevent obstacles, to promote its co-contractant. Such obligations are the duty of giving notice and the mitigation of losses.

[5] László Leszkoven, *Szerződésszegés a polgári jogban* (Wolters Kluver Hungary Kft, 2018), 112.
[6] Salamon Beck, *Kötelemvalósulás* (Pesti Lloyd-Társulat Nyomdája, 1927), 10.
[7] Béni Grosschmid, *Fejezetek kötelmi jogunk köréből (1933) - [2_2. kötet]* (Grill Károly Könyvkiadó Vállalata, 1933), 865.

As the circumstances surrounding the contract are under continuous formation, the contracting party is under the permanent obligation to evaluate the situation and to adjust to the newcoming events. Even though remedies against non-performance are the most general tools of promoting accomplishment of obligations, these do not tend to be the exclusive resort. The entitled party may have recourse to rights expressed in norms and may get inspired by the laws regulating some neighbouring institutions, like anticipatory breach and mitigation of losses and, if necessary, it may use, by analogy, arguments in alien cases fitting the specific case.

6. Circumstances to be regarded and assessed

The circumstances of the conclusion and completion of a contract are to be collected and evaluated in the view of contractual complexity, for the purpose of finding the best answer to a breach.

6. 1 The characteristics of the obligation and the service

The main characteristics of the obligation and the service take the first place in the analysis. Here belong the specificity and conformity of the service, the participants with collaborators and identified or still unknown third parties and any unbalances between them, their individual interests and aptitude for performance, as well as the duration of the contract.

6. 2 The concept of breach

The breach changes the contract, it changes the operation of the agreed obligations and their intensity. It is the concept of the breach of contract which comes into play and follows a logical chain. It is to be decided if there is a breach or not. If yes, is it fundamental or not? If yes, can the contract be saved or not? The related analysis takes the breach into consideration together with all its essential circumstances, focusing on the aspects of contractual equilibrium and the principle of *favor contractus*. For establishing the consequences, it builds on the pillars of the detriment caused by the breach and of the exemption from liability. Thus, the concept of breach is a coherent system.
Any of the contractual duties may be breached, even the lack of documentation, ancillary obligations, third party's rights and intellectual property rights. And the breach of any duties may rise to the level of fundamental breach.[8]

6. 3 The system of remedies

A cornerstone in case of breach is that both the infringing party and the injured party are to seek the outcome of the less harmful consequences and to adjust

[8] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2015), 829.

their expectations to the changed circumstances. The system of remedies offers assistance in that, its elements apply depending on the features of the breach and all the circumstances. With further subsystems, such as damages, or exemptions, it consists of objective sanctions for any kind of contractual breach. Using a modern approach, the point of departure is the breach and the equal treatment of breaches, influenced by the cause-oriented approach,[9] such as specific performance, price reduction or the 'Nachtfrist' principle in Article 48 of the CISG.

In the operation of the system, the principal direction is saving the contract. When the service does not reach the level of conformity, but the shortages and defaults causing the difference can be fixed and rectified, should the injured party be charged with the obligation to provide the obligor a further chance and accept the late or defective performance? Without disproportionate difficulty arising on its side, the aggrieved party shall not resort to avoidance but may seek a price reduction, repair, substitution, whichever is appropriate. Supplemented by damages, if no exemption applies in the given case. The functioning of the system is supported by general principles, like good faith and proportionality, and also requires case-by-case assessment and flexibility. The system of remedies must encourage performance. A negative example for that would be easily available damages.

As for the use of the remedies, certain elements of the system of sanctions may be used alone and at any time, others only when their application is not banned by another chosen or obligatory element. Logically, the demand for repair excludes avoidance, while price reduction permits only partial and proportional avoidance or demand to repair or substitution. Indeed, special issues need elaboration based on a case-by-case approach, such as delay in performing a payment obligation. Interest is an objective sanction with the presumption of the fact and measure of the harm caused by the delay. The debtor is rarely exempted from paying it. But details like duration, currency, rate, excessive damages are also important details, worth agreeing on.

6. 4 The validity and interpretation of the contract

Besides the questions of representation and the sphere of validity, a keyword is interpretation. It relates to the consensual expectation of both parties to the extent that the other party had been made aware of it. Principles and aspects worked out by comparative law navigate the parties to understand each other's words given in the past and to be heard in the future, as laid down in Articles 7 and 8 of the CISG.

[9] Ingeborg Schwenzer and Edgardo Muñoz, *Global Sales and Contract Law* (Oxford University Press, 2022), 583–585.

6. 5 The performance

The wronged party should look on the facts of performance, including malperformance and non-conformity as well, objectively, with a judge's eye, but not ignoring the subjective elements. The colliding interests of the parties are to be examined in their complexity and with due regard to the purpose of the contract, as a point of reference.
In Hungarian legal academic literature, Eörsi Gyula classified the most general types of breach, such as the obligor's delay, the obligee's delay, non-conformity or defective performance, impossibility and repudiation, which arise in most cases from a breach of the duty to cooperate.[10] It is worth having a look at delay, non-conformity and the conduct of the parties influencing default.
As regards delay, it is temporary non-performance or temporary impossibility. A frequent natural consequence is a change in the injured party's interests. Moreover, the party deprived of its contractual expectations, may refer to the lapse of its interests, effectively or based on a presumption, as provided in Section 6:154 of the CC. Pursuant to the Hungarian code, the obligee can also fall into delay, under the rules of intermediate breach. As provided in Section 6:150 of the CC, the duties of the obliged party become deferred, its responsibility is retained only for intent and gross negligence. There are situations without delay, e.g. damages which become due by the time of occurrence. Briefly mentioning the question of time, it arises not only when performing in conformity with the contract but also when saving the contract, or influencing the outcomes, as well.
When assessing conformity and non-conformity, one must start from the contractual stipulations, or, in the lack of those, from the legal regulations related to obligations.
The conduct of one party builds up confidence and trustworthiness in the co-contractant. The parties' conduct is a main influencer of the result, it may produce conformity or provoke default.[11] Even the tolerance of a non-conform state may qualify as a breach. The possible ways of conduct are partially foreseeable. Mistaken business decisions figure on the list of ordinary risks, but each party must bear the consequences of their unintentionally encouraging and provoking behaviour.[12] This is provided for in Section 6:587 of the CC. The intervention and contribution of the aggrieved party, be it an act or omission, is critical regarding the consequences of a breach. The entitled party frequently errs regarding its general obligations, like the duty to cooperate, commits an intermediate breach, it is in delay in takeover, fails to prevent or mitigate damages, etc. Regarding the infringement, it is better to make a distinction

[10] Gyula Eörsi, *Kötelmi jog Általános rész* (Tankönyvkiadó, 1983), 151.
[11] A judgment on the practical application of cooperation and the duty to inform: Győri Ítélőtábla Pf.20.483/2008/4.
[12] László Fürst, *Utaló magatartások* (Dunántúl Egyetem Nyomdája, 1929), 94, 104. Sándor Kornél Túry, *Szilárd jogú nyilatkozatok a kereskedelmi jogban* (Grill Károly Könyvkiadó Vállalata, 1938), 31.

between conduct before and after the occurrence of a breach. The infringing party faces higher standards of care, while the injured party causing unintentionally accidental damages by saving the contract, may count on a fair and reasonable assessment.
Third parties and further concerned persons might influence the contractual relationship in a direct and express form, but also indirectly, coming from the logic of living in society. In a multi-personal situation, the merchant of a seasonal product having a poor stock in comparison with the number of buyers, shares the accessible products between them to assure even a small part for everyone, even those who arrive later. The buyers are to respect this behaviour.[13]
Changes in circumstances are to be regarded strictly, apart from ignorance or default. Changes might provoke different solutions, within narrow limits. The influences of the changes on the performance show similarities to the breach. Minor changes are to be adjusted to by the party whose side these changes have arisen on. Should the changes affect the economic foundation of the obligation to such a depth that performance becomes essentially disproportionate and hard, the injured party cannot obviously expect performance. Instead, it may follow the mechanism the parties established for such hardships at the time of conclusion of the contract. Concerning the question of changes impeding performance or rendering it impossible, liability and potential exemptions need clarification. If the injuring party falls within the narrow limits and becomes exempted from liability, by virtue of Article 79 of the CISG, this fact will largely restrict the possible remedies available to the injured party.

6. 6 Assurances

The most secure fact is performance, moreover, the one promoted by inspirative assurances. The same is true for a lack of assurance in a negative sense. Assurances cannot cover each case and cannot protect every interest of each participant. Moreover, the injured party might find itself factually unassured in multi-sided obligations. Like the interests of a tenant against the buyer of the estate, the consigner's claim for the purchase price against the consignee's creditors, the owner's claim for compensation for fire loss against the pledgee, the claim of a buyer of a flat in a condominium pledged for the purpose of construction, against the bank providing a loan to the builder. These are the situations to be overcome in good faith and with self-restraint.

[13] Salamon Beck, *A többszemélyes magánjogi helyzet* (Szeged Városi Nyomda és Könyvkiadó Rt, 1935), 3–4.

6. 7 Enforcement of claims

The context of presumptions, the reasons leading to impossibility and resistibility[14] need conscious and deep consideration, while uncertainty regarding several questions raises the importance of rationality. Just like loopholes in the legal regulations, the impediments to enforcement, also regarding the limitation period and foreseen investments, the claim-killer burden of proof and the inconsistency of judicial practice, the fact that frictions generate yet further frictions.

7. The rights and duties of the aggrieved party

When a contract is breached, the aggrieved party *'cannot simply do nothing.*'[15] Its rights and duties are built on moral and ethical foundations which can be expressed in legal terms or in generally applicable requirements. Within this ensemble, each element has a counterpart on the opposite side: every right has a pair among the obligations and vice versa. The obligations charging the aggrieved party encompass its rights. This explains why they are examined together. The main aspects of the examination are dependence on purpose and proportionality. In daily life, breaches that the aggrieved party should adapt to vary on a very large scale. The possibilities can be classified along the life cycle of the contract and in addition, in the category of extraordinary situations. Besides the most well-known answers, a wronged party must not be short of creativeness, as practice raises questions. The collection below focuses on the less-known situations and aspects.

7. 1 Rights and duties over the phases of the contract

There are rights and duties which are continuously present in the toolkit, others exist before concluding the contract, or between conclusion and breach, or after the breach or around the breach.

7. 1. 1 Rights and duties accompanying the whole life of the contract

These possibilities appear rather as generally applicable requirements and regulatory frameworks, pervading the rights and duties and providing them a measure and a method of application.

[14] A non-exhaustive list is given in rule 7 of CISG-AC Opinion No. 20, Hardship under the CISG, Rapporteur: Prof. Dr. Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2 – 5 February 2020.

[15] Bruno Zeller, *Damages under the Convention on Contracts for International Sale of Goods* (Oxford, 2018), 327.

Good faith and fair dealing. This is both a right and a duty at the same time, framing the legal relationship and providing prompt aid or last resort.[16] Rationality and proportionality, as well as the demand for equilibrium of obligations, are attached to this right.
Confidence, reliability, predictability as regards performance. An expectation towards the entitled party is to form a definite will on the adequate circumstances of performance (place, time, quality, quantity, contributors, etc) and notify the obligor of them, as well as confidentiality. '*Each party undertakes its obligation in the expectation that its co-contractant will likewise perform*.'[17]
An intent to perform, a definite will to accomplish. During the whole relationship, careful, diligent and loyal-to-obligation conduct: as required by the situation. E.g. notifying, mitigating, or maintaining or saving assurances. The intention to perform generally goes hand in hand with sacrifices, even though not without limits.
Restraint from jeopardizing and from causing exaggerated harm, as it is prescribed for the pending situations in Section 6:117 of the CC. 'Exaggerated' means an otherwise not illegal step which is qualified so by the situation.
An obligation to keep away from each party all the harms and damages, which may arise in an unjustified manner, compared to the normal content of the contract. To use by reciprocal analogy a duty imposed on the debtor, the creditor is charged with a protective obligation, which is to consider the developments of interests within the legal relationship with a working diligence and to exert such influence that the interests are really accomplished in such a manner that serves the purpose the legal relationship was created for by the debtor. It is also stated in Art. 43 of the Slovak Civil Code on the notion of contract: '*The participants are obliged to pay attention that by the time of settling the contractual relationship, anything is to be eliminated, which might lead to the arising of conflicts.*'
The obligation to cooperate and the right to receive cooperation. The debtor must seek honestly to perform the obligations undertaken by it, even if it causes it special sacrifices or harm. But the creditor, in turn, must be open to settlement, if the purpose of the contract might not be reached otherwise, because of extraordinary difficulties.[18] Omitting cooperation may influence the whole contract and make it turn into a breach. Section 6:62 of the CC provides a non-exhaustive list of actions forming part of cooperation, handling it together with the duty to provide information, other than which is available from other sources. Issuing a prior reminder is a recognized example of the duty to cooperate.

[16] In the example of FOB cases ending in a third country, it would be in bad faith to stipulate any other place than the third country as the appropriate place to calculate damages. In Zeller, *Damages,* 325–326.
[17] Schwenzer and Muñoz, *Global*, 588.
[18] László Kelemen, *A szerződésen alapuló kötelmek áldozati határa* (1941), 3., Michel O. Bridge, *The international sale of goods* (Oxford University Press, 2017), 677, 688.

Protective duties by which the obligee assists the obligor to perform, by which the contractual obligation is protected from failure. These are vigorous forms of conduct, by which the entitled party shall subordinate certain of its interests to the accomplishment, even with sacrifices, withdrawals and expenditures, within the limits dictated by the purpose of the contract and proportionality.
Duty to inform. It is also deemed to belong with the duty to cooperate, but it can figure also alone because of the significant role it fulfils in practice. The elements of the obligations, the concerned persons, the subject-matter, the temporary character, instalments, recognized defaults are the most frequent subjects. The purpose is to enable the other party to take well-founded decisions. It is applied with rational limits. The desire of the legal experts to submit a claim right after it has arisen and not to wait until the end of the limitation period cannot prevail in practice, though any delay increases the burden of proof, notwithstanding the case when the burden falls on the obligor.
The duty to be informed and, connected to that, diligent and well-founded interpretation and assessment of knowledge. Today official public registries are, to a certain extent, easily accessible based on private applications, which raises the necessity of a diligent control over additional information.[19] As for interpretation, legal instruments propose a sophisticated itinerary. Besides Sections 6:86-6:87 of the CC, article 8(1) of the CISG, especially the formulation 'the other party knew or could not have been unaware' is worth the attention of the parties.

7. 1. 2 Precontractual possibilities: vigorous conduct of diligence

To choose the partners with care, to stipulate and to assess the burdens and reality of contractual conditions appear in the judicial practice in the claims labelled as frustration and impossibility.[20] Model laws and model contracts elaborated by civil and commercial associations assist the contracting parties in choosing the appropriate conditions and establishing the equilibrium of their contract.[21] It is also essential to build up a system of assurances, to allocate risks or, at least, to foresee them and to find a mechanism to deal with difficulties. Conditions of and access to penalty, interest for late payments, financial

[19] Béla Reitzer, *A teljesítési és szavatossági szabályok viszonya a tervezetben* (Pfeifer Ferdinánd Könyvkereskedésének Bizománya, 1912), 21–22.
[20] About the distinction between negligence at conclusion and frustration caused by the blockage of the Suez Canal in 1956, see the examples taken in Konrad Zweigert, Hein D. Kötz and Tony Weir, *An Introduction to the Comparative Law* (Clarendon Press, 1998), 530–531.
[21] International Commercial Terms of the International Chamber of Commerce (ICC) – INCOTERMS®, accessed Sept 9, 2024, https://iccwbo.org/business-solutions/incoterms-rules/incoterms-2020/. Standard Forms of The Grain and Feed Trade Association (GAFTA), accessed Sept 9, 2024, https://www.gafta.com/All-Contracts.

assurances, an agreed sum of damages and, at the end of the list, litigation and enforcement can be elaborated when forming a contract.
Limitations on the responsibility for breach are acceptable[22], in certain situations, like negligence or a hotel safe, or by method, through an interest rate, but cannot reach the level of complete exclusion.
The national laws regulate precontractual diligence with differences, for example, the question of disrupting negotiations. Here comes again the old and general principle of good faith to navigate the contracting parties.

7. 1. 3 Rights and duties in the phase of performance of the contract

This is the phase where the fate of the contract may easily come close to either performance or breach. Offering performance while simultaneously requiring performance, as provided for by Section 6:128 of the CC, and ensuring the conditions for performance by the other party, as the interim duties of the obligee are the first to mention here.
The examination of conformity under Section 6:127 of the CC and Article 38 of the CISG is, in fact, not an obligation, but a right by which the party's rights to protection may be broadened. The entitled party may carry out this examination, when rationally appropriate.[23]
The request for reinforcement of assurances, by further resources or by making up for lost value, under Section 6:139 of the CC or the Articles 71 and 72 of the CISG is a good example of the significance of vigorous conduct by the obligee. Assurances, in most cases, are not at the forefront of the entitled party's attention. In addition, it requires enormous attention from the aggrieved party to assert its claims based on Section 5:104 of the CC, if the pledged goods perish.
The right to withhold under Article 58 (3) of the CISG, offering simultaneous performance, can serve as a first aid in restoration of the equilibrium of obligations. It results in a temporary modification of the relationship, to inspire both sides to accomplish. The right of suspension under Section 6:139 of the CC and Article 71 of the CISG is a stronger relative of withholding, when the aggrieved party feels like being in the lobby of breach.[24]
Adjustment to changes in circumstances is an expectation in cases of hardship, anticipatory breach, and breach. If the contract does not provide a mechanism, legal instruments offer possible answers for the parties, as provided for in Section 6:192 and Section 6:151 of the CC, in Articles 79, 71 and 72 of the

[22] Rule 4(b) of CISG-AC Opinion No. 17, Limitation and Exclusion Clauses in CISG Contracts, Rapporteur: Prof. Lauro Gama Jr., Pontifical Catholic University of Rio de Janeiro, Brazil. Adopted by the CISG-AC following its 21st meeting in Bogotá, Colombia, on 16 October 2015.
[23] Rule 2 of CISG-AC Opinion no 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, 7 June 2004. Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York.
[24] '*Magánjogi Törvényjavaslat*,' the Proposal for the Hungarian Civil Code (1928), which had never been adopted but applied as a code, gave a very detailed prescription regarding the right to withhold in Section 1130.

CISG.[25] Mitigation of damages may start in this contractual phase, also by the setting of an additional deadline.

7. 1. 4 Rights and duties around and after the time of breach

The occurrence of breach and the time when the breach comes to the knowledge of the wronged party may not obviously concur. The latter, which may happen even prior to the breach, as regulated in the institution of anticipatory breach, puts the aggrieved party into a situation to decide. When choosing the appropriate consequence, the injured party may derive inspiration from the lists of the previous phases, such as suspension, demanding reinforcement of assurances and must keep its eyes on the limitation periods.

The sphere of restoration of the lost equilibrium embraces the rights, duties and reactions of the aggrieved party. The duty to mitigate, which cannot be understood as acting instead of the obligor, and the possibilities of setting an additional deadline belong here. Between cooperative parties, it works through the injured party providing an additional deadline, or the non-conforming party providing cure within the period open to performance, or through the special case between the two possibilities, the 'Nachfrist', as regulated in Articles 37 and 48 of the CISG. The 'master of performance' is the debtor, therefore, tolerance is useful on the creditor's side. To provide an additional deadline is far less than an obligation, but it cannot be denied without a good reason of interest or other circumstances. By applying an additional period, any other rights which are inapplicable before the expiry of the deadline become frozen.

The duty to renegotiate, which also serves to regain the equilibrium, is not expressed in codified legal instruments. Nevertheless, it is frequently used in practice, as it is proved in Article 6.3.2 of the UPICC. However, it requires a spirited mindset to ask for and verify proof of the obligor's intention and allegations.

Requiring performance is based on the principle of *pacta sunt servanda*. It consists of three rights, with a different meaning in national laws and international legal instruments, namely: the requirement of performance in a narrow sense, the demand to repair and the demand to substitute. The first is significant rather in the case of unique and non-fungible goods and services. The latter two, in Sections 6:159-6:167 of the CC and in Articles 46 and 82 of the CISG, provide an example how the aggrieved party should adjust to the changed circumstances, in obligatory cooperation with the wrongdoer, whose interests cannot be ignored by the former. All the three are limited by logic and rationality, which leads the injured party to look for other possibilities, and to modify its own expectations, in the purpose of reducing its losses.

[25] See also: CISG-AC Opinion No. 20, Hardship under the CISG, Rapporteur: Prof. Dr. Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2 – 5 February 2020.

Damages constitute a complex system within the remedies, completing the possibilities of the injured party. The main elements in keywords are: causality, foreseeability, questions of strict liability, and measure. Legally prescribed or consensual limits are: exemption, contribution by the injured party, proportionality, difficulties of enforcement, and mitigation. These limits may easily remove damages from among the available tools, so the aggrieved party had better look around for help.

Price reduction or reduction of the consideration for the non-conforming performance is a real jolly joker in the package. It serves as a counterbalance in the obligation imposed on the aggrieved party to balance between its own interests and those of the obligor. It can be also applied as a consolation in case of delay or omission of notice or restitution by the aggrieved party, or when the obligor is exempted from liability. Details are provided in Articles 44, 50, 79 and 83 of CISG. It is flexible and apt to be combined with other tools, like a flexible partial avoidance.

Substitute transactions are the third element of the triumphal triangle of the most useful tools in the injured party's hands to save the breached contract, the other two are: damages and price reduction.[26] A precondition for the substitute transaction, presented in Section 6:141 of the CC and Article 75 of the CISG, is the termination of the breached contract, when performance by the obligor is no longer in the aggrieved party's interests. The surplus over the harm achievable by the substitute transaction is subject to the rules on unlawful profit on damages. A close relative of the substitute transaction is the claim for the difference in price, but it forms part of and, as such, is subject to the limitations of the system of damages.

The enforcement of pecuniary claims and contractual assurances is dependent on the contractual stipulations. The stipulations are subject to judicial or authority supervision, to avoid exaggerated or underestimated claims of the injured party. These assurances can be: interest, penalty, earnest money ('foglaló'), pledge, bank guarantees, etc.

The entitled party may perform its obligation, in particular, by set-off and by deposit. The first is frequently used in practice and regulated in Sections 6:49-6:52 of the CC. Even though the CISG is silent on set-off, but the CISG Advisory Council in its Opinion No. 18[27] describes this possibility as available under the general principles of the norm. Performance by deposit is deemed to belong under the right to withhold, as it does not release the obligee automatically from the consequences of late performance, for example, it is not exempted from default interest.

[26] John O. Honnold clarifies the teamwork of the triangle in the example of the Edam cheese fair, in John O. Honnold, *Uniform Law for International Sales* (Kluwer Law International, 1999), 322–325. See also: Bridge, *The International*, 699.

[27] CISG-AC Opinion No. 18, Set-off under the CISG, Rapporteur: Professor Doctor Christiana Fountoulakis, University of Fribourg, Switzerland. Adopted by the CISG Advisory Council following its 24th meeting in Antigua, Guatemala, on 2 February 2018.

Breach of contract by the obligee as a revenge or putting pressure on the obligor is far less recognized as lawful.
Avoidance is the ultimate instrument in the hands of the aggrieved party, for the situation where the contract cannot be maintained, cannot be saved, because of a fundamental, and only fundamental, breach. By the avoidance, the contract ceases to exist, and a phase of dissolution starts with its own difficulties. These drastic changes are subject to strict legal restrictions. The concept of breach and the system of remedies offer a correct dissolution of the parties' relationship. Dwelling for a moment on avoidance, which requires all the circumstances of its basis to be taken into account, it is worth having a glance at the aggrieved party's contribution to the breach. A creditor's unilateral, even if implied, conduct disregarding the non-performance of certain obligations by its co-contractant may be interpreted as a waiver only with care, as the creditor remains entitled to return to the strict terms of the contract. But this return must respect the obligor's interests, e.g. tolerance of delay for a long time, releases.[28]
In the case of dissolving a contractual relationship, the modes of settlement and restitution, the potential claims for restitution, and the preservation of the goods are to be clarified, under the circumstances of the case. The choice of remedies is influenced by the impossibility of restitution, liability for non-performance and impossibility of performance. The question of preservation is coupled with that of expenditure, it should remain within the limits of rationality.
The last on the list is the possibility of litigation, to be estimated together with the question of enforcement. Litigation poses a series of questions, which are partially foreseeable and negotiated prior to the dispute, such as choice of law, forum, arbitration, costs. Further risks become visible only on the spot, like delay which generates further harm, additional costs generating further costs, and third-party claims endangering the satisfaction of the request of the injured party.

7. 2 Rights and duties in special cases

It is not the end of the world when the grievant realizes later its initial deafness to apperceive dangers. Invalidity ab initio is a consequence of a claim based on the lack of will, such us mistake, fraud, duress. Even though, it is available almost only through litigation.
A claim of relative invalidity may arise when a preferential right is infringed or in cases where one of multiple creditors obtains a disproportionate part of the estate and funds of a debtor who is in a financially difficult situation.
A proposition from the obligor may cause the obligee difficulties if it is about non-conform performance or performance through a third party, without its prior knowledge. Such a proposition is to be understood as a request for the modification of the contract, the acceptance of which is not obligatory. Neither refusal is obvious, depending on the causes and circumstances. Possible

[28] Commented on in detail by Grosschmid under the creative notion of 'érdekleengedés' as a frequent concomitant phenomenon of obligations. Grosschmid, *Fejezetek,* 866.

answers besides the acceptance are withholding and suspension of the obligee's own performance, or, in cases endangering with breach, the application of the rules of anticipatory breach.
Anticipatory breach obtained an expressed form not long ago in legal instruments, such as Articles 71 and 72 of CISG and Section 6:150 of the CC. It serves as a guidance for a diligent contractor, regarding the aspects, conditions and limits of suspicion, likelihood and certainty, together with proportionate reactions, due regard to and a duty to cooperate with the obligor. It may occur in any kind of breach of contract that it is not reasonable to force the entitled party to stay in the contract and wait till the deadline, as in the course of time the damage increases.
In cases of partial performance, excessive or premature delivery, the wronged party faces questions of proportionality, divisibility, the importance and extent of the non-conformity. The direct reactions might be: refusal, withholding, price reduction, avoidance, but also, the acknowledgement and tolerance of the erring party's interests, especially when there is no serious reason to ignore them.[29]
The breach of an ancillary obligation is to be judged through its connection to the purpose of the contract. Even an ancillary obligation may influence the life of a contract to an extent which shall qualify as fundamental breach.[30]
Further special cases can be found concerning relations where the aggrieved party is facing protected third parties' rights, e.g. in Article 43 of CISG.

7. 3 Tools in operation

The answers of the aggrieved party given in enforcing its interests depend primarily on the type and characteristics of the breach. A conscious approach may strengthen its position and purposes, which are to be adjusted to the changed circumstances. It is the entitled party who – bound by the purpose – disposes of the right to choose, to act, to react proportionally and in good faith, in a tolerant manner. And it is the obligor who has the possibility to perform. The law qualifies and categorizes the rights and duties, and the remedies of the parties. The law uses different approaches from country to country and such differences may influence the creditor's decision. An example is constituted by the causes of exemption from liability for damages. While the common law uses price reduction and the claim for the difference in price as a supplementary part of the system of damages subject to exemption, continental law ranks them among the basic tools. But the law of any country serves the principle of pacta sunt servanda.
A part of the tools accessible for the creditor can be used alone or together with others, while there are tools the use of which can be excluded logically or by

[29] Bridge, *The International*, 680.
[30] With reference to an example provided by Ulrich Magnus about the non-performance of an obligation of packaging in a simple case, as opposed to the case when the buyer cannot resail the goods without being packaged, in Tamás Sándor and Lajos Vékás, *Nemzetközi adásvétel* (HVG Orac Lap- és Könyvkiadó Kft, 2005), 153.

virtue of the circumstances of the case, like the request for performance and avoidance. A combination of rights is expressed in Section 6:139 (1) and (2) of the CC, where the creditor has a right to withhold performance and to request assurance. When providing a further deadline in any form, fixing the deadline means the will to end tolerance and the start of enforcement. Anticipatory breach gives rise to an obligation to mitigate one's losses. The partial application of a tool opens the door before the proportionate application of another one. The partial avoidance of the contract makes possible a substitute transaction in the same proportion, if the breach provides a reason for that.
The injured party may lose access to certain remedies. The reasons may relate to its own conduct or to that of the infringing party, but the rationality of such restrictions might be questioned on assessment of all the circumstances. An example for that is avoidance without restitution of the received goods, contained in Article 82 (2) of the CISG.
The engine of the operation is the totality of achievable interests. The essence in the engine of the operation is the duty to cooperate and, especially, the duty to inform, which can be replaced with consequential losses, by partial or complete judicial support or serious harm.

8. From the sphere of obligations to the limits of sacrifices

One shall be liable for its own facts, conduct and behaviour under the fundamental laws of society.[31] Even towards itself. In contractual relationships, we are expected to conduct ourselves vigorously, to fulfil obligations of the type of providing services, and of responsible, diligent and protective management of interests. The creditor pays due attention to its own interests, to those of its co-contractant and further members of their society. Its thoughts encompass the impediments to those interests, as well. A good reason for that is the safety provided by the equilibrium between interests and obligations. The creditor concludes a contract in trust of performance by the other side and is aware that accidental allowances and sacrifices are to be made towards others.
What do these allowances and sacrifices stand for? To save the wronged party's own interests by tolerance for the offending party's interests and conduct which are worthy of respect. Are they gratuitous exceeding the creditor's own performance? Yes, but not unlimitedly and discretionarily.
Limits to the allowances and sacrifices figure in legal terms or in general principles of law. In addition, the spirited injured party may be inspired by analogy from the rules relating to easements in favour of an infringing party in difficulty, or relating to cases of anticipatory breach or mitigation, in cases where the foundations of the legal transaction, the expectations or presumptions of the creditor fail to be fulfilled. A working and diligent party may cherry-pick from the possibilities, within the limits of its duties and circumstances.
Reasonable and logical impediments are promoted by moral and ethical limitations. The demand for allowances may become inequitable under the

[31] Fürst, *Utaló*, 10.

principle of good faith, other prevailing rights or obligations, the changes in the circumstances, or the incorrect behaviour of the debtor.
The sacrifices, efforts and risks to be taken for the purpose of performance are also limited in the case when the obligation becomes an excessive burden for the party. This may be caused by impossibility, by the other party's endangering conduct or a common false presumption of the parties.[32]
In the shaping of contractual relationships, from the precontractual phase till the termination of the contract, it is diligence, foresight, and thinking forward that are to guide the parties. An offended party is to seek performance, while keeping the rules of proportionality, the equilibrium of obligations and safety, and considering the circumstances, including the offending party's interests. For this reason, the offended party, in case of difficulties and breach, is forced to make allowances and sacrifices limited by rationality and good faith. The offended party may mitigate the harm resulting from a breach by foresight and mechanisms established for managing difficulties, and risk allocation. Consciousness increases the safety of transactions and interests.

[32] With reference to Szladits and Kelemen, *Áldozati határ*, 11.

European and International "Instruments" for Criminal Cooperation – the European Arrest Warrant, the Extradition Warrant and the International Arrest Warrant

NÉMETH, KATA*

ABSTRACT *The main objective of this study is to present the key differences between the instruments of international and European cooperation in criminal matters, which determine and significantly influence their effectiveness. Criminal cooperation is perhaps one of the youngest areas in the history of European integration which, despite its early puberty, has developed over the years, albeit with some adolescent stubbornness, into one of the most effective instruments of cooperation between the Justice and Home Affairs agencies of the Member States of the European Union. The study concludes that the current instruments of criminal cooperation have simplified and accelerated surrender procedures, especially in the area of organised crime, at the same time also points out that a number of challenges remain to be addressed, related to the independence of the judiciary and the judicial system in general, the question of mutual recognition as well as the fundamental debates on international and EU law and values, constitutional principles and further harmonisation measures. It also highlights that despite significant efforts, there are still gaps in terms of effectiveness, efficiency and coherence with other measures and the use of digital tools.*

KEYWORDS *criminal cooperation, European Arrest Warrant, extradition, extradition warrant*

1. Introductory thoughts

Criminal cooperation is a challenging area, both at the European level and in international relations, given the ideological understanding of all countries where national criminal law and the definition of the exercise of national criminal power are an integral part of sovereignty. Without exception, the Member States of the European Union – although defending it with varying degrees of intensity – consider *ius punendi*, that is national criminal law, as the ultimate bulwark of their sovereignty vis-à-vis the Union and have therefore insisted on regulating it exclusively through their internal law. Third countries take a similar view also regarding national criminal law as the cornerstone of

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their sovereignty.[1] For these reasons cooperation between States in criminal matters has always been a "powder keg" however, more recently, in view of the war on the international front, it has become an "explosive" subject, particularly at international level, with a political charge. The question rightly arises on the relationship between the sovereignty of States and European and international criminal law, which turns the question around and focuses on the extent to which a State can be considered sovereign when it does not exercise its criminal law powers (investigation, prosecution, sentencing) autonomously but delegates them to a supranational organisation (ICC, OLAF, European Public Prosecutor's Office).[2]

In many respects, criminal law stands out from other areas of law. Availing itself of the most severe and most dissuasive tool of social control – punishments – it delineates the outer limits of acceptable behaviour and in that way protects the values held dearest by the community at large.[3] For examples of laws with specific national connotations topics like drug prevention[4], abortion, or euthanasia are often referred to.[5] This is one of the reasons why it is extremely difficult to establish a coherent European – and international criminal law regime in particular. The latter is perhaps not even possible.

With the expansion of international criminal law, a fundamental question of the study is how the conceptual elements of international criminal law can be reconciled with national concepts and national legislation, and how the elements of different national legislations can be harmonised with each other. The difficulty mentioned above often arises in both law enforcement and legislation, thus the challenge is to compare the different concepts of the various fields. Therefore, the primary aim of this study is to draw a distinction between the instruments of criminal cooperation and thus to provide help in their practical application. In line with its purpose, this paper is primarily based on a doctrinal analysis, but its practical significance requires the use of a comparative analysis methodology, with attention to the slightly different

[1] Compared to: Stephen D. Krasner, *Sovereignty: Organized Hypocrasy* (New Jersey: Princeton University Press, Princeton, 1999), 9–25.
See more: Valki László, "Mit kezd a szuverenitással a nemzetközi jog?", in: *A szuverenitás káprázata,* ed. Gombár Csaba and Kankiss Elemér, Politikai Kutatások Központja (Budapest, Korridor, 1996)

[2] Molnár Dalma, "A szuverenitás és az európi büntetőjog kapcsolata," *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica* XXXVI, no. 2 (2018): 240–263.

[3] Case C-440/05. [ECLI:EU:C: 2007:393] General Advocat Mazákopinion at Comm'n of the Eur. Cmtys. v. Council of the European Union, 2007. paragraph 67–69.

[4] See e.g., Council Framework Decision 2004/757/JHA of 25.10.2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, 2004 O.J. (L 335) 8 (Establishing elements of serious types of drug offences and allowing Member States to regulate on personal consumption issues)

[5] Christoph Safferling, "Europe as Transnational Law – A Criminal Law for Europe: Between National Heritage and Transnational Necessities," *German Law Journal* 10, no 10 (2009): 1383–1397.

practices of the Member States involved in European criminal cooperation and the occurrence of Brexit. The complexity of the subject also requires a partial comparative analysis of foreign judicial and legal literature based on primary sources. Also, further comparative analysis of the pre- and post-Brexit system of criminal cooperation between the Member States of the European Union and the United Kingdom is needed. The methodology of the research is qualitative, based on doctrinal analysis and comparative legislative interpretation through research on the substantive law and closely related literature. The study also attempts to explore through explanatory and systems analysis the cause-and-effect relationships that might lead to an effectiveness deficit in criminal cooperation in the current fragmented system. Ultimately, the study addresses the key question of how to improve the effectiveness of European cooperation in criminal matters as well, which is essential for the common interest of all Member States. The study also intends to make recommendations to improve the effectiveness of international criminal cooperation.

2. International cooperation in criminal matters

International criminal law is not an autonomous system created by a supranational body but a community of states themselves voluntarily relinquishing part of their sovereignty. It follows that it exists only if and for as long as states wish it to exist. The need for cooperation in criminal matters has a long history, but it is most closely linked to the trend towards globalisation and the internationalisation of crime, as the need to combat transnational crime in Member States and third countries has increased with the growth of cross-border and organised crime. The recent growth of cybercrime, the proliferation of online and offline fraud, and the typically transnational nature of commercial crime, which can be very diverse in its subject matter such as drugs, human beings, have all served to justify and require closer links between judicial authorities in different countries and the exchange of information and experience, which has evolved from cooperation, initially in the form of intergovernmental agreements, into a dynamic and institutionalised area. The vast majority of sovereign states have thus recognised that effective and efficient action against war crimes and crimes against humanity, and the above-mentioned organised transnational crime can only be taken through international cooperation, voluntary bilateral or multilateral international treaties or membership in various international organisations.[6]

The positive conditions for international cooperation in criminal matters are *reciprocity*, i.e. the partial or full obligation of states to cooperate, and *double incrimination*, namely the requirement that the act on which the request is based must be punishable under the law of both the requesting and the requested state. In Hungary, the applicable law that can be invoked by a court in the case of

[6] Compered to: The Constitution of Hungary Article Q. (2) paragraph and the decision of the Constitutional Court 3/1993. (X. 13.) and also 36/1996. (IX. 4.) ABH conceptual content.

criminal cooperation with a third country is Act XXXVIII of 1996 on International Mutual Legal Assistance in Criminal Matters (hereinafter referred to as Njbt.), which expressis verbis presupposes reciprocity and double incrimination in the case of mutual legal assistance[7], however Act CLXXX of 2012 on Criminal Cooperation with the Member States of the European Union (hereinafter referred to as EU Act.), which regulates European criminal cooperation in Hungarian law – and will be examined later – is not explicitly laid down in the Act as a general condition in relations between EU Member States.

One form of international cooperation is the *police/law-enforcement cooperation* with International Criminal Police Organisation (Interpol) as the leading international law enforcement and information organisation, which brings together 194 countries and whose effectiveness lies in communication through the Secure Information Exchange Network Application (SIENA). Interpol is an international intergovernmental organisation with a structure that includes the National Central Bureau (NCB). In the field of crime prevention, international cooperation aims at exchanging information, identifying and monitoring individuals, optimising and sharing databases between Interpol and foreign law enforcement agencies, conducting international searches through Interpol channels and ensuring the enforcement of extradition. In order to achieve the above goals, Interpol has a Computerised Criminal Information System (ICIS) which allows a wide range of information to be searched and helps to locate the names and addresses of criminals, banks, financial institutions and the bank accounts they use, as well as the legal entities involved in the crime. The Automated Search Facility (ASF) will allow Interpol and National Central Bureaus (NCBs) to electronically retrieve information from the database (e.g. images, fingerprints, DNA profiles), opening up an increasing area of electronic evidence, particularly in cybercrime.

The other form of international cooperation is *judicial cooperation*, which operates partly through mutual legal assistance based on international conventions and partly through the establishment of joint investigation teams (JITs). The "archetype" of international judicial cooperation[8] in criminal matters is *extradition* and the *international arrest warrant* on which it is based. As far as the normative background of the extradition procedure is concerned – since the listing and analysis of all bilateral international treaties between States would go beyond the scope of this study – the most prominent multilateral international treaties are the Council of Europe Convention on Extradition of 13 December 1957, signed in Paris on 13th of December 1957 (hereinafter referred to as the Paris Convention)[9] and its Additional Protocol, which although it does

[7] Nbjt. 5. § a)

[8] M. Nyitrai Péter, *Nemzetközi bűnügyi jogsegély Európában*. (Budapest: KJK. Kerszöv Kft. 2002), 219.

[9] Promulgated in Hungary: Act XVIII of 1994 on the proclamation of the European Convention on Extradition and its Additional Protocols, signed in Paris on 13 December 1957.

not recognise the concept of the international arrest warrant, regulates the extradition procedure in detail. Modern national criminal law and international law require that the following principles be respected in extradition matters: the principle of reciprocity, the principle of double criminality, the principle of non bis in idem and the principle of specificity. These principles help to protect the sovereignty, independence, equality and prestige of States in international relations. They also promote to protect the human rights and freedoms of the person to be extradited.[10]

In the case of cooperation in criminal matters with a third country, it is only appropriate to issue an international arrest warrant as a law enforcement authority of a Member State in case the accused person has left for and is staying in a third country. Where criminal proceedings are to be brought against a suspect who is abroad and who is extraditable and where the material gravity of the crime justifies it, the court may issue an international arrest warrant.[11] The discretionary power of the court to decide whether it is necessary to issue an international arrest warrant – on the basis of the seriousness of the offence alone – will prevent situations in which a wanted person arrested in a foreign State solely on the basis of an international arrest warrant will be detained abroad without justification, following his arrest on the basis of an international arrest warrant – if Hungary does not ultimately submit an extradition request on the basis of minor material gravity of the offence. Moreover, the significant potential for human rights violations inherent in this problematic situation can be eliminated. An international arrest warrant may be issued by the investigating judge prior to indictment, by the trial judge after indictment, and by the judge executing the sentence after the final conclusion of the criminal proceedings, for the purpose of executing a custodial sentence or measure involving deprivation of liberty finally imposed on the accused, which implies that prosecutors and investigating authorities are not entitled to do so.[12] A request for extradition on the basis of an international arrest warrant must be accompanied either by the original or by a certified copy of the judgment establishing guilt and imposing the sentence, or by the arrest warrant, or by any other instrument having equivalent effect issued in accordance with a procedure laid down by the law of the requesting Party. The Minister of Justice decides on the request for extradition and notifies the court that previously issued the international arrest warrant of his decision. An important safeguard is that if the Minister of Justice does not make a request for extradition, the international arrest warrant must be immediately revoked by the court.[13] It is in the interests of the suspect that, if the extradition request is granted, the period of detention

[10] Arta Bilalli-Zerdeli, "Extradition it's nature and scope in criminal matters," *JUSTICIA International Journal of Legal Sciences*, no. 7 (2019): 33–43.
[11] Nbjt. 32. § (1)
[12] Han-Ru Zhou, "The Enforcement of Arrest Warrants by International Forces From the ICTY to the ICC," *Journal of International Criminal Justice*, no. 4 (2006): 202–218. mqi086 202..218 (silverchair.com).
[13] Njbt. 33. § (1) – (2)

abroad on the basis of the extradition request should be included in the sentence imposed by the court.[14] While the trend in the issuance of international arrest warrants has been unimpeded, the effectiveness of the extradition procedure is far from guaranteed. In international cooperation in criminal matters the obstacles to effective extradition and cooperation are often the grounds for refusal. Only some of these obstacles can be mentioned in this paper for reasons of space limitations:

Extradition can be refused or even denied, if it is imposed for a political offence[15] with the spirit of liberalism behind, which protects those from political persecution who fight against tyranny in a country. An exception to the above reason is the so-called *'attentat clause'*, whereby an attempt on the life of a head of state is not considered a political offence and therefore does not prevent extradition. In practice, extradition is often made difficult or impossible by the diplomatic protection afforded by the principle of *non-refoulement*, under which, extradition requesting states often seek diplomatic assurances that the person to be extradited will not be subjected to persecution, death penalty, life imprisonment, inhuman conditions of detention or a fair trial. Bearing in mind that in practice this is an obstacle to extradition in many cases. The ECtHR's practice has also considered whether this is in fact a guarantee or an empty diplomatic promise on the part of States.[16] Among the grounds for refusal that can be invoked in extradition proceedings based on an international arrest warrant, the case of a *national citizen* should be highlighted. A Hungarian citizen may be extradited only if the person wanted is also a citizen of another state and does not reside in Hungary.[17] However, there are exceptions to this rule if certain conditions are met.[18] While in international criminal cooperation the ground for refusal is the extradition of a Hungarian national to another state for the purpose of prosecution or execution of a sentence, the significant innovation of the European Arrest Warrant was that it broke through this ground for refusal and removed the discretion of the Minister of Justice, by using a different terminology for extradition - although some would argue that there is only a semantic difference between *'surrender'* and *'extradition'*[19] . By using the word ‘surrender’, the decision is placed entirely in the hands of the

[14] Nbjt. 36. §

[15] Mark Mackarel and Susan Nash, “Extradition and the European Union,” *The International and Comparative Law Quarterly* 46, no. 4. (1997): 948–957.

[16] See e.g. Chahal v. United Kingdom (1996) case https://hudoc.echr.coe.int/eng?i=001-58004.

[17] Nbjt. 13. § (1).

[18] Nbjt. 13. § (2) – (3).

[19] Compered to Vö. Zsuzsanna Deen-Racsmány, “Lessons of the European Arrest Warrant for Domestic Implementation of the Obligation to Surrender Nationals to the International Criminal Court,” *Leiden Journal of International Law*, (2007): 190. https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/lessons-of-the-european-arrest-warrant-for-domestic-implementation-of-the-obligation-to-surrender-nationals-to-the-international-criminal-court/3A1BBEDFB9CDDB36431A8744D1EFE5F1.

court, allowing surrender to take place at national level and thus making European criminal cooperation much more effective.
In this context, the International Criminal Court (ICC) recently issued an international arrest warrant for Russian President Vladimir Putin, based on the facts set out in the indictment against the Russian President and the Russian Ombudsman for Children's Rights for the mass deportation of civilians. These acts fall under the category of war crimes in the ICC's international arrest warrant, but in the view of many – including the author of this paper – the acts charged could be other international crimes, whether crimes against humanity or – if several other circumstances are proven – genocide. At the same time, Russia's defence saying that a humanitarian evacuation is/was taking place should also be taken into account, and this will have to be clarified in the evidentiary proceedings before the ICC, which will depend on the success of the international arrest warrant and the extradition of the accused for prosecution before the ICC.

3. Hybrid forms of criminal cooperation - the extradition warrant

There is a specific form of cooperation in criminal matters with European countries that are not or are no longer members of the European Union. One specific element of criminal cooperation is the *extradition warrant*, which has the characteristics and features of both international criminal cooperation and European criminal cooperation, making it a hybrid legal instrument. An extradition warrant can only be issued for extradition from Hungary to certain other countries – the United Kingdom, the Republic of Iceland or the Kingdom of Norway and vice versa – if the available evidence indicates that the suspect is present in these countries or if the extradition request comes from these countries. The role and frequency of provisional extradition has increased significantly since the UK's exit from the European Union, in other word Brexit.
A person present in Hungary may be arrested, detained and extradited on the basis of an extradition warrant issued by a judicial authority of the United Kingdom, the Republic of Iceland or the Kingdom of Norway in respect of a person present in the territory of the European Union for the purpose of criminal proceedings, the execution of a custodial sentence or a detention order. An extradition warrant is to be considered as an extradition request,[20] i.e. in this respect it shares the fate of an international arrest warrant and an extradition request issued by a third country, but it differs significantly from "over-politicised" international criminal cooperation in that it is not the Ministry that decides on extradition, but the Metropolitan Court of Budapest – which has exclusive jurisdiction – and if the conditions for extradition are met, the Metropolitan Court of Budapest orders the arrest and extradition of the suspect by means of a non-adjudicatory order.[21] It is important to note that a provisional

[20] Nbjt. 36/A. § (2).
[21] Nbjt. 36/B. § (1) és (2)

arrest order can only be issued after a final decision on the extradition issue has been taken, in order to ensure that the purpose of extradition, namely the surrender of the person wanted, can be properly secured.[22] A request for provisional arrest for extradition purposes may also be made through the international police cooperation channel or through the International Criminal Cooperation Centre (hereinafter referred to as : ICICC), which acts as the Hungarian contact point for Interpol. The so-called "red corner" or "red notice" has become a common and standard form at the procedure of Interpol. An extradition warrant, thus results in a hit in the Interpol Find system, on the basis of which the arrested person must be produced, his or her detention must be ordered and ICICC arranges for the wanted person are to be brought before the Metropolitan Court of Budapest.

In the case of international "public offenders", it is often the case that several different types of arrest warrants have been issued for the same suspect, both in number and in form, i.e. the warrants compete with one another. If there is a conflict between a European arrest warrant and an extradition warrant issued for the same suspect and if the conditions for execution are met for more than one State, the Metropolitan Court of Budapest will decide which warrant is to be executed, taking into account all the circumstances. The immanent criteria of the assessment are the material gravity of the offence(s) and the place where it was committed, as well as the order and purpose of the warrants.[23]

The revival of the use of the extradition warrant was mainly indicated by Brexit, although the UK was no stranger to its distance from the EU in the field of criminal cooperation, as it did not exercise the opt-out under Protocol 21 to the TFEU[24] – unlike Ireland and Norway – but it regularly exercised the opt-in right and all relevant EU instruments on judicial cooperation in criminal matters applied to the UK, which has radically changed with Brexit. It should be borne in mind that on leaving the EU, the UK became a third country in its relations with the EU. Extradition has always been the cornerstone of international criminal cooperation between states, so the most important question for criminal cooperation was what would happen to the most frequently used instrument of criminal cooperation between member states – that is the European Arrest Warrant also known as "*informalised" extradition* – once the transition period was over.[25] The somewhat protracted exit negotiations eventually led to the conclusion of the Trade and Cooperation Agreement between the parties, which created a dual system in the area of criminal cooperation, further complicating existing forms of criminal cooperation. In

[22] Jancsó Gábor, "Nemzetközi elfogatóparancs, ideiglenes kiadatási letartóztatás iránti kérelem - a nemzetközi és a hazai jogi fogalmak összeegyeztethetőségének kihívásai," *Fontes Iuris*, no. 2 (2022): 22.

[23] 36/B. § Nbjt. (4).

[24] Treaty on the Functioning of the European Union https://shorturl.at/Gg0t4.

[25] Berczeli Sándor, "Az Európai Unión belüli büntetőjogi együttműködés aszimmetriája - avagy a többsebességes EU megvalósulása a büntetőjogi együttműködés területén," *Büntetőjogi Szemle*, no. 1 (2024): 19–24.

fact, Brexit represented a step backwards in the relationship between the two parties, as the relationship between the UK and EU Member States in relation to mutual legal assistance requests and the exchange of information from criminal records reverted to a pre-EU instrument, namely the 1959 Treaty of Strasbourg. The EU and the UK have been governed by the provisions of the European Convention on Mutual Assistance in Criminal Matters since 20 April 1959, however for example the Council Framework Decision 2008/909/JHA[26] will no longer apply to the enforcement of a custodial sentence based on the principle of mutual recognition and will instead have to refer to the Convention on the Transfer of Sentenced Persons of 21 March 1983, Strasbourg. However, despite these shortcomings, it can be concluded that the instruments and the organisational framework developed in the framework of EU cooperation in criminal matters have been sufficiently effective for the United Kingdom and that it was not in the interest of either party to establish a less effective new system of relations or even to revert entirely to international conventions without EU instruments, mainly concluded under the auspices of the Council of Europe, which would not effectively fill the gap left by the EU instruments.
The effectiveness of the European arrest warrant is demonstrated by the European Union's agreement with Norway and Iceland, which establishes a surrender procedure very similar to the European Arrest Warrant for two countries that are not members of the Union, thus eliminating the multi-level decision-making and time-consuming formalisation of the extradition procedure.[27]

4. European cooperation in criminal matters - the European Arrest Warrant

Criminal cooperation was initially not covered by European (Community) integration because it is undoubtedly the most sensitive aspect of EU policy in the area of freedom, security and justice, which Member States are prepared to abandon only as a last resort in order to defend their sovereignty.[28] At the end of the 1990s, the European Union recognised that it would not be effective in the fight against cross-border crime without closer international cooperation in criminal matters.[29] Many believe that the EU's criminal cooperation was based on the recognition that the common market could be threatened by terrorism, drug trafficking, international fraud and other transnational crimes and that Member States should therefore come to an agreement at a higher level rather

[26] Council Framework Decision 2008/909/JHA https://shorturl.at/4DWMP.
[27] Berczeli, "Az Európai Unión belüli büntetőjogi együttműködés aszimmetriája," 22.
[28] Horváth Zoltán, *Kézikönyv az Európai Unióról* (Budapest: HVG-ORAC, 2007), 511-512.
[29] Blaskó Béla – Budaházi Árpád, *A nemzetközi bűnügyi együttműködés joga* (Budapest: Dialóg Campus Wolters Kluwer, 2019), 119.

than at national level.[30] Prior to the Maastricht Treaty, explicit cooperation in criminal matters took the form of classic multilateral mutual legal assistance agreements, conventions or offers of criminal proceedings.[31]
The aim of European cooperation in criminal matters is not only to ensure judicial cooperation in criminal matters between Member States and to combat cross-border crime, but also to cooperate with States which, although not being members of the European Union, are involved in one or more crimes of which the Community is a victim.[32] Traditional cooperation in criminal matters has developed around the principles of mutual recognition, double criminality and speciality.
The Convention on Mutual Assistance in Criminal Matters (MLA) between the Member States of the European Union of 29 May 2000[33] and its Protocol of 16 October 2001 have taken cooperation to the next level. The so-called TREVI group, set up in 1976, can be considered as the "baby step" in criminal cooperation, while the first step was taken on 14 June 1985 with the signing of the Schengen II Convention, supplemented by the Schengen Convention of 9 June 1990. The three-pillar structure established by the Treaty of Maastricht has also contributed to the development of cooperation in criminal matters, the third pillar being judicial and home affairs cooperation, through the emergence of separate criminal powers, where cooperation has become increasingly important in cardinal areas such as the exercise of control and surveillance of the crossing of the external borders of the Community, cross-border crime and the need to combat organised crime. The Treaty of Amsterdam, which established the principle of an area of freedom, security and justice and paved the way for radical changes, was particularly important in strengthening cooperation in criminal matters, neverthelsess the Treaty of Lisbon, which codified the *principle of mutual recognition* was even more decisive, whereby Member States recognise one another's acts as valid and enforceable in the EU without any special procedure. Under this principle, Member States renounce the principle of double jeopardy and – in accordance with the principle of ne bis in idem – do not conduct separate proceedings in cases where the other State has issued a conviction (e.g. acquittal, lighter sentence, etc.).[34]

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[30] Karsai Krisztina, *Az európai integráció alapkérdései* (Budapest: KJK- Kerszöv Jogi és Üzleti Kiadó Kft., 2004, ISBN 963 224 809 0.), 13.
Karsai Krisztina, "A büntetőügyekben folytatott rendőrségi és igazságügyi együttműködésre vonatkozó rendelkezések," in: *Az Európai Unió alapító szerződéseinek magyarázata 2*, ed. Osztovits András (Budapest: Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2008), 1947–2022.
[31] Törő Andrea, "Bizonyíték-transzfer az európai bűnügyi együttműködésben – különös tekintettel az európai nyomozási határozatra." PhD diss., (Szegedi Tudományegyetem Állam – és Jogtudományi Kar), 2014), 43.
[32] Forstner Róbert, "Az európai együttműködés nemzetközi vonatkozásban," *Európai Tükör*, no. 1-2 (2022): 151–166.
[33] EUR-Lex - 42000A0712(01) - EN - EUR-Lex (europa.eu)
[34] Nagy Anita, "Európai nyomozási határozat a kölcsönös elismerés elve tükrében Kúriai Döntések – Bírósági határozatok," *Kúria Lapja*, no. 6 (2017): 864.

In order to give effect to the principle of mutual recognition, the Council of the European Union adopted on 13 June 2002 the Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States[35] (hereafter referred to as the EAW Framework Decision), which replaced the outdated European Convention on Extradition with a faster and more effective but politically more neutral instrument and procedure.

A European Arrest Warrant (hereinafter referred to as EAW) is a judicial decision issued in one Member State for the purpose of arresting and surrendering a requested person to another Member State for the purposes of prosecution, execution of a custodial sentence or detention order.[36] A European arrest warrant is therefore nothing more than a form of request between the judicial authorities of EU Member States. The procedure is based on the principle of mutual recognition and works through direct contacts between the judicial authorities of all EU Member States.

The aim of the European arrest warrant is to introduce a faster and more efficient procedure than the extradition procedure[37], by changing the model. Therefore, the extradition procedure is replaced by a more efficient and flexible procedure based on the principle of mutual recognition, eliminating or at least reducing the role of diplomatic and political decisions. The EAW Framework Decision – which has been transposed into Hungarian national law by the EU Act – requires national judicial authorities to recognise and respond to a request from a judicial authority of another EU country within a specified time limit and with a minimum of formalities.[38] The European arrest warrant was a major improvement of its predecessor, as the basic principles of extradition, including the prohibition of extradition of nationals, double incrimination and the principle of specificity, made surrender much longer procedure and, in the case of political, financial or military offences, the exclusion of the offence delayed the processing of the case. At the same time, the EAW differs from the traditional extradition that it replaced not only regarding the shortened procedural deadlines, due to the introduction of stricter time limits[39] and the abandonment of the double criminality test for the 32 offences listed, but also regarding the more limited grounds for refusal.[40] The policy decision was

[35] OJ L 190, 18.7.2002, p. 1-20. EUR-Lex - 32002F0584 - HU (europa.eu)
[36] EEP Framework Decision Article 1
[37] KussBach,2005, 408.
[38] Bárd Petra, *Az európai elfogatóparancs Magyarországon – The European Arrest Warrant in Hungary* (Budapest: Országos Kriminológiai Intézet, 2015), 55.
[39] The State of arrest must take a decision on the execution of the European arrest warrant within a maximum of 60 days of the arrest of the person concerned. If the person consents to surrender, the surrender decision must be taken within 10 days.
[40] Németh Kata, *Az Európai Unió Bíróságának ítélkezési gyakorlata a bűnügyi együttműködés területén* (Budapest, Mailáth György Tudományos Pályázat 2023), https://shorturl.at/ZKLnz

intended to be essentially discretionary, a legally regulated framework in which the conditions for both grant and refusal were defined.[41]

One of the advantages of the European arrest warrant is that it does away with the previous administrative and political decision-making level, which was essentially characterised by a procedure and cooperation between the judicial authorities of the Member States based on direct contacts. The novelty of the European arrest warrant is that it also allows or rather requires, the surrender of a national under certain conditions, but the place of residence in Hungary may be an obstacle. Surrender is, in fact, an informalised form of extradition, which no longer refers only to the fact of the physical transfer of the person accused, but also to a decision to that effect.[42] It obliges all judicial authorities to recognise and respond to requests from a judicial authority in another EU country with a minimum of formality and within a given time limit.

In fact, the EAW Framework Decision has limited the grounds for non-execution of a European arrest warrant by providing a list of *mandatory and discretionary grounds for non-execution.* The application of the grounds for non-execution has given rise to several questions of interpretation among national practitioners. The caselaw of the European Court of Justice (hereinafter referred as CJEU) in preliminary rulings in this field provides multiple interpretations.[43]

The grounds for refusal of a European arrest warrant – both mandatory and discretionary – are expressly defined in the EAW Framework Decision. This would seem to indicate their clarity, but an analysis of the caselaw of the Court of Justice of the European Union also shows a higher number of questions of interpretation concerning the discretionary grounds for refusal of the EAW. In the caselaw of the CJEU in 2022-2023, despite the jurisprudence developed in previous decisions of the CJEU, a significant number of questions arose on the interpretation of the double criminality condition[44], – the question of the capacity and powers of the "issuing authority" to issue an EAW[45] and the postponement of surrender based on an issued EAW require further interpretation.[46] There was also a significant number of cases in which the refusal to execute an EAW was based on a violation of a fundamental right laid down in the Charter of Fundamental Rights[47], as a result of which the CJEU had to examine the competition between the Framework Decision and the Charter of Fundamental Rights and interpret EU law in this respect. At the same time there

[41] Jacsó, "Nemzetközi elfogatóparancs, ideiglenes kiadatási letartóztatás iránti kérelem," 27.

[42] M. Nyitrai, 2009, 214.

[43] Case C-168/21 (ECLI:EU:C: 2022:558) see also Case C-158/21 PPU, Case C-699/21, Case C-700/21, Case C-245/15 Bob-Dogi (OJ C 245, 27.7.2015) https://shorturl.at/p37MB

[44] Case C-168/21. (ECLI:EU:C:2022:558), C-562/21. PPU and C-563/21. PPU. (ECLI:EU:C: 2022:100)

[45] Case C-158/21. PPU (ECLI:EU:C:2023:57)

[46] Case C-492/22. PPU (ECLI:EU:C:2022:964)

[47] Case C-261/22. (ECLI:EU:C:2023:1017).

were still cases in which the refusal to execute an EAW was based on shortcomings concerning the independence of the judicial authority of the issuing State.[48]
There is no doubt that the European arrest warrant has created a quicker, more direct and thus, to a certain extent, more efficient instrument of cooperation between the Member States of the European Union, but the questions of interpretation raised by the national law enforcement authorities reveal the shortcomings of the legislation and also show that there is still untapped potential for improvement and efficiency in the European arrest warrant, in particular as regards the examination of the links between the third-country national and the executing Member State.[49] Indeed, in the case in question, the CJEU declared that, in order to assess whether a European arrest warrant issued against a third-country national staying or residing in the territory of the executing Member State should be refused, the executing judicial authority must carry out a comprehensive assessment of all the factors characterising the situation of that national citizen and making it probable that there is a link between that person and the executing Member State, which shows that he or she is sufficiently integrated in that Member State and therefore the enforcement in the executing Member State of a custodial sentence or detention order imposed on him or her in the issuing Member State will improve his or her chances of social rehabilitation after the sentence or detention order has been served.

5. Discussion

The number and depth of preliminary rulings on the interpretation of the EU criminal law before the CJEU leads to the conclusion that, while the effectiveness of the European arrest warrant is undisputed, there is no uniformity in criminal cooperation within the EU. The lack of overall uniformity is clearly a source of difficulty and makes it essential to exercise increased vigilance in the application of the law and to obtain and constantly update accurate information on the Member States participating in each instrument. This can be achieved with the excellent assistance of Eurojust, and also of the national contact points of the European Judicial Network, based on more direct informal contacts, or even the Judicial Atlas function on EJN website,[50] which allows easy navigation and location of the competent judicial authority or the applicable EU law, that is, criminal cooperation instrument.
Since the establishment of the common market, the institutions of the European Union have been engaged in a relentless fight against criminals. In order to win the windmills battle it is essential to build cooperation in criminal matters, based on mutual trust in the legal systems of the Member States. The Court of Justice of the European Union has undoubtedly been the driving force behind

[48] Case C-562/21. PPU and C-563/21. PPU. (ECLI:EU:C: 2022:100).
[49] Case C-700/21. számú ügy (ECLI:EU:C:2023:444).
[50] European Judicial Network (EJN) (europa.eu).

this, fuelled by the proactive spirit of national judges who "turn themselves in" to the Court. The CJEU through its constant interpretative activity has shaped the existing instruments and the principles of their application, which does not only serve to establish a unified European criminal law (in certain areas), but also set the pace in the fight against transnational crime, thus taking the wheel back from the transnational criminals who dictate the pace of development.

With regard to the higher number of cases before the CJEU and thus the rich case-law, it can be said that the CJEU plays an important role in the field of European criminal cooperation by acting as an interpreter and *negative legislator*, by interpreting and chiselling out principles which indicates steps towards the mirage of a unified EU criminal law. Therefore, the judicial activity of the CJEU should be appreciated, as it has played (and still playing) a central curatorial role in the development of the current "toolbox" and sui generis principles of criminal cooperation. The principles of mutual recognition and ne bis in idem – which are the cornerstones of criminal cooperation – and the content of the instruments of criminal cooperation have been elaborated by the case-law of the CJEU. In addition, the case law of the CJEU has clarified the interpretation of certain grounds for refusal of a European Arrest Warrant. On the one hand, in the case of violation of Charter rights[51] it would have led to inhuman or degrading treatment in the issuing State as a result of its transfer; on the other hand, in the case of shortcomings in the judicial system, such as a deficit in the rule of law or a clear interpretation of the condition of double criminality. It is clear from all this that mutual trust is far from being complete and that differences in the level of protection of fundamental rights and the rule of law can arise between Member States. In both cases, Hungary is affected, which may have a negative impact on the application of standards based on negative harmonisation.

Nevertheless, my position is that despite the concerns, the EAW has proved to be effective and is being used by national courts frequently. It is undoubtedly a significant improvement on the previous rules administering extradition between Member States of the European Union, but its application is far not smooth. The fate of the legislation is a drop in the bucket of the pitfalls of criminal cooperation. The European arrest warrant, as presented in this study, is only one segment of the European system of criminal cooperation, but its development is continuous and unstoppable, and one of the most interesting element of which is perhaps the area of electronic evidence[52] together with electronic evidence,[53] the e-file due to the recent technological revolution.

[51] See more: Sampo Salmenojo, *Mutual recognition and the European Arrest Warrant: On the collision course with fundamental rights?* (Master of Law Thesis, University of Turku, Faculty of Lay, 2020).

[52] Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM (2018) 225 final, 2018/0108(COD).

[53] Compared to Stanislaw Tosza, "All evidence is equal, but electronic evidence is more equal than any other: The relationship between the European Investigation Order and

6. Concluding thoughts

The question of how the conceptual elements of international criminal law can be integrated with national concepts and national regulatory systems is difficult to answer for several reasons. Comparing the instruments of criminal cooperation analysed above and their effectiveness is not only difficult, but perhaps pointless, since the very wide range of territorial scope and countries involved in criminal cooperation in their relations with each other and the different aspects of the comparison render the system very diverse. However, it is possible to summarise where there are shortcomings in international and European co-operation on crime, and where and how it could be improved in order to increase the effectiveness and productivity of law enforcement.
The difficulty of international criminal cooperation lies in its vulnerability, because once a national criminal court or the ICC itself has issued an international arrest warrant, the reality is that it has few real options to rely on in the further course of the proceedings, over which it has no real control and is left in a situation of loss of control (a situation known in European criminal cooperation as mutual recognition based on mutual trust, blind trust or optimism?). Vulnerability can be defined as the fact that the State on whose territory the accused is arrested may decide to execute the arrest warrant diligently, whether or not as a result of international political pressure, or for an unrelated reason, or – even if it is out of touch with reality – the accused himself may decide to surrender voluntarily to the issuing court or to the ICC, but if he refuses, the issuing State is powerless to act and has no influence on the functioning of bodies involved in criminal cooperation such as Interpol or Eurojust. Some authors have argued that this area of international law can be paralleled with national courts, and further examine the effectiveness (or weakness) of national criminal justice systems, where there is a degree of automation in the enforcement of criminal law. It can be expected that in each case where a crime is committed, the national or local administration has committed in advance a certain amount of resources to locating, prosecuting and punishing the offender.[54] In distinction, European cooperation in criminal matters is smoother because – not surprisingly – the European Union is more integrated and has a higher gradation of cooperation and institutionalisation (such as Europol, Eurojust, EPPO, OLAF) than criminal cooperation with third countries. Among the various reasons for this, it should be stressed that the EU does not hide its intention to approximate and to some extent unify the criminal law of the Member States, thus creating a European criminal law.[55] The

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the European Production Order," *New Journal of European Criminal Law* 11, no. 2 (2020): 161–183.

[54] Han-Ru Zhou, "The Enforcement of Arrest Warrants by International Forces From the ICTY to the ICC,"217.

[55] Compared to: Karsai Krisztina, *Alapjogi (r)evolúció az európai büntetőjogban* (Szeged: Iurisperitus, 2015), Karsai Krisztina, "European Criminal Policy," *FORVM Acta Juridica et Politica 9*, no. 2 (2019): 63–81., Luisa Martin, "Effective and

institutional network of European criminal cooperation is broader and covers all stages of criminal proceedings, from investigation and prosecution to transfer of proceedings. In relation to third countries, it is necessary to rely on requests for mutual legal assistance based on bilateral or multilateral international treaties and some international organisations. On the whole, however, as a national judge, the law enforcement officer is by no means powerless, since it is possible to issue both European and international arrest and extradition warrants, depending on the suspect's place of residence.

In terms of the effectiveness of the European arrest warrant, the Framework Decision has therefore achieved its objective of speeding up and simplifying surrender procedures. In practice, however, the executing State continues to refer to the judicial authorities as a result of which, practical cooperation on the basis of the EAW form does not always work effortlessly. The case-law of the European Court of Justice has raised further practical questions by clarifying many aspects left open by the general wording of the EAW.

I agree with the view expressed by Advocate General Bobek in case C-717/18.[56] that a distinction should be made between "*individual effectiveness*" and "*structural effectiveness*" regarding the use of EAW. The former reflects the need to ensure the effective transfer of the person wanted, whereas the latter relates solely to the functioning of the procedure as a whole. In the light of the above, the present case has amply demonstrated that the effectiveness of the European arrest warrant system is primarily a matter of a swift and prompt examination of the application by the executing judicial authority, without reference to the outcome of the individual proceedings.[57]

In my view, the effective implementation of the Framework Decision could be further improved. In this respect, it is recommended that infringement proceedings be initiated against Member States that have failed to transpose correctly or fully the Framework Decision[58] and the related provisions of the procedural rights directives. Furthermore, the assistance and coordination

legitimate? Learning from the Lesson of 10 Years of Practice with the European Arrest Warrant," *New Journal of European Criminal Law* 5, no. 3 (2014): 327–348.

[56] Opinion of the Advocate General in Case C-717/18 (ECLI:EU:C: 2020:142) (ECLI:EU:C: 2019:1011).

[57] Lorenzo Grossio, "Legality, Double Criminality and Effectiveness in the European Arrest Warrant System the court of justice in X.," *European Papers* 5, no. 1 (2020): 460–467.

[58] According to the "Exploratory Study the possible Lisbonisation of Ex-third pillar acquis in area of mutual recognition in criminal matters" conducted by Spark and ICF, Hungary has mostly fulfilled its implementation obligation through the provisions of the EU Act, however, certain provisions such as § 3 (2) and (3), § 5. § the Framework Decision has not been fully transposed, which means that only partial conformity with the Framework Decision was established, while for example Article 3(5) and Article 5(4) of the EU Regulation have been only partially transposed and non-compliance with the Framework Decision was established. At the same time Hungary is in line with the European average as regards the completeness of the transposition of the EAW Framework Decision.

provided by Eurojust to the judicial authorities of the Member States could be further supported and financed from the EU budget. The same applies to training and exchanges between judicial authorities. The Commission (in cooperation with Eurojust, the European Judicial (Training) Network and the FRA) could develop and regularly update a "handbook" on judicial cooperation in criminal matters in the EU. Finally, judicial authorities would benefit from the establishment of a central database of national case law on the EAW (as in other areas of EU law). There is no doubt that there is always potential for improvement in criminal cooperation, as well as new challenges that emerge every year, the most fascinating ones at the moment are relating to crimes committed in the digital space and the electronic transfer of evidence generated in this context, and the functioning of the EPPO which encourages further work in this area.

Furthermore, improving the exchange of information and data sharing through standardised databases, further integration of existing systems such as Europol SIENA, the Schengen Information System (SIS) and Eurojust databases would be of key importance to improving the effectiveness of European criminal cooperation. Even more useful would be the increase of real-time data sharing capacities, with a particular focus on cyber security, the processing of which, through the analysis of data by automated and artificial intelligence tools, would allow a faster identification of crime patterns, again contributing to the main objective of European criminal cooperation, namely the effectiveness of law enforcement. In addition to the forementioned, in my considered opinion, an essential and critical element of resolving the current fragmented regulation and increasing efficiency would be the harmonisation of the legal framework and criminal law rules, for example the introduction of common minimum standards for several crimes,[59] such as terrorism and human trafficking, which are typically cross-border offences involving several Member States, and the establishment of a fast-track procedure for the issuing and execution of international and European arrest warrants.

In essence, the efficiency of European cooperation in criminal matters can be improved mainly in the areas of information exchange, technology involvement, legislative harmonisation and resource enhancement. The key is to reduce the current obstacles to cooperation, increase trust between Member States and use innovative tools in all areas of law enforcement.

[59] This has already been partly done by adopting the Directive on the fight against fraud affecting the financial interests of the Union (PIF), which lays down minimum standards for the definition of criminal offences and criminal penalties in the fight against fraud and other illegal activities affecting the financial interests of the Union, with a view to ensuring that they operate in a way that is consistent with the Union acquis in this area.

The Reflection of International Standards for Ensuring the Right to Freedom and Personal Security in Current Vietnamese Criminal Procedure Code

NGUYEN, THI KIM CUC*

ABSTRACT *The right to freedom and personal security is a fundamental human right that can be found in a plethora of international and regional instruments. Firstly, this right is enshrined in the Universal Declaration of Human Rights, as articulated in Article 3, which states that everyone has the right to liberty and security of person. Additionally, other treaties have acknowledged the right to freedom and personal security, including but not limited to the ASEAN Human Rights Declaration and the International Covenant on Civil and Political Rights. In addition to the principle of equality, freedom and personal security are widely regarded as values of democracy, and contemporary Vietnamese society has the task of effectively reconciling and striking a balance between these three elements in a rational manner. This article aims to examine Vietnam's implementation of the commitment to ensure the right to freedom and personal security in human rights treaties to which it is a member. This implementation originated from the principle of pacta sunt servanda, which states that governments have a responsibility to comply with international treaties. Using the analysis and synthesis method, this article focuses on studying international standards that guarantee the right to freedom and personal security, as well as the relevant provisions of the current Vietnamese Criminal Procedure Code. This study employs a comparative method to illustrate how the current Vietnamese Criminal Procedure Code reflects international standards for the right to freedom and personal security. As a result, some findings and initial discussions are highlighted to enhance the effective implementation of ensuring and enhancing the right to freedom and personal security, with the aim of building a rule-of-law state.*

KEYWORDS *freedom, personal security, international standards, Vietnam, criminal proceedings*

1. Introduction

The right to freedom and personal security is one of the most fundamental human rights, due to the fact that this right belongs to first-generation rights. This generation encompasses civil and political rights, which emerged as a

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theory during the seventeenth and eighteenth centuries[1]. At that time, people began to recognize that the all-powerful rulers should not be allowed to do certain things, and that they should have some influence over the policies that affected them[2]. In other words, it is advocated to limit rulers' powers, preventing abuses and injustices. Additionally, the importance of individual rights and freedoms should be emphasized. Therefore, the right to freedom and personal security became a central idea for the generation of this right, aiming to grant every person the freedom to make independent decisions and request others to respect them.

The right to freedom and personal security holds significant relevance not only because of its association with the first generation of human rights, but also because it is a main part of human dignity. Accordingly, human dignity, although there is no unified definition, has been considered one of the moral foundations and legal values. Indeed, human beings cannot live without dignity and the right to freedom and personal security ensures that individuals can live without fear of oppression, violence or arbitrary interference. To put it briefly, this right is acknowledged to prevent arbitrary deprivation since freedom is of human nature[3]. Individuals have the right to freedom, which prohibits arrest and detention unless legally mandated. Meanwhile, the right to personal security protects individuals from physical and psychological harm, maintaining their safety by requiring the states to take reasonable measures. These rights affirm the inherent worth of every person, contributing to a humane society. In essence, the right to freedom and personal security is integral to ensure that individuals can live with dignity, free from fear and arbitrariness.

Among human rights, the most often raised one in criminal proceedings is the right to freedom and personal security. Interference with this right certainly causes considerable suffering because it is the most serious measure of coercion permitted both by domestic and international criminal procedure laws and by the international human rights instruments[4]. In the context of crime control, the authorities regularly and legitimately refer to this right when implementing some specific measures or penalties, such as detention and imprisonment. Detention, in some criminal proceedings, is taken to ensure that defendants are

[1] Patricia Brander, Ellie Keen, Vera Juhász, Annette Schneider, *COMPASS Manual for Human Rights Education with Young People* (Council of Europe, 2023), 403.

[2] Patricia Brander, Ellie Keen, Vera Juhász, Annette Schneider, *COMPASS Manual for Human Rights Education with Young People*, 403.

[3] Antony Flew, "Freedom and Human Nature," *Philosophy* 66, no. 255 (1991): 53, https://www.jstor.org/stable/3751141.

[4] Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2006), 407.

brought to justice[5] and imprisonment is used as a form of punishment in every country[6], including Vietnam.
Vietnam, in its pursuit of establishing a rule-of-law state, clearly identifies that freedom and personal security, in addition to equality, are fundamental values of democracy. Therefore, the strategies and policies issued by the Vietnamese government must be based on the requirement of balancing these elements in a reasonable manner. Given that Vietnam is a signatory to numerous international and regional legal documents that recognize the right to freedom and personal security, the primary objective of this article is to examine Vietnam's implementation of the commitment to ensure the right to freedom and personal security. This obligation originates from the principle of pacta sunt servanda in international law when any nation decides to become a member of any international treaties. When it comes to the Vietnamese legal framework in criminal proceedings, the provisions of the 2015 Vietnamese Criminal Procedure Code will be the focus. Some findings and initial discussions will be outlined at the end of this article to enhance the effective implementation of this right in Vietnam.

2. Methodology

This article uses a combination of different research methods to examine Vietnam's implementation of the commitment to ensure the right to freedom and personal security in human rights treaties to which it is a member. Firstly, Part III uses the analysis and synthesis method to clarify the international standards that guarantee the right to freedom and personal security. By using the same method, Part IV will present provions of the current Vietnamese Criminal Procedure Code that protect this right. Using the comparative method, Part V will assess how well the current Vietnamese Criminal Procedure Code complies with the right to freedom and personal security. Consequently, initial discussions to enhance the effectiveness of the enforcement of the right to freedom and personal security will also be presented in this Part.

3. International standards for the right to freedom and personal security

3. 1 Prior to the introduction of the Universal Declaration of Human Rights

Being a human right affecting the vital elements of an individual's physical freedom and security, the right to freedom and personal security can be tracked

[5] Božidar M. Banović, Vince Vari, Dragana S. Čvorović, "Detention in the Criminal Procedure Legislation of Hungary," *Strani pravni život* 66, no. 4 (2022): 431, https://doi.org/10.56461/SPZ_22405KJ.
[6] "Module 6: Prison Reform – Introduction and learning outcomes," E4J University Module Series: Crime Prevention and Criminal Justice, United Nations Office on Drugs and Crime, accessed August 17, 2024, https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-6/key-issues/1--introducing-the-aims-of-punishment--imprisonment-and-the-concept-of-prison-reform.html.

back to the 1215 Magna Carta, which is known as the Great Charter of Liberties[7]. As considered the UK's most precious gift to mankind when creating a strong inspiration for the US Constitution and many other countries' constitutions in the world[8], Art. 39 of this Charter states that no free person can be imprisoned or arrested except under the law of their equals and the law of the state.[9] This implies that the king and his government was not above the law any longer.[10] In other words, the Charter prevented the king from exploiting his power and granted rights and liberties to "free men". In this case, free men refer to freeholders of feudal law who were those further up the social scale such as the barons, knights, churchmen and merchants.[11] Although the Magna Carta only granted rights and liberties to a limited group of people, it required that arrest or detention must be lawful and safeguarded the individuals against the excesses of their governor. This is seen as the first foundation of the right to freedom and personal security.

The 1679 Habeas Corpus Act further established protection against arbitrary arrest and detention in the 17th century, following the Magna Carta. "Habeas Corpus" in Latin signifies "you may have the body" and serves as a safeguard against unlawful imprisonment and determines the legality of a person's detention.[12] Anyone, including officials, who detained a prisoner, had to show that this detention was legal. As stated by Amanda L. Tyler, this Act accomplished two very important things: it not only imposed substantial limitations on the scope of lawful detention by the executive, but it also dramatically curtailed judicial discretion.[13]

The right to freedom and personal security was further developed, and its scope of application widened after the French Revolution. Accordingly, the 1789 Declaration of the Rights of Man and of the Citizen, inspired by the 1776

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[7] The Preamble, Magna Carta 1297.

[8] Do Trong Tuan, "Magna Carta Libertatum and its value," *Industry and Trade Magazine*, January 25, 2021, https://tapchicongthuong.vn/magna-carta-va-gia-tri-doi-voi-lich-su-nhan-loai-78180.htm#:~:text=Magna%20Carta%20l%C3%A0%20m%E1%BB%99t%20v%C4%83n,nh%C3%B3m%20qu%C3%BD%20t%E1%BB%99c%20n%E1%BB%95i%20lo%E1%BA%A1n.

[9] Valeriy Dmytrovych Pcholkin, Olena Valeriivna Fedosova, Liubov Vyacheslavna Kotova, Valentina Alexandrovna Merkulova, "International Standards for Ensuring the Right to Liberty and Personal Security in Criminal Proceedings of Ukraine," *Amazonia Investiga* 9, no. 29 (2020): 252, https://doi.org/10.34069/AI/2020.29.05.28.

[10] "Magna Carta", UK Parliament, accessed August 19, 2024, https://www.parliament.uk/magnacarta/.

[11] William Cox, "Magna Carta and the Law," *The Western Australian Jurist* 6 (2015): 211, https://classic.austlii.edu.au/au/journals/WAJurist/2015/7.pdf.

[12] "Habeas Corpus Act of 1679," Produce the body, SLP, accessed August 9, 2024, https://blog.umd.edu/slaverylawandpower/habeas-corpus-act-of-1769/.

[13] Amanda L. Tyler, "A Second Magna Carta: The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege," *Notre Dame Law Review* 91 (2016): 1972, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849615.

American Declaration of Independence,[14] was released and the right to freedom and personal security was refered to in Art. 7. In this case, the guarantee of this right is of a higher order. Initially, similarly to the previous documents, liberty and personal security was explained by stating that no man may be accused, arrested or detained except in the cases determined by the law and following the procedure that it has prescribed. Following this statement, Art. 7 outlines the consequences of such arbitrariness. Anyone who solicits, expedites, carries out or causes arbitrary orders to be carried out must be punished.
In summary, the right to freedom and personal security is a natural and fundamental right for every person. Prior to its enshrinement in various international and regional legal documents related to human rights, some legal documents that played a significant role in the development of human rights perceived this right as a basic human right.

3. 2 International and regional legal documents

The first legal reference to the right to freedom and personal security, at the international level, is found in Art. 3 of the 1948 Universal Declaration of Human Rights (UDHR). Accordingly, everyone has the right to freedom and security of person. To understand more details, Art. 3 should be seen in the context of Art. 9 of the UDHR, which states that no one shall be the subject of arbitrary arrest, detention or exile.[15] Despite the brief description of Art. 9, this provision serves as the initial legal articulation of the right to freedom and personal security. To ensure that individuals enjoy the right to freedom and personal security, Art. 9 prohibits arbitrary arrest, detention, or exile. In addition to Art. 9, when it comes to the right to freedom of human body, Art. 10 (right to fair public hearing), Art. 11 (right to be considered innocent until proven guilty) and Art. 13 (right to free movement in and out of a country) also can be referred to as the extended description.
Even though the right to freedom and personal security is described by means of a short provision, it has since been further elaborated upon by a number of human rights instruments at the international and regional levels, such as the 1966 International Convenant on Civil and Political Rights (ICCPR),[16] the 1950 European Convention on Human Rights (ECHR),[17] the 1969 American Convention on Human Rights (ACHR),[18] the 1981 African Charter on Human

[14] "The Declaration of the Rights of Man and of the Citizen," Élysée, accessed August 15, 2024, https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen#:~:text=In%20its%20preamble%20and%20its,principle%20of%20separation%20of%20powers.
[15]Gudmundur Alfredsson and Asbjørn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law International, 1999), 89.
[16] Art. 9, ICCPR.
[17] Art. 5 ECHR.
[18] Art. 7 ACHR.

and Peoples' Rights (Banjul Charter),[19] the 1998 Asian Human Right Charter (AHRC)[20] and the United Nations General Assembly Resolution 43/173 of 9 December 1988 on the Principles for the Protection of All persons under any forms of Detention or Imprisonment and others (the UN General Assembly Resolution 43/173). These documents serve as the foundation for comprehending the essence and scope of the right to freedom and personal security, playing a crucial role in safeguarding and advancing this fundamental human right. Depending on the nature of these legal documents, they may or may not be legally binding for countries, including Vietnam.

3. 3 Vietnam and relevant international standards for the right to freedom and personal security

Vietnam is considered an Asian country with positive strategies and actions in the recognition, protection and promotion of human rights as it is a member of many core human rights treaties and other human rights legal instruments.[21] Within the scope of the right to freedom and personal security, some legal documents should be taken into account, including ICCPR, AHRC, the UN General Assembly Resolution 43/173 and the ASEAN Human Rights Declaration (AHRD). Among these documents, the ICCPR is the only document which is legally binding on Vietnam due to the fact that Vietnam has been a member state of the ICCPR since 1982.[22] Regarding AHRC, despite expectations that this document would be a landmark document in the advance of human rights in the Asian Pacific region,[23] this document is not legally binding.[24] It appears that countries in this region have forgotten the existence of this document since its introduction in 1998, as observed. Similarly, the AHRD, adopted by ASEAN in 2012, does not contain a commitment binding on ASEAN States.[25] This implies that ASEAN members are not required to

[19] Art. 6 Banjul Charter.
[20] Art 14.2 AHRC.
[21] "Vietnam deserves to be an active and responsible member of United Nations Human Rights Council", Nhandan, accessed August 16, 2024, https://special.nhandan.vn/vietnam-deserves-en/index.html.
[22]"Enhancing the effective implementation of the International Covenant on Civil and Political Rights", Foundation Office Vietnam, accessed August 18, 2024, https://www.kas.de/en/web/vietnam/veranstaltungsberichte/detail/-/content/enhancing-the-effective-implementation-of-the-international-covenant-on-civil-and-political-rights.
[23]"Asian Human Rights Charter (1998)", Resources, UCLG Committee, accessed August 20, 2024, https://www.uclg-cisdp.org/en/documents/asian-human-rights-charter-1998#:~:text=Landmark%20document%20in%20the%20advance,(South%20Korea)%20in%201998.
[24] "Legal protection of human rights," Council of European Portal, accessed August 17, 2024, https://www.coe.int/en/web/compass/legal-protection-of-human-rights.
[25] Nicholas Doyle, "The ASEAN human rights declaration and the implications of recent Southeast Asian Initiatives in Human Rights Institution – Building and Standard-

guarantee the rights mentioned in the text. However, the AHRD could be a significant development for human rights in this region as a source of soft law,[26] and it could be the basis for legally binding human rights instruments in the future of the ASEAN.[27] This is the same as what the UDHR has accomplished for the international and regional human rights instruments since its introduction in 1948.

The ICCPR elaborates on Art. 9 of the UDHR's right to freedom and personal security in Art. 9, 10, 11, and 12.4. While Art. 10 and 11 serve as further clarification of Art. 9 of the ICCPR, Art. 12.4 reaffirms a partial content of Art. 9 of the UDHR. It is particularly important to pay attention to Art. 9 since it establishes certain procedural guarantees and minimum standards for protection against arbitrary arrest and detention. Accordingly, the liberty of the individual is not absolute. In other words, Art. 9 of the ICCPR is not an international legal basis that protects individuals from arrest or detention in all cases, and the deprivation of liberty for individuals who have seriously violated the laws and regulations has always existed. These deprivations will remain a legitimate means for states to control individuals within their jurisdiction.

Art. 9 of the ICCPR ensures the lawfulness and non-arbitrariness of arrest and detention, both in content and procedural perspectives. This provision requires state members, including Vietnam in this case, to uphold a set of standards to safeguard and advance the right to freedom and personal security. These standards include: (i) ensuring lawfulness and prohibiting arbitrariness in arrest and detention; (ii) providing information to the arrested persons; (iii) protecting the rights of those arrested and detained; (iv) reviewing the lawfulness of detention; and (v) providing compensation for unlawful arrest and detention. Each paragraph of Art. 9 of the ICCPR presents the aforementioned standards in turn.

3. 3. 1 Ensuring lawfulness and prohibiting arbitrariness in arrest and detention

As mentioned above, the right to freedom and personal security is not an absolute right. Paragraph 1 clearly states the two premissible limitations on this right: (i) the deprivation of liberty should be in accordance with procedures as are established by law, and (ii) the nature of law and its enforcement should not be arbitrary. This means that arrest and subsequent detention must be authorized and fully regulated by law. To do this, the law shall state clearly both the grounds for arrest and detention and the procedure for carrying them out.

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setting," International And Comparative Law Quarterly 63, no.1 (2014): 81, https://doi.org/10.1017/S0020589313000390.

[26] Nicholas Doyle, "The ASEAN human rights declaration and the implications of recent Southeast Asian Initiatives in Human Rights Institution", 81.

[27] Edmund Bon Tai Soon and Umavathni Vathanaganthan, *A Decade of the ASEAN Human Rights Declaration- The AHRD in Disuse and ASEAN's Inability to Take Human Rights Seriously* (Friedrich Naumann Foundation, 2023), 6.

Within the ICCPR, while the following paragraphs of Art. 9 outline the criteria for the legality of the arrest and detention procedure, the grounds for arrest and detention are not regulated.

There has been debate over the definition of "arbitrary," with no support for ideas such as “illegal,” “unjust,” or “both illegal and unjust.”[28] While an illegal arrest or detention is almost always arbitrary, an arrest or detention that is in accordance with the law may nevertheless be arbitrary.[29] After considering many proposals, the following definition of the term “arbitrary” has been adopted by the Committee, which was appointed to prepare a study on the right of everyone to be free from arbitrary arrest, detention, and exile.[30] An arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with respect for the right to liberty and security of person.[31] Obviously, “arbitrary” is not synonymous with “illegal” and the former has a broader meaning than the latter. In other words, the scope of arbitrariness is understood more broadly than just being limited to the scope of legal regulations.

Even though the definition of the term “arbitrary” was released, the exact meaning of “arbitrary” should be established on a case-by-case basis, taking into account all relevant circumstances. For example, in ***Taright v. Algeria,*** it is agreed that arbitrariness should not be synonymous with breaking the law, but rather requires a broader interpretation that encompasses elements of inappropriateness, injustice, lack of predictability and illegality.[32] Similarly, in ***Van Alphen v. the Netherlands***, arbitrariness is not to be equated with against the law.[33] However, the UN Human Rights Committee clarifies arbitrariness in this case by mentioning three elements: inappropriateness, injustice, and lack of predictability.[34] In conclusion, no matter the number of factors involved, it is evident that lawful detention must be reasonable in all aspects. This reasonableness should be evaluated based on the necessity of the detention, to prevent situations where the person detained, if not detained, would engage in activities that could disrupt the case handling process, such as flight, interference with evidence or the recurrence of crime.[35] Furthermore, in any

[28] UN Commission on Human Rights, *Study of the right of everyone to be free from arbitrary arrest, detention and exile* (Departmen of Economic and Social Affairs, 1964), 6.

[29] UN Commission on Human Rights, *Study of the right of everyone to be free from arbitrary arrest, detention and exile,* 7.

[30] UN Commission on Human Rights, *Study of the right of everyone to be free from arbitrary arrest, detention and exile,* 1.

[31] UN Commission on Human Rights, *Study of the right of everyone to be free from arbitrary arrest, detention and exile,* 7.

[32]Abdelhamid Taright et al. v. Algeria, Communication No. 1085/2002, U.N. Doc. CCPR/C/86/D/1085/2002 (2006), para 8.3.

[33] Van Alphen v. the Netherlands (Communication No. 305/1988), para 5.8.

[34] Van Alphen v. the Netherlands (Communication No. 305/1988), para 5.8.

[35] Van Alphen v. the Netherlands (Communication No. 305/1988), para 5.8.

case, detention shall not be continued beyond the period for which the state can provide appropriate reasons. To ensure this, every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In ***A v. Australia***, despite the illegal entry, the state has not advanced any grounds particular to the A's case, which would justify his continued detention for a period of four years; therefore, detention for over four years was arbitrary.[36] It seems that Australia could have avoided this arbitrariness if it had carried out the periodic review process.

3. 3. 2 Providing information to the arrested persons

Paragraph 2 of Art. 9 imposes an obligation to provide information. Accordingly, anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. This provision specifies two different times for providing information, namely (i) the time of arrest and (ii) the reasonable but prompt time. The former will be applied to guarantee individuals the right to understand the precise reason for their arrest. In other words, there will be a connection between the announcement of reasons for arrest and the actual arrest. Meanwhile, the announcement of charges is requested to be released promptly due to the fact that the criminal proceedings necessitate a period of time to investigate and formulate a charge, making it impossible to disclose the charges immediately upon arrest. Therefore, it is important to note that Art. 9.2 of the ICCPR only guarantees the right to know the charges against the arrested without specifying the precise timing of this announcement.

3. 3. 3 Protecting the rights of those arrested and detained

The rights of those arrested and detained will be guaranteed when judicial control is established. Judicial control of arrest and detention in criminal proceedings is presented in paragraph 3 of Art. 9, which states that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. The judicial control imposes two basic requirements, namely (i) the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power and (ii) the right to be tried within a reasonable time or to be released.

Regarding the first requirement, the term "other officer authorized by law" has been discussed in many cases brought to the European Court of Human Rights. In ***Schiesser v. Switzerland***, the Court established the criteria for distinguishing an "other officer" from a "judge." These criteria include: (i) institutional guarantees: independence vis-à-vis the executive and the parties; (ii) procedural guarantees: obligation for the official concerned to hear the accused brought

[36] A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997), para 9.4.

before him personally; (iii) substantive guarantees: decision on the continuation of detention or release to be taken by reference to legal criteria, after the circumstances militating for and against the detention have been examined; power to order release if there are insufficient reasons to justify the detention.[37] Judge Matscher also referenced this criterion in ***Huber v. Switzerland***, raising some contentious issues. He posited that the definition of an officer should meet all the aforementioned requirements, except for the one concerning independence from the parties.[38] It could be seen that the vague nature of the term "other officer" makes it difficult to determine its exact meaning. Furthermore, it should be considered within the context of cases. However, the "other officer," at the very least, should not be dependent on or controlled by the administration to ensure the judiciary's independence.

As for the request being brought promptly, The UN Human Rights Committee states that each country's laws determine how quickly a person can appear before a judge or other officer authorized by law.[39] However, the Committee believes that delays should not exceed a few days.[40] Owing to the lack of specificity in this explanation, the Committee has made several related comments during the handling of the cases that have been brought before it. For instance, in the Concluding Observations: Gabon, the Committee stated that the state should take action to ensure that detention in police custody never lasts longer than 48 hours and that detainees have access to lawyers from the moment of their detention.[41] In this case, the Committee's perspective on the term "a few days" is clearer with precise time. This will serve as a note for member states when establishing relevant provisions in domestic law.

Concerning the duration of pre-trial detention, it is recommended that pre-trial detention should be an exception and as short as possible, according to the Committee.[42] This provision aligns with Art. 14.3, which mandates the prompt trial of the accused following charges. It could be seen that while Art. 9.3 deals with pre-trial detention, Art.14 refers to the entire pre-trial period. Both of these articles require countries to ensure a reasonable period of time. Especially, when mentioning that pre-trial detention should be an exception, this provision grants individuals the right to be released pending trial. In other words, detention pending trial could not be created as a general rule. It should be a measure in some circumstances, if necessary. Furthermore, bail should be permitted, except in situations where there is the likelihood that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state.[43] While encouraging bail, the Committee maintains that

[37] Schiesser v. Switzerland, para 31.
[38] Huber v. Switzerland.
[39] CCPR General Comment No. 8: Article 9, para 2.
[40] CCPR General Comment No. 8: Article 9, para 2.
[41] UN Human Rights Committee: Concluding Observations: Gabon, para 13.
[42] CCPR General Comment No. 8: Article 9, para 3.
[43] Michael and Brian Hill v. Spain, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997), para 12.3.

detention may be required for those charged with horrific offences, where there is a high risk that they will flee and pose a danger to society if released on bail. For example, in ***Thomas v. Jamaica***, even though the period from arrest to trial was nearly fourteen months, the Committee considered that this delay did not, in the overall circumstances of the case, constitute a violation of paragraph 3 of Art. 9.[44]

3. 3. 4 Reviewing the lawfulness of detention

Paragraph 4 of Art. 9 provides for the request to review the lawfulness of detention. Accordingly, the arrested and detained persons shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and may order his release if detention is not lawful. There is no specific regulation on the period of time without delay, therefore, it will be determined on a case-by-case basis. In ***Hammel v. Madagascar***, the detention lasted for three days (72 hours) and during this time, Hammel was unable to approach the court to request a review of the lawfulness of the detention, therefore, the Committee concluded that this action violated the right to a review of the lawfulness of the detention[45]. Meanwhile, in ***Portorreal v. Dominica***, although Portorreal was detained for 50 hours and had no opportunity to access the court, the Committee concluded that there was no violation of paragraph 4 of Art. 9 here.[46] Obviously, the duration of these two cases is quite similar; however, the conclusions are different. Consequently, the violation regarding the delay in accessing the court to get the review of the lawfulness of detention will be determined based on the specific circumstances.

3. 3. 5 Providing compensation for unlawful arrest and detention

Under paragraph 5 of Art. 9, because of the legality of arrest and detention, if these actions are illegal, the right to seek compensation could be raised. In ***A v. Australia***, the Committee agreed that the granting of compensation for detention that is unlawful, is either under the terms of domestic law or within the meaning of the ICCPR.[47] Therefore, the legality of arrest and detention should be in accordance with domestic law and ICCPR. This means that compensation could occur when the arrest and detention are unlawful under domestic law but permitted under Art. 9 of the ICCPR, and vice versa.

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[44] Samuel Thomas v. Jamaica, Communication No. 614/1995; U.N. Doc. CCPR/C/65/D/614/1995 (31 March 1999), para 9.6.

[45] Eric Hammel v. Madagascar, Communication No. 155/1983, U.N. Doc. Supp. No. 40 (A/42/40) at 130 (1987), para 20.

[46] Ramon B. Martinez Portorreal v. Dominican Republic, Communication No. 188/1984, U.N. Doc. Supp. No. 40 (A/43/40) at 207 (1988), para 10.2.

[47] A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997), para 9.5.

4. Right to freedom and personal security in current Vietnamese Criminal Procedure Code

The right to freedom and personal security, or, in other words, ensuring lawfulness and non-arbitrariness in arrest and detention, is specified in the current Vietnam Constitution. Accordingly, Art. 20.2 of the 2013 Constitution states that arrest, holding in custody, or detention of a person shall be prescribed by law. The current Constitution, a document with the highest legal value in the Vietnamese legal system, has established the general principle of arrest and detention to guarantee individuals' right to freedom and personal security. In line with this fundamental principle, the 2015 Vietnamese Criminal Procedure Code (VCPC) and other pertinent documents establish measures to safeguard the freedom and personal security outlined in the 2013 Constitution. Among these documents, the 2015 VCPC plays a leading role in detailing the relevant aspects of arrest and detention.

Given that both arrest and detention result in deprivation of an individual's liberty and can potentially affect many fundamental human rights, the Vietnamese criminal procedure law pays significant attention to regulating their relevant aspects. First, Art. 10 of the 2015 VCPC states that (i) no person is arrested without a court's warrant or procuracy's decision or approval, except for acts in flagrante, and (ii) emergency custody, arrest, temporary detainment or detention must abide by this Code. Obviously, this provision reaffirms the spirit of the 2013 Constitution in Art. 20.2 about the preservation of bodily integrity. This is one of the fundamental principles in criminal proceedings to ensure human rights, and it is consistent with Vietnam's orientation in the judicial reform process. In other words, the recognition of this principle demonstrates the state's responsibility to ensure bodily integrity by establishing effective mechanisms to protect the right of not to be subjected to arbitrary arrest or detention. Following this principle, some main aspects of arrest and detention have been regulated in Chapter VII of the 2015 VCPC when stating that arrest and detention are on the list of preventive measures of criminal procedure, including (a) the goals of arrest and detention, (b) arrest and relevant aspects, (c) temporary detainment and relevant aspects (d) detention and relevant aspects. These other relevant aspects can include (i) the grounds for applying measures, (ii) the subjects of application, (iii) the jurisdiction of application, (iv) the procedure, and (v) the duration of application. Furthermore, rights of subjects in arrest and detention are also stipulated in some other provisions of this Code, such as right to compensation (Art. 31), right to be informed and explained (Art. 58-61).

4. 1 The goals of arrest and detention

Art. 109.1 of the 2015 VCPC clearly states the goals of the preventive measures. These goals are: (a) to preclude crime; (b) to prevent accused persons from evidently obstructing investigations, prosecution, and adjudication; (c) to prevent accused persons from committing other crimes; and (d) to assure the

enforcement of sentences. Given the variety of arrest and detention methods, along with other listed preventive measures such as bail, surety, residential confinement, and exit restriction, it's important to acknowledge that arrest and detention cannot ensure all the aforementioned goals. Additionally, each type of arrest and detention serves to fulfil one or more of these listed goals. For example, the arrest of those who commit crimes in flagrante delicto, also known as a case of arrest, occurs when someone catches them in the act of committing a crime and pursues them.[48] If a person is caught committing a crime, the criminal act has been completed, but the dangerous consequences may not have been caused yet. As a result, arrest could serve to deter crime. Meanwhile, a person who is detected immediately after committing a crime and chased is most likely to hide or destroy evidence. In this scenario, the application of arrest could prevent accused individuals from obstructing investigations, prosecution, and adjudication. Hence, arrest of perpetrators of crimes in flagrante delicto is applied to ensure two goals, including (a) to preclude crime and (b) to prevent accused persons from evidently obstructing investigations, prosecution, and adjudication.

4. 2 Arrest and relevant aspects

Recognizing that arrest has a direct impact on individual liberty, the 2015 VCPC clearly defines the circumstances under which a person can be arrested. Accordingly, the apprehension of persons refers to (a) emergency custody, (b) arrest of perpetrators of crimes in flagrante, (c) arrest of wanted fugitives, (d) arrest of suspects and defendants for detention, and (e) arrest of persons for extradition.[49] Among them, arrest of persons for extradition is carried out under the regulations of arrest of suspects and defendants for detention.

4. 2. 1 Emergency custody

Art. 110 of the 2015 VCPC provides the grounds for emergency custody, the jurisdiction of its application, and the procedure of application.
Regarding the grounds, emergency custody can be applied when: (i) there is substantial evidence that the individual is committing a horrific or extremely serious felony; or (ii) the accomplice committing the crime or the perpetrator of the crime who was identified by the crime victim or a person at the crime scene must be obstructed from escape; or (iii) a person carrying criminal traces or a suspect whose residence, workplace, or tools contain criminal traces must be obstructed promptly from escaping or disposing evidence. Each ground is requested to be understood clearly to ensure that emergency custody will be applied properly. For instance, in the first ground, substantial evidence can be documents, evidence collected by the investigation authorities about which such a person is looking for, preparing tools, means, or creating other necessary

[48] Art. 111.1, The 2015 Vietnamese Criminal Procedure Code.
[49] Art. 109.2, The 2015 Vietnamese Criminal Procedure Code.

conditions for committing a crime, which, if not arrested immediately, crime may occur, causing damage to the interests of the state, society, and the legitimate interests of others. Similarly, there are two requirements that must be met in the second ground. Firstly, there must be a statement from the accomplice or perpetrator of the crime, who was identified by the crime victim, or a person present at the crime scene. Secondly, the investigating authorities must issue a document confirming the accuracy of the aforementioned statement and providing a basis for considering the necessity of preventing the perpetrator's escape.

As regards the jurisdiction of application, Art. 110.2 of the 2015 VCPC clearly states that individuals, such as the head and vice heads of investigation authorities, commanding pilots and captains of aircraft and ships departing airports or seaports, and heads of authorities assigned to conduct certain investigative activities, are entitled to issue an order of emergency custody. The assigned authorities in this case are border protection units, the maritime police force, and bureaux of fisheries resources surveillance. These authorities have been playing an important role in the practice of fighting crime.

Due to the urgency of this measure in preventing crime, the application procedure for the order of emergency custody does not require the approval of procuracy prior to execution. However, all individuals entitled to issue an order of emergency custody must comply with all provisions in Art. 110 to prevent any acts of abuse or arbitrary arrest that infringe upon the legitimate rights and interests of citizens. The procuracy, in particular, must strictly administer relevant issues, including the grounds for detainment.[50] If necessary, the procurator will meet with the emergency detainee before approving or denying the order of emergency custody. If the order is denied, both the individual issuing the order and the investigating authority receiving the detainee must immediately release the detainee.

4. 2. 2 Arrest of perpetrators of crimes in flagrante

Art. 111 of the 2015 VCPC provides the grounds for arrest of perpetrators of crimes in flagrante, the jurisdiction of its application, and the procedure of application.

The grounds for arresting perpetrators of crimes in flagrante include: (i) a person is discovered while committing a crime; (ii) a person is discovered immediately after committing a crime; or (iii) the offender who was discovered while committing the crime or immediately after committing the crime fled and was chased.[51] In the first scenario, the offender is committing one or more prescribed crimes under the Penal Code but has not yet completed the crime when discovered. On the other hand, the second scenario involves an offender who has already committed all the crimes listed in the Penal Code and has just come to light. The offender may be discovered while escaping from the scene,

[50] Art. 110.6, The 2015 Vietnamese Criminal Procedure Code.
[51] Art. 111.1, The 2015 Vietnamese Criminal Procedure Code.

while hiding, concealing the tools and means of committing the crime, or while erasing traces of crime before fleeing and being discovered. The time of discovery and the time of committing the crime must be consecutive or close together. In the third ground scenario, the pursuit must begin immediately after the offender has fled. A time gap between the chase and the escape prevents the arrest of the person in flagrante.

All citizens have the authority to arrest a person in flagrante, according to the 2015 VCPC. This provision originates from the urgency of preventing criminal acts and the evasion of the law by criminals, as well as promoting the active and proactive role of the masses in the fight against crime.

Citizens have the right to search an arrested person in flagrante to disarm them, ensure the safety of citizens, and prevent the arrested person from suddenly using a weapon to attack, continue committing a crime, or evade the law. The nearest police station, procuracy, or people's committee will then receive the arrested person. These authorities, when taking the detainee, must make a written record of the incident and delivery by forcing the detainee or reporting to competent investigation authorities in a prompt manner.

4. 2. 3 Arrest of wanted fugitives

Competent authorities issue a wanted notice for those who have committed crimes and are considered wanted. These individuals include suspects or defendants who have fled or whose whereabouts are unknown; those sentenced to deportation and those serving deportation sentences who have escaped; those sentenced to prison who have escaped; those sentenced to death who have escaped; those serving prison sentences, those whose prison sentences have been temporarily suspended and those whose sentences have been postponed who have escaped.

The authority to arrest a wanted person and the process after arresting are the same as those prescribed for arresting a person in flagrante.[52]

4. 2. 4 Arrest of suspects and defendants for detention

As clearly identified in the term, the arrested persons in this case are suspects and defendants. In other words, a person who has committed a crime or whose behavior shows signals of a crime but has not yet been prosecuted by a competent authority cannot be subject to this preventive measure.

Even though this preventive measure is prescribed to apply to suspects and defendants, not all suspects and defendants can be arrested for detention. This measure will be applied to suspects and defendants who have committed a horrific or extremely servere felony.[53] Furthermore, it can also apply to those who have committed a felony or misdemeanor if they meet the requirements described in Art. 119.2 and 119.3 of the 2015 VCPC. Particularly, it should be

[52] Art. 112.2 and Art.112.3, The 2015 Vietnamese Criminal Procedure Code.
[53] Art. 119.1, The 2015 Vietnamese Criminal Procedure Code.

noted that in the case of suspects and defendants who are pregnant, raising a child less than 36 months of age, or suffering from senility or serious diseases, arrest will be applied with certain conditions listed in Art. 119.4.

Regarding the jurisdiction of application, pursuant to Art. 113.1, the following individuals are entitled to order and decide the apprehension of suspects and defendants for detention, namely (i) heads and vice heads of investigation authorities, (ii) head and vice heads of procuracy, (iii) court presidents, vice court presidents and trial panel. While the trial panel renders an arrest decision, other authorities issue an arrest warrant. The arrest warrant issued by the investigation authorities should be approved by the procuracy.

Regarding the procedure of arrest, enforcers of an arrest warrant must read out the warrant, explain its content, the arrestee's duties and rights, make a written record of the arrest, and serve the warrant upon the arrestee. It should be noted that apprehension must not occur at night,[54] in other words, from 22 pm to 6 am in the next morning.[55]

4. 3 Temporary detainment and relevant aspects

Art. 117 of the 2015 VCPC prescribes temporary detainment. Accordingly, temporary detainment may apply to persons held in emergency custody or arrested for crimes in flagrante, malefactors confessing or surrendering, or persons arrested as per wanted notices. Listing five categories of subjects of application reveals that temporary detainment serves as the next preventive measure for certain arrest cases. Investigation authorities carry out temporary detainment to establish favorable conditions for gathering initial evidence, which clarifies details about the crime and the identity of the detainee. According to the collected documents and evidence, the investigation authorities decide whether to initiate a case, prosecute the accused, apply detention or other necessary preventive measures, or release the arrested person. In other words, not all cases of emergency custody, arrested for crimes in flagrante, malefactors confessing or surrendering, or persons arrested as per wanted notices can be temporarily detained. After being arrested, if it is determined that there is insufficient evidence, or the nature of the crime is not serious, or there is no basis for that the arrested person will continue to commit crimes, evade the law and obstruct the investigation, temporary detainment is not applied.

According to Art. 117.2, individuals have the authority to issue an emergency custody order that determines temporary detainment. They are (i) the head and vice heads of investigation authorities, (ii) commanding pilots and captains of aircraft and ships departing airports or seaports, and (iii) heads of authorities assigned to conduct certain investigative activities, namely border protection units, the maritime police force, and bureaux of fisheries resources surveillance.

[54] Art. 113.3, The 2015 Vietnamese Criminal Procedure Code.
[55] Art. 134.1, The 2015 Vietnamese Criminal Procedure Code.

Regarding the procedure of temporary detainment, this preventive measure is carried out when a written decision on temporary detainment is made by the competent authority. In 12 hours upon making such decision, the individual issuing the decision on temporary detainment must send the decision and supporting documents to the equivalent procuracy or a competent procuracy. If the temporary detainment is found unjustified or unnecessary, the procuracy issues a decision on annulling the decision on temporary detainment. Following that decision, the individual issuing the decision on temporary detainment must immediately discharge the person on temporary detainment.[56]

In regard to the duration of temporary detainment, Art. 118 of the 2015 VCPC allows the time limit for temporary detainment to be 3 days. If necessary, the duration of temporary detainment can be extended for at most 3 additional days. Furthermore, special events allow for a second extension of the temporary detainment duration, up to a maximum of 3 more days. As a result, the duration of temporary detainment, including the maximum extension, shall not exceed 9 days. It should be noted that the time spent in detainment shall be subtracted from the time spent in detention. One day spent in detainment gives one day's credit towards the time passed in detention. Additionally, the time spent in detainment shall be subtracted from the time spent in imprisonment[57] and community sentence.[58] These deductions are quite suitable for ensuring the detainee's legitimate rights as temporary detainment has deprived the right to personal freedom.

4. 4 Detention and relevant aspects

Detention is the most severe preventive measure because it deprives personal liberty for a relatively long period of time, compared to temporary detainment and other preventive measures that do not deprive personal liberty. Art. 119 of the 2015 VCPC specifies the grounds for applying detention and the jurisdiction of its application, which bear similarities to the grounds and jurisdiction of apprehension of suspects and defendants for detention outlined in Art. 113.

Regarding the procedure of detention, detention orders made by authorized individuals must be approved by the equivalent procuracy prior to the enforcement of such orders. The procuracy must approve or deny such request within 3 days upon receipt of a detention order, written request for approval and relevant documents. The procuracy must return documents to investigation authorities upon the former's completion of the ratification process.[59] When implementing detention, investigation authorities must inspect identity papers of persons in detention and inform their family members, worksplace,

[56] Art. 117.4, The 2015 Vietnamese Criminal Procedure Code.
[57] Art. 38, The 2015 Vietnamese Penal Code.
[58] Art. 36, The 2015 Vietnamese Penal Code.
[59] Art. 119.5, the 2015 Vietnamese Criminal Procedure Code.

educational facility or local authorities in the commune, ward or town where they reside.[60]

The 2015 VCPC divides the duration of detention into three categories: detention for investigation, detention for prosecution, and detention for trial. In the first category, the maximum period of detention will be 20 months for extremely severe felony crimes against national security.[61] Meanwhile, when applying for an aggravated severe felony, the maximum period of detention for prosecution is 60 days.[62] In cases of detention for trial, the duration of detention depends on the stage of trial, such as first instance trial, appeal, or cassation proceedings. It can be seen that Vietnam clearly understands the severity of detention and the deprivation of personal liberty when implementing detention measures. Therefore, the 2015 VCPC has divided many cases of detention with different detention periods suitable for each purpose and nature of each case in detention.

5. Current Vietnamese Criminal Procedure Code: Complete or partial compliance?

The 2015 VCPC essentially recognizes and prescribes the fundamental standards for ensuring the right to freedom and personal security in a detailed manner. Accordingly, as mentioned above, there are five standards based on Art. 9 of the ICCPR: (i) ensuring lawfulness and prohibiting arbitrariness in arrest and detention; (ii) providing information to the arrested persons; (iii) protecting the rights of those arrested and detained; (iv) reviewing the lawfulness of detention; and (v) providing compensation for unlawful arrest and detention.

Regarding the first standard, to ensure the lawfulness of arrest and detention, the 2015 VCPC has detailed the grounds and procedures for each category of arrest and detention, which are presented in Section IV. Each category will have distinct grounds and procedures, with detailed requirements depending on the nature of each arrest and detention type. Furthermore, this Code specifies the goals of preventive measures, including arrest and detention, to avoid arbitrariness. These goals have proven Vietnam's stance on recognizing and ensuring human rights in criminal proceedings. As a result, Vietnam always respects and carefully considers measures that directly affect basic human rights before prescribing and implementing them. The 2015 VCPC emphasizes that the application of arrest and detention, despite their deprivation of freedom and personal security, serves to uphold social order and other legitimate rights and interests of individuals.

As for providing information to those who have been arrested, even though the 2015 VCPC does not have a separate provision on this standard, the fact that arrested persons are informed and explained about their rights and obligations

[60] Art. 119.6, the 2015 Vietnamese Criminal Procedure Code.
[61] Art. 173, the 2015 Vietnamese Criminal Procedure Code.
[62] Art. 240.1, the 2015 Vietnamese Criminal Procedure Code.

has been clearly mentioned in this Code. Accordingly, persons held in emergency custody and arrested for criminal acts in flagrante and wanted notices, temporary detainees are entitled to be informed of reasons for their temporary detainment and arrest.[63] Meanwhile, suspects are entitled to be informed of reasons for charges against them.[64] All these individuals also receive information and clarification regarding their responsibilities and rights.[65] Ensuring the provision of information to arrested persons plays an important role in ensuring transparency and fairness in arrest and detention, avoiding cases of arrest and detention without reason, leading to arbitrary arrest and detention.

In regard to protecting the rights of those arrested and detained and reviewing the lawfulness of detention, the 2015 VCPC has guaranteed by providing for detailed regulations on the grounds, procedures, jurisdiction, and duration of temporary detainment and detention, which are presented above in Section IV. Recognizing that the implementation of arrest and detention will impact fundamental human rights, this Code has meticulously categorized various arrest and detention scenarios with pertinent provisions. This approach contributes to maintaining a balance between crime prevention effectiveness and safeguarding the rights and legitimate interests of individuals.

The 2015 VCPC clearly states the right to compensation in Art. 31. This provision places an obligation on the state to guarantee compensation for crime victims in criminal cases. Accordingly, the state shall compensate persons held in emergency custody, arrested, temporarily detained, or held in detention incorrectly or illegally for physical and spiritual damage and the restoration of their dignity. Vietnam has clearly defined the types of damage that require compensation in this case, namely physical and spiritual damage. Additionally, due to the fact that human dignity is essential for each individual, competent authorities should consider human dignity. And in case of violation, it will be restored appropriately.

The VCPC fully complies with the standards outlined in Article 9 of the ICCPR, ensuring the right to freedom and personal security. Nevertheless, in the specific provisions on related issues, there are still some unreasonable contents that need to be discussed, further researched, and clarified. For instance, if there is sufficient evidence to suspect that the individual is preparing to commit a horrific or extremely severe felony, the measure of emergency custody can be applied. However, at the preparation stage, it is very difficult to determine what type of crime an act may constitute. In other words, the basis for determining that the person is preparing to commit a horrific or extremely severe felony will depend largely on the subjective assessment of the competent procedural persons. This will lead to a lack of objectivity and fairness for the arrested person. Or, in the event of detention, other preventive measures should take the place of those suffering from senility or serious diseases, according to

[63] Art. 58.1.b, Art. 59.2.a, the 2015 Vietnamese Criminal Procedure Code.
[64] Art. 60.2.a, the 2015 Vietnamese Criminal Procedure Code.
[65] Art. 58.1.c, Art. 59.2.b, Art. 60.2.b, the 2015 Vietnamese Criminal Procedure Code.

the 2015 VCPC. However, the definition of "the persons suffering from serious diseases" lacks clarity. Meanwhile, in some other documents, such as the 2015 Vietnamese Penal Code, the term "people having fatal diseases" has been used.[66] Neither of the terms have clarified definitions, and there is no basis stating that they can be used interchangeably. When concepts lack unity and clarity, the competent procedural authorities may make inaccurate assessments.

In short, it can be briefly commented that compliance with a provision mentioned in a relevant international treaty is not only demonstrated by the existence of specific provisions and regulations in domestic law but also by the appropriateness of these provisions. In this case, Vietnam has recognized and prescribed the standards set out in the ICCPR for ensuring personal freedom and security. At the same time, Vietnam must continue to improve relevant regulations, particularly the 2015 VCPC, to ensure that the implementation of standards on freedom and personal security in criminal proceedings is effective in practice.

6. Conclusion

The right to freedom and personal security is one of the most fundamental human rights. This right is acknowledged to prevent arbitrary deprivation since freedom is of human nature. In criminal proceedings, the right to freedom and personal security is the most frequently raised issue because, in the context of crime control, the authorities regularly and legitimately refer to this right when implementing some specific measures or penalties, such as detention and imprisonment. Detention in some criminal proceedings is taken to ensure that defendants are brought to justice and imprisonment is used as a form of punishment in every country, including Vietnam.

Vietnam, in its pursuit of establishing a rule-of-law state, clearly identifies that freedom and personal security are fundamental values of democracy. Furthermore, Vietnam is considered an Asian country with positive strategies and actions in the recognition, protection, and promotion of human rights when being a member of many core human rights treaties and other human rights legal instruments. Within the scope of the right to freedom and personal security, the ICCPR is the only legally binding document for Vietnam. According to ICCPR, arrest and detention should be lawful and non-arbitrary, both in content and procedural perspectives. This provision requires state members, including Vietnam in this case, to uphold a set of standards to safeguard and advance the right to freedom and personal security, namely ensuring lawfulness and prohibiting arbitrariness in arrest and detention; providing information to the arrested persons; protecting the rights of those arrested and detained; reviewing the lawfulness of detention; and providing compensation for unlawful arrest and detention.

The 2015 VCPC essentially recognizes and prescribes the fundamental standards for ensuring the right to freedom and personal security, as detailed in

[66] Art. 36.4, the 2015 Vietnamese Penal Code.

Art. 9 of ICCPR. However, in the specific provisions on related issues, some unreasonable content still remains. It should be noted that compliance with a provision mentioned in a relevant international treaty is demonstrated not only by the existence of specific provisions and regulations in domestic law, but also by the appropriateness of these provisions. As a result, it is not enough for Vietnam to recognize and regulate standards on personal freedom and security. Vietnam needs to improve current relevant regulations so that the implementation of these standards is effective in practice.

Determining who has custody of children after divorce in Vietnam: A legal perspective from children's rights

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ABSTRACT *The right of parents to custody of children after divorce is a significant privilege and obligation under marriage law, which is of interest to the legal systems of many countries, including Vietnam. The provisions regarding the right of parents to directly nurture their children post-divorce impose a responsibility on parents and contribute to the protection of children's rights. Competent state agencies and organisations are also responsible for protecting children when parents divorce and the family unit is no longer intact. Consequently, the rights and interests of children are guaranteed to be upheld in the event of a divorce.*

Furthermore, the implementation of parental rights and responsibilities after divorce helps children avoid psychological complexes and trauma, thereby ensuring their optimal development in all domains. However, the right to custody of children by parents after divorce is not inherent in all divorce cases. This right is reserved for minors and adult children who have lost civil capacity, are unable to work, and have no assets to support themselves. To meet the objective requirements of societal and familial development, the current Vietnamese law on marriage and family, in general, and the law on protecting children's rights when parents divorce, in particular, have been developed. Nevertheless, the Vietnamese law on marriage and family still has disadvantages and inadequacies, which, in practical cases, create challenges in implementing the right to sole custody of children when parents divorce, alongside its positive aspects.

This article examines the legal issues related to the right to custody of children in the event of divorce under Vietnamese law. It also suggests strategies for enhancing the law using the legislative experiences of various jurisdicions countries worldwide.

KEYWORDS *family law, comparative law, Vietnamese law, child custody, divorce*

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1. Introduction

According to Vietnamese law, the settlement of child custody in the event of parental divorce is primarily governed by the Law on Marriage and Family.[1] The right to child custody post-divorce encompasses the right to directly look after, care for, raise, and educate the child, as determined by the Court's divorce decree. Post-divorce, parents retain the right and obligation to look after, care for, raise, and educate minor children, as well as adult children who have lost civil act capacity or are unable to work and lack the means to support themselves, as described by the Law on Marriage and Family, the Civil Code,[2] and other relevant laws. The parents may agree on who will raise the child and each party's obligations and rights post-divorce.[3] Without such an agreement, the Court will assign custody to one parent based on the child's best interests.[4]
In other countries, the right to child custody is recognized under different terminologies. For instance, in the United States, it is referred to as a "physical custody arrangement,"[5] which is a decision by the Court or an agreement between the parents regarding the child's post-divorce residence. Depending on the specific circumstances and the child's best interests,[6] this arrangement can be assigned to one parent or shared between both. In the United Kingdom, it is termed a "child arrangement order,"[7] a decision by the Court or a shared agreement between the parents,[8] prioritizing the child's best interests. In Japan, the term "custody right" is used. The Family Court typically considers it in the

[1] Law No. 52/2014/QH13 was issued by The National Assembly on Marriage and Family on 19. 6. 2014, gazette number 52/2014/QH13. https://thuvienphapluat.vn/van-ban/quyen-dan-su/Luat-Hon-nhan-va-gia-dinh-2014-238640.aspx.
[2] Civil Code No. 91/2015/QH13 was issued by the 13th Vietnamese National Assembly on November 24, 2019. https://thuvienphapluat.vn/van-ban/quyen-dan-su/Bo-luat-dan-su-2015-296215.aspx.
[3] Anh Tuan, "Child Custody After Divorce." *Communist Party of Vietnam Electronic Newspaper*," https://dangcongsan.vn/ban-doc/luat-su-cua-ban/quyen-nuoi-con-sau-ly-hon-637700.html. Posted on May 15, 2023. Accessed on March 6, 2024.
[4] Dien Nguyen Ngoc, *Giáo Trình Luật Hôn Nhân và Gia Đình Việt Nam=Course Book-Law on Marriage and Family Vietnam" - Volume 1*, (National Political Pulishing House, 2022): 223–230.
[5] CustodyxChange, "US child custody law," https://www.custodyxchange.com/topics/custody/types/joint-physical-custody.php. (accessed 05. August 2024).
[6] See: June Carbone, "Child Custody and the Best Interests of Children—A Review of" From Father's Property to Children's Rights: The History of Child Custody in the United States," *Family Law Quarterly* 29, no. 3 (1995): 730–731.
[7] Lancashire, "Children's Arrangement Order," https://www.proceduresonline.com/lancashirecsc/p_ch_arr_order.html (accessed 05. August 2024).
[8] See: Edward Kruk,*Child custody, access and parental responsibility: The search for a just and equitable standard* (Father Involvement Research Alliance, 2008), 31.

child's best interest[9] to remain in their "usual residence," often granting sole custody to the parent who has most recently cared for the child. However, shared custody is also possible, always focusing on the child's best interests.[10] In Germany, the term "Sorgerecht" is used, and it involves a court decision or an agreement between the parents regarding the child's residence post-divorce. The German legal system prioritizes the child's best interests. It encourages shared parental responsibility.[11] Nonetheless, one parent can independently delegate custody to the other based on mutual agreement and the child's best interests. Generally, the right to custody post-divorce, across various countries, is either a court decision or an agreement between the parents regarding the child's residence, care, and upbringing, with the child's best interests being the paramount consideration.

It can be concluded that the right to custody of children when parents divorce is an agreement between the couple regarding who the child will live with and who will primarily raise and care for them. If the parents cannot agree, the Court will decide who will raise the child based on the child's best interests. After the divorce, parents retain the rights and obligations to look after, care for, raise, and educate minor children, as well as adult children who have lost civil act capacity or are unable to work and lack the means to support themselves, under the Law on Marriage and Family. The husband and wife can agree on who will directly raise the child. The law ensures the child's rights during divorce proceedings, and agreements between husband and wife on child custody after divorce are always encouraged. This article analyzes the legal regulations on parents' rights to custudy of children after divorce in Vietnam, based on comparisons with the laws of other countries and their reference values for Vietnam. The study also identifies shortcomings in the legal regulations on the right to custody of children of parents after divorce in practice. It proposes recommendations to improve the law in Vietnam.

[9] Takao Tanase, and Matthew J. McCauley, "Divorce and the best interest of the child: Disputes over visitation and the Japanese family courts," *Pac. Rim L. & Pol'y J.* 20 (2011): 576–577.

10Australian Embassy Tokyo, "Japan Child Custody Law," https://japan.embassy.gov.au/tkyo/familylaw.html#:~:text=In%20Japan%2C%20married%20parents%20have,be%2 0considered%20under%20certain%20circumstances. (accessed 05-03-2024).

[8] Anwalt, "Law on child custody, rights and responsibilities between parents and children," https://www.anwalt.org/sorgerecht/#%E2%80%9EGeteiltes_Sorgerecht%E2%80%9C_Rechte_und_Pflichten. (accessed 05 August 2024).

[11] Sabine Walper, Christine Entleitner-Phleps, and Alexandra N. Langmeyer, "Shared physical custody after parental separation: Evidence from Germany," *Shared Physical Custody* 25 (2021): 285.

2. Sole custody of the child after divorce: who has the right

The legal relationship between marriage and family and the relationships arising from emotional or blood ties involve individuals within the family. Termination of marriage due to divorce is an act of will by one or both spouses, formalized by the Court's decision. The marital relationship ceases to exist immediately after the Court's judgment or decision on divorce takes legal effect. Post-divorce, the personal rights and obligations between husband and wife end entirely, regardless of mutual agreement, as determined by the Court. Obligations from marriage, such as love, respect, care, mutual support, and fidelity, naturally terminate.

However, the relationship between parents and children remains unaffected by the marital status. Raising and educating children are both a right and an obligation of parents, encompassing issues such as child custody, child support, and changes in custody post-divorce, as regulated by the Law on Marriage and Family.[12] After divorce, the Court assigns the right to raise the child directly to the spouse deemed qualified to care for, raise, and educate the child. Parents retain the right and obligation to look after, care for, raise, and educate minor children, as well as adult children who have lost civil act capacity or are unable to work and lack the means to support themselves, in accordance with the Law on Marriage and Family, the Civil Code, and other relevant laws. The settlement of sole child custody rights can occur at the time of divorce and at different times if there is a request to change custody arrangements post-divorce. Thus, the right to child custody can be subject to change based on the requests of either parent.

Husbands and wives, as parents, possess equal rights and obligations in loving, raising, caring for, and educating their children. There is no distinction between biological and adoptive parents; both hold the same rights and responsibilities towards their children. Adoptive parents are endowed with the same rights and obligations as biological parents, including the duty to love, care for, and educate their children. This parity extends to situations of divorce, where adoptive parents retain the right to raise their children, akin to biological parents.

Post-divorce, the responsibility for the education of minor children, as well as adult children who are disabled, lack civil capacity, are unable to work, and have no means of self-support, must be determined based on the actual conditions of the parents. The paramount consideration is the best interests of the children in all aspects. The court must evaluate each parent's moral character, employment status, economic conditions, and available time to ascertain who is better equipped to care for, raise, and educate the child. Additionally, the court should consider the emotional bond between the child and each parent when resolving custody matters. When parents mutually agree on child custody and support arrangements, the court must intervene only if such agreements are deemed unreasonable or fail to protect the child's interests.

[12] Linh Thi My Nguyen, Giang Thi Truc Huynh, and Qui Khac Tran, "A legal perspective on child support obligation after divorce: The Vietnamese case," *CTU Journal of Innovation and Sustainable Development* 15, no. 3 (2023): 116.

Under specific legal provisions, parental rights may be restricted at the request of either parent, other family members, the Procuracy, other agencies or individuals. Changes in the person directly raising the child can be requested by family members other than the parents, the Procuracy, other agencies or organizations if such changes serve the child's best interests. In exceptional cases, the court may decide to place the child in the care of grandparents or other relatives if both parents are found unqualified or lack the necessary conditions to care for, raise, and educate the child.[13]

In addition to parents asserting their right to directly raise their children post-divorce directly, there are instances where both parents relinquish this responsibility. Consequently, grandparents or other relatives may assume the right to raise the children upon the parents' divorce.[14] Article 108 of the Law on Marriage and Family of Vietnam delineates the rights and obligations of paternal and maternal grandparents towards their grandchildren. It states that grandparents have the right and responsibility to look after, care for, and educate their grandchildren, live exemplary lives, and set good examples for their descendants. Specifically, in cases involving minor grandchildren, adult grandchildren who have lost civil capacity, or those unable to work and lack property to support themselves, grandparents are obligated to raise them.

According to the law, if a minor or an adult who has lost civil capacity or is unable to work and has no property to support themselves, lacks parental or sibling care, the paternal and maternal grandparents have the right and obligation to raise them. Clause 2, Article 87 of the Law on Marriage and Family stipulates that child care and custody will be assigned to a non-parent guardian under the following conditions: (i) both parents have limited rights over the minor child; (ii) one parent is not restricted but is unqualified to raise, care for, and exercise rights and obligations towards the child; (iii) one parent has limited rights over the minor child and the other parent is unidentified. Article 52 of the Civil Code outlines the natural guardianship order for minors, prioritizing biological siblings. If siblings are unqualified, the next biological sibling becomes the guardian. Without qualified siblings, the natural guardians are the paternal or maternal grandparents.

Thus, grandparents can only gain custody of their grandchildren when both parents have restricted custody rights, are unqualified to raise the children, or when the grandchildren express a desire to be raised by their grandparents, as per Clause 2, Article 81 of the Law on Marriage and Family. Grandparents must meet additional conditions to obtain custody, including: (i) both parents have limited custody rights, or one parent has limited custody rights, and the other is unqualified to raise the child; (ii) no siblings are qualified to raise and care for the child. Based on these provisions, according to the law, grandparents have the

[13] Dien Nguyen Ngoc, "*Giáo Trình Luật Hôn Nhân và Gia Đình Việt Nam=Course Book-Law on Marriage and Family Vietnam" - Volume 1*. (National Political Pulishing House, 2022), 223–230.

[14] Huyen Le Thi Le, "Quyền của con chưa thành niên sau khi cha mẹ ly hôn = Rights of minors after parental divorce" (PhD diss., Trường Đại học Trà Vinh, 2021), 31–33.

right to raise their grandchildren in exceptional cases.[15] The priority order in the Law on Marriage and Family regarding custody when a child has no parents or when parental rights are limited prioritizes siblings. Without qualified siblings, grandparents have the right and obligation to raise the grandchild directly.

Therefore, the party entitled to sole custody of the child post-divorce is determined based on the mutual agreement of the child's parents. Without such an agreement, the Court will decide on the custodial arrangement, prioritizing the child's best interests and considering both material and spiritual conditions. In exceptional circumstances where parents have limited rights over their minor children, the Court may assign custody to grandparents, siblings, relatives, or guardians. The custodial rights may vary depending on the specific case, as stipulated by the Law on Marriage and Family and the Civil Code.

In summary, the primary custodians in the context of divorce within the legal framework of marriage and family are biological parents for their biological children and adoptive parents for their adopted children. Additionally, other particular custodians such as grandparents, biological siblings, other relatives, or guardians may be granted direct custody of the children after divorce.

3. Content and scope of child custody rights

According to the Law on Marriage and Family of Vietnam, when parents divorce, the right to raise the child is typically based on the mutual agreement of the father and mother. The Court will prioritize the child's best interests if no such agreement is reached. For children who are 7 years old or older, the Court must consider their wishes. For children under 36 months old, the mother is generally granted sole custody unless the mother is deemed unqualified to look after, care for, and educate the child or if the parents have another agreement that better serves the child's interests (Article 81). Husbands and wives have equal rights and obligations in looking after, caring for, raising, and educating their children. A Court decision assigning a child to one parent for direct care is not permanent and can be changed. Issues related to children are resolved based on protecting the child's interests in all aspects.[16] Upon request from parents or other individuals or organizations as prescribed by law, the Court may decide to change the person directly raising the child. This change can be based on (i) an agreement between the parents that aligns with the child's interests or (ii) the current custodian being unqualified to look after, care for, raise, and educate the child. The wishes of children aged seven years and older must be considered. If both

[15] Nguyen Huong, Nguyen Thi Hong Van, "Ông bà có được giành quyền nuôi cháu khi bố mẹ ly hôn? = Do grandparents have the right to raise their grandchildren when their parents divorce?, " 2022. https://luatvietnam.vn/dan - su/quyen - nuoi - chau - khi - bo - me - ly - hon - 568 - 35577 - article.html. (accessed August 25, 2024).

[16] Thi Truc Giang Huynh, "The Principle of Protecting the Best Interests of the Child in Vietnamese Divorce Law," *Essays of Faculty of Law University of Pécs, Yearbook of [year]* 1 (2024): 128.

parents are deemed unqualified to raise the child, the Court will assign a guardian in accordance with the Civil Code (Article 84).

The parent directly raising the child has the right to request the non-custodial parent to fulfill their support obligations as prescribed in Article 110 of the Law on Marriage and Family. They can also request that the non-custodial parent and family members respect their right to raise the child directly. The custodial parent and family members must not prevent the non-custodial parent from visiting, caring for, raising, and educating the child (Article 83).

In addition to the biological children of a couple, adopted children also require significant attention and legal protection. According to the Law on Marriage and Family of Vietnam, "Adoptive fathers, adoptive mothers, and adopted children have the rights and obligations of fathers, mothers, and children as prescribed in the Law on Marriage and Family from the time the adoption relationship is established according to the provisions of the Law on Adoption[17]" (Article 78). Although these children are not biologically related to their adoptive parents, the law recognizes the parent-child relationship as equivalent to that of biological parents and children. Consequently, after a divorce, adoptive parents must continue to fulfill their obligations to look after, raise, care for, and educate their adopted children until they reach adulthood, are capable of working, and have the means to support themselves.

In general, when parents divorce, they retain the right and obligation to raise their children, whether biological or adopted. The Law on Marriage and Family includes specific provisions to protect children's welfare post-divorce, ensuring they are cared for and raised by both parents to develop generally in all aspects, thereby minimizing harm. The right to sole custody of children after divorce is considered for both biological and adopted children based on the principle of non-discrimination. Custody arrangements are primarily based on the agreement between the parents. If no agreement is reached, children under 36 months old are typically placed with the adoptive mother, and the opinions of adopted children aged seven years and older are considered.

Additionally, Precedent No. 54/2022/AL[18] addresses the right to raise children under 36 months old in cases where the mother does not directly care for, raise, and educate the child. This precedent involves a case where a mother abandoned her very young child, failing to provide care. In contrast, the father provided good care, and the child became accustomed to those living conditions. In such cases, the Court must continue to entrust the child under 36 months of age to the father for direct care and nurturing by the spirit of Precedent No. 54.

[17] Law No. 52/2010/QH12 was issued by The National Assembly's Vietnam on Adoption on 17 June 2014, gazette number 52/2010/QH12 https://thuvienphapluat.vn/van-ban/Quyen-dan-su/Luat-nuoi-con-nuoi-2010-108082.aspx.

[18] As of September 2024, Vietnam has published and applied 72 precedents, and this is precedent number 52th https://anle.toaan.gov.vn/webcenter/portal/anle/chitietanle?dDocName=TAND281185.

4. Changing the person's custody of the child after divorce

Children's rights and parents' obligations are not solely determined during divorce but extend until the child reaches adulthood. Consequently, when a court issues a decision regarding the direct custody of a child in divorce judgments, any subsequent change in the custodial arrangement can be requested if the child's interests are not adequately protected (Art. 84). The care, upbringing, and education of children are considered the rights and obligations of parents. However, upon divorce, this right is exercised directly by only one parent. If the custodial parent fails to fulfil their responsibilities and does not ensure the child's rights and interests, either the non-custodial parent or the custodial parent may request a custody change.

According to the Law on Marriage and Family of Vietnam, any change in the custodial arrangement must consider the wishes of children aged seven and above (Art. 84). Before making a decision, the court must carefully evaluate the situation to prevent parents from using the child to satisfy their desires to gain custody. A change in custody can only occur if the current custodial parent cannot ensure the child's rights in all aspects. The non-custodial parent cannot use their better living conditions as a pretext to force the custodial parent to relinquish custody. Such changes can have negative consequences that disrupt the child's life. Therefore, the court will only accept requests for a change in custody in cases of extreme necessity to protect the child's legitimate rights and interests.

In decisions regarding changes in custody, children aged seven and older are allowed to express their wishes. After living with one parent, the child can express their feelings about whether their physical and intellectual development needs are met. However, this is not the sole factor in the court's decision. The child's wishes are merely one condition for the court to consider.

The second condition for the court to consider a change in custody is a request from one or both parents. Parents who care for and love their children the most understand their needs best and always strive to provide the best for them. Therefore, if parents feel that their current situation does not ensure the best development conditions for their child, they have the right to request a change in custody. The rights and obligations towards the child are vested in both parents, allowing them to request a change in custody to ensure the child's optimal development materially and spiritually.

Finally, upon request by the parties, the Court will consider the requests of both the father and mother, evaluating all aspects of the child's interests to decide on changing the custodial parent. Other entities, such as relatives, state management agencies for families and children, and the Women's Union also have the right to request a change in the custodial arrangement.

5. Sanctions for violating the right to child custody after divorce

According to the law, the responsibilities of looking after, caring for, raising, and educating children are parents' rights and obligations. Parents maintain legal

duties toward their children even after divorce.[19] When parents fail to fulfill their direct commitments to raise their children or engage in actions that harm them, they must face the legal consequences of their misconduct.

Firstly, the non-custodial parent, after divorce, retains the right and obligation to visit the child and provide child support until the child reaches 18 years of age. However, there are numerous instances where the non-custodial parent fails to hand over the child to the custodial parent, thereby infringing upon the custodial parent's rights and interests emotionally and legally. In disputes over custodial rights, the Court enforces compliance based on Article 120 of the Law on Civil Judgment Enforcement: "The enforcement officer shall issue a decision to compel the handover of a minor to the person assigned to care for them according to the judgment or decision. Before forcibly handing over a minor to the person assigned to care for them, the enforcement officer shall coordinate with local authorities and socio-political organizations to persuade the party to execute the judgment voluntarily."

Suppose the person required to execute the judgment or the current caretaker of the minor fails to comply. In that case, the enforcement officer shall decide to impose a fine and set a five-working-day deadline for compliance. Should the individual fail to comply within this period, the enforcement officer will forcibly hand over the minor or request the competent authority to prosecute for non-compliance with the judgment (Article 120 of the Law on Civil Judgment Enforcement). According to Clause 1, Article 165 of the Law on Civil Judgment Enforcement,[20] violations are handled as follows: "A person who must execute the judgment intentionally fails to comply with the judgment or decision; does not voluntarily comply with the decisions on judgment enforcement shall, depending on the nature and seriousness of the violation, be subject to administrative sanctions or criminal prosecution by the provisions of law."

According to Clause 3, Article 64 of Decree 82/2020/ND-CP,[21] administrative sanctions for failing to hand over children to the custodial parent after divorce include fines ranging from VND 3,000,000 to VND 5,000,000 for the following acts: (i) Failure to perform work required by the judgment or decision; (ii) Failure to cease work not required by the judgment or decision; (iii) Delaying the execution of the judgment when conditions for execution are present.

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[19] See Minh Nguyen Huu, "Các mối quan hệ trong gia đình ở Việt Nam: Một số vấn đề cần quan tâm = Family relationships in Vietnam: Some issues of concern," *Journal of Sociology* 120, no. 4 (2012): 93–96.

[20] Law No. 09/VBHN-VPQH was issued by The Office of The National Assembly of Vietnam on enforcement of civil judgments on 25 January 2022, can be downloaded from the link https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Van-ban-hop-nhat-09-VBHN-VPQH-2022-Luat-Thi-hanh-an-dan-su-547842.aspx.

[21] Decree No. 82/2020/ND-CP of the Government of Vietnam issued on July 15, 2020, Stipulating the handling of administrative violations in legal aid; administrative law; marriage and family; civil judgment enforcement; and bankruptcy of enterprises and cooperatives, can be downloaded from the link: https://thuvienphapluat.vn/van-ban/Doanh-nghiep/Nghi-dinh-82-2020-ND-CP-xu-phat-hanh-chinh-linh-vuc-hon-nhan-thi-hanh-an-pha-san-doanh-nghiep-392611.aspx.

Additionally, failing to hand over the child to the custodial parent can result in criminal liability. At a more serious level, this act can constitute failing to comply with a judgment under Article 380 of the 2015 Penal Code. Any person who has the means but fails to comply with a legally effective court judgment or decision may be imprisoned for three months to 2 years despite being subject to coercive measures or administrative sanctions. If the crime involves acts against enforcement officers, use of sophisticated and cunning tricks, or asset dissipation, the penalty increases to imprisonment from 2 to 5 years. The offender may also be fined from VND 5,000,000 to VND 50,000,000.[22]

Secondly, parents must look after, care for, and educate their minor children after divorce. If the custodial parent fails to fulfill these obligations, they may face administrative sanctions for violating childcare and upbringing regulations. According to Decree No. 130/2021/ND-CP,[23] fines ranging from VND 10,000,000 to VND 15,000,000[24] may be imposed for failing to perform obligations and responsibilities in caring for and raising children, except in temporary isolation or alternative care prescribed by law. Fines from VND 20,000,000 to VND 25,000,000[25] may be imposed for parents or caregivers who intentionally abandon children (Point b, Clause 1, Article 21, Decree 130/2021/ND-CP).

According to these regulations, if the custodial parent fails to care for and raise the child or abandons the child after divorce, they will be fined from VND 10,000,000 to VND 15,000,000.[26] Additionally, they must fulfill their obligations to care for and raise the child as mandated by law.

6. Comparative Law on Child Custody After Divorce: China and Thailand

6. 1 The People's Republic of China

The laws of the People's Republic of China regarding marriage and family relations are stipulated in the Civil Code of the People's Republic of China, effective from January 1, 2021.[27] The Chinese Civil Code provides for two methods of divorce: a simple divorce by joint application or a judicial divorce.[28]

[22] Equivalent to 180-1,840 Euros.

[23] Decree 130/2021/ND-CP of the Government of Vietnam issued on December 30, 2021, Imposing penalties for administrative violations in social assistance and children affairs, can be downloaded from the link: https://thuvienphapluat.vn/van-ban/Vi-pham-hanh-chinh/Nghi-dinh-130-2021-ND-CP-xu-phat-vi-pham-hanh-chinh-bao-tro-xa-hoi-va-tre-em-499523.aspx.

[24] Equivalent to 370-550 Euros.

[25] Equivalent to 730-920 Euros.

[26] Equivalent to 370-550 Euros.

27 The State Council of The People's Republic of China. "Part Five-Family Law Civil Code of The People's Republic of China," https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html (accessed 10 August 2024).

[28] See Lei Shi, "Divorce Procedure Reform in China," in *Routledge Handbook of Family Law and Policy*, ed. John Eekelaar and Rob George (Routledge, 2020), 115–124.

A divorce can only be registered with the competent authority if both spouses agree to divorce, sign the corresponding divorce papers, and voluntarily file for divorce. In a judicial divorce, the court initially acts as a mediator to prevent divorce and resolve conflicts.[29] If mediation fails and the court deems the marriage irreparable, it issues a divorce order.[30]

The decision on the right to sole custody of children is made during the divorce process and is effective upon the court's ruling. Typically, the mother is granted custody if the divorced couple has a child under two years old. For children aged 2 to 8 years, if the parents cannot reach an agreement, the court decides which parent will have custody. The wishes of children older than eight years must be considered. During the divorce process, the court evaluates the parents' right to sole custody based on factors such as the parent's ability to care for the child physically and mentally, the child's relationship with the parents, and the child's health and development.

In some cases, parents can agree on custody arrangements after the divorce. The age at which children are given to the mother for custody is earlier in Chinese law compared to Vietnamese law, where children under 36 months are given to the mother. Additionally, Chinese law considers the wishes of children older than eight years, whereas Vietnamese law considers the wishes of children from 7 years old.

There are also provisions regarding maintenance payments and contact rights for the non-custodial parent. In some instances, such as domestic violence or when the other parent lives with a third party, the affected person may claim damages. In summary, the right to custody of children under Chinese law shares similarities with Vietnamese law in terms of parental agreements on child custody and prioritizing the child's interests[31] during divorce. However, differences exist in the age at which children are given to the mother for custody and in considering the child's wishes.

6. 2 Thailand

Family and marriage relations in Thailand are governed by the Thailand Civil and Commercial Code,[32] Part III and Chapter VI. Section 1501 regulates marriages terminated by death, divorce, or annulment by the Court. The divorce process under Thai law is similar to that of Vietnamese law, where divorce can be

[29] Xin He, "Divorce in China: Institutional constraints and gendered outcomes," *Fem Leg Stud* 29 (2021): 429 – 433.

[30] Youngjin Kang, and Weimiao Zhou, "Divorce in China: Institutional constraints and gendered outcome,." *Journal of Family Theory & Review* 14, no. 1 (2022): 97–103.

[31] Jianghao Xia, "The best interests of the child principle in residence disputes after parental divorce in China," *International Journal of Law, Policy and the Family* 34, no. 2 (2020): 105–125.

[32] Samuiforsale, "Thailand Civil and Commercial Code part III chapter VI Termination of Marriage," https://www.samuiforsale.com/law - texts/thailand - civil - code - part - 3.html#1535. (accessed 02 September 2024).

conducted through mutual agreement or a court decision. The relationship between parents and children after divorce is regulated by Section 1520, Chapter VI of the Thai Civil and Commercial Code.[33] In a divorce by agreement, the spouses must make a written agreement on exercising child custody rights for each child. If no agreement is reached, the Court will resolve the matter. In the event of a divorce by the court decision, the Court hearing the divorce case will also decide on the parental rights of each child.

Regarding child support after divorce, the Thai Civil and Commercial Code stipulates, "In the case of divorce by mutual consent, the divorce agreement shall include an agreement as to who, either the spouses or one of them, shall contribute to child support and in what amount" (Section 1522). If no agreement is reached, the Court shall make the final decision.

Generally, the Thai Civil and Commercial Code provides more detailed and specific provisions when the couple files for divorce in the Court. While the trial is pending, the Thai Court may decide to intervene in matters of child custody and maintenance if necessary. For example, while the divorce case is in progress, the Court may, upon application by either party, make any interim orders it deems appropriate, such as those relating to material assets (known as "Sin Somros"), accommodation, spousal support, and the right to custody and child support (Section 1530). The right to raise children continues through either mutual agreement of the parents or the Court's decision when the marriage ends.

It can be seen that the right to child custody in the Thai legal system has many differences in determining the principle of child custody after divorce compared to Vietnam. Unlike in Vietnam, the primary principle under Thai law is to respect the agreement of the spouses when divorcing, and that agreement always includes the right to child custody. If the spouses disagree, the Court will decide on child custody after divorce. In contrast, the Law on Marriage and Family of Vietnam provides additional principles for the Court to choose based on the age and all aspects of the child's interests[34] when resolving disputes over child custody after divorce. However, the Thai Civil and Commercial Code has more specific regulations on protecting the child's rights during the trial stage when the judgment has not yet been enacted. The Thai Court considers it necessary to issue appropriate orders during this time on child custody to intervene and protect the rights of the children promptly. In general, Thai marriage and family law has new and different points to protect children's rights, care, and support for children after their parents' divorce.

[33] Kamonwan Yoowattana, "The study of ground of divorce under the civil and commercial code that affects quality of life," *J. International Journal of Systems Applications, Engineering and Development* (2016): 2–3.

[34] See: Wei-Yun Chung, Wei-Jun Jean Yeung, and Sonja Drobnič, "Family policies and care regimes in Asia," *International Journal of Social Welfare* 30, no. 4 (2021): 371–384.

7. Recommendation for improving the law on child custody after divorce in Vietnam

7. 1 Statistics on settlement of disputes over the right to child custody

The divorce rate in Vietnam has increased over the years. From 2020 to 2023, the number of first-instance divorce cases rose by 9,725, representing an increase of 10.31%. Conversely, the number of divorce appeal cases decreased by 65, a reduction of 2.65%. Additionally, the number of first-instance cases involving disputes over child custody after divorce increased by 74 cases, an 8.14% rise. However, the number of appeal cases concerning disputes over child custody decreased by 34 cases, an 11.18% reduction. The ratio of appeal cases to first-instance cases on divorce and child custody has sharply declined.
Therefore, although the number of divorce cases and disputes over child custody is increasing, the number of appeal cases is decreasing. Nonetheless, disputes over the right to child custody after divorce remain complex, with many instances prolonged due to the inability of parents to reach an agreement.

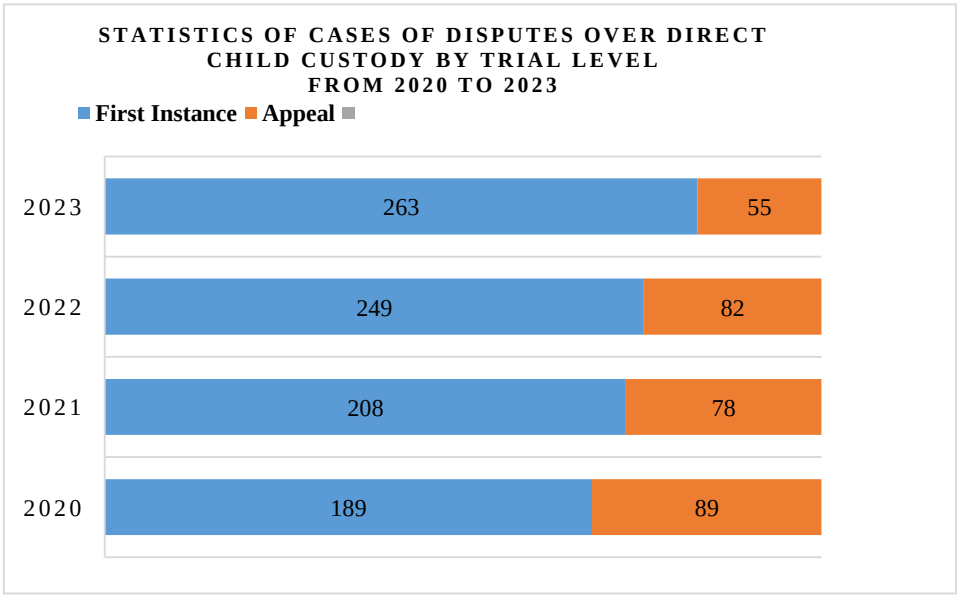

Figure 1. Statistics of child custody dispute cases by court level from 2020 to 2023[35]

7. 2 Proposal to recognize shared child custody after divorce

The current practice of determining child custody when parents divorce, as stipulated by the Law on Marriage and Family of Vietnam, has specific areas for improvement. The Court acknowledges the agreement between the husband and

[35] Statistics are obtained through search results by the keyword "judgment on the dispute over custody of children" on the website of: "Supreme People's Court Electronic Information Portal," https://congbobanan.toaan.gov.vn/. (accessed August 06. 2024).

wife regarding who will directly raise the child and the rights and obligations of each party towards the child after the divorce. This recognition by the Court facilitates a swift and effective resolution of the divorce procedure. However, examining judgments or decisions recognizing consensual divorce reveals that the Court acknowledges the parties' agreement without verifying each party's ability to ensure the child's upbringing, care, and education.

Moreover, Vietnamese Marriage and Family Law should consider the concept of shared custody upon divorce, which is recognized in the laws of the United States,[36] England, France, and other countries.[37] Under Vietnamese law, only one parent, usually the mother, is typically granted custody after a divorce. This regulation can be limiting in terms of child-rearing and may cause psychological harm to children due to the absence of one parent. As practiced under French law, the division of custody between parents represents a significant advancement in promoting gender equality and protecting children's rights by ensuring they are cared for by both parents simultaneously.

This approach should be considered for incorporation into Vietnamese law to help reduce disputes over child custody during divorce,[38] ensure children receive optimal care and education from both parents, minimize harm to children, and foster increasingly civilized and progressive social relations.

8. Conclusion

Parental custody rights after divorce are crucial for the well-being of children and must be carefully considered and implemented by parents, family members, society, and national policies. Generally, each country may have different policies regarding child custody post-divorce, but the common goal is to ensure the child's overall welfare. This underscores that the primary principle in determining custody rights after divorce is to ensure the child's optimal development, respecting the parents' agreement and considering the child's wishes.

Vietnamese law recognizes that parents are free to agree on child custody after divorce; however, this agreement must ensure the child's comprehensive welfare. The court will resolve disputes based on the principle that if the child is under 36 months old, the mother is given priority for custody, and if the child is seven years old or older, the child's wishes are considered. However, there are

[36] Daniel R Meyer, Maria Cancian, and Steven T. Cook, "The growth in shared custody in the United States: Patterns and implications," *Family Court Review* 55, no. 4 (2017): 500–512.

[37] Mia Hakovirta and Christine Skinner, "Shared physical custody and child maintenance arrangements: A comparative analysis of 13 countries using a model family approach," *Shared physical custody: Interdisciplinary insights in child custody arrangements* (2021): 309–331.

[38] Thi Hong Tuyen Nguyen, "Thực trạng tranh chấp về nuôi con và cấp dưỡng nuôi con sau khi ly hôn= Current situation of disputes over child custody and child support after divorce," *Vietnam Lawyer Journal* (2022): 21–22.

exceptions to this principle. If a child under 36 months old is being directly cared for by the father and the mother is not fulfilling her caregiving role adequately, the father is given priority for custody, as reflected in Precedent No. 52.

Additionally, it is necessary to recognize shared custody alongside sole custody in Vietnamese law to align child custody practices after divorce with global development trends. The shared custody model has been adopted by many countries worldwide and is becoming a current trend. This approach provides children with comprehensive development and minimizes the negative impact of parental divorce, allowing them to grow up with the love and care of both parents.

Balancing Cybersecurity and Fundamental Rights: The Responsibility of States to Address Cyber Threats

NSHIMIYIMANA, FRANCOIS REGIS*

ABSTRACT *The rise of cyber threats poses significant challenges to states,[1] necessitating robust cybersecurity measures. However, these measures often risk infringing upon fundamental rights such as privacy, freedom of expression, and access to information.[2] This paper explores the delicate balance between ensuring cybersecurity and protecting individual rights, emphasizing the responsibility of states to address these challenges. The study examines legal frameworks and policies governing cybersecurity and fundamental freedoms using comparative legal methods. It reveals disparities in states' approaches, with some prioritizing security over rights while others strive for a balanced approach. The research emphasizes the importance of incorporating human rights considerations into cybersecurity policies. The conclusion emphasizes the need for a comprehensive approach involving government, business, and civil society partners in developing policies prioritizing security and safeguarding fundamental rights. This study is highly relevant because it provides crucial insights into the complex field of cybersecurity law and how it affects human rights. It also offers recommendations that will help policymakers effectively tackle these complex issues.*

KEYWORDS *Cybersecurity, Cyber threats, Fundamental rights, responsibility, privacy*

1. Introduction

In the digital age, states face the dual responsibility of safeguarding their citizens' fundamental rights and addressing the increasingly sophisticated landscape of cyber threats.[3] Society's reliance on digital infrastructures for daily activities

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[1] ITSpark Media, "The Rise of Cyber Threats Poses Significant Challenges to States," accessed October 2023, https://itsparkmedia.com/Category/technology/.

[2] Naeem Allahrakha, "Balancing Cyber-Security and Privacy: Legal and Ethical Considerations in the Digital Age," *Legal Issues in the Digital Age* 2 (2023): 78–121.

[3] Aisha M. K. B. Sadiq, "How Counseling Psychologists Address Issues of Race with Clients from Black Asian and Minority Ethnic Backgrounds: A Discourse Analysis" (master's thesis, London Metropolitan University, 2020), https://repository.londonmet.ac.uk/9084/.

spanning business, governance, and communication makes this balance both essential and urgent.[4] The rapid advancement of technology brings unprecedented opportunities but also significant challenges, particularly in ensuring security without undermining privacy, freedom of expression, and other fundamental rights.[5] Cybersecurity measures that excessively prioritize national security risk infringe upon individual liberties, while a lack of robust security policies exposes citizens to significant risks, including data breaches, identity theft, and cyber–terrorism.

This paper explores how states can reconcile cybersecurity imperatives with protecting fundamental rights, emphasizing the necessity of legal frameworks and policies that ensure a balanced approach. The European Union (EU) is a focal point for this study due to its comprehensive legislative initiatives addressing cybersecurity and its strong commitment to human rights. By employing a comparative legal methodology, this research examines varying national approaches to cybersecurity within and outside the EU, identifying best practices and areas requiring improvement.

1. 1 Methodology

The study employs a comparative legal research methodology, systematically analyzing legal instruments, policies, and judicial interpretations governing cybersecurity and human rights in selected jurisdictions. Primary data sources include legislation, case law, policy documents, and international agreements, while secondary sources encompass academic literature and expert commentary. Comparative analysis highlights similarities, differences, and emerging trends in balancing security and rights across jurisdictions, particularly between EU member states and other global actors.

1. 2 Hypothesis

The research hypothesizes that states adopting cybersecurity frameworks incorporating explicit human rights safeguards are better equipped to strike an effective balance between security and individual freedoms. These frameworks ensure compliance with international human rights standards and promote public trust in digital governance, fostering long-term resilience against cyber threats.

[4] Sadiq, *How Counseling Psychologists Address Issues of Race*, 2020.

[5]Miriam Kollarova, Tomas Granak, Silvia Strelcova, and Juraj Ristvej, "Conceptual Model of Key Aspects of Security and Privacy Protection in a Smart City in Slovakia," *Sustainability* 15, no. 8 (2023): 6926.

1. 3 Objectives

This study aims to achieve the following:

- Identify and analyze key legal frameworks and policies that address the intersection of cybersecurity and fundamental rights, with a focus on the European Union.
- Evaluate the effectiveness of current state practices in balancing security imperatives with human rights obligations, highlighting disparities and common challenges.
- Propose recommendations for integrating human rights considerations into cybersecurity policies, emphasizing collaborative approaches involving governments, businesses, and civil society.
- Contribute to the academic discourse on cybersecurity law by providing actionable insights and policy-oriented solutions for addressing the complex interplay between digital security and fundamental freedoms.

1. 4 Value

This research offers significant value to both academic and policy-making communities. By providing a comprehensive analysis of how cybersecurity measures interact with fundamental rights, it equips policymakers with evidence-based recommendations to craft balanced legal frameworks.

1. 5 An overview of cybersecurity in modern society

The term "cybersecurity" describes the procedures, tools, and methods used to guard against damage, theft, and unauthorized access to computers, networks, software, and data.[6] As our world becomes increasingly digital, cybersecurity has become crucial to individual and organizational security.[7]

1. 5. 1 Cybercrime definition

Cybercrime is illegal in which the computer is either a tool, a target, or both.[8] Cybercrime is a form of crime where the internet or computers are used as a medium to commit a crime.[9] "Any criminal activity that uses a computer as an instrumentality, target, or a means for perpetuating further crimes comes within the ambit of cyber-crimes," states Supreme Court Advocate and cyber law expert

[6] Mohammad Shamsul Akter, *GR-284 Automated Vulnerability Detection in Source Code Using Deep Neural Networks* (2022), https://core.ac.uk/download/548485179.pdf.
[7] Akter, *GR-284 Automated Vulnerability Detection*, 2022.
[8] Kollarova et al., "Conceptual Model of Key Aspects of Security and Privacy," 6926.
[9] "The Birth of Internet Crime," *Stock Daily*, accessed October 2023, https://stock-daily.com/technology/the-birth-of-internet-crime/.

Pavan Duggal.[10] Since the late 1970s, cybercrime has been a significant issue, with the first spam email and virus in 1978 and 2000 complaints in 2006.[11]

1. 5. 2 The significance of cybersecurity is increasing

Cybersecurity is becoming increasingly significant due to the growing threat landscape, the monetary implications of cybercrime, regulatory duties, and the requirement for comprehensive security strategies.[12] The prevalence and sophistication of cyber threats, such as ransomware attacks, phishing schemes, data breaches, and state-sponsored hacking, have recently increased significantly.[13] These threats pose significant risks to individuals, businesses, governments, and critical infrastructure.

1. 5. 3 Cybercrime's complex legal landscape

Numerous factors contribute to the legal complexity surrounding cybercrime, such as the internet's global reach, the swift advancement of technology, and the disparate legal frameworks found in various jurisdictions.[14] Below are key aspects that contribute to these complexities:

- *Jurisdictional challenges:* Since cybercrime frequently crosses international borders, it can be challenging to identify which nation's laws apply. Conventional jurisdictional rules, including nationality or the territory where the crime happened, are less evident on the internet.[15] For example, a cybercriminal in one country may target victims in another, complicating law enforcement efforts. Countries may have varying definitions of cybercrime and differing laws regarding prosecution and penalties.
- *Variability in laws and definitions:* The term "*cybercrime*" lacks a standard definition and varies significantly throughout legal systems.[16] For example, unauthorized access to computer systems may be seen as a minor infraction

[10] "A Study on Crime Awareness Among the Secondary Students of Standard 8th of Mulund, 2021," accessed October 2023, https://doi.org/10.5281/zenodo.6948478.

[11] "International Conference on Cyberlaw, Cybercrime, and Cybersecurity: To Analyze Today's Emerging Cyberlaw, Cybercrime, and Cybersecurity Trends," accessed October 2023, https://www.adndrc.org/files/panellist/60_Pavan_Duggal.pdf.

[12]Dawei Wang, "Enhanced Intrusion Detection with LSTM-Based Model, Feature Selection, and SMOTE for Imbalanced Data," *Applied Sciences* 14, no. 2 (2024): 479.

[13] Supreme Court of the United States, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

[14] Roderic Broadhurst, "Developments in the Global Law Enforcement of Cyber-Crime," *Policing: An International Journal of Police Strategies & Management* 29, no. 3 (2006): 408–433.

[15] Emmanuel Femi Gbenga Ajayi, "Challenges to Enforcement of Cyber-Crimes Laws and Policy," *Journal of Internet and Information Systems* 6, no. 1 (2016): 1–12.

[16] Kirsty Phillips, Julia Catherine Davidson, Ruby Rose Farr, Christine Burkhardt, Stefano Caneppele, and Mary Patricia Aiken, "Conceptualizing Cybercrime: Definitions, Typologies, and Taxonomies," *Forensic Sciences* 2, no. 2 (2022): 379–398.

in one nation while being classified as a severe felony in another. This unpredictability may make it difficult to investigate and prosecute cybercriminals internationally and to provide reciprocal legal help.

- *Evolving nature of cybercrimes:* Cybercrimes are constantly changing because of technological advancements. New types of cybercrime, such as ransomware attacks, phishing scams, and identity theft techniques that take advantage of weaknesses in digital systems, surface regularly/.[17] Legal frameworks often need to keep up with technological advancements, making it challenging for lawmakers to create effective legislation that addresses current threats.
- *Enforcement difficulties:* Law enforcement organizations face numerous obstacles when investigating cybercrimes because of the anonymity provided by the Internet.[18] Cybercriminals can mask their identities and whereabouts using various strategies, including VPNs and anonymizing networks like Tor.[19] Additionally, many law enforcement agencies need more technical expertise or resources to investigate complex cyber crimes effectively.
- *Evidence collection and admissibility:* Gathering digital evidence presents different obstacles than typical crime scenes. Because digital data is temporary, it is easy for evidence to be changed or erased if it is not quickly stored.[20] Furthermore, rules governing the admissibility of digital evidence vary by jurisdiction, complicating prosecutions when cases cross borders.
- *Human rights considerations:* Cybercrime legislation must balance upholding individual liberties and rights and enforcing the law. Authorities may abuse overbroad legislation and unintentionally criminalize lawful internet activity, which could result in abuses of people's rights to privacy and free speech.[21]
- *International cooperation:* Effective law enforcement responses to cybercrime necessitate international collaboration due to its transnational nature.[22] However, disparities in national legal norms and practices may impede cooperation through regional agreements to harmonize laws or treaties like the Budapest Convention on Cybercrime.

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[17] Anupama Mishra, Brij Bhushan Gupta, and Deepak Gupta, "Identity Theft, Malware, and Social Engineering in Dealing with Cybercrime," in *Computer and Cyber Security* (Auerbach Publications, 2018): 627–648.

[18] Graham Horsman, "Can We Continue to Police Digital Crime Effectively?" *Science and Justice* 57, no. 6 (2017): 415–422. https://doi.org/10.1016/j.scijus.2017.06.001.

[19] Graham Horsman, "Can We Continue to Police Digital Crime Effectively?," *Science and Justice* 57, no. 6 (2017): 415–22.

[20] ICISET (International Conference on Information Security and Emerging Technologies), Sepiso Rezen Chikuruwo, and Attlee Gamundani, "The Effects of Volatile Features on Digital Evidence Preservation," (November 23, 2022; 2023).

[21] Gregor H. Allan, *Responding to Cybercrime: A Delicate Blend of the Orthodox and the Al* (2022), https://ro.uow.edu.au/lawpapers/242/.

[22]INTERPOL, "Cybercrime," accessed October 2023, https://www.interpol.int/en/Crimes/Cybercrime.

1. 5. 4 Cybersecurity challenges

There are many different types of cybersecurity challenges, ranging from the swift advancement of technology to the growing complexity of cyberattacks.[23] As attackers develop new strategies and tools, defenders must constantly adapt and innovate to protect against breaches.[24] Regulatory compliance challenges, the lack of qualified cybersecurity specialists, and the constant threat to data privacy make securing digital environments even more difficult. It is imperative to comprehend these problems to ensure that digital infrastructures are resilient in the face of escalating threats and to establish successful cybersecurity strategies.

- *Evolving threat landscape:* Security experts find it challenging to keep up with cybercriminals' continuously evolving attack techniques.[25]
- *Skills gap:* There is a severe lack of qualified cybersecurity specialists globally, which leaves many firms vulnerable.[26]
- *Compliance and regulation*: Companies must manage a complicated web of rules and guidelines that differ depending on the nation and sector.[27]
- *Data Privacy:* Concern over protecting the privacy of sensitive and personal data is rising, particularly in light of laws like the GDPR.[28]

In a few words, cybersecurity affects everything from personal privacy to national security, making it a crucial component of modern life. The tactics and resources employed to defend against cyberattacks must also advance along with technology. Cybersecurity procedures must be proactive and up-to-date to reduce risks and protect the digital world.

2. Literature review

The protection of citizens from cyber threats is a fundamental obligation of states. However, it is equally crucial that the protective measures implemented do not infringe upon essential human rights, such as privacy and freedom of expression. Scholars have highlighted the necessity for cybersecurity laws to be designed with a dual focus: safeguarding individual rights while addressing national security interests. Shackelford (2014) argues that a balanced approach is essential

[23] Howard Lipson, *Tracking and Tracing Cyber-Attacks: Technical Challenges and Global Policy Issues* (Carnegie Mellon Software Engineering Institute,2002): 38-40.
[24] Lipson, *Tracking and Tracing Cyber-Attacks*, 38–40.
[25] Kieran James David O'Leary, *Cyber Security: Evolving Threats in an Ever-Changing World* (2022), https://researchonline.jcu.edu.au/69675/.
[26] William Crumpler and James A. Lewis, *Cybersecurity Workforce Gap* (Washington, DC: Center for Strategic and International Studies, 2022).
[27]"The Organization of Corporate Crime: Introduction to Special Issue of Administrative Sciences," *Administrative Sciences* 8, no. 3 (2018): https://doi.org/10.3390/admsci8030036.
[28] European Commission, "General Data Protection Regulation (GDPR)," accessed October 2023, https://ec.europa.eu/info/law/law-topic/data-protection/general-data-protection-regulation_en.

for creating effective legal frameworks that respect fundamental freedoms.[29] The intersection of cybersecurity and human rights has emerged as a significant topic within legal and policy discussions. Various authors contend that existing human rights frameworks, including the Universal Declaration of Human Rights and regional treaties, should inform state actions in cyberspace. Kosseff (2018) advocates for integrating human rights assessments into cybersecurity strategies, positing that such integration is vital for ensuring that security measures do not compromise individual liberties.[30]

Privacy concerns are paramount in the realm of cybersecurity. The implementation of cybersecurity measures often involves extensive data collection practices, which may infringe upon individuals' privacy rights. Scholars argue for a balanced approach where states ensure that cybersecurity initiatives are both proportionate and necessary, thereby upholding relevant data protection laws. Hoofnagle et al. (2019) emphasize that a careful consideration of privacy implications is essential in the formulation of cybersecurity policies.[31] Given the global nature of cyber threats, international cooperation among states is imperative. The authors emphasize the need for collaborative efforts to develop comprehensive regulatory frameworks that address cybersecurity challenges while honoring human rights obligations. Elkin-Koren and Haber (2016) highlight the importance of sharing best practices and creating standardized legal instruments to facilitate effective cross-border cybersecurity initiatives, thus promoting a unified approach to addressing these pervasive threats.[32]

To ensure that cybersecurity measures do not infringe upon fundamental rights, the establishment of accountability mechanisms is critical. Some literature suggests that states should create independent oversight bodies responsible for monitoring cybersecurity practices and addressing complaints related to potential human rights violations. Fuster and Jasmontaite (2020) argue that such oversight is essential for maintaining public trust and ensuring that security measures align with human rights standards.[33] This literature review highlights the complexities involved in balancing cybersecurity and fundamental rights. It emphasizes the

[29] Scott James Shackelford, "Beyond the New Digital Divide: Analyzing the Evolving Role of National Governments in Internet Governance and Enhancing Cybersecurity," *Stanford Journal of International Law* 50 (2014): 119–152.

[30] Jeff Kosseff, "Developing Collaborative and Cohesive Cybersecurity Legal Principles," in *2018 10th International Conference on Cyber Conflict (CyCon)* (IEEE, 2018), 283–298.

[31] Chris Jay Hoofnagle, Bart Van Der Sloot, and Frederik Zuiderveen Borgesius, "The European Union General Data Protection Regulation: What It Is and What It Means," *Information & Communications Technology Law* 28, no. 1 (2019): 65–98.

[32] Niva Elkin-Koren and Eldar Haber, "Governance by Proxy: Cyber Challenges to Civil Liberties," *Brooklyn Law Review* 82 (2016): 105–134.; Gloria González Fuster and Lina Jasmontaite, "Cybersecurity Regulation in the European Union: The Digital, the Critical and Fundamental Rights," in *The Ethics of Cybersecurity*, ed. M. Christen, B. Gordijn, M. Loi (Springer, 2020), 97–115.

[33] Gloria González Fuster and Lina Jasmontaite, "Cybersecurity Regulation in the European Union: The Digital, the Critical and Fundamental Rights," 97–115.

need for states to develop comprehensive policies that safeguard both security interests and individual rights, ensuring accountability and compliance with human rights standards.

3. The importance of fundamental rights in the era of technology

The digital era has completely changed the way we engage with one another, communicate, and work. This change presents previously unheard-of chances for creativity and connectedness, but it also raises serious questions about preserving fundamental rights.[34] Ensuring privacy, freedom of expression, and access to information are upheld in the digital realm is crucial for maintaining a just and democratic society.

3. 1 Right to privacy

The fundamental right to privacy allows people to manage their data and defend against unauthorized access. Because data is continually being collected, shared, and analyzed in the digital era, protecting privacy has become increasingly difficult. The unprecedented extent to which governments and companies can track and monitor individuals raises concerns over monitoring, data breaches, and exploiting personal information.[35] Protecting privacy is essential to prevent abuse of power and ensure that individuals maintain control over their lives.

3. 2 Right to freedom of expression

The internet has become a powerful free-speech platform, enabling people to express their opinions, share ideas, and participate in public discourse.[36] However, censorship, online harassment, and the dissemination of false information frequently pose a threat to fundamental freedom.[37] In the digital era, striking a balance between the need to protect others from harm, such as hate speech or encouragement of violence, and freedom of expression is complex. A thriving democracy depends on people expressing themselves freely online without worrying about discrimination or repression. Several international agreements, such as the International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights, uphold this right.[38] It

[34] A General Assembly United Nations Human Rights Council, accessed October 2023, https://studylib.net/doc/17681315/a-general-assembly-united-nations-human-rights-council.
[35] A General Assembly United Nations Human Rights Council, accessed October 2023.
[36] Jack M. Balkin, "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society," *Law and Society Approaches to Cyberspace*, ed. (Routledge, 2017), 325–382.
[37] Balkin, "Digital Speech and Democratic Culture," 325–382.
[38]United Nations General Assembly, *Universal Declaration of Human Rights*, Article 19, adopted December 10, 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

includes written and spoken words and communication like music, art, and digital media.

3. 3 Right to access information

Several international legal instruments recognize the right to access information, most notably within the human rights framework. One of the critical documents that explicitly provides for this right is the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948. Article 19 of the Universal Declaration of Human Rights states, "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*." Access to information is a fundamental right that underpins education, participation in democratic processes, and the ability to make informed decisions. The internet has made vast amounts of information available, but barriers such as digital divides, censorship, and information overload can limit this access.[39] Global efforts are needed to strengthen legal frameworks, address implementation challenges, and promote transparency and accountability in governance by providing reliable and diverse information sources.

4. Understanding cybersecurity

Cybersecurity is the discipline of defending networks, systems, and data against online threats, illegal access, and harm.[40] As cyber dangers increase in sophistication and scope, legal frameworks are becoming crucial for defining norms and obligations for people, businesses, and states. The General Data Protection Regulation (GDPR) of the European Union, which imposes strict data protection and privacy regulations, and the Budapest Convention on Cybercrime, the first international treaty addressing internet and computer crimes, are the two main legal tools in cybersecurity.[41] National laws, such as the *Computer Fraud and Abuse Act (CFAA)* in the United States and the *Network and Information Systems (NIS) Directive* in the E.U., further complement these efforts by regulating the security of network and information systems.[42] These legislative documents create a legal framework that supports international efforts to counter cyber threats by defining cybercrime and establishing international cooperation channels.

[39]UNESCO, "The Right to Access Information," United Nations Educational Scientific and Cultural Organization (UNESCO), 2021, https://en.unesco.org/themes/right-access-information.

[40] John Michael Borky and Thomas Henry Bradley, "Protecting Information with Cybersecurity," *Practical Model-Based Systems Engineering* (2019): 345–404.

[41] Luca Tosoni, "Rethinking Privacy in the Council of Europe's Convention on Cybercrime," *Computer Law & Security Review* 34, no. 6 (2018): 1197–1214..

[42] Tosoni, "Rethinking Privacy," 1197–1214.

4. 1 What constitutes cybersecurity?

Cybersecurity refers toa rangeof procedures, guidelines, and technological solutions that protect data, networks, and information systems against loss, theft, alteration, and illegal access.[43] Cybersecurity and its implementation, monitoring, and upholding should be outlined in legal frameworks. The essential components of cybersecurity are:

4. 2 The Budapest Convention on Cybercrime

The Budapest Convention on Cybercrime, established by the Council of Europe, is the first international treaty to address crimes committed via the Internet and other computer networks. It offers a thorough framework for preventing unauthorized access, data interference, system interference, and device abuse, among other forms of cybercrime.[44] A hacker stealing client data from a bank's computer system is an example of a crime that would be prosecuted by the legal definitions given by the Budapest Convention. Recognizing the cross-border nature of many cyber dangers, this treaty also makes it easier for countries to work together to investigate and prosecute cybercrime.

4. 3 General Data Protection Regulation (GDPR)

The GDPR is a regulation in the European Union that focuses on data protection and privacy. It mandates strict security measures to protect personal data and holds organizations accountable for breaches.[45] The law emphasizes protecting private information from hackers and illegal access. For example, a corporation must implement encryption and other security measures to safeguard client data. The firm has 72 hours to notify the relevant authorities in the case of a data breach. GDPR's cybersecurity requirements must be followed, or severe consequences could occur.

4. 4 Network and Information Systems (NIS) Directive

The NIS Directive is another E.U. legal instrument focused on enhancing the security of network and information systems across member states. This rule covers operators of essential services, such as those in the energy, transportation, healthcare, and digital service sectors. It requires thorough cybersecurity

[43] Jangirala Srinivas, Ashok Kumar Das, and Neeraj Kumar, "Government Regulations in Cyber Security: Framework, Standards and Recommendations," *Future Generation Computer Systems* 92 (2019): 178–188.
[44] Council of Europe. Convention on Cybercrime. Budapest, Hungary: Council of Europe, 2001. https://www.coe.int/en/web/cybercrime/the-budapest-convention.
[45] Chris Jay Hoofnagle, Bart Van Der Sloot, and Frederik Zuiderveen Borgesius, "The European Union General Data Protection Regulation: What It Is and What It Means," *Information & Communications Technology Law* 28, no. 1 (2019): 65–98.

procedures and the reporting of any events.[46] Under the NIS Directive, a hospital must set up procedures to protect patient data from cyberattacks and report any serious security breaches to the relevant national body. Improving the general cybersecurity requirements in the critical infrastructure industries is the primary goal of this order.

4. 5 U.S. Cybersecurity Information Sharing Act (CISA)

A federal statute in the United States called CISA promotes information exchange regarding cyber threats between the public and private sectors.[47] By shielding businesses from accountability when they provide the government access to threat intelligence, it encourages cooperation in cybersecurity. An illustration would be a tech business that discovers a novel kind of malware and can notify government organizations about it to assist in stopping more widespread cyberattacks. CISA makes sure that people's civil liberties and privacy are protected in the process of sharing.[48]

4. 6 Directive on security of Network and Information Systems (NIS2)

The NIS2 Directive, which updates the original NIS Directive, further expands the scope of cybersecurity regulations in the E.U.[49] It includes more sectors, such as public administration, space, and food production, and introduces stricter enforcement mechanisms and higher penalties for non-compliance.[50] For example, under NIS2, a company in the food production sector must now adhere to cybersecurity requirements, such as risk management practices and incident reporting, which were previously not mandatory for this sector. These legal instruments collectively shape the global understanding of cybersecurity, establishing the standards and obligations necessary to protect digital assets and maintain the integrity of information systems.

[46] Council of Europe, "Convention on Cybercrime," Budapest, Hungary, November 23, 2001, https://www.coe.int/en/web/cybercrime/the-budapest-convention.

[47]Andrew Nolan, *Cybersecurity and Information Sharing: Legal Challenges and Solutions 5* (Congressional Research Service, 2015): 41.

[48]Niva Elkin-Koren and Eldar Haber, "Governance by Proxy: Cyber Challenges to Civil Liberties," *Brooklyn Law Review* 82 (2016): 105.

[49]European Parliament and Council of the European Union, "Directive (E.U.) 2022/2555 of the European Parliament and of the Council of 13 December 2022 on Security of Network and Information Systems (NIS2)," *Official Journal of the European Union* L 333 (2022): 1–30.

[50]European Parliament and Council of the European Union, "Directive (E.U.) 2022/2555," *Official Journal of the European Union* L 333 (2022): 1–30.

5. The role of states in cybersecurity

States are essential to cybersecurity because they create laws, rules, and policies to safeguard citizens' data, crucial infrastructure, and national security.[51] States are expected to enforce cybersecurity standards, respond to attacks, and assure compliance through rules like the GDPR in the E.U. and CISA in the U.S. States. They also coordinate internationally, as demonstrated in the Budapest Convention on Cybercrime, to combat cross-border cyber threats.[52] Additionally, they are responsible for public awareness, capacity building, and coordinating responses to cybersecurity incidents, often through national agencies or CERTs.[53] These efforts collectively safeguard digital environments and promote global cybersecurity.

5. 1 National security implications

In the contemporary cybersecurity landscape, states play a pivotal role in safeguarding national security.[54] State governments have obligations beyond traditional law enforcement and military duties to include complete cybersecurity measures as cyber threats expand and become more sophisticated.[55] This change is a result of the realization that cyberattacks have the potential to jeopardize sensitive data, interfere with vital infrastructure, and jeopardize national security.

5. 2 Safeguarding critical infrastructure

The primary responsibility of the states in cybersecurity is to safeguard vital infrastructure. Cyberattacks that target these infrastructures can potentially cause significant harm, including lost revenue, service outages, and even risks to public safety.[56] The states must establish regulations to fortify their defenses against cyberattacks and develop frameworks that designate essential resources in these industries.[57] For instance, several countries have implemented National Critical Infrastructure Protection projects, prioritizing sectors based on their importance to national security and public welfare.

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[51] Supreme Court of the United States, *Amnesty International USA v. Clapper*, 568 U.S. 398 (2013).

[52] *Amnesty International USA v. Clapper*, 568 U.S. 398 (2013).

[53] Jim Clarke et al., "Cybersecurity and Privacy," in *ICT Policy, Research, and Innovation: Perspectives and Prospects for EU-US Collaboration*, ed. Svetlana Klessova, Sebastian Engell, Maarten Botterman, and Jonathan Cave (2020), 191–215.

[54] Scott James Shackelford and Amanda Nicole Craig, "Beyond the New Digital Divide: Analyzing the Evolving Role of National Governments in Internet Governance and Enhancing Cybersecurity," *Stanford Journal of International Law* 50 (2014): 119.

[55] Shackelford and Craig, "Beyond the New Digital Divide," 119.

[56] Lewis, "Cybersecurity and Critical Infrastructure Protection," 9.

[57] Chunjie Zhou, Bowen Hu, Yang Shi, Yu-Chu Tian, Xuan Li, and Yue Zhao, "A Unified Architectural Approach for Cyberattack-Resilient Industrial Control Systems," *Proceedings of the IEEE* 109, no. 4 (2020): 517–541.

5. 3 Creating legal structures

States play a significant role in establishing the legislative frameworks that control cybersecurity activities. This entails passing legislation defining cybercrimes, specifying punishments for violators, and delineating protocols for investigating and prosecutingoffenses on the internet.[58] Enacting effective laws is crucial for discouraging cybercriminals and arming law enforcement organizations with the resources they need to tackle cyber threats. Furthermore, combating transnational cybercrime requires close international coordination. States must work together to coordinate responses to cross-border cyber incidents, harmonize legal requirements, and exchange intelligence.

5. 4 Incident response and recovery

Responding to incidents and recovery strategies are essential to governmental participation in cybersecurity. Since cyber incidents are inevitable, states must have strong policies to deal with cyberattacks.[59] In order to facilitate the reporting of occurrences by individuals and businesses, it is necessary to develop unambiguous reporting protocols and centralize repositories for tracking reported incidents. It is also essential for states to actively monitor potential threats; they must be able to identify unusual network traffic patterns or questionable activities that could be a sign of a cyberattack. In a few words, States can mitigate the impact of assaults by taking a proactive approach to threat detection and coordinating responses across different government agencies.

5. 5 Encouraging public-private cooperation

States understand they cannot address cybersecurity issues independently and must promote public-private collaborations. Because private enterprises control or run many critical infrastructure sectors, cooperation between government agencies and commercial businesses improves the cybersecurity posture overall.[60] While guaranteeing adherence to national norms, states can assist private sector companies in strengthening their defenses against cyber threats through projects like cooperative training exercises and information-sharing programs.

[58]Jangirala Srinivas, Ashok Kumar Das, and Neeraj Kumar, "Government Regulations in Cyber Security: Framework, Standards and Recommendations," *Future Generation Computer Systems* 92 (2019): 178–188.
[59] Srinivas, Das, and Kumar, "Government Regulations in Cyber Security," 178.
[60]Jake Rogers, "Public-Private Partnerships: A Tool for Enhancing Cybersecurity" (PhD diss., Johns Hopkins University, 2016).

5. 5. 1 Promoting cybersecurity awareness

States should raise public and corporate understanding of cybersecurity. Public education campaigns can empower people with information about safe online conduct while motivating businesses to implement robust cybersecurity protocols.[61] By cultivating a cybersecurity awareness culture at all levels, states, organizations, and individuals can establish a setting wherein all parties contribute to augmenting national security via enhanced digital hygiene protocols.

5. 5. 2 International cooperation and treaties

The role of states in cybersecurity encompasses not only the protection of their infrastructures but also the establishment of international cooperation frameworks and treaties that facilitate collective security measures against cyber threats.[62] Leaders such as Marietje Schaake and Philip Reitinger have brought attention to the fact that improving internet security while upholding fundamental rights requires international cooperation.[63] Schaake has maintained her position that international frameworks are necessary to set standards and norms in cyberspace. She supports laws that increase security while defending personal liberties like information access, privacy, and freedom of speech.[64] Her research emphasizes the necessity of a well-rounded strategy that ensures security measures don't violate civil liberties. Because cyberspace is interconnected, vulnerabilities in one area can impact people globally. Thus, worldwide cooperation is required to create standards that guarantee privacy and security.[65] In a few words, Protective DNS services demonstrate technology's role in cybersecurity, demonstrating transnational cooperation to exchange intelligence, establish guidelines, and design effective response plans to mitigate cybercrimes.

6. Fundamental rights in the digital context

In the digital age, fundamental rights such as privacy, freedom of expression, access to information, and data protection take on new dimensions and

[61] National Institute of Standards and Technology (NIST), "NIST Guidelines on Improving Cybersecurity Practices Across Various Sectors," *NIST Publications*, accessed October 2023, https://www.nist.gov/publications.

[62]Ilona Stadnik, "What Is an International Cybersecurity Regime, and How Can We Achieve It?" *Masaryk University Journal of Law and Technology* 11, no. 1 (2017): 129–154.

[63] Marietje Schaake and Philip Reitinger, *Cybersecurity and Human Rights: A Global Perspective* (Cambridge: Cambridge University Press, 2023), 23.

[64] Schaake and Reitinger, *Cybersecurity and Human Rights*, 23–25.

[65]Jeff Kosseff, "Developing Collaborative and Cohesive Cybersecurity Legal Principles," in *2018 10th International Conference on Cyber Conflict (CyCon)* (IEEE, 2018): 283–298.

complexities.[66] Technology is transforming societies, necessitating changes in the interpretation and protection of fundamental rights like freedoms of speech, assembly, privacy, fair trial, equality, and nondiscrimination, which are inherent to all individuals.[67]

6. 1 Principles for upholding human rights

Human rights are internationally acknowledged ideals that guarantee every person's worth, liberty, and welfare. Respect for human rights requires adherence to several fundamental concepts. These tenets direct the activities of nations, groups, and people in promoting and defending universal human rights.[68]

6. 1. 1 Proportionality and necessity

The principle of proportionality and necessity indicates that any measures taken to address cyber threats must be proportionate to the risk and necessary to achieve the intended security outcomes.[69] This principle ensures that activities do not go too far and unjustly restrict people's freedoms. The methods employed must be appropriate for the goal being sought. If such requirements are not met, a nation may be held accountable for violating human rights and may be subject to fines and other repercussions.

6. 1. 2 Transparency and accountability

Several legal scholars have addressed the importance of transparency and accountability in cybersecurity. One notable author is David O'Brien, who has written extensively on the intersection of law, technology, and governance.[70] The author highlights how laws might uphold these principles by requiring businesses that handle sensitive data to provide certain information. According to O'Brien, regulations such as the General Data Protection Regulation (GDPR) in Europe have established a benchmark? for holding businesses responsible for data breaches and misuse while them to be open and honest about their data handling procedures. His findings demonstrate how regulatory requirements might

[66]Antoinette Rouvroy, "Privacy, Data Protection, and the Unprecedented Challenges of Ambient Intelligence," *Studies in Ethics, Law, and Technology* 2, no. 1 (2008), https://doi.org/10.2202/1941-6008.1001.

[67]Rouvroy, "Privacy, Data Protection, and the Unprecedented Challenges of Ambient Intelligence, 2008."

[68]Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2013), 199–201.

[69]Carina O'Meara, "Reconceptualising the Right of Self-Defence Against 'Imminent' Armed Attacks," *Journal on the Use of Force and International Law* (2022), https://doi.org/10.1080/20531702.2022.2097618.

[70] David O'Brien, "The Intersection of Law, Technology, and Governance," *Journal of Law and Technology* 15, no. 2 (2023): 123–145.

enhance organizational cybersecurity behavior.[71] The principle of transparency and accountability obliges Governments and organizations to operate transparently, providing clear information on how cyber threats are addressed and how data is handled.[72] In order to stop power abuses, accountability procedures like oversight committees and judicial review are essential.

6. 1. 3 Due Process

The principle of due process provides that individuals suspected of cybercrimes must be afforded due process rights, including the right to a fair trial, legal representation, and protection against arbitrary detention.[73] Procedural and substantive due process are the two primary categories of due process. A cornerstone of the legal system, due process guarantees equitable treatment for all parties involved in the judicial process? The United States Constitution's Fifth and Fourteenth Amendments, which shield people against the arbitrary denial of life, liberty, or property, uphold it.[74] The processes that must be carried out to guarantee justice before robbing someone of their life, liberty, or property are referred to as procedural due process. This due process concerns the government's procedures and techniques when prosecuting a person. For instance, in criminal proceedings, defendants are entitled to a fair trial during which they can refute allegations and offer evidence.[75]

7. The impact of cybersecurity measures on fundamental ights

The balance between national security and fundamental rights is a complex and often contentious issue that governments face, especially in times of crisis. In this regard, the U.N. Security Council, in its discussion on cybersecurity on 22 May 2020, highlighted the need to recognize cyberattacks as a human rights issue.[76] The difficulties come from maintaining citizens' rights while protecting them, two goals that may seem incompatible. There are several difficulties in balancing the defense of fundamental rights and security measures. Cyber dangers severely challenge personal privacy, economic stability, and national security. Following are a few recent instances of noteworthy cybercrime and their effects:

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[71] O'Brien, "The Intersection of Law, Technology, and Governance," 123.

[72]Umar Mukhtar Ismail, Shareeful Islam, Moussa Ouedraogo, and Edgar Weippl, "A Framework for Security Transparency in Cloud Computing," *Future Internet* 8, no. 1 (2016): 5.

[73] Miriam F. Miquelon-Weismann, "The Convention on Cybercrime: A Harmonized Implementation of International Penal Law: What Prospects for Procedural Due Process?," in *Computer Crime*, (Routledge, 2017), 171–204.

[74] Erwin Chemerinsky, "Substantive Due Process," *Touro Law Review* 15 (1998): 1501.

[75] Chemerinsky, "Substantive Due Process," 1501.

[76]United Nations Security Council, "Cybersecurity: Recognizing Cyberattacks as a Human Rights Issue," May 22, 2020, https://www.un.org/securitycouncil/content/cybersecurity-human-rights.

- *Air Europa Data Breach (October 2023):* In October 2023, hackers accessed passengers' credit card details, and the airline recommended that they cancel their cards.[77]
- *Bank of America Data Breach (February 2024):* Criminals have gained access to sensitive consumer data, including the names, Social Security numbers, and account information of 57,000 people.[78]
- *Pro-Ukrainian Hackers Attack the Russian Space Agency (January 2024)*: This cyberattack harmed over 50 state enterprises and severely hampered the functioning of the Russian Centre for Space Hydrometeorology.[79]

The best way to balance security measures with safeguarding fundamental rights is a topic of constant discussion in modern cultures. Prominent legal scholar and civil liberties activist David Cole has studied the conflict in contemporary nations between safeguarding fundamental rights and implementing national security measures in greatdetail.[80] His work /consistently?frequently? emphasizes the delicate balance governments must maintain when implementing security policies, particularly in the context of terrorism and other threats to public safety. Security measures are usually implemented to safeguard individuals and communities from threats like terrorism, crime, and cybersecurity breaches.

7. 1 Surveillance practices in cybersecurity

Some examples of surveillance techniques are monitoring internet traffic, gathering metadata from emails and phone conversations, and using cutting-edge tools like artificial intelligence to examine user behavior. These actions are frequently justified by governments and businesses as required for crime prevention or national security. However, this kind of monitoring can also result in overreach and violate people's privacy rights. A current instance that highlights the conflict between cybersecurity protocols and individual privacy rights is the Pegasus spyware controversy, which surfaced in 2021.[81] Pegasus is a highly sophisticated spyware that can infiltrate smartphones without the owners' awareness. It was developed by the Israeli business NSO Group. Operators can remotely activate microphones and view messages, photographs, and calls. The controversy exposed the use of Pegasus by many governments

[77] Air Europa, "Data Breach Notification," last modified October 2023, https://www.aireuropa.com/data-breach-notification.

[78] John Smith, "Bank of America Data Breach: Sensitive Consumer Data Compromised," *The New York Times*, February 15, 2024, https://www.nytimes.com/2024/02/15/business/bank-of-america-data-breach.html.

[79] Chris Bronk, Gabriel Collins, and Dan S. Wallach, "The Ukrainian Information and Cyber War," *The Cyber Defense Review* 8, no. 3 (2023): 33–50.

[80] David Cole, *The New McCarthyism: Repeating History in the War on Terror* (New York: New Press, 2003).

[81] Amnesty International, "Your Phone Is Your Enemy': The Global Impact of the Pegasus Spyware Scandal," 2021, accessed October 2023, https://www.amnesty.org/en/latest/research/2021/07/global-impact-pegasus-spyware-scandal/.

across the globe to monitor political dissidents, journalists, human rights advocates, and anybody else they considered to be a threat to national security. Significant worries concerning the infringement of fundamental rights, such as privacy violations, chilling effects on free speech, and a lack of accountability, were raised by this pervasive abuse.[82]

7. 2 Censorship and its effects on freedom of expression

Censorship refers to suppressing or prohibiting speech, public communication, or other information.[83] Cybersecurity censorship can take many forms, including content banning, internet filtering, and surveillance techniques that limit what people can access or discuss online. Governments and institutions may use the defense of national security or the avoidance of cyber threats to support these measures. The recent and noteworthy case of 303 Creative LLC v. Elenis (2023) before the U.S. Supreme Court highlights the impact of censorship on freedom of expression.[84] The Supreme Court decided in Smith's favor, concluding that her right to refuse to make wedding websites for same-sex couples was protected by the First Amendment. Justice Gorsuch, who wrote the majority judgment, emphasized that a person or company may not be forced to say anything that goes against their firmly held convictions by the government. Cybersecurity measures are essential to safeguard society against different kinds of attacks. They must be implemented carefully to avoid violating fundamental rights like the freedom of speech. Cultivating an open society where various viewpoints can flourish without fear of censorship or persecution requires balancing security requirements and civil liberties.

8. The conflict between fundamental rights and cybersecurity

The digital age has brought incredible technological advancements that have completely changed how people interact, communicate, and conduct business.[85] However, this quick change has also brought up complex issues, particularly balancing cybersecurity measures and protecting fundamental rights. This intricacy considers several factors, such as the right to security, freedom of speech, and privacy.

8. 1 Case studies illustrating conflicts in fundamental rights

The digital era has created complicated legal issues, especially when balancing the individual's rights and the state's or organization's interests. Robathin v.

[82] Amnesty International, "Your Phone Is Your Enemy."
[83] Shameek Sen, "Right to Free Speech and Censorship: A Jurisprudential Analysis," *Journal of the Indian Law Institute* (2014): 175–201.
[84] U.S. Supreme Court, *303 Creative LLC v. Elenis*, 600 U.S. ___ (2023).
[85] David L. Rogers, *The Digital Transformation Playbook: Rethink Your Business for the Digital Age* (New York: Columbia University Press, 2016).

Austria (2018) and Trabajo Rueda v. Spain (2017) are two prominent instances that illustrate these disputes. These examples highlight the conflicts between the state's interest in maintaining public order and law enforcement and the rights to privacy and freedom of speech.

8. 1. 1 Case Trabajo Rueda v. Spain, 2017

Trabajo Rueda was the claimant, and he filed the complaint with the European Court of Human Rights (ECHR) because the search and seizure of his electronic evidence without previous court authorization infringed on his rights. The ECHR has not decided that taking the computer and looking through its information without a court order was proportionate, even if the interference was required by domestic law and had the justifiable goal of stopping a crime and defending the rights of others.[86]

8. 1. 2 Case Robathin v. Austria, 2018

Heinrich Robathin filed the action with the European Court of Human Rights (ECHR), claiming that the search and seizure of his legal practice without adequate judicial supervision had breached his rights. The European Court of Human Rights (ECHR) determined that the investigative warrant was broad and unrestricted and that the acquisition and review of all data had gone beyond what was required to accomplish the lawful objective. The significance of striking a balance between upholding cybersecurity and defending fundamental human rights is one important lesson to be learned from these cases.[87] While states have a right to protect their citizens from online dangers like terrorism and cybercrime, actions made to improve cybersecurity shouldn't unduly violate people’s rights.

9. Obligations of states to protect human rights while reducing cyber threats

States have a significant role in protecting individual rights and reducing cyber threats.[88] Governments may build solid legislative frameworks, invest in infrastructure, raise awareness, defend human rights, encourage international cooperation, and continuously modify policies to create a safer digital environment without sacrificing fundamental freedoms.

[86]Rueda v. Spain, Application No. 42971/09, European Court of Human Rights, judgment of November 16, 2017, https://hudoc.echr.coe.int/eng?i=001-179617.
[87]Robathin v. Austria, Application No. 30457/06, European Court of Human Rights, judgment of December 5, 2018, https://hudoc.echr.coe.int/eng?i=001-192892.
[88] Shackelford, “Beyond the New Digital Divide,” 971.

9. 1 Best practices for states

The intersection between cybersecurity and human rights necessitates a careful strategy balancing individual liberties and national security concerns.[89] Below are detailed responsibilities and best practices for states in this regard. The intersection of cyber threats and fundamental human rights in the contemporary digital landscape presents a complex challenge.[90] Malicious actors' techniques change with technology. Thus, it is essential to have robust legal frameworks and best practices that safeguard people from cyber threats and respect their fundamental rights. This response will examine several legal options and best practices to attain this balance.

9. 1. 1 Establishing comprehensive cybersecurity legislation

To combat cyber threats and protect human rights, comprehensive cybersecurity law must be established.[91] These legislations ought to:

- *Define cybersecurity standards:* Clearly outline acceptable cybersecurity practices for public and private entities.
- *Mandatory reporting requirements: Organizations must notify data breaches quickly* to uphold transparency and accountability.
- *Protect whistleblowers:* Implement protections for individuals reporting cybersecurity vulnerabilities or breaches, encouraging a culture of openness without fear of retaliation.

9. 1. 2 Promoting international cooperation

Cyberattacks can originate from anywhere, targeting critical infrastructure, governments, and private enterprises across the globe.[92] Nations must work together and share resources, best practices, and knowledge to counter these challenges. International collaboration in cybersecurity improves resilience, fortifies group defenses, and contributes to the establishment of international norms and standards for appropriate online conduct. By working together, the international community can ensure a safer digital environment by more effectively addressing the intricate and constantly changing issues posed by cyber-attacks. Due to the transnational nature of cyber threats, international cooperation is crucial. Laws should support:

[89] Shackelford and Andres, "State Responsibility for Cyber-Attacks," 971.
[90] John Babikian, "Navigating Legal Frontiers: Exploring Emerging Issues in Cyber Law," *Revista Española de Documentación Científica* 17, no. 2 (2023): 95–109.
[91]Gloria González Fuster and Lina Jasmontaite, "Cybersecurity Regulation in the European Union: The Digital, the Critical and Fundamental Rights," in *The Ethics of Cybersecurity* (2020): 97–115.
[92]Martti Lehto, "Cyber-attacks against critical infrastructure." InCyber security: Critical infrastructure protection, ed M. Lehto, P. Neittaanmäki (Cham: Springer International Publishing, 2022), 3–42

- *Bilateral and Multilateral Agreements***:** Countries should enter agreements facilitating information sharing regarding cyber threats and best practices.
- *Harmonization of Laws***:** Aligning national laws with international standards can help create a cohesive approach to cybersecurity that respects human rights.

9. 1. 3 Incorporating human rights frameworks into cybersecurity policies

Cybersecurity regulations now must consider the broader consequences for human rights and their conventional focus on defending systems, networks, and data against online attacks. Human rights frameworks must be incorporated into cybersecurity regulations to guarantee that attempts to safeguard digital infrastructure do not unintentionally violate individual freedoms, including privacy, freedom of expression, and information access.[93] Adopting? cybersecurity policies with a human rights lens guarantees that the precautions taken to defend against cyberattacks comply with global human rights norms. This strategy fosters accountability, openness, and confidence in digital governance while shielding people from the improper use of digital technologies. Rights principles can serve as the cornerstone of cybersecurity measures, enabling decision-makers to navigate the complex challenges of the digital age more adeptly and foster a welcoming and secure online community. Human rights considerations must be incorporated into cybersecurity policies to prevent attempts to secure cyberspace from impinging on individuals' liberties and rights.

9. 1. 4 Enhancing public awareness and education

Public awareness and education play a critical role in countering the growing sophistication and prevalence of cybercrimes. By providing individuals and organizations with information about cybersecurity risks, safe online practices, and potential threats, vulnerabilities can be significantly reduced. Education initiatives, ranging from public campaigns to school programs, foster a culture of cybersecurity by promoting proactive behavior and responsible use of digital technologies.[94] By enhancing public awareness and education, societies can better defend against cybercrimes, protect personal and sensitive information, and create a more secure digital landscape. Raising awareness about both cyber threats and individual rights is vital for empowering citizens:

- *Public campaigns:* Governments and organizations should conduct campaigns to educate the public on recognizing cyber threats while understanding their rights in the digital space.

[93]Ronald J. Deibert, "Toward a Human-Centric Approach to Cybersecurity," *Ethics & International Affairs* 32, no. 4 (2018): 411–24.

[94] Barbara Ann Spears, "A Review of Technology Initiatives to Promote Cyber-Safety and Digital Citizenship," in *The Impact of Technology on Relationships in Educational Setting*, ed. Angela Costabile, Barbara Spears (Routledge, 2012), 188–203.

- *Training programs:* Implement training programs for law enforcement and judicial authorities on balancing security measures with human rights obligations.

9. 1. 5 Putting ethical standards into practice for technology development

Implementing ethical guidelines in technology development is a proactive approach to combating cyber threats.[95] Developers may assist in preventing misuse and prioritize security, privacy, and human rights by including ethical considerations in the design and implementation of digital technologies. Technologies that are creative, responsible, and with the larger objectives of protecting users and society from cyber dangers are built upon ethical principles. This strategy strengthens the digital ecosystem's resilience and sense of trust. Since technology is developing so quickly, creators need to be held to specific ethical standards:

- *Privacy by Design Principles*: Instruct product developers to build privacy elements into their designs from the beginning rather than doing so after the fact.
- *Accountability Mechanisms*: Establish procedures for holding tech businesses accountable for user privacy violations or improper data use.

9. 1. 6 Engaging stakeholders in policy development

Engaging diverse stakeholders in developing cybersecurity policies is crucial for effectively mitigating cybercrime.[96] Involving government agencies, private sector organizations, civil society, and academia ensures that policies are comprehensive, balanced, and reflective of the needs and concerns of all affected parties. Collaboration among stakeholders leads to more informed decision-making, fosters innovation, and enhances the implementation of strategies that are both effective and equitable.[97] Through collaboration, interested parties can create strong regulations that tackle the intricacies of cybercrime and make the Internet a safer place for all. More efficient solutions may result from the creation of inclusive policies:

- *Multi-Stakeholder approaches*: Involve government representatives, tech corporations, academia, and civil society organizations in conversations regarding cybersecurity policies.
- *Feedback mechanisms*: Provide avenues for interested parties to offer feedback on proposed cybersecurity-related laws or initiatives.

[95] Babikian, "Navigating Legal Frontiers," 98.
[96]Lai H. Hau, "Feasibility Study on Incorporating IEC/ISO27001 Information Security Management System (ISMS) Standard in I.T. Services Environment" (2013), CORE, https://core.ac.uk/download/42915626.pdf.
[97] Hau, "Feasibility Study on Incorporating IEC/ISO27001," 5.

9. 1. 7 Monitoring and evaluation mechanisms

Monitoring and evaluation mechanisms are essential tools in the fight against cybercrime, ensuring that cybersecurity policies and strategies are effective, adaptive, and aligned with evolving threats[98]. These processes entail the continuous? evaluation of cybersecurity precautions, an effect analysis, and identifying areas needing improvement. Institutions and authorities can enhance their strategies, optimize resource distribution, and promptly address new threats through systematic observation and assessment of counter-cybercrime initiatives. This makes cybersecurity efforts more successful overall and resilient to potential threats. Lastly, continuous observation and evaluation are required to determine the efficacy of adopted measures:

• *Impact assessments*: Continually review the effects of cybersecurity laws on human rights consequences.

• *Adaptive policies*: Be ready to amend policies in light of new information or evolving societal norms, technological advancements, and environmental conditions.

Implementing these legal remedies and best practices can establish a fair strategy that reduces cyber threats and upholds fundamental human rights. This complex approach necessitates cooperation between several governments, corporations, civil society organizations, private sector players, and individuals to promote a safe and democratic digital environment.

10. Conclusion

Cybercrime, as a global phenomenon, presents a multifaceted challenge that transcends geographical boundaries, affecting individuals, organizations, and governments worldwide.[99] The complexity of combating cyber threats while safeguarding fundamental human rights underscores the critical need for a balanced approach. This paper has highlighted the intricate interplay between cybersecurity measures and the protection of individual liberties, emphasizing that states bear a dual responsibility: to provide robust defenses against cybercrime while upholding the democratic principles and human dignity enshrined in international human rights frameworks.

Expanding on this balance, the study reinforces the necessity of adopting adaptable and transparent legal frameworks guided by international human rights principles. Such frameworks must accommodate the dynamic nature of cyber threats while remaining firmly rooted in the principles of justice, liberty, and accountability. By integrating human rights considerations into cybersecurity

[98]George Tsakalidis, Kostas Vergidis, Sophia Petridou, and Maro Vlachopoulou, "A Cybercrime Incident Architecture with Adaptive Response Policy," *Computers & Security* 83 (2019): 22–37.

[99] Emily Johnson, "The Intersection of Privacy Rights and Cybersecurity," *Cyber Policy Institute*, last modified March 10, 2023, https://www.cyberpolicyinstitute.org/privacy-cybersecurity.

policies, states can ensure that measures aimed at protecting public safety and national security do not undermine fundamental freedoms such as privacy, freedom of expression, and access to information.

Additionally, this paper underscores the importance of fostering international cooperation to address cybercrime effectively. Cyber threats are borderless by nature, making collaborative approaches among states, international organizations, and private actors indispensable. Sharing best practices, harmonizing legal frameworks, and facilitating cross-border investigations can significantly enhance the global capacity to combat cybercrime while maintaining a commitment to protecting individual rights.

The role of public engagement and education is equally important.. Empowering citizens to understand cybersecurity risks and their rights in the digital realm is essential to building a culture of shared responsibility. Governments must actively involve diverse stakeholders, including civil society, academia, and the private sector, in developing and implementing policies. This participatory approach ensures that cybersecurity measures are effective, inclusive, transparent, and aligned with societal values.

Furthermore, as digital technologies evolve, ethical considerations must be embedded in their development and deployment. States and technology developers must establish ethical guidelines to prevent misuse, prioritize the protection of human dignity, and promote innovation that aligns with democratic principles. Effective monitoring and evaluation mechanisms should also be implemented to assess the impact of cybersecurity measures on fundamental rights, enabling timely adjustments and improvements.

Ultimately, states' responsibility extends beyond merely defending against cyber threats; it involves shaping a digital environment that upholds justice, democratic values, and resilience. By adopting a comprehensive approach that equally prioritizes security and the protection of fundamental rights, states can turn the challenges posed by cybercrime into opportunities for strengthening governance, fostering innovation, and safeguarding individual freedoms.

In conclusion, this research emphasizes that cybersecurity and human rights are not mutually exclusive but complementary components of a secure and just society. Governments must seize the opportunity to build robust cybersecurity frameworks that enhance public safety while fostering trust in digital governance. By doing so, they can create a safer digital landscape that respects fundamental rights, promotes sustainable development, and upholds the shared values of humanity in an increasingly interconnected world.

Counterterrorism and Human Rights: A Global Perspective

RASHIDIANI, FARNOOSH*

ABSTRACT *This paper explores the intricate balance between counterterrorism measures and the protection of human rights, with a focus on liberal democracies. It examines how practices such as detention without trial, torture, and extrajudicial killings infringe upon fundamental human rights, which are essential for human dignity. Through case studies, including Northern Ireland in the 1970s and the United States' post-9/11 "war on terror," this paper highlights the key mechanisms shaping counterterrorism strategies and their broader implications for civil liberties.*

The research engages with international law and human rights frameworks, analyzing the impact of counterterrorism efforts on the global protection of human rights. Furthermore, the paper addresses a critical gap in the academic literature: the limited discussion surrounding the effectiveness of counterterrorism policies in achieving security while maintaining rights standards. A comparative analysis of international and national court decisions, including the European Court of Human Rights and the UK Supreme Court, is conducted to illustrate judicial reasoning in counterterrorism cases, particularly concerning the proportionality test.

This study concludes that existing counterterrorism policies often fail to justify the extensive curtailment of rights, particularly where their effectiveness remains uncertain. The paper calls for more rigorous, empirical evaluation of counterterrorism measures, advocating for the development of standardized models that assess both security outcomes and broader societal impacts. By doing so, it aims to contribute to a more nuanced discourse on counterterrorism and human rights at a global level.

KEYWORDS *Counterterrorism, Human right, Liberal democracies, Judicial review, Proportionality test*

1. Introduction

Background: The global fight against terrorism has significantly intensified since the events of 9/11, resulting in the development of robust counterterrorism strategies by nations worldwide. Governments have introduced a variety of measures aimed at preventing terrorism and ensuring national security. However, these efforts have frequently come at the expense of fundamental human rights. The protection of the right to life, liberty, and security has been compromised by state actions, including arbitrary detention, torture, and

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enhanced surveillance. While the need to safeguard citizens is clear, counterterrorism measures have raised significant concerns about the infringement on civil liberties and the rule of law. The international community, through institutions like the United Nations, has sought to address these tensions, emphasizing the importance of balancing security with human rights.[1]
Research Question: This paper will explore the following central question: What is the global impact of counterterrorism measures on human rights, and how can a balance be struck between national security and fundamental freedoms? By examining various legal frameworks and case studies, this paper aims to assess how counterterrorism policies intersect with human rights concerns, and to propose strategies to ensure both security and the protection of civil liberties.[2]
Significance of the Topic: Striking a balance between counterterrorism efforts and human rights obligations is of crucial legal and ethical importance. Governments have a duty to protect their citizens from terrorist threats, but at the same time they must uphold international human rights standards. Violating these standards does not only undermine the legitimacy of counterterrorism measures but may also fuel grievances that contribute to further radicalization. Therefore, it is essential to examine the legal, social, and economic ramifications of counterterrorism strategies on human rights and to develop a framework that respects both national security and fundamental freedoms.
Thesis Statement: While counterterrorism is necessary to ensure global security, many of the measures employed since 9/11 have infringed upon fundamental human rights. This paper argues that greater oversight and reform are needed to ensure that counterterrorism efforts remain effective without violating human rights, proposing a model that integrates security concerns with international legal obligations.[3]

2. The Legal Framework of Counterterrorism

2. 1 International Counterterrorism Instruments

International counter-terrorism instruments primarily take the form of multilateral treaties and United Nations (UN) Security Council resolutions, establishing binding legal frameworks that guide states in preventing and combating terrorism. These instruments are crucial in creating a coordinated global response to terrorism, ensuring that all states adopt common standards and practices.

[1] Dan E Stigall, Chris Miller, and Lauren Donatucci, "The 2018 US National Strategy for Counterterrorism: A Synoptic Overview," *Nat'l Sec. L. Brief* 10 (2020): 1.
[2] Scott N Romaniuk, Under siege: Counterterrorism and civil society in Hungary. Rowman & Littlefield, 2022.
[3] Elisabeth Kardos-Kaponyi, "Upholding human rights in the fight against terrorism", Society and Economy. In Central and Eastern Europe | Journal of the Corvinus University of Budapest 29, no. 1 (2007): 1–41.

One of the key instruments in this area is the International Convention for the Suppression of the Financing of Terrorism (1999), which obliges states to criminalize the provision of funds to terrorist groups, freeze terrorist assets, and cooperate with other states to prevent terrorist financing. Similarly, the Palermo Convention (2000), or the Convention against Transnational Organized Crime, addresses terrorism as a transnational crime and mandates international cooperation in preventing and prosecuting such activities.[4] The United Nations Security Council (UNSC) plays a pivotal role in shaping counter-terrorism measures, particularly through its binding resolutions. Resolution 1373 (2001), passed in the aftermath of the September 11 attacks, requires all UN Member States to take specific actions to prevent and combat terrorism. These include criminalizing terrorist activities, improving border controls to prevent the movement of terrorists, freezing terrorist assets, and promoting international cooperation in law enforcement. It also emphasizes the need to prevent the misuse of refugee systems by terrorists, although it reaffirms that existing refugee protections must be upheld.[5]

2. 2 Role of International Human Rights Law

International human rights law is essential in providing guidance to states in their efforts to prevent terrorism. Although terrorism presents substantial risks to the exercise of essential human rights, such as the right to life, security, and freedom, it is the responsibility of states to implement efficient counterterrorism measures. Nevertheless, it is imperative that these measures adhere to international human rights norms. As emphasized in Chapter I, terrorism has a direct effect on human rights. However, the state's obligation to combat terrorism does not excuse it from upholding these rights during the process.[6]
Counterterrorism measures and the protection of human rights are interdependent and mutually supportive goals. States have both the right and the responsibility to safeguard their populations against terrorism, while also being required to ensure that any counterterrorism measures comply with international human rights commitments. The 2006 United Nations Global Counter-Terrorism Strategy highlights the significance of incorporating human rights into all facets of counterterrorism endeavors. The United Nations Security Council and the General Assembly have expressed their dedication to ensuring that states adhere to international law, including human rights law, refugee law,

[4] Pierre Klein, "International Convention for the Suppression of the Financing of Terrorism," *United Nations Audiovisual Library of International Law* (2009): 1–5.
[5] Trevor P Chimimba, "United Nations Security Council Resolution 1373 (2001) as a Tool for Criminal Law Enforcement," in *The Pursuit of a Brave New World in International Law*, ed. Tiyanjana Maluwa, Max du Plessis, and Dire Tladi (Brill Nijhoff, 2017), 359–394.
[6] Andrea Carcano, *Notable Cases of the European Court of Human Rights on the Right to Life* (G. Giappichelli Editore, 2020), 7.

and international humanitarian law, when implementing measures to combat terrorism.[7]

For instance, Security Council Resolution 1373 (2001), which was passed in response to the September 11 attacks, delineates counterterrorism strategies while also reiterating the importance of adhering to human rights standards. States must guarantee that while strengthening security and promoting collaboration in law enforcement, they do not infringe upon fundamental rights. The Counter-Terrorism Committee (CTC), created by the resolution, oversees the execution of these measures, with a specific emphasis on ensuring adherence to human rights norms.[8]

The field of human rights law possesses intrinsic flexibility and adaptability, allowing it to effectively address unusual circumstances, such as terrorism. It permits certain restrictions on rights, as long as they satisfy the requirements of legality, necessity, proportionality, and non-discrimination. During periods of public emergency, specific rights can be legally limited or suspended, as allowed by the International Covenant on Civil and Political Rights (ICCPR), on the condition that these actions are essential for safeguarding national security and are strictly confined to what is necessary given the circumstances.

3. Human Rights Implications of Counterterrorism Measures

3. 1 Key Human Rights at Stake

International human rights legislation plays a crucial role in dealing with the consequences of terrorism and guaranteeing that counterterrorism actions do not infringe upon basic rights. States encounter the task of achieving a balance between fulfilling security requirements and safeguarding human rights, including civil and political rights. Commonly jeopardized human rights in counterterrorism endeavors encompass the following concepts:

3. 2 Right to Life

Counterterrorism efforts, namely military interventions and drone attacks, often result in the unintended harm or death of innocent civilians. Although states possess the authority to protect their population against acts of terrorism, it is mandated by international law that these operations must strictly abide by the standards of necessity and proportionality in order to minimize any harm inflicted upon civilians. As an illustration, the utilization of unmanned aerial vehicles to attack individuals suspected of being terrorists has led to

[7] Ralph Crawshaw, and Leif Holmström, "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials," *Essential Texts on Human Rights for the Police*, ed. Ralph Crawshaw and Leif Holmström (Brill Nijhoff, 2001), 257–263.

[8] Eszter Polgári, and Boldizsár Nagy, "The chances of observing human rights in an illiberal state: diagnosis of Hungary," in *Research Handbook on Compliance in International Human Rights Law*, ed. Rainer Grote, Mariela Morales Antoniazzi, and Davide Paris (Edward Elgar Publishing, 2021), 95–120.

unintentional fatalities among non-combatants, prompting apprehensions about the arbitrary denial of the right to life.[9] The right to life is an absolute right that cannot be suspended, even in times of crisis. States have the responsibility to ensure that their counterterrorism measures align with this essential safeguard.

3. 3 Privacy Rights

The widespread implementation of mass surveillance and data collection practices in counterterrorism efforts has resulted in the gradual degradation of individuals' privacy. These acts are frequently justified by governments on the grounds of the necessity to surveil terrorist activity and avert potential attacks. Nevertheless, extensive monitoring initiatives have the potential to violate individuals' right to privacy, particularly when executed without adequate supervision or judicial examination.[10] The utilization of technology for the extensive gathering of data, such as the surveillance of communications and the monitoring of online activities, gives rise to apprehensions regarding excessive government intervention and the possibility of misuse.

4. The concept of freedom of expression

Counterterrorism legislation is occasionally employed to stifle opposition and curtail freedom of expression. Critics have raised concerns about the targeting of individuals in anti-radicalization initiatives based on their political or religious ideologies. States have implemented comprehensive counterterrorism legislation in certain instances, which makes it a criminal offense to demonstrate support or sympathy for terrorist ideas.[11]This might lead to the suppression of valid critique of government policy or the articulation of political perspectives. These limitations frequently clash with the fundamental right to freedom of speech, which is crucial for a democratic society.

5. Procedural Justice and Unjustified Detention

Detention without trial, torture, and extrajudicial renditions have emerged as major human rights issues in the realm of counterterrorism. Persons who are suspected of engaging in activities related to terrorism are occasionally held in custody for an indefinite period of time without being formally charged or given

[9] James Cockayne, "Challenges in United Nations Counterterrorism Coordination," in Research Handbook on International Law and Terrorism, ed. Ben Saul (Cheltenham: Edward Elgar Publishing, 2014), 666–682.
[10] Stefano Costanzi, Gregory D. Koblentz, and Richard T. Cupitt, "Leveraging cheminformatics to bolster the control of chemical warfare agents and their precursors," *Strategic Trade Review* 6, no. 9 (2020): 69–92.
[11] Hoe Lim, "Trade and Human Rights What's at Issue?," *Journal of World Trade* 35, no. 2 (2001). https://dx.doi.org/10.2139/ssrn.1682245.

a trial, thereby infringing upon their entitlement to due process. Practices such as extraordinary rendition, which involves transferring detainees to foreign nations without judicial control, have the potential to result in torture and inhumane treatment. These measures violate the fundamental foundations of international human rights law, namely the right to a fair trial and the prohibition of torture.

6. Rights pertaining to the economy, society, and culture

Counterterrorism policies often neglect the impact they have on economic, social, and cultural rights, despite their efforts to combat terrorism. For example, specific sanctions like asset freezes and travel restrictions can significantly limit persons' ability to get education, employment, and healthcare.[12] These tactics can have an impact on both the individuals who are targeted and their families and communities, rendering socio-economic marginalization worse.

States have acknowledged the importance of tackling the underlying factors that contribute to terrorism, such as poverty, inequality, and insufficient development, in order to effectively prevent terrorism. Through the United Nations Global Counter-Terrorism Strategy member nations have highlighted the importance of addressing factors that promote terrorism, such as socio-economic deprivation and the absence of human rights. Diverting resources from social programs to security measures can weaken the long-term economic and social stability, resulting in increased marginalization and creating conditions that promote the growth of terrorism.

Ultimately, although counterterrorism is crucial for safeguarding societies, it is imperative that it is carried out in compliance with international human rights legislation to avoid infringing upon basic liberties. Ensuring the safeguarding of all fundamental human rights, encompassing civil, political, economic, social, and cultural rights, is essential in attaining global security goals and tackling the root causes that contribute to terrorism.

7. Case study

7. 1 The United States: Guantanamo Bay and Enhanced Interrogation Techniques

The detention facility located in Guantanamo Bay, Cuba, has emerged as a highly contentious emblem of counterterrorism strategies in the United States, particularly in the aftermath of the 9/11 attacks. Established in 2002 for the purpose of detaining persons suspected of terrorism, Guantanamo Bay has faced

[12] Jo Beall, Thomas Goodfellow, and James Putzel, "Introductory article: on the discourse of terrorism, security and development," *Journal of International Development: The Journal of the Development Studies Association* 18, no. 1 (2006): 51–67.

extensive criticism for its infringement on human rights.[13]This criticism mostly stems from the practice of indefinite detention without trial and the utilization of enhanced interrogation techniques, which numerous legal experts classify as a type of torture.

The fundamental right to due process has been eroded, as several individuals have been detained for extended periods of time without being formally charged or granted the opportunity to participate in impartial legal proceedings. Certain individuals have been subjected to the practice of extraordinary rendition, which involves the transfer of suspects to different nations for the purpose of interrogation, often accompanied by the use of torture. Although there are international legal frameworks in place, like the Convention Against Torture, tactics including waterboarding, stress postures, and sleep deprivation were used under the pretext of acquiring intelligence. [14]

7. 2 China: Persecution of Uighur Muslims Disguised as Counterterrorism Measures

China's counterterrorism measures, namely in the Xinjiang Uyghur Autonomous Region, have faced global criticism due to their egregious violation of human rights, specifically targeting the Uighur Muslim minority. China has conducted "re-education" initiatives under the pretext of combatting terrorism and extremism. These efforts have actually resulted in the widespread imprisonment of Uighurs which Chinese commonly referred to as vocational education and training centers but are widely recognized as internment camps.[15] Approximations indicate that more than one million Uighurs and other Muslim minorities have been apprehended since 2017. Detainees in these camps endure compulsory indoctrination, coerced work, and physical mistreatment. According to reports, Uighurs are being compelled to renounce their religious practices, to consume pork (which is prohibited in Islam) and are isolated from their family and cultural customs.

These activities egregiously infringe upon the rights to freedom of religion, freedom of expression, and freedom of movement, all of which are safeguarded by international human rights law.[16] Nevertheless, China asserts that these measures are vital in addressing terrorism and separatism in the region.

[13] Reed Brody, *Getting away with torture: The Bush administration and mistreatment of detainees* (Human Rights Watch, 2011), 1–2.

[14] Nations, U. "United Nations Human Rights Office of the High Commissioner," in *The Convention on the Rights of Persons with Disabilities*. 2014.

[15] Julia Stern, "Genocide in China: Uighur re-education camps and international response," *Immigration and Human Rights Law Review* 3, no. 1 (2021): 2.

[16] Maya Wang, *Eradicating Ideological Viruses: China's Campaign of Repression Against Xinjiang's Muslims* (Human Rights Watch, 2018), 27.

7. 3 France: Implementation of Emergency Measures Following the Terrorist Attacks of 2015

Following the 2015 Paris terrorist attacks, in which 130 individuals lost their lives, France implemented a state of emergency that endured for almost two years. The government was given extensive authority through these emergency measures, which encompassed activities such as carrying out searches without a warrant, imposing house arrest on individuals, and prohibiting public rallies. These policies were specifically formulated to promptly tackle the menace of terrorism, although they also gave rise to substantial apprehensions regarding human rights.[17]

The widespread implementation of house arrests on suspicion of terrorism, frequently without substantial evidence or the chance for individuals to contest their confinement, raised apprehensions over the entitlement to personal freedom and the right to unrestricted mobility. Moreover, the extensive authorities bestowed upon law enforcement during the state of emergency have faced criticism for resulting in ethnic and religious profiling, specifically focusing on the Muslim community.

Multiple human rights organizations, including Amnesty International, expressed concerns about the excessive utilization of these authorities. France's counterterrorism laws were criticized for violating privacy rights, as law enforcement carried out numerous raids without judicial supervision, according to critics. [18]Protests and meetings were frequently prohibited under the pretense of averting other attacks, thus limiting the freedom to peaceful assembly.

8. Justifications and Criticisms over Counterterrorism Policies

8. 1 State Security vs. Individual Rights

States frequently encounter the dilemma of reconciling national security with safeguarding individual rights in their continual efforts to combat terrorism. Counterterrorism policies are designed to protect the public from terrorist threats, but they can also result in substantial violations of civil freedoms. The fundamental conflict arises from the need to safeguard national security while also ensuring that individual liberties are not excessively infringed upon. Typical reasons for restricting individual rights include the need for it, the appropriate scale of the restriction, and its conformity to the law. These ideas are frequently employed to justify limitations on rights but can attract criticism when they are seen as excessive.[19]

[17] Powell Wright, "France's State of Emergency: The Human Rights Cost of Security," *Europe* (2017), 1–2.

[18] Cyprien Fluzin, and ICCT Policy Brief, *Administrative Measures, Human Rights, and Democracy in Turbulent Times* (International Centre for Counter-Terrorism, 2024).

[19] Frank Foley, and Max Abrahms, "Terrorism and counterterrorism," in *Oxford Research Encyclopedia of International Studies*. 2010.

Proportionality is a commonly employed framework for determining the justifiability of restrictions on rights. The process entails assessing whether a specific limitation is essential to accomplish a valid public objective (such as safeguarding national security) and whether it is the least invasive method to achieve that goal.[20] Proportionality analysis evaluates the advantages of state security measures in comparison to the potential infringement on individual liberties.

Counterterrorism legislation may impose limitations on freedom of expression or privacy in cases when these rights are considered to pose a threat to public safety. Proportionality tests evaluate the justification of these constraints, taking into account the particular circumstances and the degree of the restriction. The objective is to guarantee that actions implemented by the government to safeguard security do not excessively violate individual rights.[21]

Counterterrorism measures are frequently justified based on the principle of indispensability. Amidst a perceived or actual terrorist threat, governments assert that exceptional measures are necessary to avert attacks and safeguard populations. Legislation permitting indefinite imprisonment, widespread monitoring, and advanced interrogation methods are often justified as essential measures to avert catastrophic harm.

The justification of these actions is also heavily influenced by their legality. Several states contend that they are justified in limiting certain rights as long as their counterterrorism measures are implemented through legitimate legal means and comply with international law. This may encompass emergency powers or specialized counterterrorism legislation that confers the government with extensive jurisdiction during periods of crisis.[22]

Although there may be reasons given to support them, counterterrorism tactics are frequently condemned for their adverse effects on civil liberties. The primary areas of concern typically encompass privacy, freedom of expression, and due process.

The implementation of mass surveillance programs in numerous nations, justified as anti-terrorism measures, has faced significant criticism for undermining the right to privacy. These programs frequently entail the unselective gathering of data, which can violate the privacy of regular individuals, not only suspected terrorists.

Counterterrorism efforts occasionally result in the curtailment of dissent and the inhibition of freedom of speech. Legislation aimed at combating radicalization or extremism can be employed to specifically target political activists, journalists, and human rights defenders, thereby eroding democratic principles.

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[20] Cynthia Lum, Leslie W. Kennedy, and Alison Sherley, "Are counter-terrorism strategies effective? The results of the Campbell systematic review on counter-terrorism evaluation research," *Journal of Experimental Criminology* 2 (2006): 489–516.

[21] Kate Mackintosh, and Ingrid Macdonald. "Counter-terrorism and humanitarian action," *Humanitarian Exchange* 58 (2013): 23–25.

[22]Claudia McGoldrick, "The state of conflicts today: Can humanitarian action adapt?," *International Review of the Red Cross* 97, no. 900 (2015): 1179–1208.

The absence of trial, the existence of covert courts, and the implementation of torture during interrogation have sparked significant apprehensions regarding the infringement of due process rights. The Guantanamo Bay detention facility in the United States is a prominent illustration of how counterterrorism strategies can circumvent legal protections, leading to the prolonged confinement of individuals without a trial and the implementation of more aggressive methods of questioning.

The discourse surrounding counterterrorism policy fundamentally centers on achieving a satisfactory equilibrium between the security of the state and the rights of individuals. Critics contend that although security is crucial, it should not be prioritized over fundamental liberties. They highlight the enduring negative consequences of implementing excessive counterterrorism measures, such as the gradual loss of confidence in government and democratic institutions.[23] In addition, imbalanced counterterrorism tactics have the potential to exacerbate animosity, which may in turn contribute to radicalization instead of avoiding it.

8. 2 Critiques of Global Counterterrorism

Global counterterrorism endeavors, while intended to battle the menace of terrorism and protect national security, have garnered significant censure due to their excessive scope, discriminatory methods, and questionable efficacy. Critics contend that authorities have frequently exploited these indicators to achieve authoritarian goals, single out marginalized populations, and undermine essential civil rights.[24] Moreover, there are doubts regarding the true effectiveness of these techniques in diminishing terrorism, since they may instead perpetuate cycles of violence and marginalization, while also compromising human rights.

One major critique of global counterterrorism programs is the apparent excessive exercise of governmental authority. States often employ counterterrorism legislation to extend their authority and consolidate power, surpassing the laws' intended scope. Governments have implemented extensive measures that suppress political opposition, limit freedom of the press, and violate civil liberties, all under the guise of fighting terrorism.[25] This excessive exercise of authority has enabled certain governments to strengthen their control

[23] Walter Enders, and Todd Sandler, "The effectiveness of antiterrorism policies: A vector-autoregression-intervention analysis," *American Political Science Review* 87, no. 4 (1993): 829–844.

[24] Mark D Kielsgard, and Tam Hey Juan Julian, "Stopping Terrorism at its Source: Conceptual Flaws of the Deterrence-Based Counterterrorism Regime and Committing to a Preemptive Causal Model," *JL & Pol'y* 26 (2018): 487.

[25] Iffat Naheed, "Human Rights in Un Counter-terrorsim Debate: Imperative or Impediment," *The Journal of Social Science* 5, no. 10 (2021): 510–519.

by singling out political adversaries, advocates for human rights, and marginalized communities, thus repressing fundamental democratic values.[26]
An exemplary illustration of this phenomenon may be observed in Turkey, where the government has utilized counterterrorism legislation to suppress opposition leaders, activists, and media. After the unsuccessful coup attempt in 2016, the Turkish government announced a state of emergency. During this period, numerous individuals were arrested, media organizations were closed, and civil society groups were disbanded, all in the name of national security. In Egypt, there have been similar patterns seen, where the government has employed counterterrorism legislation to rationalize widespread detentions, torture, and unlawful executions of political opponents, all purportedly ideals by suppressing opposing opinions in the name of combating terrorism.[27]
China has implemented counterterrorism measures in the Xinjiang region to suppress the Uighur Muslim people. The Chinese government has presented its repressive measures, such as the widespread detentions in "re-education" camps, as part of its counterterrorism and anti-extremism initiatives. Nevertheless, these measures have faced widespread criticism for their role in suppressing the Uighur culture and religion, exemplifying a flagrant abuse of official authority under the guise of security.[28]
This excessive exercise of authority frequently leads to egregious infringements on human rights. Governments take advantage of the expansive definitions of terrorism in their domestic legislation, enabling them to classify a diverse range of nonviolent activities as acts of terrorism. Consequently, this leads to the unjustifiable imprisonment of individuals who have minimal or no affiliation with terrorist acts. These activities violate fundamental human rights, such as freedom of speech, assembly, and the right to a fair trial. Additionally, they weaken democratic and restrict civic participation.
Another significant criticism of global counterterrorism strategies revolves around its selective implementation, specifically targeting Muslims, migrants, and ethnic minorities. Many countries have counterterrorism legislation and policies that unfairly focus on these communities, resulting in their stigmatization, estrangement, and marginalization. This biased approach has substantial social and political ramifications, impacting not only the specific groups being targeted but also society at large.[29]
There is a tendency to unfairly link Muslim populations with terrorism, as counterterrorism efforts primarily target Islamic extremism and overlook other

[26] Irene Zempi and Imran Awan, *The Routledge international handbook of Islamophobia* (London: Routledge, 2019) 18–31.
[27] Konrad Lachmayer, *Counter-developments to Global Constitutionalism, Global Constitutionalism and Its Challenges to the Westphalian Constitutional Law (2018*) (Hart Publishing 2018), 81–101.
[28] Makenzie D. Briglia, "Big Brother XI: How China's Surveillance of the Uyghur Population Violates International Law," *Geo. Wash. Int'l L. Rev.* 53 (2021): 85.
[29] Ambassador T. Hamid Al-Bayati, "Counter-terrorism," *Behavioral Science in the Global Arena: Addressing Timely Issues at the United Nations and Beyond* (2020): 125.

types of violent extremism, like far-right terrorism. In Western nations such as the United States, the United Kingdom, and France, Muslims have faced increased monitoring, discriminatory targeting, and distrust in the name of counterterrorism efforts.[30] Initiatives such as Prevent in the United Kingdom, which seek to counteract radicalization, have exhibited a disproportionate focus on Muslim communities, leading to the cultivation of animosity and suspicion between these groups and the government. Furthermore, the increase in Islamophobia has been intensified by political discourse that equates terrorism with Islam, resulting in additional marginalization and isolation of Muslims.

Likewise, those who migrate or seek refuge, especially those originating from countries with a Muslim majority, have faced more stringent immigration regulations and biased counterterrorism actions. The travel bans implemented in the United States, which specifically targeted persons from certain Muslim-majority nations, were defended as essential counterterrorism policies, but faced significant backlash due to its discriminatory characteristics. These policies not only infringe upon the rights of persons seeking refuge, but also reinforce damaging preconceptions that associate migration with terrorism.

Counterterrorism regulations have had a disproportionate impact on ethnic minorities. For instance, in France, the implementation of emergency measures following the terrorist attacks in 2015 had a disproportionate effect on Muslim and North African communities. The implementation of these measures, such as conducting searches of homes without a warrant and imposing limitations on people's freedom of movement, faced significant backlash due to their biased application.[31] These policies exacerbate societal differences and prolong systemic prejudice by unfairly singling out specific racial, ethnic, and religious groups.

These discriminatory acts not only subvert the values of equality and justice but can also have a counterproductive outcome. Through the process of alienating and marginalizing entire groups, authorities may unintentionally contribute to the very process of radicalization that they aim to stop. When individuals perceive themselves as being singled out or treated unjustly, they may become more vulnerable to extremist ideas, thus perpetuating a cycle of violence and government oppression.

The efficacy of global counterterrorism measures in effectively diminishing terrorism while upholding human rights remains a topic of contention. Although governments frequently assert that stringent counterterrorism laws and regulations are crucial for safeguarding national security, evidence indicates that these measures do not regularly achieve the desired results. There is a rising apprehension that certain counterterrorism measures may actually exacerbate

[30] Paul Wilkinson, *Terrorism versus democracy: The liberal state response* (Routledge, 2006).

[31] Sikander Ahmed Shah, *International law and drone strikes in Pakistan: the legal and socio-political aspects* (Routledge, 2014).

long-term instability and radicalization, rather than effectively mitigating the threat of terrorism.[32]

For instance, military operations and drone strikes, commonly employed in counterterrorism efforts, have faced criticism due to their restricted efficacy and substantial unintended harm. Drone strikes in nations such as Yemen, Pakistan, and Afghanistan have effectively targeted prominent terrorist leaders, but they have also caused significant harm to innocent civilians. The loss of innocent lives not only diminishes the credibility of counterterrorism endeavors but also fosters animosity towards the participating nations, let alone generating fresh recruits for terrorist organizations. Moreover, the act of damaging infrastructure and means of living during these interventions frequently results in additional instability, so worsening the exact circumstances that contribute to the emergence of terrorism initially.[33]

Mass surveillance programs, a frequently used counterterrorism measure, have also encountered scrutiny due to their dubious efficacy and substantial infringement on private rights. Although these programs have the objective of identifying and stopping terrorist activity, there is limited evidence to indicate that the extensive gathering of data and surveillance have played a crucial role in preventing major terrorist plots. Furthermore, the violation of private rights gives rise to significant ethical issues, as individuals are being monitored by the state without any valid grounds for suspicion, which undermines trust in government institutions and democratic procedures.

Furthermore, the overall efficacy of counterterrorism strategies is frequently compromised by their inability to tackle the underlying causes of terrorism. Several counterterrorism methods primarily prioritize security measures while disregarding the socio-economic and political variables that contribute to radicalization and violence. Commonly, matters like poverty, social exclusion, political grievances, and limited access to education and economic opportunity are disregarded in favor of measures that prioritize militarization.[34] In the absence of addressing these fundamental causes, counterterrorism measures are improbable to attain enduring success in the prevention of terrorism.

9. The Role of International Organizations and Civil Society

9.1 United Nations and Other International Bodies

The involvement of international organizations and civil society in combating terrorism has played a crucial role in influencing global plans and reactions. An

[32] Magdalena König, "Preventing extremism–riskifying enlargement: Prevention imaginaries of counter-terrorism in EU enlargement towards South East Europe," (PhD diss., University of Groningen, 2024).

[33] Mark D Kielsgard and Juan Julian Tam Hey, "Stopping Terrorism at its Source: Conceptual Flaws of the Deterrence-Based Counterterrorism Regime and Committing to a Preemptive Causal Model," *JL & Pol'y* 26 (2018): 487.

[34] Makenzie D Briglia, "Big Brother XI: How China's Surveillance of the Uyghur Population Violates International Law," *Geo. Wash. Int'l L. Rev.* 53 (2021): 85.

important milestone in this matter is the acceptance of the United Nations Global Counter-Terrorism Strategy by the General Assembly on September 8, 2006. This strategy is the initial, all-encompassing, worldwide framework created to address terrorism, providing a clear set of specific actions for Member States to implement both individually and collectively.[35]

The plan includes several primary goals: addressing the factors that promote terrorism, preventing and defeating terrorism, improving the ability to handle these threats, and protecting human rights and the rule of law while battling terrorism. Importantly, it emphasizes the need for Member States to cooperate with the United Nations system in order to carry out these measures, and for the United Nations institutions to assist in these endeavors.

To achieve these goals, the United Nations created the Counter-Terrorism Implementation Task Force (CTITF) in 2005. The CTITF functions as a central coordinating entity, guaranteeing coherence and synergy among the various UN organizations involved in counter-terrorism endeavors.[36] The task force has established a well-organized work program and formed specialized working groups to promote key elements of the strategy.

Enabling the coordinated execution of the strategy: This group's primary objective is to create effective approaches to help Member States incorporate the counter-terrorism policy into their national frameworks. This is done in cooperation with several United Nations institutions.

Combating Radicalization and Extremism that Result in Terrorism: This organization's primary objective is to assist Member States in comprehending and combating the mechanisms of radicalization and extremism, with the ultimate goal of diminishing the allure of terrorism.

The objective of this group is to combat the exploitation of the Internet for terrorist purposes. It aims to gather relevant parties to find effective solutions on a national, regional, and global scale.

Regional and international legislative acts have had a considerable impact on the development of counterterrorism measures. The aftermath of the 9/11 attacks in the United States initiated a contemporary surge of counterterrorism legislation, with numerous European states commencing the development of such laws only after the events of 9/11. As of 2013, the European Union had implemented more than 200 counterterrorism measures.[37] Following the emergence of ‘foreign fighters,’ a fresh wave of legislation was introduced around 2013-2014. By 2016, at least 47 states had implemented new laws in response to this situation.

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[35] Kent Roach, “Accountability Mechanisms for Transnational Counterterrorism,” *Security and Human Right*s (2019): 179.

[36] Fiona De Londras and Josephine Doody, *The impact, legitimacy and effectiveness of EU counter-Terrorism* (London: Routledge, 2015).

[37] Letta Tayler, “Foreign terrorist fighter laws: Human rights rollbacks under UN Security Council Resolution 2178,” *International Community Law Review* 18, no. 5 (2016): 455–482.

The legislative frameworks consist of a variety of laws, including national laws, EU regulations, and adherence to regional and international counterterrorism treaties like UN Security Council resolutions. Nevertheless, the increasing array of counterterrorism measures has produced diverse effects, particularly on 'limitable' rights, which can be constrained in the interest of the public, unlike 'absolute' rights which cannot be restrained.

9. 2 NGOs and Advocacy

Non-governmental organizations (NGOs) like Amnesty International and Human Rights Watch have been instrumental in promoting a human rights-oriented strategy for counterterrorism. Following the post-9/11 global proliferation of counterterrorism rules, these organizations have endeavored to contest laws and policies that violate civil liberties and human rights, while advocating for enhanced openness and accountability in governmental procedures. Non-governmental organizations have reacted to counterterrorism initiatives variably, contingent upon the political context and legal structures of the nations in which they function.[38]

Numerous NGOs have taken a position of vocal dissent against counterterrorism legislation that encroaches upon fundamental liberties. Amnesty International constantly underscores how counterterrorism legislation in numerous countries, including the U.S., the U.K., and other Western nations, infringes upon human rights. Amnesty's initiatives concentrate on safeguarding civil freedoms, including the right to privacy, freedom of expression, and freedom of association. They contend that governments frequently rationalize extensive powers under the guise of national security yet neglect to uphold proportionality and necessity—two essential components of international human rights law.

Certain NGOs have adopted a more direct strategy by engaging in lawsuit against state-enforced counterterrorism regulations. Human Rights Watch has actively opposed legislation permitting indefinite detention without trial, torture, and excessive surveillance practices. In nations such as the United States and the United Kingdom, NGOs have engaged in or endorsed legal actions contesting the legality of specific counterterrorism measures, including rendition programs and clandestine detention.[39] These legal challenges seek to guarantee that counterterrorism initiatives adhere to international human rights responsibilities.

Besides protest and lawsuits, NGOs have also participated in governmental policy-making processes. In Germany and Canada, NGOs have been afforded the opportunity to contribute to the formulation of counterterrorism rules. They

[38] Maria T Baldwin, "Amnesty International, Human Rights & US Policy" (PhD diss., Bowling Green State University, 2006).

[39] Lynn Welchman, "Rocks, hard places and human rights: anti-terrorism law and policy in Arab states," *Global Anti-Terrorism Law and Policy* (2005): 581–608.

frequently engage in consultations to guarantee that the new legislation conforms to international human rights norms. Through participation in the legislative process, these NGOs promote the incorporation of safeguards that protect individual rights while addressing security issues.

NGOs prominently critique the biased enforcement of counterterrorism legislation, especially towards underprivileged populations. Non-governmental organizations have recorded the disproportionate targeting of Muslims, migrants, and ethnic minorities by counterterrorism initiatives. Amnesty International and Human Rights Watch have documented racial profiling, discriminatory law enforcement, and the stigmatization of particular communities under the pretext of counterterrorism. [40] Their reports advocate for the cessation of behaviors that discriminate against individuals based on religion or ethnicity, and they promote reforms that prioritize equality and non-discrimination.

Internationally, NGOs such as Amnesty International and Human Rights Watch leverage their global networks to initiate campaigns to confront the adverse effects of counterterrorism legislation globally. They frequently provide reports to international organizations such as the United Nations Human Rights Council or the Special Rapporteur on Counterterrorism and Human Rights. These proposals aim to prioritize human rights issues in global counter-terrorism initiatives. Through these international efforts, NGOs strive to align counterterrorism policy with human rights standards across many countries.

10. Toward a Balanced Approach: Recommendations

10. 1 Legal Reforms

In combating terrorism, it is essential that counterterrorism measures adhere to human rights, necessitating meticulous consideration of legislative frameworks and their revision. The covert nature of terrorist activities and organized crime typically require specific investigative techniques, including surveillance, undercover operations, and informant collaboration. Nonetheless, in the absence of stringent legal protections, these measures may readily result in power abuses, privacy infringements, and the deterioration of civil freedoms. To provide a more equitable framework, numerous essential legislative reforms are proposed, concentrating on augmenting judicial monitoring, bolstering accountability, and overhauling surveillance legislation.

A fundamental worry in contemporary counterterrorism initiatives is the insufficient judicial control of security organizations and law enforcement entities. To resolve this issue, it is imperative to enact reforms that impose greater checks and balances on the application of special investigative techniques (SITs).[41] SITs frequently entail covert operations that may violate

[40] Human Rights Watch (Organization), and Judith Sunderland, *Preempting justice: Counterterrorism laws and procedures in France* (Human Rights Watch, 2008).

[41] Musa Karyah Inusa, "Combating terrorism in Nigeria: a critical analysis of the legal framework" (PhD diss., School of Law, 2018).

individual rights, such eavesdropping, monitoring, or undercover activities. Although essential for information collection without notifying targets, these approaches must undergo rigorous legal examination.

Judicial bodies should be authorized to evaluate all Special Investigation Teams (SITs) in real-time or promptly following their deployment, guaranteeing their proportional usage and application alone when indispensable. Reforms may require that any implementation of surveillance, wiretaps, or other intrusive methods receive authorization from a judge or an independent entity proficient in counterterrorism and human rights legislation.[42] This method would mitigate abuses and guarantee adherence to human rights standards, hence diminishing the likelihood of excessive or arbitrary acts.

The absence of accountability for counterterrorism abuses is a critical concern. Security agencies frequently function in secrecy, complicating the accountability of personnel for criminal actions, such disproportionate force, arbitrary detention, or racial profiling. To address this issue, legal reforms must prioritize the accountability of security forces and intelligence organizations for their conduct.[43]

It is advisable to create independent monitoring committees that routinely evaluate the operations of counterterrorism units, with particular emphasis on situations involving the deployment of Special Intervention Teams (SITs). These supervisory entities ought to possess the authority to examine allegations of misconduct and, when warranted, recommend cases for prosecution. Furthermore, explicit criteria must be formulated for the utilization of SITs, accompanied by transparent reporting obligations that guarantee a record of accountability.

Additionally, systems must be established to safeguard whistleblowers and informants who reveal corruption in counterterrorism operations.[44] In the absence of sufficient safeguards, individuals within these organizations may apprehend retaliation and so choose to remain silent regarding violations.

Surveillance legislation frequently ignites problems related to counterterrorism, as it can readily violate individuals' privacy rights. Amending these laws is essential to reconcile national security interests with the safeguarding of civil liberties. Surveillance must not function in a legal void; rather, it should be rigorously regulated, with protections that guarantee its necessity, proportionality, and legality.

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[42] James Cockayne, "Challenges in United Nations counterterrorism coordination," in *Research handbook on international law and terrorism*, ed. Ben Saul (Edward Elgar Publishing, 2014), 666–682.

[43] Katerina Akestoridi, and Sofia Tzortzi. "The United Nations' Current Legal Approach to Terrorism, Organized Crime and 'Organized Criminal Terrorism'," *Organized Criminal Terrorism* (Brill Nijhof,2024), 39–73.

[44] Martin Scheinin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. E/CN.4/2005/103, February 7, 2005, para. 37.

Legislation regulating surveillance ought to be amended to incorporate enhanced data protection protocols, restrictions on data retention, and more stringent access controls. Authorities must establish a clear and impending threat prior to commencing monitoring on individuals, and all surveillance efforts should be precisely directed at authorized objectives. Mass surveillance initiatives, specifically, present a considerable threat to privacy and are ought to be restricted unless there exists a unique, evidence-based justification for targeting extensive populations.

The procedure for acquiring surveillance warrants should be rendered more rigorous. Law enforcement must provide substantial proof prior to the authorization of surveillance, and courts should evaluate whether the invasion of privacy is warranted by the perceived threat.

The employment of informants and insider collaboration has been a persistent strategy in counterterrorism and organized crime investigations. Although informants can furnish essential intelligence to avert assaults, the strategies employed to motivate their collaboration may occasionally result in human rights infringements.[45] Leniency agreements or plea bargains extended to informants might engender moral hazards, as they may feel pressured to fake or embellish their information to evade punishment.

Legal changes ought to provide a more stringent evidence standard prior to the imposition of sanctions, accompanied by explicit procedures for appeal and review.[46]

10. 2 Human Rights-Based Approach to Counterterrorism

In the progressing worldwide battle against terrorism, it is imperative to promote a counterterrorism policy that conforms to international human rights commitments. This methodology underscores the concepts of proportionality, need, and non-discrimination, guaranteeing that initiatives to prevent and combat terrorism do not infringe upon fundamental human rights.[47] Integrating a human rights framework into counterterrorism strategies enables authorities to enhance security while safeguarding civil freedoms and preserving public trust.

A human rights-oriented strategy for counterterrorism commences with the notion of proportionality. States must ensure that their activities to combat terrorist threats are commensurate with the real level of risk. Measures must be

[45] Matthew Manning, Gabriel TW Wong, and Nada Jevtovic, "Investigating the relationships between FATF recommendation compliance, regulatory affiliations and the Basel Anti-Money Laundering Index," *Security Journal* 34 (2021): 566–588.

[46] David Webber, Marina Chernikova, Arie W. Kruglanski, Michele J. Gelfand, Malkanthi Hettiarachchi, Rohan Gunaratna, Marc-Andre Lafreniere, and Jocelyn J. Belanger, "Deradicalizing detained terrorists," *Political Psychology* 39, no. 3 (2018): 539–556.

[47] Kyle K. Bradley, "A Mending Wall: A Critical Look at the International Court of Justice's Analysis in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," *Temp. Int'l & Comp. LJ* 19 (2005): 419.

meticulously designed to target specific risks, avoiding sweeping measures that may unduly affect innocent civilians.

Large-scale surveillance initiatives and indiscriminate detentions not only violate individual privacy and freedom but also jeopardize community cohesion, potentially exacerbating radicalization instead of mitigating it. Proportionality guarantees that counterterrorism programs maintain an appropriate equilibrium between security and human rights, reducing superfluous harm while addressing genuine dangers.

The principle of necessity, closely associated with proportionality, stipulates that counterterrorism measures must be enacted solely when they are truly essential to prevent or mitigate terrorist activity.[48] This concept guarantees that states refrain from implementing excessively wide or intrusive policies under the guise of counterterrorism.

This entails refraining from activities that violate rights, such as arbitrary detention or excessive force, unless there is unequivocal proof necessitating such steps for public safety protection. By implementing the necessity requirement, governments guarantee that all actions are substantiated and grounded on a clear, evidence-based comprehension of the threat.

A fundamental principle of a human rights-based counterterrorism approach is non-discrimination. Counterterrorism legislation and tactics should be implemented generally, without discrimination against certain racial, ethnic, religious, or political groups. Discriminatory measures, such racial profiling and the unequal targeting of Muslim or migrant communities, not only infringe against human rights but also exacerbate social divisions and animosity.

Incorporating non-discrimination into counterterrorism policies promotes a more inclusive society and enhances the credibility of governmental efforts to address terrorism.[49] A human rights approach promotes the formulation of laws that safeguard all individuals uniformly, thereby averting the stigmatization of specific groups.

UNESCO has emphasized the significance of education, dialogue, and scientific integrity in fostering a culture of peace and mitigating terrorism. UNESCO's frameworks advocate for human rights-based methodologies in education, fostering inclusive pedagogies and varied content that enhance understanding, tolerance, and solidarity among diverse communities.[50]

Initiatives like UNESCO's UNITWIN program and the Global Learning Portal offer youth opportunity to participate in discourse and cultivate critical thinking abilities, crucial for combating extreme beliefs. The educational initiatives are a

[48] Pascal Boyer, Rengin Firat, and Florian van Leeuwen, "Safety, threat, and stress in intergroup relations: A coalitional index model," *Perspectives on Psychological Science* 10, no. 4 (2015): 434–450.

[49] Eric Rosand, "The Role of the United Nations in Combating Terrorism," Global Governance 10, no. 3 (2004): 333–349.

[50] Chiara Altafin, Veronika Haász, and Karolina Podstawa, "The new Global Strategy for the EU's Foreign and Security Policy at a time of human rights crises," Netherlands *Quarterly of Human Rights* 35, no. 2 (2017): 122–143.

fundamental component of a comprehensive approach aimed at tackling the underlying causes of terrorism by fostering intercultural understanding and preventing the exploitation of scientific research for terrorist objectives.[51]
A counterterrorism strategy grounded on human rights necessitates strong procedures for accountability and oversight to avert abuses of power. This entails the creation of autonomous entities to oversee the conduct of security forces and intelligence services, guaranteeing that their operations conform to both national and international legal norms. Furthermore, those impacted by counterterrorism measures ought to possess access to transparent legal redress, safeguarding their ability to contest unfair actions.
This strategy necessitates that the international community holds states accountable for human rights breaches committed under the guise of counterterrorism. The establishment of global norms and the enhancement of institutions such as the United Nations Human Rights Council can facilitate the adherence of counterterrorism strategies to fundamental human rights.

10. 3 International Cooperation

International collaboration in counterterrorism is essential for tackling the global aspect of terrorism while protecting fundamental human rights. The World Summit Outcome, ratified by the UN General Assembly in 2005, emphasized that counterterrorism initiatives must conform to international law, particularly the UN Charter and pertinent conventions. States must ensure that their counterterrorism measures adhere to human rights, refugee law, and international humanitarian law, as reaffirmed by the UN Security Council in Resolutions 1456 (2003) and 1624 (2005).
The 2006 report by the UN Secretary-General, "Uniting Against Terrorism," underscored that successful counterterrorism and the protection of human rights are not mutually exclusive goals. They are mutually reinforcing, as the protection of human rights strengthens the credibility and effectiveness of counterterrorism efforts. This methodology has been reiterated by multiple UN entities and international accords, guaranteeing that global counterterrorism initiatives adhere to international human rights standards.
Switzerland actively engages in global counterterrorism initiatives, having ratified 16 of the 18 UN agreements on terrorism and cooperating in European Union security frameworks such as Europol and Schengen. Additionally, Switzerland partners with other countries and international organizations to enhance global counterterrorism collaboration, with a special emphasis on aligning these initiatives with human rights commitments. The nation's participation in the Global Counterterrorism Forum and its leadership in efforts such as the International Process on Global Cooperation in Combating

[51] Todd C Helmus, Miriam Matthews, Rajeev Ramchand, Sina Beaghley, David Stebbins, Amanda Kadlec, Michael A. Brown, Aaron Kofner, and Joie D. Acosta, *RAND program evaluation toolkit for countering violent extremism* (Santa Monica, CA: RAND Corporation, 2017)

Terrorism demonstrate a dedication to ensuring that international security protocols do not infringe upon fundamental rights.

Switzerland's emphasis on human rights has been essential to its contributions to the UN Global Counter-Terrorism Strategy, established in 2006. Switzerland, in conjunction with other countries, has played a pivotal role in promoting discourse on the equilibrium between security and human rights. The 2009 International Workshop of National Counter–Terrorism Focal Points in Vienna and subsequent global conferences provide venues for governments to exchange ideas that effectively mitigate terrorism while upholding human rights.

Conclusion

This essay underscores the persistent issue of reconciling counterterrorism initiatives with safeguarding of human rights in a post-9/11 context. Although global security is paramount, numerous counterterrorism initiatives have encroached upon fundamental rights, such as privacy, freedom of expression, and due process. Legal frameworks, including international human rights laws and UN resolutions, establish a basis for safeguarding these rights; nevertheless, implementation is fraught with challenges, as evidenced by case studies from the U.S., China, and France.

Legal reforms are essential to improve judicial monitoring, accountability, and compliance with human rights norms. A human rights-based strategy emphasizing proportionality, necessity, and non-discrimination is not merely desirable but indispensable. Furthermore, international collaboration must be enhanced to establish global norms that ensure safety while preserving fundamental freedoms.

However, achieving this balance requires a deeper understanding of the root causes of terrorism. Beyond legislative measures, policymakers must address structural drivers, such as socio-economic disparities, political marginalization, and systemic inequalities. Investment in education, community engagement, and deradicalization programs is essential to dismantle extremist narratives and foster resilience among vulnerable populations.

As novel threats, such as cyberterrorism, arise, counterterrorism strategies must evolve. Forthcoming policies should leverage technological innovation while ensuring robust accountability mechanisms to prevent misuse. Transparent oversight structures are critical to maintaining trust and preventing the erosion of democratic values during security operations.

Ultimately, safeguarding security and human dignity must be intertwined. Governments must strike a sustainable equilibrium, where the pursuit of safety does not come at the expense of human rights. By promoting transparency, inclusivity, and justice, global counterterrorism efforts can transcend mere reactionary measures, evolving into proactive, human-centric strategies that ensure both security and the enduring protection of fundamental freedoms.

Identity in the Society of the 21st Century Advocating for Electronic Governance - Modern Information Society or Modernization of Information Society?

SZAKÁLNÉ SZABÓ, ZITA*

"Everybody knows that some things are simply impossible until somebody, who doesn`t know that, makes them possible."
Albert Einstein

ABSTRACT *We can evaluate the quality of the state's activities primarily through the functioning of the public administration, and if clients often feel that administrators are in a position of power, this can greatly affect the dynamics of their relationship.*
With the formation of communities, the range of issues that affected the entire society and the effective solution of which was felt to be everyone's, naturally appeared. The citizen's expectation is that administration should be simple, fast and should ensure equal treatment. The relationship between public administration and the client is very important, as the quality of public services and the satisfaction of citizens largely depend on how public administration communicates with clients. Therefore, it is important that public administration takes into account the needs and expectations of customers in every case in order to improve customer satisfaction. In parallel with the trust of the client, public administration will be efficient.
Nevertheless, in today's customer-friendly public administration the question is how well electronic administration meets the expectations and possibilities of citizens. In what way do the clerks who perform office work serve according to the possibilities available to them?

KEYWORDS *electronic administration, e-government, NPM, customer satisfaction*

1. Introductory thoughts

The 21st century is undoubtedly the age of information revolution and information society. The rapid development of computing devices and their proliferation have opened up many new ways of obtaining information, and the Internet has made it easier and faster to access almost any kind of public

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information, such as to pursue any business activity without having to go out in person, or to purchase without leaving the house. Nowadays, there are various means of transmitting paper documents electronically as well, with a never-ending list of advantages and disadvantages. However, the development of e-government and the attitude of the public towards it are largely determined by the way in which it is accessed.
Today, information has no borders – it can be considered global – but we still see that the most common reason for a citizen to go to an office is to obtain information, followed by general administration and complaints. What is the reason why very few people use e-government, and e-administration? To understand the essence of the relationship between public administration and the customer, to see what rights the customer has, it is necessary to briefly review the change in the status of the customer and to understand where the customer's exact place in information society is. Furthermore, the question may arise as to whether information society itself needs to be modernised in the already fast-paced and customer-centric world of the 21st century. I have examined this question by studying and researching relevant legislation, academic literature and my own experience, and have tried to provide a picture on the advantages and disadvantages of electronic administration and administrative aspects of customer-friendly administration in our modern information society.

2. The development of the relationship between public administration and the customer

In Europe, it was not until the emergence of the monarchies in the 17th century that the foundations of central administration were settled, and it was only in the 18th century that the discipline of chamberlaincy created an institutionalised framework for public affairs under the rule of law, with social participation, which became an important factor in the bourgeois transformation. Later, however, the changes brought about by the economic boom, in the second half of the 20th century meant that public administration could no longer adapt flexibly, and the need for a service character began to emerge, with the citizen, who over the centuries had evolved from being a subject to a client, becoming an active participant in the administrative process.
However, when can we talk about public administration in the modern sense? In Lajos Lőrincz's view, public administration comes into being where community issues, that are felt by the whole of society, arise and where the whole of society contributes to their resolution. It is a process that has taken place over a long period of time in which a social effort, integrated to serve individual interests, has been elevated to a dimension that can be called community. This is why the first systems of community administration can be said to have emerged in societies based on irrigation and water management, where the growing needs of society could be met through close cooperation in advance, with the administrative elite being made up not of those with birthright privileges but of

selected individuals chosen on the basis of professional merit.[1] At the same time, public affairs were elevated by social consensus to private affairs, public functions were separated from individual private interests, public money from private money, and a vertical and horizontal division of labour and hierarchical administration were established.[2]

Both overseas and in Europe, the First World War and the subsequent recovery process, the Great Depression and the preparations for the Second World War brought about the need to strengthen public administration. Everywhere, strong and consistent enforcement, concentration of power and absolute obedience to the head of the executive were expected, but to no avail. Personal relations were – are and will be – present in the administration, which go beyond the principles of organisation. By the 1930s, citizens' trust was based on professional administrative activity and the term 'service administration' emerged. A term which referred to the economic nature of the administration's activity, i.e. the main purpose of public services was to meet needs. By that time, however, the not entirely clear-cut theory of public administration organisation, i.e. New Public Management (NPM), established that the measure of customer-friendly public administration was citizen-friendliness, which meant clear rules, simpler procedures, deregulation of unnecessary regulations and quality services. However, the methods and principles of NPM cannot apply to all countries and cannot have a universal impact.

The 1990s also saw the emergence of another dominant trend within NPM, namely the idea of electronic public administration which emerged in the Anglo-Saxon area, more specifically in the United States. This not only brought citizens closer to public administration, but also enabled them to be involved in economic and political processes, since from then on the Internet was available to everyone. It can therefore be said that the Internet, the global network, opened up the possibility of easy exchange of information. It must also be clear that the customer is generally unable to judge whether a given public administration is operating legally or cost-effectively, but can in any case judge whether it is able to deal with his or her affairs quickly and conveniently. It can also be argued that traditionally rigid administrations are no longer able to meet the challenges of the technological age[3] and that administrative reforms need to be redirected towards citizens' charters, in line with quality objectives.

3. The development of e-government

One of the characteristics of public administration is that it is a very complex and intricate team effort, requiring the simultaneous application of a variety of

[1] Edgar Norman Gladden, *A History of Public Administration: Volume II: From the Eleventh Century to the Present Day* (Routledge, 2019), 87.

[2] Karl August Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (Yale University Press, 1957), 556.

[3] David T. Osborne & Ted Gaebler, *Reinventing government: How the entrepreneurial spiritis transforming the public sector* (Addison-Wesley, 1992), 212–220.

different approaches. Another is that it has a direct or indirect impact on almost every aspect of people's lives. The huge administrative burden and the rigidity of administration, which is bounded by strict rules, are still one of the main problems facing public administration.[4] The main difficulty, however, stems from the very nature of public administration, in the case of which it is extremely difficult to make any changes to a complex bureaucratic organisation. and the inevitable conflict with the staff working in the office adds to the difficulties as well.[5]

Public administrations are constantly changing and transforming. Since 2010, one of the main thrusts of this transformation has been to improve customer-friendliness.[6]

"For the term 'customer friendliness' to be more than just a slogan, and for the customer to leave the customer service department truly satisfied, a number of conditions must be present at the same time."[7]

Just as the institution itself has changed over the decades, so has the legal position of the citizen and his or her status with the state transformed. Sometimes earlier, sometimes later, the interaction with the customer has become the alpha and omega of the output of the administration, the success of which depends on the satisfaction or dissatisfaction of the customer.

The customer has clearly become the focal point of administrative modernisation processes. As already mentioned in the previous chapter, the idea of e-government[8] has been created as a defining feature of NPM,[9] with the advantages

[4] Balázs Benjámin Budai, *Az e-közigazgatás elmélete* (Akadémia Kiadó, 2016), 285.

[5] Due to the characteristics of a bureaucratic organisation, the workload of the administrative workforce is very unevenly distributed: there is a contrast between often overburdened staff and those who can easily be replaced by more efficient organisation and automation.

[6] By customer-friendly administration we mean an administrative model and its practical expression, which provides an adequate response to the problems and challenges of practical life through the methods, procedures and tools used. This model is flexible and adaptable to real challenges, thus helping citizens in their daily lives and helping market players to be competitive.

[7] Andrea Bajnok, "Ügyfélbarát kommunikáció," in *Ügyfélszolgálati készségfejlesztés. Tréning háttéranyag,* ed. Jenei Ágnes (Nemzeti Közszolgálati Egyetem, 2017), 11.

[8] There are two main national models for eGovernment solutions: (i) eID model, (ii) service-centric solutions. The eID model is based on the use of an ID card, which can identify the user electronically, to request e-services. The core of this model is that it focuses first on enabling the state to connect with citizens and organisations, and then on extending the range of electronic services. This model is used in Austria, the Netherlands and Belgium, among others. The service-centric model strongly promotes the quantity and quality of services in particular, by bringing together the different services in a single portal and allowing for personal identification. Among the countries that have adopted this approach are Denmark, Germany and Hungary.

[9] In the United Kingdom, Prime Minister John Major's Citizens' Charter, drafted in the 1990s in the spirit of the NPM, made the issue of public service quality a central theme, and considered citizens as consumers with a right to expect quality service. It gave customers safeguards such as choice, accountability of the authority, transparent

of speed and convenience, and the disadvantages of impersonality, cost and lack of security guarantees. It was developed in response to pressure from several quarters: on the one hand, pressure from the European Union, which had to comply with the requirements of the European Union, and on the other, pressure from below, that is to respond to information society. However, the compulsion does not mean that this is a necessary evil, since the arguments in favour of it are considerably weightier than the arguments against it.[10]
A modern, service-oriented state takes the opposite approach, i.e. it does not advocate the exclusivity of efficiency and effectiveness, but looks at the necessity and effectiveness of services. At the heart of a service provider state is the client, for the sake of whom the state removes all barriers, including distance, physical, communication or even electronic access barriers.

3. 1 Information society in the context of global transformation

In the context of the emergence of e-government, the phenomenon of information society should be mentioned, which has become very widespread in recent decades. The concept of information society has become a catch-all term for social transformation taking place in the second half of the 21st century. It has been defined in many ways over time, as it is a highly abstract concept based on assumptions about the areas of life in which significant changes are taking place.
"A new type of society transformation and development is driven by the production of information [...] goods [...]" - Yoneki Masuda.[11]
"A society in which [...] information is used as an economic resource, the community makes better use of it, and behind all this, an industrial sector develops that produces the information it needs." - Nick Moore.[12]
"A society that organises itself around knowledge to control society and manage innovation and change [...]" - Daniel Bell.[13]
It can be seen that the concept of information society is a quite complex concept. This complexity is due to the fact that the phenomenon itself is not clearly analysed and presented in scientific discourse. It is also important to note that e-government is also driven by the imperative of information society itself, in which the awareness and training of citizens are of key importance.

procedures, code of conduct, complaints handling, etc., aimed at improving the quality of public services.

[10] The use of info-communication technologies and networks has improved the flow of information and, along with it, the consultation on policies. With better communication, trust reaches a higher level, so that citizens' commitment to achieving goals is also improved, which consequently can strengthen the will to participate and pursue a dialogue.

[11] Avornicului Mihai, László Seer, Benedek Botond, *Identitás a XXI. század információs társadalmában, az internet hatásai* (Budapesti Gazdasági Egyetem, 2016), 70.

[12] Mihai, Seer, Benedek*, Identitás a XXI. század információs társadalmában, az internet hatásai*, 70.

[13] Mihai, Seer, Benedek, *Identitás a XXI. század információs társadalmában, az internet hatásai*, 70.

As the developed countries of the 21st century gradually began to enter information society, it began to have a significant impact on the future, since effects of mass communication mean that individuals are less and less likely to make decisions on their own, but are more and more often under the influence of others. At the same time, even the most technophilic theorists acknowledge that technology will not resolve all social and economic contradictions in the future, as social inequalities will always be reproduced in some form. In the long term, however, the winners in information society will be those who use and benefit from info-communication techniques on a daily basis and are able to learn new skills. On the other hand, the losers will be those who do not have access to these technologies and are not able to develop their skills. Consequently, digital divide[14] between the two will be created. Implicitly, it is the task of all governments to address this divide and bring the lagging groups back onto the 'winners' side, which can only be done through strategic means. The role of the state in its own public administration is the most important task for the study, and it must also encourage itself to make progress.

More and more information is wanted, as fast as possible, at the same time and even through the same channel. We are constantly multitasking and spinning, dictated by newer and newer emerging technologies, and we feel the need to keep up with the times to be and stay winners in the long term. Nevertheless, information dominance is only one feature of information society, and overemphasizing it can lead us astray.[15] It is the task of public governance to recognise the problems that arise and to recognise that information society will helping the economy to move to a higher level of development, and it is the task of public administrations to create the conditions for success and to use their own knowledge and networks to stimulate economic innovation.

3. 2 An axiomatic approach to e-government and platforms for modernisation

Nowadays, e-government is a well-known and increasingly suggestive expression. However, only few can actually grasp its essence due to its interdisciplinary nature, which often presents itself as a complex and intangible task that is approached by many in various ways. Its essence is holistic, as it focuses on the more efficient and effective performance of tasks necessary for the functioning of the country's bureaucracy, allowing the maintainers of the system to handle their affairs in a more convenient and carefree manner.[16]

[14] The digital divide, also known as the e-gap, occurs where per capita income does not allow a household to afford access to the internet and the requirements to learn, maintain and develop computer skills. The existing e-gap cannot be solved and can only be prevented through public and private support. As a consequence, the user may develop a hatred of the unattainable, as he or she will not see the benefits of digitalisation.

[15] László Z. Karvalics, "Információs társadalom – a metakritika hiábavalósága és gyötrelmessége," *Információs Társadalom* 7, no. 4 (2007): 107–123.

[16] Budai, *Az e-közigazgatás elmélete*, 39.

By taking a horizontal approach, we can examine the characteristics that permeate the entire public administration, which is suitable for uncovering its regularities. Where we observe regularities, the axiomatic approach naturally arises. By fitting the identified findings together , we obtain a more and more seamlessly describable system of e-government operations. It is clearly visible in the diagram below that e-government emerged at the intersection of three fundamental fields. However, we must also include other fields around this resulting triangle, not forgetting about sociology, psychology, and social psychology. Considering that continuous and substantial educational and methodological background is necessary for e-government, we must mention the fields of pedagogy and andragogy. This illustrates that the development of certain e-government services follows a specific cycle, where the interactions of various fields of study are repeated. It is also an interesting experience that following a specific direction when traversing the established triangle and the areas circumscribed around it aids understanding.

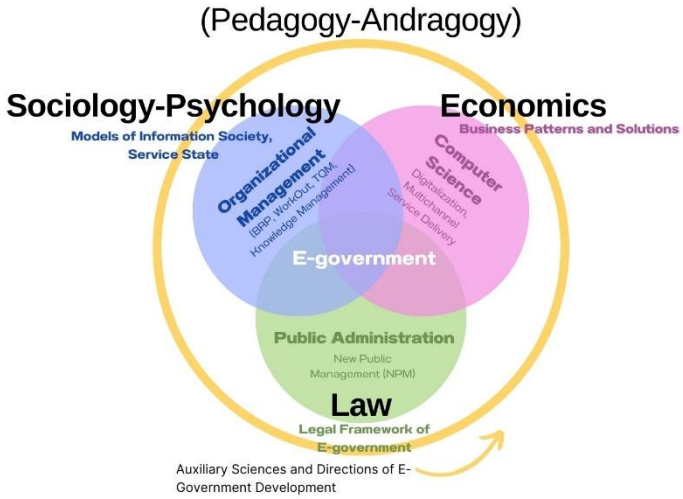

FIGURE 1: AREAS OF E-GOVERNMENT APPEARANCE
SOURCE,[17] OWN EDITION

The above-described activities are referred to as service-oriented public administration, the main element of which nowadays is for the administration to go to the client, not the other way around. In practice, this means that administration should be present where the clients are, and since a significant portion of clients already handle their affairs online, administration should also integrate into the digital life cycle. On the other hand, it is important to note that e-government is not synonymous with the internet, as the internet is merely a communication channel.

[17] Budai, *Az e-közigazgatás elmélete*, 39.

It is generally believed that the application of various technologies has brought about fundamental changes in the operation of public administration, as it has created the opportunity for electronic administration and has resulted in a significant improvement in the quality of the municipality's relationship with the population. It is crucial, however, that the mindset of those working in public administration changes appropriately, that sharing of information and knowledge flowing beyond institutions is strengthened, and that political leaders are committed and set an example for their civil servant colleagues. In terms of skills, it is necessary to highlight and strengthen the development of digital literacy, and to establish the routine use of information and communication tools for both the population and the officials involved in handling matters and last but not least, the wider use of m-government.

3. 3 M-government as a mobile technology for responsive governments and connected societies

M-government, or mobile government, refers to the strategic use of government services and applications on mobile phones. It aims to facilitate the connection between citizens and government and enables convenient access to services anywhere, anytime. M-government solutions significantly align with citizens' growing expectations for convenience, speed, transparency and inclusivity.[18] However, for m-government to meet its full potential, challenges such as digital literacy, privacy concerns, and data security need to be continuously addressed. In some regions, not all citizens may have access to smartphones or internet connectivity, and some might not be comfortable with digital interfaces either. This calls for efforts to improve digital inclusion and to provide alternative access points.[19]

Fortunately, there are states where m-government has recently been adopted which align with citizen expectations: Estonia is a global leader in digital governance, and its *e-Estonia* platform is one of the best examples of m-government. Estonia's e-Government system offers a range of services through smartphones, such as e-residency, X-Road, Mobile e-ID. India's "*m-Government" Services* – e.g., UMANG, DigiLocker, and MyGov –, have made substantial strides in m-government with apps designed to bridge the gap between citizens and government services. South Korea has developed a robust mobile platform called *Government 24* that offers over 3,000 public services, including birth certificate applications, tax filing services, access to public housing information, and national health insurance registration. The government of the United Kingdom of Great Britain has integrated m-government solutions such as *GOV.UK*, which enables citizens to securely access government services via their

[18] "*m-Government*," https://www.commonwealthgovernance.org/wp-content/uploads/2012/10/m-Government.pdf.

[19] Thamer Alshammari, Chris Messom, Yen Cheung, "*M-government continuance intentions: an instrument development and validation,"* *https://www.tandfonline.com/doi/full/10.1080/02681102.2021.1928589#d1e206*.

mobile phones. Some services include accessing tax records, renewing licenses, registering births and deaths, or signing up for benefits.
Today's m-government apps do meet citizens' expectations significantly for convenience, transparency, and engagement. By offering efficient, accessible, and user-centric services, they help create a more customer-friendly public administration. At the same time, for m-government to be truly universal, challenges related to digital divide, privacy, and security must be addressed, ensuring that all citizens can fully benefit from these advancements in governance.

4. Customer satisfaction/satisfied customer and quality of service

The basic question of customer satisfaction[20] is what is customer satisfaction defined by? As this is a fundamental issue not only in public administration but also in the world of business, there has been a great deal of research and development work in this area in various countries around the world. However, one of the most important questions is whether there is any correlation between customer satisfaction and the quality of service, i.e. whether customers are more satisfied if they receive a better service.[21]
The relationship between the client and the administrator is fundamentally a very fragile one, given that the client may often feel that the administrator is in a position of power over him or her. This can trigger a hostile attitude from the client - not infrequently aggressiveness out of fear - which the case handler has to deal with. In most cases, however, the client is not even in a position to judge the professional quality of the work carried out. Similarly, we do not know how good a doctor is in his field or how much he follows the literature, but rather we can identify satisfaction with the health service by his personal attitude towards the patient. Consequently, by shaping this, customer satisfaction could be significantly improved. In the same way, the client often does not understand the professional aspects, for example, if he is not entitled to what is requested, he cannot receive it, etc. It is therefore possible to improve satisfaction through personal attitudes, which would require, first and foremost, a reinterpretation of the professionalism of professionals, which is a rather difficult task.[22]
In order to understand the key to increasing customer satisfaction, we need to understand that it stems first and foremost from the tension between expectations and experience, which can be formulated as satisfaction = customer

[20] By customer satisfaction, we mean where the customer subjectively perceives his or her level of satisfaction, on a scale from imaginary very dissatisfied to very satisfied, primarily with the service as a whole, and possibly with specific aspects of it.
[21] Another important question and research topic is what and how to improve in order to increase customer satisfaction.
[22] György Gajduschek, *Ügyfélkapcsolatok és ügyfél-elégedettség a közszektorban* (Nemzeti Közszolgálati Egyetem, 2014), 16.

experience/expectation.[23] The following figure summarises the factors that determine the level of expectations.[24]

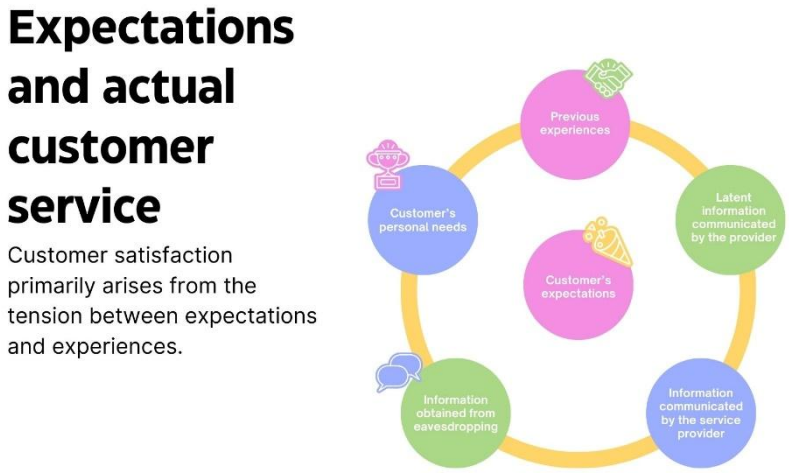

FIGURE 2: EXPECTATIONS AND ACTUAL CUSTOMER SERVICE
OWN EDITION

The academic literature has distinguished several aspects of administration, which can be grouped in a variety of ways. The resulting data are extremely useful, as the analyses provide a picture the aspects of which are important to citizens or, on the contrary, which are less important. SERVQUAL,[25] a method also used in the market sector, looks at the following aspects:

[23] Gajduschek, *Ügyfélkapcsolatok és ügyfél-elégedettség a közszektorban*, 16.

[24] It is also worth mentioning that four types of electronic administration can be distinguished according to the degree of electronic communication: (i) the application can be submitted electronically, the rest of the procedure is paper-based, (ii) electronic communication, (iii) electronic internal administration, (iv) the decision is also electronic (automatic).

[25] As quality systems have evolved, there has been a growing need for measurement tools in the service sector that can be used to analyse the quality of a service and, if necessary, to support decisions to improve quality. The SERVQUAL model, a model for measuring the quality of services, developed in 1990 by US researchers Zeithaml, Parasuraman and Berry, is a suitable method for providing a central method for the decision support system to be developed. The model is based on the assumption that there is a mismatch between customer expectations and perceived service characteristics. It aims to be a generally applicable tool that can be used to measure service quality. Norbert Becser, *Analysis of the applicability of the SERVQUAL (service quality) model using multivariate data analysis methods* (Budapesti Corvinus Egyetem, Vállalatgazdaságtan Intézet, 2005).

Perspective	Interpretation
Tangibles	The appearances of the company's facilities, equipment, personnel and communication tools.
Reliability	The company's ability to deliver the promised service accurately and reliably.
Responsiveness	The company's willingness to assist customers and provide prompt service.
Competence	The skills, knowledge and expertise required to provide the services.
Courtesy	Friendliness, respect, attentiveness, courtesy
Credibility	Reliability, honestly, sincerity
Security	Risk, no-doubt
Access	Easy accessibility, contact
Communication	Informing the customer in an accessible format.
Understanding the customer	The effort to get to know the customer and their needs.

TABLE 1: SERVQUAL'S 10 DIMENSIONS (ZEITHAML, PARASURAMAN, BERRY, 1990.)[26]

If one accepts that there is a correlation between satisfaction and case handling, but that correlation is not perfectly directly proportional, then it is legitimate to ask what the discrepancy is. Nevertheless, if we know the answer to this question, we can increase customer satisfaction even with relatively little effort. "Given the strong association between customer experience and product branding, leading organisations are now aware that customer experience is the key to strategic synergy in the consistent delivery of value to consumers."[27]

Nevertheless, does customer satisfaction really matter, and if so when and why? The importance of customer satisfaction was first brought into the professional mainstream by NPM. However, it should also be stressed that, while customer satisfaction is a crucial aspect of public services, particularly in the field of public human services, it plays almost no role in the application of public law, and in many cases customer satisfaction can be an indicator of poor performance. Customer satisfaction therefore plays a crucial role in public services.[28]

Dealing with clients requires constant concentration and flexibility on the part of the administrators, which is very demanding, as they need to deal with every situation on the basis of appropriate professional knowledge, empathy and

[26] Mohammad Tahir Che Umar, Yusuf Haji-Othman, "*Customer Loyality In Hotel Kasih Sayang Kedah Malaysia A Quantitative Research Side*," https://www.researchgate.net/publication/365825890_Customer_Loyality_In_Hotel_Kasih_Sayang_Kedah_Malaysia_A_Quantitative_Research_Side.

[27] Samsinar Md Sidin, Alexander Tay Guan Meng, "The Effect of Expectations and Service Quality on Customer Experience in the Marketing 3.0 Paradigm," *Journal of Marketing Advences and Practices* 2, no. 2 (2020): 65–84.

[28] The NPM has developed a technique that can make customer satisfaction a reality in the practice of public services. Indeed, the importance of customer satisfaction is present in public administrations in a cross-system way. Gajduschek, *Ügyfélkapcsolatok és ügyfél-elégedettség a közszektorban*, 5.

preparedness. Public administrations can regulate a lot of factors in the workplace, but not how the administrator uses non-verbal means of communication in response to the client's presentation. This is why, in Hungary, since 2010, steps have been taken to reform the public administration system, with the primary aim of restoring public confidence in the state. This has been achieved through the development and continued implementation of the Magyary Programme[29], i.e. the public administration development programme, and the establishment of an office system that establishes a permanent link between the state and citizens, in short, a customer-friendly and customer-oriented public administration.[30]

5. Summary and Concluding thoughts

In this study, I have sought, among other things, to answer the question of how much e-government in today's customer-friendly public administration meets citizens' expectations and opportunities, and how it is served by the administrators who carry out the work of the office, in relation to the possibilities available to them. It is essential that the creation of a win-win situation requires both the attitude of customers and the supportive approach of administrators and, given the constantly changing circumstances, that citizen-customers on the one hand need to be flexible in their approach and that administrators in public administrations on the other hand need to be ready to evolve and to adopt new methods.

The study also discussed the characteristics of the citizen and administrator aspects of customer-friendly administration in the 21st century, concluding that this identity consciousness is not automatic for everyone and can be demanding and require flexible adaptation on both sides. The basis for improving this field is the establishment of a good communication channel, since it is through the means of communication that the relationship between the administrator and the client is established, from the first moment of the client's arrival to the last one. The development of e-government has opened up a new era in customer communication, meeting the needs of society.[31]

[29] The public administration development programme, which bears the name of Zoltán Magyary, assumes that administrators have the right professional knowledge and pay constant attention to communication with customers.

[30] Mónika Balatoni, *Közszolgálati Kommunikáció. Ügyfélkapcsolatok Alapismeretei* (Nemzeti Közszolgálati Egyetem, 2017), 17.

[31] Balatoni, *Közszolgálati Kommunikáció*, 38.

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