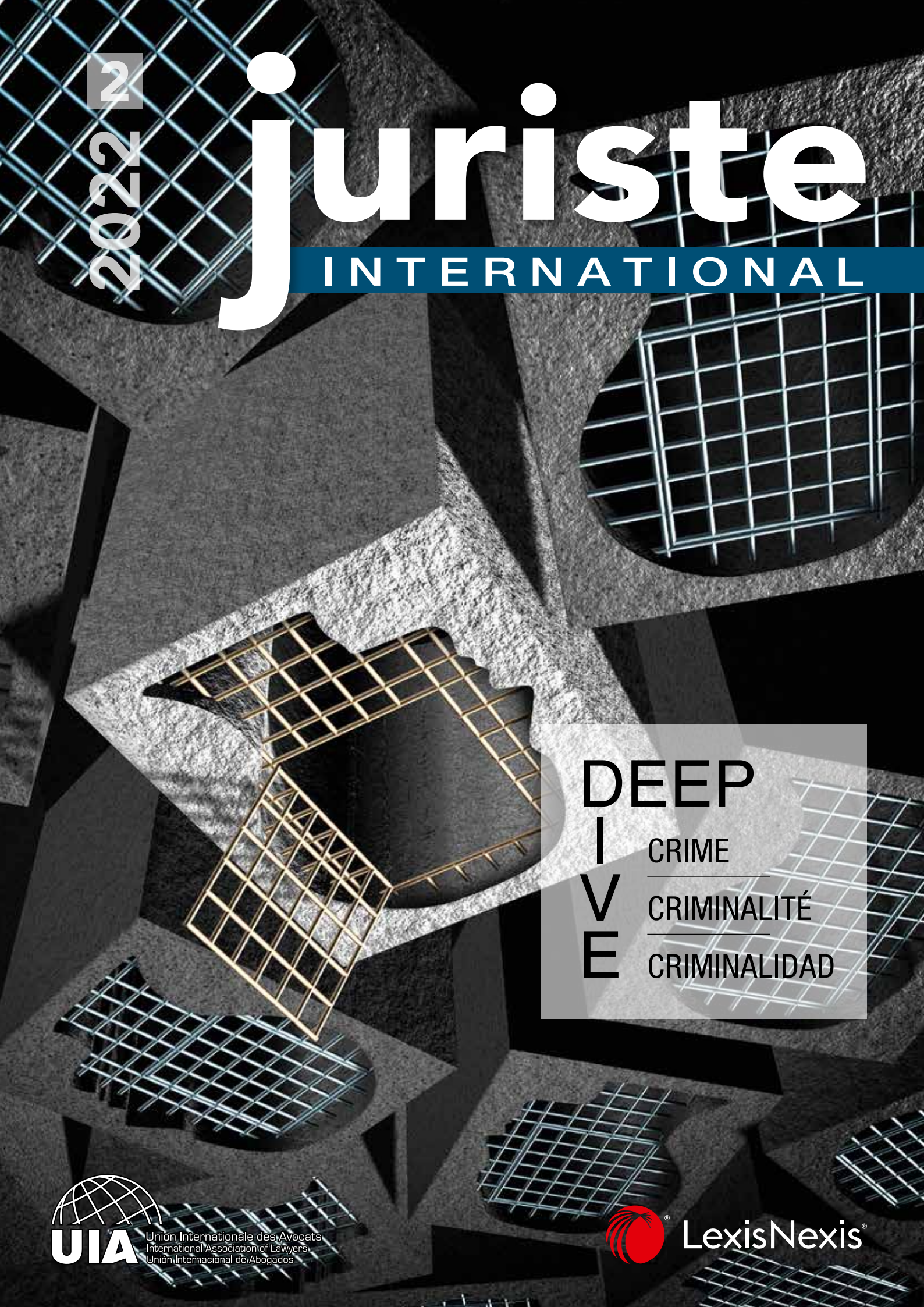

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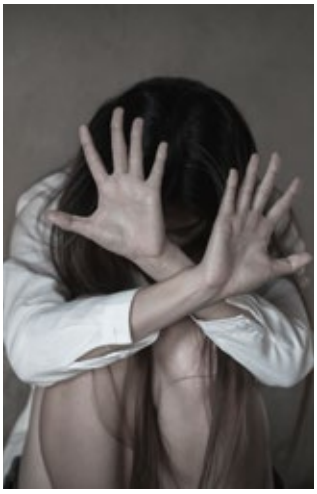

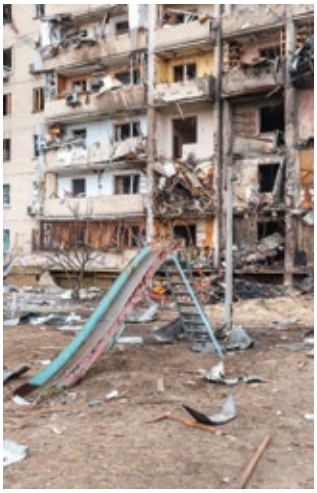

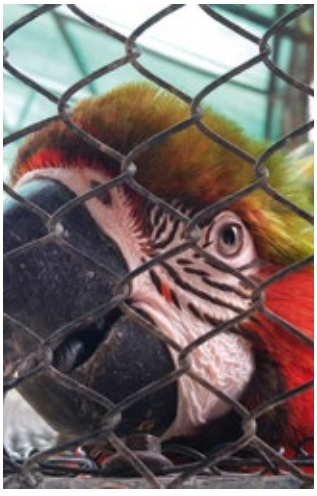

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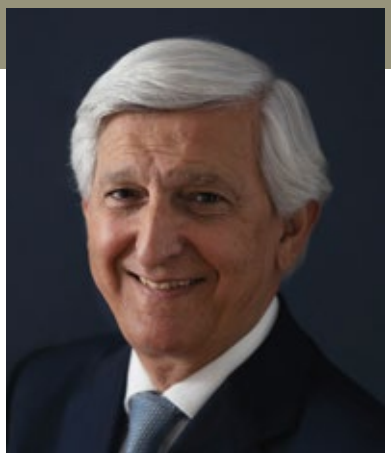

Hervé **Chemouli**

PRESIDENT'S MESSAGE

Dear Colleagues,

September will mark the beginning of the end of my term in office, which will conclude with the Dakar congress on 26-30 October. Registration is open and the scientific and social programmes are proving to be of high quality in terms of the subjects dealt with and the speakers in charge of facilitating discussions.

Senegal reflects the values that we uphold within our association – the mixing of all the colleagues who are part of it and the sharing of our legal cultures.

This congress will offer extremely memorable experiences for you, starting with the opening session, which will be marked by the presence of the President of the Republic of Senegal, His Excellency Mr. Macky Sall, which has been announced, as well as that of Dr. Denis Mukwege, the Nobel Peace Prize winner in 2018.

We will conduct our work at the Abdou Diouf International Conference Centre (CICAD).

During the informal evening, we will have the privilege to attend a concert by the famous Senegalese singer, Youssou N'Dour.

Our Gala Dinner will be held at the Terrou Bi Hotel facing the ocean. I also would advise you to participate in the general excursion at Bandia Reserve on Sunday 30 October.

I hope to see you in large numbers for this congress, which promises to be truly exceptional, marked by a substantial mobilisation of the whole of the Senegalese Bar, its President and former Presidents, who have jointly invested their efforts to ensure that this congress remains a benchmark among our past and future events.

I wish all of you a wonderful summer! My best regards to all.

LE MOT DU PRÉSIDENT

Chers Consœurs et Confrères

La rentrée de septembre marquera le début de la fin de mon mandat qui s'achèvera avec notre congrès à Dakar du 26 au 30 octobre prochains. Les inscriptions sont ouvertes et le programme scientifique et social s'avère être d'une grande qualité par les sujets traités et par les intervenants en charge de les animer.

Le Sénégal est à l'image des valeurs que nous défendons au sein de notre association : le brassage de l'ensemble des confrères qui en font partie et un partage de nos cultures juridiques.

Ce congrès offrira des moments extrêmement forts qui seront marqués, dès leur ouverture, par la présence annoncée de Monsieur le Président de la République du Sénégal, son Excellence Monsieur Macky Sall, ainsi que la présence du docteur Denis Mukwege, Prix Nobel de la paix en 2018.

Nos travaux se tiendront dans le Centre International des Conférences Abdou Diouf (CICAD).

Durant la soirée informelle, nous aurons le privilège d'assister au concert du célèbre chanteur sénégalais Youssou N'Dour.

Notre dîner de gala se tiendra à l'hôtel Terrou Bi face à l'océan. Enfin, je vous conseillerai de participer à l'excursion générale du dimanche 30 octobre à la réserve de Bandia.

J'espère vous retrouver très nombreux pour ce congrès qui s'annonce exceptionnel, marqué par une mobilisation importante de l'ensemble du barreau du Sénégal, de son Bâtonnier et anciens Bâtonniers qui ont uni tous leurs efforts pour que ce congrès demeure une référence parmi nos événements passés et futurs.

Je vous souhaite à tous un très bel été et recevez mes amicales salutations.

MENSAJE DEL PRESIDENTE

Estimadas compañeras, estimados compañeros:

Septiembre marcará el principio del final de mi mandato, que terminará con nuestro congreso de Dakar del 26 a 30 de octubre próximo. Las inscripciones están abiertas y el programa científico y social, promete ser de gran calidad por los temas tratados y por los intervinientes que los animarán.

Senegal representa los valores que defendemos en nuestra asociación: la mezcla de todos los compañeros que la conforman y un intercambio de nuestras culturas jurídicas.

Este congreso ofrecerá momentos importantes que serán muy especiales, desde su inauguración, con la presencia anunciada del Presidente de la República de Senegal, Su Excelencia don Mack Sall, así como la presencia del doctor Denis Mukwege, Premio Nobel de la Paz en 2018.

Nuestros trabajos se desarrollarán en el Centro Internacional de Conferencias Abdou Diouf (CICAD).

Durante la velada informal, tendremos el privilegio de asistir al concierto del famoso cantante senegalés Youssou N'Dour.

Nuestra cena de gala tendrá lugar en el hotel Terrou Bi con vistas al océano. También les aconsejaré que participen el domingo 30 de octubre en la excursión general en la reserva de Bandia.

Espero verles en este congreso que promete ser excepcional, marcado por una movilización importante de todo el Colegio de Abogados de Senegal, de su Decano y de los antiguos Decanos que han aunado sus esfuerzos para que erigir este congreso como una referencia entre nuestros eventos pasados y futuros.

Deseándoles a todos un muy feliz verano, reciban un muy cordial saludo.

Hervé CHEMOULI • *UIA President, Président de l'UIA, Presidente de la UIA* • **president@uianet.org**

Barbara **Gislason**

↘ EDITORIAL

We are all aging. Multiple studies show that before the chronological age of 50, humans can be significantly biologically older or younger than their chronologically same-aged peers. Biological age can be influenced by genetics, social environments, lifestyles, and now the fruits of biotechnology, funded in part by billionaires. Investments to curtail biological aging, affecting skin, memory, and vital organs, are expected to skyrocket this decade.

What are called molecular clocks, that affect cell aging by discerning a cell's rejuvenation behavior, can be reprogrammed. This reprogramming can yield younger acting cells. Studies show that four protein transcription factors herald the potential of changing mature, specialized cells in the body into 1) unspecialized pluripotent stem cells that can be reprogrammed completely into a different cell, or 2) partially reprogrammed so the targeted cell does not lose its specialized qualities.

Biotechnology will not only impact lawyer and judge viability in the workforce, but the clients they serve. Around the world, retirement ages are typically between the chronological age of 60 and 70, with some retirement mandatory. But more relevant criteria for retirement in the future may be based on both chronological and biological age criteria, perhaps in combination with actual contracts and social contracts, and opportunities for labor retooling.

The aging world population will impact the need for looking at aging in a new way. According to the Population Reference Bureau, Japan has 28% of its population over age 65; Spain at 21%; US at 16%; China at 12%; and India at 6%. Why should lawyers and others able to clearly think, learn, and remember, as well as appropriately interpret and respond to emotions, and still valuable to their profession, be sidelined? Why should anyone else who wants to and is able to work?

Lawyers will impact age-related infrastructures and safety nets, ranging from pensions and Social Security benefits to health benefits and access to prescription medications through their role in better crafting the Rule of Law. Lawyers should be planning now to ensure that the benefits of anti-aging biotechnology products are equitably distributed and contemplate the ability of the earth to sustain long living human demands for resources. There are many challenges ahead!

↘ L'ÉDITO

Nous vieillissons tous. De multiples études montrent qu'avant l'âge chronologique de 50 ans, les humains peuvent être significativement plus âgés ou plus jeunes que leurs pairs du même âge chronologique.

L'âge biologique peut être influencé par la génétique, les environnements sociaux, les modes de vie, et maintenant les fruits de la biotechnologie, financée en partie par des milliardaires. Les investissements visant à freiner le vieillissement biologique, qui affecte la peau, la mémoire et les organes vitaux, devraient monter en flèche cette décennie.

Il est possible de reprogrammer ce que l'on appelle les horloges moléculaires, qui influent sur le vieillissement cellulaire en discernant le comportement de rajeunissement d'une cellule. Cette reprogrammation peut produire des cellules plus jeunes. Des études montrent que quatre facteurs de transcription protéique annoncent la possibilité de transformer des cellules matures et spécialisées de l'organisme en 1) cellules souches pluripotentes non spécialisées qui peuvent être entièrement reprogrammées en une cellule différente, ou 2) partiellement reprogrammées de sorte que la cellule ciblée ne perde pas ses qualités spécialisées.

La biotechnologie n'aura pas seulement un impact sur la viabilité des avocats et des juges sur le marché du travail, mais aussi sur les clients qu'ils servent. Dans le monde entier, l'âge de

Barbara J. GISLASON • *Editor-in-Chief,* Juriste International, *Rédactrice en chef,* Juriste International, *Redactora Jefe,* Juriste International • **barbara@gislasonlaw.com**

> *Lawyers will impact age-related infrastructures and safety nets, ranging from pensions and Social Security benefits to health benefits and access to prescription medications through their role in better crafting the Rule of Law.*

la retraite se situe généralement entre l'âge chronologique de 60 et 70 ans, la retraite étant parfois obligatoire. Mais des critères plus pertinents pour la retraite à l'avenir pourraient être basés sur des critères d'âge chronologique et biologique, peut-être en combinaison avec des contrats réels et, des contrats sociaux, et des opportunités de réoutillage de la main-d'œuvre.

Le vieillissement de la population mondiale aura un impact sur la nécessité de considérer le vieillissement d'une nouvelle manière. Selon le Population Reference Bureau, le Japon compte 28 % de sa population âgée de plus de 65 ans ; l'Espagne, 21 % ; les États-Unis, 16 % ; la Chine, 12 % ; et l'Inde, 6 %. Pourquoi les avocats et d'autres personnes capables de penser, d'apprendre et de se souvenir clairement, ainsi que d'interpréter et de réagir de manière appropriée aux émotions, tout en restant utiles à leur profession, devraient-ils être mis sur la touche ? Pourquoi toute autre personne qui veut et peut travailler devrait-elle l'être ?

Les avocats auront un impact sur les infrastructures et les filets de sécurité liés à l'âge, allant des pensions et des prestations de sécurité sociale aux prestations de santé et à l'accès aux médicaments sur ordonnance, grâce à leur rôle dans l'amélioration de l'État de droit. Les avocats devraient également prévoir dès maintenant de veiller à ce que les avantages des produits biotechnologiques anti-âge soient équitablement répartis et considérer la capacité de la terre à supporter les demandes de ressources des êtres humains vivant de plus en plus longtemps. Les défis à relever sont nombreux !

↘ EDITORIAL

Todos envejecemos. Son muchos los estudios que demuestran que antes de la edad cronológica de los 50 años, los humanos pueden ser biológicamente mucho mayores o más jóvenes que otras personas con las que comparten la misma edad cronológica. La edad biológica puede verse influida por la genética, el entorno social, el estilo de vida y ahora también por los frutos de la biotecnología, financiada en parte por millonarios. Se espera que esta década se disparen las inversiones para limitar el envejecimiento biológico que afecta a la piel, la memoria y los órganos vitales.

Lo que llamamos relojes moleculares, que afectan al envejecimiento celular diferenciando el comportamiento de rejuvenecimiento de las células, pueden reprogramarse. Esta reprogramación puede producir células que actúen como si fueran más jóvenes. Los estudios demuestran que cuatro factores de transcripción de proteínas son los precursores del potencial de cambiar células maduras especializadas del cuerpo por 1) células madre pluripotenciales no especializadas que pueden reprogramarse completamente para crear una célula diferente, o 2) células parcialmente reprogramadas de modo que la célula diana no pierda sus virtudes específicas.

La biotecnología no solo influirá en la viabilidad de los abogados y jueces como trabajadores, sino también en la de los clientes a los que prestan servicio. En todo el mundo, la edad de jubilación suele situarse cronológicamente entre los 60 y los 70 años de edad y en algunos casos la jubilación es obligatoria. Pero los criterios más relevantes para la jubilación podrían basarse tanto en la edad cronológica como biológica, quizá en combinación con los contratos reales, los contratos sociales y las oportunidades de reorganización del trabajo.

El envejecimiento de la población mundial afectará a la necesidad de considerar el envejecimiento de una forma nueva. Según el *Population Reference Bureau*, el 28 % de la población de Japón tiene más de 65 años y este grupo de edad alcanza el 21 % en España, el 16 % en EE.UU., el 12 % en China y el 6 % en India ¿Por qué los abogados y otras personas capaces de pensar, aprender y recordar claramente, así como de interpretar y responder a las emociones correctamente, deberían quedar relegados cuando siguen siendo valiosos para su profesión? ¿Por qué debería quedar relegada cualquier otra persona que desee y sea capaz de trabajar?

Los abogados influirán en las infraestructuras y redes de seguridad asociadas a la edad - que van desde las pensiones y las prestaciones de la Seguridad Social hasta los beneficios sanitarios y el acceso a medicación bajo receta - a través de su papel en la construcción de un Estado de derecho mejor. Los abogados deberían ahora planificar cómo asegurarse de que los beneficios de los productos de la biotecnología antienvejecimiento sean distribuidos de forma igualitaria y considerar la capacidad de la tierra para sostener la demanda humana de recursos durante mucho tiempo. ¡Tenemos muchos retos por delante!

I. Stephanie Boyce
A New Vision for the Profession

I. Stephanie Boyce is the first person of color to serve as the 177th President of the Law Society of England and Wales, as well as the sixth woman. Although much has been said about I. Stephanie Boyce's vision, with excellent interviews readily available online, the focus of this Interview is on four subjects important to her: climate change, ethics, access to justice, and fairness.

Barbara Gislason, Rédactrice en chef de *Juriste International*, s'entretient avec I. Stephanie Boyce, première personne de couleur et la sixième femme à occuper le poste de 177è présidente de la *Law Society of England and Wales*. La vision de I. Stephanie Boyce a déjà fait couler beaucoup d'encre et d'excellentes interviews sont disponibles en ligne. Cette interview se concentre sur quatre sujets importants pour elle : le changement climatique, l'éthique, l'accès à la justice et l'équité.

Barbara Gislason, Redactora jefa de *Juriste International* entrevista a I. Stephanie Boyce, primera persona de color y sexta mujer que ocupa el cargo de 177° Presidenta da la *Law Society of England and Wales*. Aunque se ha hablado mucho de la visión de I. Stephanie Boyce, con excelentes entrevistas disponibles en línea, esta entrevista se centra en cuatro temas importantes para ella: el cambio climático, la ética, el acceso a la justicia y la equidad.

Climate Change

Barbara Gislason (BG): When there are laws, regulations, or treaties that pertain to climate change and protecting the environment in England and Wales, what should the ethical obligations be for lawyers in rendering appropriate advice on climate change issues? What is your perspective on the role of solicitors with the climate crisis?

I. Stephanie Boyce (ISB): The climate crisis and its effects are pervasive on all of society, including solicitors, so we must consider how lawyers impact the climate crisis and vice versa. A lawyer's duty to abide by their professional conduct rules, which includes upholding the rule of law and their duties to the court, pertains to climate change as with anything else. The Law Society published its climate change resolution ahead of COP26 (Conference of the Parties) which set expectations for solicitors about how they should take into consideration the climate crisis in the context of the practice of law. The Law Society committed to deliver ethical guidance to solicitors on this challenging topic.

To deliver on the targets of the Paris Agreement – which contains legally binding obligations for parties on climate change and requires the maintenance of the rule of law, access to justice, and protection of human rights – lawyers and law societies around the globe will play a vital role in securing global climate justice. Accordingly, the Law Society believes it is essential for all civil society, including professional bodies, to step up and bridge the gap by creating the appropriate environment and setting the goals needed for themselves and their members to confront the challenge. We are currently working to understand how solicitors' professional duties and the practice of specific areas of the law itself are affected and interact with climate change issues to provide even more guidance to the profession.

BG: Would this be binding?

(ISB): The climate change resolution contains no binding commitments for solicitors in England and Wales.

Ethics

BG: Are lawyers in private practice in law firms held to a different standard than in-house counsel regarding private lawyer ethical and legal duties?

(ISB): All solicitors are expected to adhere to the same high level of ethical standards. All are expected to make a commitment to behaving ethically, which is at the heart of what it means to be a solicitor. In other words, there are no different standards applied to any kind of

solicitor. Committing to acting ethically forms the basis of the standards and requirements set out in the Solicitors Regulation Authority (SRA) Standards and Regulations. These standards stem from the seven mandatory principles in the Standards and Regulations that apply to all solicitors and underpin all aspects of practice.

BG: Would you comment on who promulgates and enforces these standards and requirements? What is the relationship between the SRA and the Law Society? Who imposes and enforces these mandatory principles?

(ISB): The Law Society of England and Wales and the SRA operate independently. The Law Society is the independent professional body for solicitors and promotes the highest professional standards, the public interest, and the rule of law. The SRA, meanwhile, is the regulator of solicitors and law firms in England and Wales, protecting consumers and supporting the rule of law and the administration of justice. It is the SRA which enforces the profession's ethical standards and compliance against these standards.

BG: Are the expectations for lawyer ethics too narrow? Should ethics include more expansive societal duties? If so, how would that impact white-collar crime?

(ISB): We do not agree that expectations for lawyer ethics are too narrow. The SRA's ethical standards apply in all situations, and action can potentially be taken by the SRA for any serious breach of these principles, whether the action complained of relates to client work, or occurs in the private lives of solicitors. The SRA has also indicated that its primary interest concerning enforcement is conduct, which brings with it a direct risk to the public or to the public interest.

Access to Justice

BG: How does the availability of criminal defence services affect access to justice, including for juveniles?

(ISB): The requirement on the part of the UK government to provide services through legal aid helps to ensure a comprehensive network of services. Anyone held in a police station is entitled to a lawyer at no cost. Legal aid is available in the criminal courts subject to a means test and an interests-of-justice test. Because most criminal defence work in this country is done through legal aid, this means the government can set minimum quality and service standards that must be met, which it does through the criminal legal aid contract.

The recent Criminal Legal Aid Independent Review report from Sir Christopher Bellamy included proposals for enhancing the standards of youth justice work, including both new standards and enhanced payments to reflect the importance and complexity of the work.

BG: Are you satisfied that the minimum quality and service standards are satisfactory and apply evenly to all defendants without bias? If not, what would you specifically change?

(ISB): Yes. Police station defence solicitors need to be accredited. They are supervised and subject to auditing by the Legal Aid Agency, while the SRA's Code of Conduct requires solicitors to provide services in a way that doesn't discriminate against particular groups of clients.

BG: Is there anything about the referenced report that you are particularly proud of?

(ISB): Our main achievement was that Sir Christopher recognised and acknowledged the desperate state of criminal legal aid firms. He made a very clear recommendation that additional funding of approximately £135 million per year is injected into the fees for criminal legal aid work 'as soon as possible', and that such an uplift would be 'the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect.' Adding that this does not 'exclude that further sums may be necessary in the future to meet these public interest objectives.'

Fairness

BG: If the make-up of the legal professional better references your goals for diversity, inclusion, retention, and advancement, how do you think the changes in the legal profession would affect crime? Address my questions in any way you prefer.

(ISB): If the legal professionals, the judiciary, the police, and others involved in the criminal justice system were more diverse, I am sure there would be greater trust from marginalised and under-represented groups in our society that all would be treated equally before the law and greater respect for the rule of law. We have seen in the UK how a lack of diversity in the criminal justice system can lead to institutional racism.

This was defined by the Macpherson Inquiry into the failure to properly investigate and prosecute the racist murder of Stephen Lawrence more than 20 years ago as *"the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin"*. Similar concerns have been expressed more recently about institutional sexism and the collective failure to tackle violence against women and girls and institutional homophobia in the failure of the police to properly investigate a serial killer who murdered young gay men because wrong and stereotyped assumptions were made about the victims.

We see the effect that bias, sometimes unintended, can have on many aspects of the system's response to crime from whether and how it is investigated to some differences in verdicts and sentencing. The Lammy Review[1] found a higher likelihood of Black or ethnic minority offenders getting a prison sentence for drug offences than White

1. Editor's Note: *The Lammy Review* is a publication that examines outcomes in the Criminal Justice System impacted by race and ethnicity.

offenders and more ethnic minority women being found guilty by magistrates than White women.

The lack of trust by those affected in the criminal justice system also means that crime affecting marginalised communities or under-represented groups often go unreported, so they do not get investigated or addressed. As such, there is less attention on the issues and fewer resources put into identifying the underlying causes of crime and improving the lives of those communities by taking preventative action. Achieving greater diversity at all levels in the legal profession, as well as the wider criminal justice system, has the potential to bring greater benefits to not only profession, but wider society.

We have been making progress. In 1994, only 4% of the profession were Black, Asian, or from another ethnic minority, whereas today it is 17%, which is broadly in line with the UK population. However, in 2020, we published our Race for Inclusion report, which found that the profession must ensure there is equity in retention, development, and progression rates if the increased diversity is really going to have an impact and bring the wider benefits it can bring. There is much more that still needs to be done to remove the barriers that those from lower socio-economic backgrounds and disabled people still face in getting into the profession.

BG: On behalf of the *Juriste International*, I express my gratitude to you for sharing with us your perspectives on these matters of great importance. ■

Marie-Eve Sylvestre

Les enjeux du droit pénal

Pierre-Gilles Bélanger, Rédacteur – Juriste International s'entretient avec le Dre Marie-Ève Sylvestre, professeure de droit pénal et doyenne de la Section de droit civil de la Faculté de droit de l'Université d'Ottawa.

Pierre-Gilles Bélanger, Editor - Juriste International, interviews Dr. Marie-Ève Sylvestre, Professor of Criminal Law and Dean of the Civil Law Section of the Faculty of Law at the University of Ottawa.

Pierre-Gilles Bélanger, Editor - Juriste International conversa con la Dra. Marie-Ève Sylvestre, Profesora de Derecho Penal y Decana de la Sección de Derecho Civil de la Facultad de Derecho de la Universidad de Ottawa.

Pierre-Gilles Bélanger (PGB) : Qu'est-ce qui vous a amenée au droit pénal?

Marie-Ève Silvestre (MÈS) : En réalité, c'est vers le droit en premier lieu que s'est dirigé mon intérêt. J'étais intéressée par la défense des droits et je pensais que le droit pouvait être une solution aux diverses injustices sociales. J'avais été impliquée, avant d'être étudiante en droit, dans des associations d'étudiants et appuyé leurs revendications, comme celle de lutter contre la hausse des frais de scolarité ou l'accessibilité aux études. Pour moi, le droit était la continuité de ces revendications politiques. Toutefois, une fois arrivée à la Faculté de droit de l'Université de Montréal, je me suis rendu compte que le droit était enseigné, du moins à l'époque, essentiellement comme droit positif. On le représentait comme étant neutre, objectif, universel, en décalage avec les considérations politiques et sociales qui pourtant l'animent et le sous-tendent, alors que ma motivation était justement les enjeux politiques et les injustices sociales. Aussi, bien que j'aie beaucoup aimé la technique du droit et ses formes de raisonnement, j'ai constaté un décalage entre ce que je croyais être le droit et la justice et ce que l'on m'enseignait en première année.

Pendant le cours de droit pénal, j'ai eu la chance de suivre l'enseignement de la professeure Anne-Marie Boisvert qui avait osé situer les questions sociales à l'intérieur du droit pénal, de manière claire et explicite. Elle nous avait fait étudier un écrit de la première femme juge ayant siégé à la

Cour suprême du Canada, Bertha Wilson, qui présentait sa vision de la justice. Selon cette vision, les valeurs sont véhiculées dans le droit et ont un impact tant sur la société que sur le droit lui-même. Par exemple, nommer des femmes à des postes de juges était non seulement une question de représentation égalitaire, mais aussi de bénéficier de l'interprétation d'une situation, sur l'évaluation de la preuve et ainsi, d'avoir un impact sur les jugements et faire évoluer le droit. Ceci n'est qu'un exemple qui m'a montré que le droit, particulièrement le pénal, doit être vivant, se situer dans l'actualité et la réalité de la société. Ceci m'a passionnée et réconciliée avec les études de droit.

Bien connaître le droit positif demeure fondamental, mais le situer dans les débats sociaux et les enjeux de notre temps permet de mieux le comprendre, l'interpréter à la lumière des droits humains et le rendre plus légitime.

PGB : Voyez-vous une forme de barrière entre le droit civil, *i.e.* la manière de penser pour un civiliste comme vous, et la *Common Law*, en l'occurrence le droit pénal au Canada?

(MÈS) : Au Québec et à Ottawa, dans notre faculté, les étudiants sont initiés au droit d'abord par la porte du droit civil qui est étudié dès la première session de la première année. Le cours de droit pénal enseigné lors de la deuxième session est donc l'un des premiers cours à nous confronter à la *Common Law*. La *Common Law* amène une façon tout à fait différente de penser, poser le droit, lire les textes. La *Common Law* ne repose pas sur les mêmes certitudes que le droit civil, du moins encore une fois, dans la façon dont cette tradition juridique civiliste est enseignée. La *Common Law* offre un grand espace pour l'argumentation et en cela, constitue un exercice passionnant et créateur. Cela nous permet de proposer des façons d'envisager le droit sous d'autres angles et d'être partie prenante de son évolution. Cette forme différente de faire pave souvent la voie à de nouvelles alternatives et à une variété de recours.

PGB : Comment voyez-vous l'évolution du droit pénal dans les prochaines années?

(MÈS) : Le droit, et le droit pénal en particulier, devient de plus en plus décloisonné, et dévoile par voie de conséquence ses liens face aux enjeux sociaux et économiques qui le sous-tendent. En particulier, l'on se pose de plus en plus de questions sur l'impact du droit pénal : une partie de la population est-elle plus visée par le droit pénal qu'une autre? Pourquoi et comment? Que cherche à accomplir le droit pénal et pourquoi des personnes sont-elles régulièrement sanctionnées? Bref, quel est l'impact du système de la justice pénale face aux populations qui font l'objet de plus de surveillance et sont ainsi souvent plus représentées que d'autres dans le système carcéral?

Évidemment, il y a des raisons historiques et systémiques qui sous-tendent ces questionnements et qui se prolongent aujourd'hui. Il existe sans aucun doute au Canada du profilage racial et social exercé par les policiers canadiens, dont l'impact est disproportionné sur les personnes en situation de pauvreté et d'itinérance, les personnes noires et racisées et les Autochtones. Ces groupes d'individus sont ensuite surreprésentés dans le système de justice et dans nos prisons, dans lesquelles ils continuent d'être discriminés. Au Canada, l'on note par exemple que 50% des femmes incarcérées dans les prisons provinciales sont Autochtones, alors qu'elles représentent 4% de la population canadienne. On ne peut plus faire abstraction

de cette sur-judiciarisation. Le droit pénal ne peut pas être enseigné, pensé ou réformé sans tenir compte de ces données et sans faire des liens historiques et contemporains entre l'utilisation de la force par l'État contre ces groupes d'individus et le maintien de certains arrangements politiques et sociaux par les groupes dominants.

Le droit pénal est un outil dans l'arsenal étatique. Il est un mécanisme de gestion des problèmes sociaux par le truchement de la responsabilité individuelle.

Au moment où l'on se parle, le centre-ville d'Ottawa est « sous occupation » et l'on constate que les policiers gèrent difficilement cette situation. Pourtant, leur réactivité et leur capacité à utiliser la force est toute autre lorsqu'il s'agit de gérer des populations marginalisées. C'est une forme de profilage politique.

C'est pourquoi l'on ne peut pas enseigner le droit pénal de façon uniquement théorique et philosophique. Il y a aussi une responsabilité, qui pèse en particulier sur les chercheurs et universitaires, d'aller à la rencontre des acteurs judiciaires et de voir leurs quotidiens afin que nos recherches et notre compréhension du système pénal reflètent ces réalités. En faisant cela, l'on évitera les distorsions, le « choc » entre le droit positif et ce que font les acteurs sur le terrain.

Dans la salle de comparution et d'audience, les droits sont régulièrement bafoués. Il faut donc mettre en lumière les obstacles, reconnaître autant les limites dans la mise en œuvre de ces droits que les innovations proposées par les acteurs judiciaires. D'où l'importance d'échanger avec les juges, les avocats, les procureurs, le personnel autour du système carcéral, afin de discuter des barrières et limites, conscientes comme inconscientes, et de comprendre comment tout cela est mis en œuvre en pratique dans leur travail quotidien. C'est ce que j'appelle le droit pénal vivant. Il s'agit de rendre visibles les pratiques et barrières routinières et invisibles que ses acteurs rencontrent, lesquels acteurs doivent prendre des décisions sur une base individuelle alors qu'ils n'ont pas de vision globale ni le recul nécessaire à la réforme du droit.

À vrai dire, le système de justice pénale doit tendre vers une déjudiciarisation et non vers une augmentation des ressources punitives. Ses acteurs pourront toujours demander de nouveaux effectifs pour pallier le manque de ressources, mais cela ne fera que perpétuer et reproduire des travers systémiques si ces nouvelles ressources ne sont pas investies dans la défense des droits et redirigées vers d'autres mécanismes sociaux de prise en charge des conflits. Je crois qu'il y a trop de judiciarisation face à des comportements qui pourraient se résoudre autrement qu'au sein du système de justice criminelle.

Il est aussi important d'échanger au niveau international. Je faisais récemment une présentation aux États-Unis et ai constaté que les Américains sont très préoccupés, et avec raison, par l'incarcération de masse et cherchent des solutions de rechange. Ils voient la mise en place d'autres types de peines, comme la probation - une peine qui contient une ordonnance de mise à l'épreuve dans la communauté - comme une alternative possible. Or, le résultat de mes recherches publiées dans l'ouvrage Red Zones en 2020 démontre le contraire. Souvent, ces alternatives aux plus démunis n'en sont pas et ne constituent que le prolongement de la peine de prison, une courroie de transmission vers celle-ci, puisque le système leur impose des conditions impossibles à respecter, qu'ils brisent. Il est important de ne pas réfléchir à ces questions dans « l'ombre de la prison » mais de manière radicalement différente, en échangeant sur les succès comme les échecs de diverses expériences à l'international.

PGB : En qualité de doyenne d'une grande faculté de droit, vers quelles directions voulez-vous voir le droit pénal évoluer et quelles actions avez-vous posées ou avez-vous l'intention de poser afin de voir le droit pénal évoluer en ces directions?

(MÈS) : Je vois mon travail de doyenne d'abord comme consistant à appuyer mes collègues et nos étudiants, les accompagner dans leurs projets, et encourager ainsi le développement de projets en droit pénal.

C'est une de nos responsabilités sociales comme institution universitaire. En droit pénal, en plus des cours de base, l'on doit être à l'affût des tendances, et aussi essayer de répondre justement là où il y a un vide, même s'il ne s'agit pas de parler directement de droit pénal mais de tout ce qui gravite autour. Actuellement, mes collègues développent des projets sur la responsabilité des entreprises afin qu'elles agissent de façon responsable et en relation avec les droits de la personne.

Je cherche aussi à encourager des études et la recherche liées aux acteurs judiciaires afin de travailler en collaboration avec eux dans la recherche de solutions. Nous regardons comment le droit pénal est appliqué à l'égard de certaines populations souvent plus vulnérables et tentons d'y trouver des réponses. Nous nous intéressons au profilage; nous étudions comment est utilisé par ses acteurs leur pouvoir discrétionnaire, qu'ils soient policiers, procureurs, défenseurs, juges etc., etc. L'université est là pour répondre aux besoins de la société. Par exemple, l'étude de ma collègue Emmanuelle Bernheim a montré que les personnes qui se présentent dans les cliniques juridiques ont la plupart du temps divers besoins quant au logement, à la santé, etc. et à la suite de ses observations, nous avons créé une clinique juridique interdisciplinaire dans laquelle des juristes, des travailleurs sociaux, femmes et hommes et des infirmier(es) accompagnent des personnes en situation de pauvreté et ou en itinérance, afin de leur donner un accompagnement le plus complet possible. Nous avons aussi un projet pilote avec des tribunaux pour les accusés qui se représentent seules fautes d'avoir accès à un avocat.

En résumé, en tant que doyenne, mon rôle en relation avec le droit pénal est, d'une part, de stimuler son enseignement afin qu'il soit le plus complet, diversifié et inclusif possible et d'autre part, d'appuyer et encourager les projets de recherches et les actions concrètes afin de rendre cette formation encore plus vivante et en contact avec la réalité. ■

"No One Believed Me": Women Facing the Death Penalty for Drug Offenses

HAILEY SHAPIRO

ARIANE JACOBERGER

Le *Cornell Center on the Death Penalty Worldwide*, en collaboration avec *Harm Reduction International*, a récemment publié un rapport sur les femmes passibles de la peine de mort pour des crimes liés à la drogue. Ce rapport révèle que les injustices liées au genre, notamment l'instabilité économique et les relations abusives ou manipulatrices, poussent de nombreuses femmes, parfois à leur insu, à être impliquées dans des crimes de drogue. Les juges ignorent ou rejettent pourtant fréquemment les arguments des femmes liés aux formes de discrimination de genre dont elles ont fait l'objet.

El *Cornell Center on the Death Penalty Worldwide*, en colaboración con Harm *Reduction International*, ha publicado recientemente un informe sobre las mujeres que se enfrentan a la pena de muerte por delitos de drogas. El informe revela que las desigualdades de género, como la inestabilidad económica y las relaciones abusivas o manipuladoras, empujan a muchas mujeres, a veces sin saberlo, a involucrarse en delitos de drogas. Los jueces suelen ignorar o rechazar los argumentos de las mujeres relacionados con las formas de discriminación de género que han sufrido.

Introduction

"My name is Merri Utami. 20 years ago, I was sentenced to death for a drug offense. I have spent 20 years in prison for an act I did not understand at the time. During this long imprisonment, I have suffered a lot. I had no chance to tell the truth. I said repeatedly that the drugs were not mine, but no one was there to help me, and no one believed me."[1]

Merri Utami is one of hundreds of women around the world who have been sentenced to death for drug offenses. Like many women on death row for drug offenses, Merri's life has been shaped by poverty, abuse, and exploitation. Merri was involved in an abusive marriage and had to work abroad to support her children. When she met a man named Jerry, she was drawn to his apparently generous and kind nature and began a relationship with him. They traveled on a romantic holiday together, but, when Merri returned to the airport in Indonesia, the fairytale came to an abrupt end. Airport security officers found heroin in the lining of a bag that Jerry had given her. Merri frantically tried to contact Jerry but his phone was disconnected. The police held a gun to her head, slapped her, and kicked her in the face in an attempt to force her to confess but Merri insisted she had no knowledge of the drugs.

The rest of Merri's story is a judicial nightmare that epitomizes the experiences of many women facing capital sentences for drug offenses. Merri could not afford private counsel, and her government-appointed lawyer provided appallingly inadequate representation. He failed to present a single witness or expert to testify on her behalf and did not tell the court about her history of domestic violence or explain how her status as a migrant domestic worker left her vulnerable to exploitation. The

1. Cornell Center on the Death Penalty Worldwide, *"No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, Prologue written by Merri Utami, p. 3, Oct. 2021.

all-male panel of judges observed that Merri's testimony was "fractured and unclear" and that she did not look sufficiently remorseful. They reasoned that this was indicative of her role in a highly secretive drug syndicate, instead of considering that it might in fact reflect the effect of trauma. They convicted her of importing heroin and sentenced her to death by firing squad.[2]

Merri's story is not unique. Poverty, abuse, and coercion push many women into involvement in the drug trade, and, far too often, judges discount their experiences of gender-based discrimination and do not believe those with innocence claims. The war on drugs has a significant – although often unacknowledged – impact on women. Due to a rise in harsher sentencing for low-level drug offenses, the number of women arrested for participating in the drug trade is on the rise worldwide, particularly among women who lack education or economic opportunity or who have experienced abuse.

A small but vocal minority of nations have deployed the harshest tools of the drug war and passed legislation expanding the application of the death penalty for drug offenses.[3] As of 2021, 35 countries retain the death penalty for drug offenses, and 28 of those countries have carried out at least one execution in the last 10 years. Capital drug laws are of special concern as human rights bodies have repeatedly found that drug offenses do not meet the threshold of the "most serious crimes" required by international law for the use of the death penalty.

Data regarding women sentenced to death around the world is scant.

Data regarding women sentenced to death around the world is scant. Nonetheless, we know that drug offences are the second most common crime for which women are sentenced to death in the Middle East and Asia. All eight states defined as "high application" death penalty states for drug offenses[4] currently have, or recently had, women on death row for drug offenses. In some countries, an overwhelming majority of the women on death row were convicted of drug offenses, and in many states a larger proportion of the women on death row were convicted of drug offenses than the men on death row. In Malaysia, for instance, 95% of all women on death row in 2019 were convicted of drug offenses, compared to 70% of the men under sentence of death. Similarly, 82% of the women sentenced to death in Indonesia between 2000–2018

were convicted of drug offenses. Little existing research, however, focuses on these women who have been so harshly affected by punitive drug policy.[5]

The Report: A Global Overview of Women Facing the Death Penalty for Drug Offenses

The Cornell Center on the Death Penalty Worldwide's new report, *No One Believed Me*,[6] seeks to address this research gap. The report examines the unique injustices that women facing capital drug convictions experience. This report builds on the findings in a last report, "*Judged for More than Her Crime*",[7] which highlights the gender bias affecting women in capital trials and on death row. The new report hones in on the experiences of women convicted of capital drug offenses.

The report's gender lens reveals a key feature of the death penalty: the punishment targets the most vulnerable in society. The women on death row whose cases we examined had been harshly marginalized by patriarchal

2. Cornell Center on the Death Penalty Worldwide, "*No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, p. 11, Oct. 2021.

3. Cornell Center on the Death Penalty Worldwide, *"No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, p. 8, Oct. 2021. Joon Lee, The Death Penalty in 2019: Declining Use of the Death Penalty Worldwide, Cornell Center on the Death Penalty Worldwide, https://perma.cc/UCA5-JENN, 14 Apr. 2020.

4. China, Indonesia, Iran, Malaysia, Saudi Arabia, Singapore, Thailand, and Vietnam.

5. Cornell Center on the Death Penalty Worldwide, *"No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, pp. 15-16, Oct. 2021. U.N. High Commissioner for Human Rights, Women and girls on death row require specific gender-based responses and policies, World Day Against the Death Penalty, 18 Oct. 2018.

6. Cornell Center on the Death Penalty Worldwide, *"No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, Oct. 2021.

7. Cornell Center on the Death Penalty Worldwide, Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty, Sep. 2018.

societies, and their marginalized status pushed them into involvement in the drug trade. Some women had strong defenses of innocence. Others had made the choice to traffic drugs, but their range of choices was often narrowed by poverty, coercion, violence, manipulation, and their family's survival needs. Many had been pushed to work abroad to support their families, putting them in a vulnerable position as migrant workers. Economic insecurity and/or manipulative relationships also defined many women's pathways to offending.

Gendered Pathways to Drug Offending

Economic insecurity

The women in most of the cases we reviewed had experienced economic instability before their arrest. Their financial insecurity reflects the global context of gender inequalities that pushes women into economic marginalization. Worldwide, women are disproportionately employed in part-time, low-paying jobswithout long-term contracts or opportunities for career progression. In addition, women perform a disproportionate share – around 75% – of unpaid care work. The burden of unpaid care work simultaneously contributes to women's financial responsibilities and hinders them from securing stable employment. Moreover, since neoliberal reforms have dismantled many public services, women carry the burden of care work without the aid of strong social support systems. As a result, many women find themselves responsible for financially supporting their families, but unable to secure a stable and adequate income or access the support of public services. This gendered financial stress underlies the situations of many of the women who traffic drugs.

Many of the women in the cases we examined share similar stories: childhood poverty led them to leave school early, limiting their employment prospects. As adults, they continued to face poverty amid growing responsibilities to financially support their parents and dependents. They needed money to afford necessities such as food, utilities, and the cost of sending their children to school. As their anxiety reached a peak, a friend or acquaintance who was aware of their precarious economic situation offered them a job transporting drugs. The women saw the job as a solution to the pressing problem of how to support their families. One woman whose case we examined, for example, was single and working at a hair salon, and accepted a job transporting drugs because she needed extra money to pay for her father's medical bills. In another case, a single mother spent the proceeds of a drug sale to care for her son, who had a disability.

Although economic need often propels women into drug trafficking, women typically make little money from trafficking. Hence, drug trafficking is, like most women's jobs pre-arrest, just another precarious job – albeit one that exposes them to the risk of capital punishment.

Manipulative relationships

In our research, we also identified many cases in which women transported drugs under the influence or pressure of their male romantic partner. Available data makes clear that men are considerably more likely to play a role in women's pathways to offending than the other way around. Many women report that their intimate partners manipulated, coerced, or misled them into participating in drug-related activities. Indeed, we found evidence that some drug syndicates send male operatives to establish relationships with – and sometimes even marry – women, with the intention of targeting these women to traffic drugs.

Abusive relationships also push women into drug trafficking. Financial control, a common feature of abusive relationships, increases the chance that a woman will commit a crime out of economic need. Moreover, past trauma often makes individuals more suggestible and vulnerable to deception. For example, Merri Utami's experiences of marital abuse increased her vulnerability to a scammer posing as a kind man who seemed to care deeply about her, but who later tricked her into trafficking drugs.

Another pattern we observed is that many women get involved in drug-related activities after falling prey to online scams. Women are disproportionately likely to fall victim to an online financial romance scam compared to men.[8] Romance scammers initiate a romantic relationship over the internet and groom victims over a period of time, sometimes maintaining the scam relationship for years. In many cases, scammers claim to live in a different country than the scam victim and ask the victim to embark on an international trip so that they can be together. The scammer then tricks or coerces the victim into transporting drugs during the trip. For example, we found one case in which a woman's online boyfriend told her that he would be able to marry her if she picked up some documents for him abroad. She made the international trip, and her boyfriend's acquaintance gave her the documents and a bag to bring back to her home country. Unbeknownst to her, the bag contained hidden drugs and she was arrested at the airport on her way home. Women facing capital punishment for drug offenses after falling prey to a romance scam are doubly victimized, first by their alleged romantic partners and then by the country charging them with a capital offense.

Financial control, a common feature of abusive relationships, increases the chance that a woman will commit a crime out of economic need.

8. Cornell Center on the Death Penalty Worldwide, *"No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, pp. 26-27, Oct. 2021.

Gender Bias at Trial

Legal actors, including judges and defense lawyers, often lack sensitivity to the context of gender-based discrimination that shapes women's pathways to offending. As a result, they often discount women's experiences or do not believe their innocence claims. Several states have a mandatory death penalty for drug offenses that bars judges from considering any mitigating circumstances – including gender-specific circumstances – when making decisions about defendants' punishment. In some states, the death penalty is discretionary only if the defendant can provide information to disrupt drug activities. Women, who are usually low-level offenders, often lack information about the context of their jobs and are unable to provide the necessary information to avoid a mandatory death sentence.

Courts tend not to believe that women from less disadvantaged backgrounds or who have experienced prior romantic relationships are vulnerable to coercion or manipulation.

We also found many cases in which judges did not believe women who argued they were tricked into trafficking drugs. Judges often reasoned that the women were not sufficiently suspicious of the people who gave them hidden drugs to carry, even if that person was a trusted intimate partner. One woman argued that she had not known that a bag her boyfriend had given her contained hidden drugs, but the judge, basing his reasoning on gender stereotypes about how women should behave in relationships, decided that she should have been more suspicious of her boyfriend and that she must have been aware of the drugs. We even found cases in which courts held that the fact that a co-defendant bore the primary responsibility for the crime was irrelevant to determining whether a woman was aware of the drugs in her possession.[9] For instance, the court in one case sentenced a woman to death even after concluding that her boyfriend was likely the "mastermind" of the drug trafficking operation.

We found troubling evidence that courts are especially likely to dismiss women's claims if the women do not fit gender stereotypes. Courts are reluctant to accept that a female defendant was tricked or pressured into transporting drugs unless she matches the profile of a "helpless female victim": poor, uneducated, and—in cases involving a male co-conspirator—inexperienced with men. Courts tend not to believe that women from less disadvantaged backgrounds or who have experienced prior romantic relationships are vulnerable to coercion or manipulation.

In one drug trafficking case, for example, the court posited that the defendant *"was hardly a naïve or gullible person,"* explaining that she graduated from high school, spoke English, modeled, and traveled. According to the court, the sunglasses, makeup, and other items in her handbag were *"not a poor lady's possessions"* and indicated that *"she is a socializer—a lady of the 'world.'"* The court concluded that *"it is very unlikely that [she] could have placed herself in a situation where she could be exploited to commit a crime." In another case, the court rejected a woman's argument that she had been manipulated by her boyfriend into trafficking drugs, implying that, as a divorced woman, she had lost the innocence that would enable her to fit the profile of a stereotypical victim. The court reasoned that she "acted and portrayed herself like a damsel in her maiden love but [...] her background would indicate this most probably is a concoction of her real self."*[10]

Presumptions of Guilt

Courts' failures to take women's evidence into account are especially problematic in jurisdictions where women must rebut presumptions of their guilt. In many countries that impose the death penalty for drug offenses, courts presume that defendants found with a certain drug quantity were aware of and intended to traffic the drugs, and defendants carry the burden of disproving these presumptions. By using quantity as a proxy for criminal intent, this legal framework puts low-level drug couriers at higher risk of receiving harsh sentences. This disproportionately affects women, who are concentrated in low-level courier positions in drug syndicates.

These presumptions also constrain judges' ability to take into account the patterns of gender-based discrimination that shape women's pathways to becoming embroiled in the legal system. If a woman does not meet the high burden of proof required by the presumption of guilt, judges must convict her of drug trafficking, even if she brings strong evidence that gender-based discrimination shaped her pathway to offending. In countries with the mandatory death penalty for drug trafficking, such a conviction automatically results in a death sentence. Women are especially disadvantaged in rebutting presumptions because judges often dismiss gender-specific evidence.

Foreign Nationality

Foreign nationals, who are overrepresented among women facing the death penalty for drug offenses,

9. Cornell Center on the Death Penalty Worldwide, *"No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, p. 44, Oct. 2021. Luo Dan v. Public Prosecutor, para. 5, Criminal Appeal No. J-05(M)-609-12-2017, Court of Appeal, Putrajaya, 13 May 2019. This trend was also found in the United States,

10. Cornell Center on the Death Penalty Worldwide, *"No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, p. 30, Oct. 2021.

experience especially substantial barriers to rebutting presumptions and avoiding capital punishment. In Malaysia, for instance, 95% of the women on death row for drug offenses in 2019 were foreign nationals. Foreign nationals face exacerbated injustices in the criminal legal system. For instance, foreign nationals lack local support in contacting local lawyers or navigating an unfamiliar legal system, and their families are often too far away to contribute to the background investigation necessary for an adequate defense. Moreover, foreign nationals often lack access to interpreters during their interrogation and/or trial. Many foreign national women are arrested with a male co-defendant, and if these women lack access to an interpreter, their co-defendant may be more likely to co-opt conversations with police or with attorneys, depriving these women of an individualized criminal process. For example, we profiled the case of one woman foreign national who was arrested in Malaysia with her boyfriend and requested an interpreter because she did not speak English or Malay. Her boyfriend, however, interjected that they did not need an interpreter because he spoke English. He alone answered all the police officers' questions and told his girlfriend to sign a document that she only later learned was a confession statement.

Conclusion

One night in 2016, two prison guards woke up Merri Utami and told her she would be transferred to a prison known as "Execution Island." The night before Merri was scheduled to be executed, her daughter and granddaughter visited her to say goodbye. Merri describes that moment as *"the height of [her] sorrow."* On 29 July 2016, four people who had been imprisoned with Merri were executed, but Merri was spared. Five years later, however, Merri remains on death row. Her request for clemency has gone unanswered.

Hundreds of women around the world on death row for drug trafficking, like Merri, are pushed into trafficking by gendered factors and then face legal processes that are warped by gender bias. As our report examines, judges often lack sensitivity to the context of gender-based discrimination and discount women's experiences or do not believe their innocence claims. To achieve gender justice, we must finally listen to these women's stories, both inside and outside the courtroom. In Merri's words: "I want the world to know that we, women on death row, are suffering inwardly. Women often keep their struggles to themselves, even though they are unconsciously destroying themselves. But people can, and must, learn from the experiences of women. So, women must open up and tell their stories. This is our story."[11]

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11. Cornell Center on the Death Penalty Worldwide, *"No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, Prologue written by Merri Utami, p. 3, Oct. 2021.

12. Hailey Shapiro and Ariane Jacoberger are co-authors of the report *"No One Believed Me": A Global Overview of Women Facing the Death Penalty for Drug Offenses*, Oct. 2021, accessible at: https://deathpenaltyworldwide.org/publication/no-one-believed-me-a-global-overview-of-women-facing-the-death-penalty-for-drug-offenses/. The source of the information presented in this article is the report itself.

La defensa de la defensa **en México**

OSCAR CRUZ BARNEY

La défense de la défense sert précisément à protéger le libre exercice de la défense par la profession d'avocat, à protéger le secret professionnel et à assurer la soi-disant « égalité des armes » dans les processus juridictionnels. Le rôle des barreaux en matière de défense est fondamental. Ils sont, ou du moins doivent être, les garants de l'indépendance de l'exercice professionnel du droit. L'indépendance est précisément une exigence de l'État de droit et du droit à la défense du défendeur. Elle est donc considérée comme, à la fois, un droit et un devoir.

The defense of the defense serves precisely to protect the free exercise of the defense by the legal profession, to preserve the professional secrecy and to ensure the so-called "equality of arms" in the jurisdictional processes. The role of the bar associations in the field of defense is fundamental. They are, or at least must be, the guarantors of the independence of the professional practice of law. Independence is precisely a requirement of the rule of law and of the defendant's right to defense. It is therefore considered both a right and a duty.

La "defensa de la defensa" es un tema de enorme trascendencia en el ejercicio de la abogacía a nivel internacional, pero que ha pasado desapercibida en México salvo por contadas excepciones. En buena medida consideramos que ese "olvido" o falta de interés se debe en parte a la ignorancia existente sobre el particular y a la atomización que la abogacía ha sufrido en México desde que desapareció la colegiación obligatoria para el ejercicio profesional.

Una defensa adecuada ejercida por el abogado es siempre útil y necesaria a la sociedad.

Pareciera que el abogado mexicano es poco consiente de la trascendencia de su profesión y la importancia social de la misma. Poco consiente también de la necesidad de garantizar su independencia y libertad frente a autoridades y clientes para el correcto ejercicio de la defensa de sus representados.

Es claro que se ignora por la inmensa mayoría que una de las tareas esenciales de los colegios de abogados es precisamente asegurarles esa independencia y libertad. La colegiación obligatoria que afortunadamente se intenta restablecer busca garantizar esa independencia y libertad en el ejercicio profesional, brindando protección jurídica a los abogados que así lo requieran.

La defensa de la defensa atiende precisamente a proteger el libre ejercicio de la defensa por la abogacía, a la preservación del secreto profesional, a asegurar la denominada "igualdad de armas" en los procesos jurisdiccionales. Temas todos que han sido ya objeto de preocupación y estudio por entidades internacionales respecto de la realidad del ejercicio profesional de la abogacía en México.

La libertad de defensa requiere de la libertad de expresión y de actuación procesal del abogado[1], sin embargo, el derecho a la defensa se ve continuamente amenazado por diversos medios y formas, no solamente por el poder público sino por los intereses particulares y delincuenciales. No debemos olvidar que el abogado es un elemento esencial para que la administración de justicia pueda cumplir con los objetivos que la Constitución y la legislación secundaria señalan. Por más reformas que se hagan a la impartición de justicia, estas no serán suficientes sino incluyen una reforma a la educación jurídica y al ejercicio profesional de la abogacía, que responda a las apremiantes necesidades de justicia y Estado de Derecho.

El abogado debe siempre actuar libre respecto de quienes solicitan su patrocinio para aceptar o no su defensa, salvo cuando son designados de oficio por el Colegio de Abogados al que estén incorporados. Una

1. Vives Antón, Tomás, "Observaciones preliminares", en T*eoría & Derecho Revista de Pensamiento Jurídico, El Derecho de Defensa*, Valencia, Tirant Lo Blanch, Número 8, Diciembre 2010, p. 10. Asimismo, véase Cruz Barney, Oscar, *Defensa a la defensa y abogacía en México*, México, Instituto de Investigaciones Jurídicas, UNAM, Ilustre y Nacional Colegio de Abogados de México, Ilustre Colegio de Abogados de Madrid, Colección Cuadernos de Abogacía 1, 2015. (Primera reimpresión 2016). Véase también Cruz Barney, Oscar, *El ejercicio de la abogacía en México, una propuesta de reordenación: el proyecto de Ley General para el Ejercicio de la Abogacía*, México, UNAM, Instituto de Investigaciones Jurídicas, 2020.

defensa adecuada ejercida por el abogado es siempre útil y necesaria a la sociedad.[2]

Es claro que la colegiación obligatoria constituye la mejor garantía de esa libertad e independencia de los abogados, imperativo del servicio que se debe prestar a la sociedad. Toca a los Colegios de Abogados asegurar, además, el mantenimiento del honor, la dignidad, la integridad, la competencia, la deontología y la disciplina profesional.[3] La independencia del abogado se configura a través de la designación y la responsabilidad del mismo. La defensa por medio del derecho de los intereses que le son confiados al abogado constituyen su deber fundamental.[4] Lo anterior exige garantizar la idoneidad y la exigencia deontológica disciplinaria. Claro es que la titularidad del derecho de defensa corresponde a la parte, pero es al abogado al que le toca ejercerlos por el deber de asistencia jurídica que tiene en el proceso.[5]

Como ya señalamos, el papel de los Colegios de Abogados en materia de defensa de la defensa es fundamental, son o al menos, deben ser, los garantes de la independencia del ejercicio profesional de la abogacía. La independencia es precisamente una exigencia del Estado de Derecho y del derecho de defensa del justiciable, de ahí que se considere tanto un derecho como un deber.

Hemos señalado ya en otro lugar[6] que el Colegio es una institución útil y necesaria por los servicios que presta al colegiado, si bien su función primordial es constituirse en la garantía institucional del ejercicio de la abogacía. Constituye, en los regímenes de colegiación obligatoria, "el primer entorno elemental del abogado y le concierne de forma determinante si se tiene en cuenta que la condición de abogado y el modo en el que se produce el ejercicio de su función dependen de la existencia del Colegio y de la incorporación al mismo"[7]

En México tres son los colegios de abogados de carácter nacional que atienden al alto deber de procurar la defensa de la defensa.

El Ilustre y Nacional Colegio de Abogados de México establece en el Artículo 53 de sus Estatutos vigentes que siempre que un miembro del Colegio se hallare acusado o procesado criminalmente, luego que llegue a conocimiento del Presidente, por cualquier conducto, nombrará dos individuos entre sus miembros, de la misma localidad en que se radique la consignación o el proceso, que lo auxilien en su defensa y se encarguen de ella si así conviniere al interesado. Este tendrá derecho en todo caso, a designar de entre los miembros al o a los que desee encomendar su defensa, y el que o los que fueren designados tendrán obligación de prestar el servicio, fijándose la remuneración del defensor de acuerdo al caso y la situación económica del acusado. Cabe destacar que esta disposición la podemos encontrar en los estatutos colegiales desde 1828 en su artículo 151, en la edición de los estatutos de 1854, en los estatutos de 1863, en los de 1891 y en los estatutos de 1946, en los que además se estableció como derecho de los colegiados el reclamar ante la Junta Menor la resolución, trámite u omisión del Presidente y demás funcionarios, sobre cualquier asunto, este derecho se mantiene en los estatutos vigentes.

Para hacer efectivo el derecho señalado para los asociados a la Barra Mexicana, se emitió un "Reglamento de la Barra Mexicana, Colegio de Abogados, A.C. De la Defensa de la Defensa"

El o los que fueran designados para intervenir en los procedimientos a que se refiere el párrafo anterior podrán rechazar o aceptar su designación libremente y bajo su responsabilidad, pero si la aceptan sólo podrán renunciar por causa de fuerza mayor.

En el proyecto de reformas a los estatutos del Ilustre Colegio se plantea incluir dentro de las facultades de la Junta Menor, en aras de una mayor claridad, la de "Velar por que los Abogados puedan ejercer su profesión con independencia y libertad, protegiéndoles cuando se menoscabe o pueda menoscabar dichos principios con quebranto o riesgo de quebranto del derecho de defensa y desarrollando, en dicha protección, las acciones que se estimen adecuadas para preservar la dignidad de la Abogacía y el derecho fundamental de defensa de los justificables."

Por su parte, la Barra Mexicana, Colegio de Abogados establece en caso de ser sujetos de presiones, ataques o intimidación con motivo del ejercicio profesional, sus asociados tienen el derecho a ser defendidos para salvaguardar el derecho del cliente a su defensa y preservar el derecho al ejercicio libre y honroso de la profesión. Para estos efectos intervendrá la Junta de Honor o, en caso urgente, el Presidente del Colegio, quién podrá convocar a un comité *ad-hoc* de la defensa de la defensa. Lo anterior siempre que exista petición

2. Así Moreno Tarrés, Eloy, "Habilidades profesionales", en Moreno Tarrés, Eloy, Serrano Amado, Roberto y Vernengo Pellejero, Nancy Carina, *Asesoramiento y habilidades profesionales del abogado*, Barcelona, BOSCH, Wolters Kluwer España, 2014, pág. 48. Barbosa, Ruy, *O Dever do Advogado: Carta a Evaristo de Morais*, 2ª ed. Prefácio de Evaristo de Morais Filho, Brasil, EDIPRO, 2007, p. 57.

3. Basla, Enrique Pedro, "El derecho de defensa en Iberoamérica", en Martí Mingarro, Luis, Martín-Retortillo Baquer, Lorenzo y Basla Enrique Pedro, *La defensa, una visión iberoamericana*, Argentina, Imprenta Lux, Unión Iberoamericana de Colegios y Agrupaciones de Abogados, 2012, pág. 39.

4. Serra Rodríguez, Adela, *La responsabilidad civil del abogado*, Navarra, Ed. Aranzadi, 2000, pág. 336.

5. Vives Antón, Tomás, "Observaciones ...", *op. cit.*, p. 10.

6. Cruz Barney, Oscar, *Aspectos de la regulación del ejercicio profesional del Derecho en México*, México, Instituto de Investigaciones Jurídicas, UNAM, Tirant Lo Blanch, 2013.

pp. 25 y sigs.

7. Rosal, Rafael del, *Normas deontológicas de la abogacía española. Una doctrina construida a partir del ejercicio de la competencia disciplinaria*, Madrid, Thomson Civitas, 2002, p. 33.

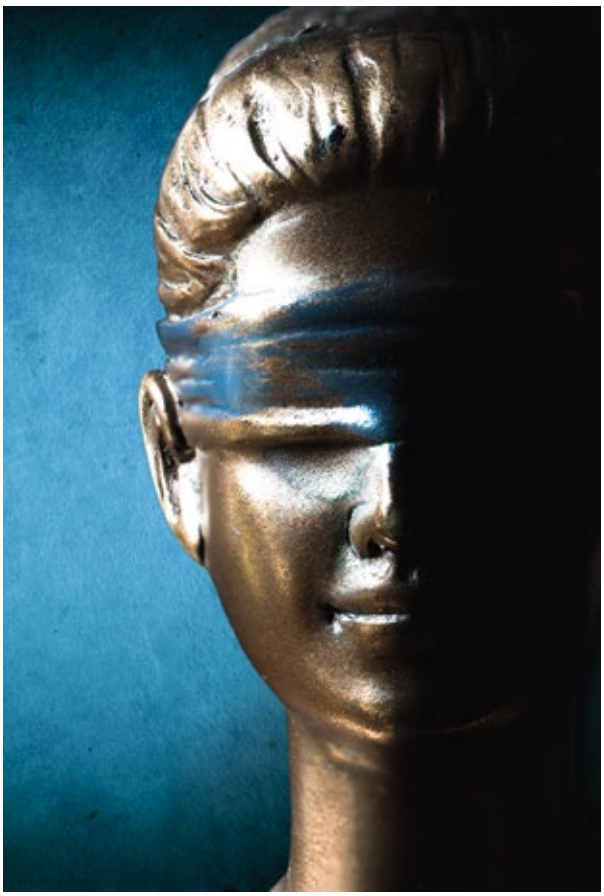
del interesado o, si éste se encuentra imposibilitado, a petición de un familiar o socio del interesado.

Para hacer efectivo el derecho señalado para los asociados a la Barra Mexicana, se emitió un "*Reglamento de la Barra Mexicana, Colegio de Abogados, A.C. De la Defensa de la Defensa*".

En el Reglamento se establece que La Barra Mexicana, Colegio de Abogados, A.C. por conducto de la Junta de Honor del Colegio, de su Presidente, o de la persona o personas que cualquiera de estos órganos designe, deberá encargarse de la defensa de cualquier asociado, por la interferencia o persecución que alguna autoridad siga o pretenda seguir en su contra, con motivo de su ejercicio de la profesión. Asimismo, serán materia de la Defensa de la Defensa aquellos casos en que, aun cuando no se trate de asociados, la naturaleza de la interferencia o persecución afecte el ejercicio de la profesión de abogado, incluso en otros países.

Para el Reglamento se entiende que existe interferencia, persecución o afectación en el ejercicio de la profesión, cuando los hechos motivo de la petición presentada se adecuen a cualquiera de los siguientes supuestos, en forma enunciativa mas no limitativa:

I. Cuando cualquier autoridad interfiera indebidamente, en la relación entre cliente y abogado o ponga en entredicho la integridad o capacidad profesional de éste;



II. Cuando cualquier autoridad pretenda vincular o vincule al abogado con sus patrocinados, clientes, representados o con las causas que se sigan a éstos, por el hecho de haberlos representando profesionalmente;

III. Cuando se inflija al abogado hostigamiento, presión, influencia, intimidación o cualquier tipo de perturbación en el desempeño de sus funciones profesionales;

IV. Cuando sin causa legal se obligue al abogado a renunciar a la representación o asesoramiento de sus clientes o a abandonar el patrocinio del caso de que se trate;

V. Cuando la autoridad intimide u obligue al cliente a renunciar a los servicios de su abogado;

VI. En cualquier otro caso en que la autoridad amenace, de cualquier manera, el libre ejercicio de la profesión de abogado o el derecho de cualquier persona a ejercer su defensa.

El Secretario Ejecutivo será el encargado de llevar a cabo las providencias inmediatas necesarias para que la Defensa de la Defensa sea oportuna. Desempeñará su función en cuanto tenga conocimiento de una petición presentada por el abogado o cualquier otra persona en nombre de él. Podrá asignar, por acuerdo del Presidente o de la Junta de Honor, en su caso, entre los miembros del Colegio designados para ese efecto, las peticiones, para su estudio, formulación escrita de opinión y seguimiento.

Conforme al Reglamento se deberá presumir la inocencia del abogado que haya presentado la petición, por lo que ésta se tramitará en forma inmediata, observando los principios relativos a este procedimiento. Si del estudio de la petición se desprende razonablemente que el abogado faltó al Código de Ética del Colegio y que la actuación de la autoridad en su contra es legítima, deberá informarse inmediatamente a la Junta de Honor y al Presidente, quienes decidirán continuar o dar por terminada la intervención del Colegio, sin mayor trámite que la comunicación de esta decisión al abogado peticionario.

En el caso de la Asociación Nacional de Abogados de Empresa, Colegio de Abogados ANADE, están trabajando actualmente en su reglamendo de Defensa de la Defensa, tarea encargada a su expresidente Ricardo Cervantes.

Cabe destacar que cada ves más, los Colegios de Abogados tendrán que actuar en la defensa y protección de sus colegiados frente a los atentados contra su independencia y libertad.

Se debe tener presente desde luego que la independencia debe mantenerse por igual no solamente ante las autoridades sino ante el cliente mismo. ■

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Charter of Fundamental Principles on Access to Justice for Women Victims of Violence

On the occasion of International Women's Day, on 8 March 2022, the UIA Women's Committee and the National Bar Council (NBC), with the participation of the Federation of European Bars and Law Societies (FEB), organised a hybrid seminar on the theme: "Access to Justice for Women Victims of Violence - Meeting the Challenges for Real Change". On this occasion, the Charter of Fundamental Principles on Access to Justice for Women Victims of Violence was presented.

A l'occasion de la Journée internationale des femmes, le 8 mars 2022, le Comité des Femmes UIA et le Conseil national des barreaux (CNB), avec la participation de la Fédération des Barreaux d'Europe (FBE), ont organisé un séminaire hybride sur le thème : « Accès à la Justice pour les femmes victimes de violence - Relever les défis pour opérer un véritable changement ». A cette occasion, la **Charte des Principes Fondamentaux sur l'accès à la justice des femmes victimes de violence** a été proclamée. Les versions française et espagnole de ce texte sont disponibles sur www.uianet.org.

Con motivo del Día Internacional de la Mujer, el 8 de marzo de 2022, el Comité de Mujeres de la UIA y el Consejo Nacional de Abogados (CNB), con la participación de la Federación de Colegios de Abogados de Europa (FEB), organizaron un seminario híbrido sobre el tema: *«El acceso a la justicia para las mujeres víctimas de la violencia - Responder a los desafíos para un cambio real»*. En esta ocasión, se proclamó la **Carta de Principios Fundamentales sobre el acceso a la justicia para las mujeres víctimas de violencia**. Las versiones española y francesa de este texto está disponibles en www.uianet.org.

The Women's Committee of the International Association of Lawyers (UIA),

Recalling the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966, which affirm the equal rights of women and men to enjoy all rights and freedoms set forth therein,

Considering the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979, which condemns all forms of discrimination concerning women and establishes the obligations of States to ensure through competent tribunals and other public institutions the protection of women from any act of discrimination,

Recalling the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985, which sets forth that victims are entitled to have access to the appropriate mechanisms of justice and to prompt redress for the harm they have suffered,

Noting that the United Nations Basic Principles on the Role of Lawyers of 1990 recognizes that adequate protection of rights and fundamental freedoms to which all persons are entitled requires an effective access to justice and highlights that professional associations of lawyers have a vital role in providing legal services to all in need of them,

Recalling that the Declaration on the Elimination of Violence against Women proclaimed by the United Nations General Assembly resolution 48/104 of 1993, specifically expressed concern that violence against women is an obstacle to the achievement of equality, development and peace and constitutes a violation of Women's rights and fundamental freedoms,

Considering the Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women in 1995 which reaffirms the commitment of States to the promotion and protection of Women's rights,

Recalling the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross

Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the United Nations General Assembly in 2005,

Noting that the United Nations Principles and Guidelines on access to Legal Aid in Criminal Justice Systems of 2012 encourages the provision of legal aid for victims in the criminal justice process,

Recalling the United Nations 2030 Agenda for sustainable Development which aims to achieve gender equality and universal access to justice (Goals 5 and 16),

Considering:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,
- The American Convention on Human Rights of 1969,
- The African Charter on Human and People Rights (Banjul Charter) of 1981 and its Protocol on the Rights of Women in Africa (Maputo Protocol) of 2003,
- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Parà) of 1994,
- The Arab Charter on Human Rights of 2004,
- The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) of 2011,

Declaring expressly its deep concern about the phenomenon of violence against women globally, the new forms it takes with the development of information and communication technologies and its aggravation due to the Covid-19 pandemic,

And

Determined to combat violence against women and to undertake appropriate measures to promote and protect the fundamental rights of victims as enshrined in the texts referenced above with the effective and concrete support of Bar Associations,

Proclaims this Charter:

Article 1:

For the purposes of this Charter,

- The term "Women" should be understood to include women of all ages as well as girls under 18 years of age.
- The term "Violence against Women" means any act of gender-based violence or omission that results in, or is likely to result in, death or physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, harassment, coercion or arbitrary deprivation of liberty, whether occurring in private or public spheres, offline or online.

Violence can take multiple forms such as, but not limited to:

a) Physical, sexual and psychological abuse occurring in the family, including battering, sexual abuse of female children in the household, non-spousal violence and violence related to exploitation,

b) Physical, sexual and psychological abuse occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution,

c) Neglect, emotional, verbal or societal violence,

d) Legal violence (Laws that discriminate against women, lack of laws protecting them).

Violence against women can be perpetrated by States, private persons and non-state actors, including business entities.

- The term "Gender-Based Violence" means, as stated by the Committee for the Elimination of Discrimination against Women in its general recommendation No 19 of 1992 and No 35 of 2017, violence which is directed against a woman because she is a woman or that affects women disproportionately.
- The term "Online Violence against Women", as commonly defined, extends to any act of gender-based violence against women that is committed, assisted or aggravated fully or in part by the use of information and communication technology such as mobile phones and smartphones, the Internet, social media platforms or emails.
- The term "Bar Associations" will include Law Societies, "Ordres d'avocats" and, in general, all professional associations of lawyers.

Article 2:

Women everywhere have the right to live a life free from gender-based violence.

Article 3:

Violence against women is a form of discrimination and constitutes a violation of human rights and fundamental freedoms which impairs or nullifies the enjoyment by women of their rights, mainly the right to life, the right to liberty and security of person, the right to health, the right to equal protection under the law, the right to equality in the family, the right to participate in public and political life, the right to fair and favorable conditions of work, freedom of expression and freedom of movement.

Article 4:

Violence against women evolves rapidly and affects women across the world, whatever their age, familial, cultural, religious, social, educational and economic background.

Women belonging to minority groups, including but not limited to indigenous women, refugee and migrant women, women in poverty, and women with disabilities, are especially vulnerable to violence.

Internal and international armed conflicts, natural disasters, pandemics, and the destruction or degradation of natural resources also put women at particular risk of violence.

Article 5:

Violence against women shall be considered a criminal offence.

Rape and other forms of sexual abuse can constitute international crimes such as war crimes, crimes against humanity and genocide.

Article 6:

Women victims of violence have the right to an unhindered and easy access to justice as well as to an effective remedy for the harm they have suffered.

They are entitled to competent and highly qualified legal services and representation during judicial proceedings and to legal aid if they lack sufficient means.

They must always be treated with respect of their dignity and their privacy and protected from repeated violence.

Article 7:

Bar Associations have a fundamental role in supporting women victims of violence who seek protection and legal assistance as well as in providing them an effective access to pro bono legal services and to legal aid.

Article 8:

Lawyers should be encouraged to volunteer in this process and, to enhance their skills, Bar Associations will organize continuous and specialized training focusing on the different forms of violence and the appropriate legal services in cases of women victims of any of these forms of violence.

Article 9:

Speed in the procedure, effective enforcement of judgements, and ending the delay of justice are necessary in cases of violence against women.

Bar Associations should identify issues that have to be addressed in this regard to streamline procedures and work to reform, repeal and enact new laws where necessary.

Article 10:

Response to violence against women and helping the victims requires a multi-professional approach involving all stakeholders concerned with the various issues related to the subject.

Bar Associations play a pivotal role in this field. They should initiate or support the creation of a national multi-professional committee to combat violence against women, implement the appropriate structures to protect victims and prosecute perpetrators.

Article 11:

Bar Associations should advocate for and take part in training other professionals of the justice system (including police officers, law enforcement agencies and the judiciary) on the best practices to handle cases of women victims of violence and on the application of international

standards in order to increase the effectiveness of their work.

Article 12:

Bar Associations must engage actively in combating stereotypes and prejudices that are still hindering access to justice for women victims of violence and their right to an effective remedy.

Article 13:

Bar Associations should organize outreach events to raise general awareness on the issue of violence against women and the rights of the victims.

They also must contribute to the easy access of women victims of violence to information about their rights and legal proceedings by publishing such information on the internet, social media, or through hotlines or helplines and to create departments within the Bar to provide legal free advice to victims, start the legal proceedings, and coordinate the various services that support victims.

Article 14:

The Women's Committee undertakes to implement this Charter with the support of the International Association of Lawyers (UIA) and in partnership with its collective and individual members.

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This Charter was proclaimed in Paris by the Women's Committee of the International Association of Lawyers (UIA), on March 8, 2022, on International Women's Day. ■

Fraud and the Courtroom: A Game of Chess with Darkly Veiled Moves

Andrew GROSSO

Editor's Note
For this article, use of male pronouns is intended to be gender neutral.

Lorsqu'il s'agit de juger une affaire criminelle dans une salle d'audience, la fraude est différente. Pour prouver qu'un défendeur avait l'« intention » de commettre une fraude, le procureur doit anticiper – et réfuter – tous les autres moyens de défense que le défendeur pourrait de bonne foi invoquer pour convaincre un juge ou un jury qu'il n'avait pas l'intention de commettre une fraude. Le procureur doit le faire avant le procès, car une fois dans la salle d'audience, il est trop tard pour rassembler les preuves nécessaires pour répondre à ses moyens de défense. Dans une affaire pénale, les outils dont disposent la défense et l'accusation pour obtenir des preuves sont très différents. Ainsi, la confrontation judiciaire devient un lieu de combats de stratégies, où les avocats de chaque partie cherchent à se surpasser, en utilisant différents moyens pour y arriver. À bien des égards, c'est comme une partie d'échecs, mais avec des pièces de valeur inégale et des enjeux beaucoup plus élevés.

Cuando se trata de juzgar un caso penal en un tribunal, el fraude es diferente. Para demostrar que un acusado tenía la «intención» de defraudar, el fiscal debe anticiparse -y refutar- a todas las defensas alternativas de buena fe en las que podría basarse el acusado para convencer al juez o al jurado de que no tenía intención de engañar. El fiscal debe hacerlo antes del juicio, porque una vez dentro de la sala, es demasiado tarde para adquirir las pruebas necesarias para derrotar esa defensa. En un caso penal, las herramientas de que disponen la defensa y la acusación para obtener pruebas son muy diferentes. Por lo tanto, la lucha se convierte en un concurso de estrategia, en el que los abogados de cada parte tratan de pensar más que el otro, utilizando diferentes medios para llevar a cabo esta tarea. En muchos sentidos, es como una partida de ajedrez, con piezas desiguales y con apuestas mucho más altas.

Once, while serving as a prosecutor in the United States, I was asked about the difference between trying a drug or a violent-crime case as compared to trying a case for fraud. The difference, I explained, is like that between a boxing match and a chess game. For the drug or violent-crime case, everyone knows that *what* was done was a crime. The question to be answered is simple: *who* committed it? The government prosecutor and the lawyer for the defendant will "march" into the courtroom and "slug it out," using the best evidence available, plus their own intelligence, skill, and ability to persuade a judge or jury as to whether this defendant did – or did not – commit the crime.

Fraud is different. Everyone knows what happened: a paper was signed, an agreement was made, money was paid, and a victim was hurt. The question is not who caused these things – but *why* the defendant did so. Fraud is called a "crime of intent" because it includes as an essential element the "intent to deceive," and intent is not out in the open, but inside a person's mind. So, to prosecute a fraud case – and win – a prosecutor must get inside a defendant's mind and establish, to the unanimous satisfaction of a jury, doing so beyond a reasonable doubt, that the defendant *understood* the truth of what he was saying (or doing), *knew* that what he was saying was not true (or was in some significant way misleading), and did what he did anyway, *for the purpose* of deceiving his victim in some fashion to convince that victim to do something that he would otherwise not have done, such as pay-over money or deliver property or enter into a contract.

So, how does one get into a defendant's mind? One cannot. But what a prosecutor can do is identify every intention that the defendant might possibly have had when he undertook his deceptive conduct, and then – one by one – disprove *all* of these until there is only one possible intention remaining, this being the intention to deceive the victim. This approach means that the prosecutor must out-think the defendant; the prosecutor must anticipate, well before trial, every possible exculpatory explanation the defendant might give for his actions and then, one by one, obtain the evidence necessary to refute these explanations so that the only remaining, reasonable explanation is that the defendant *intended* to deceive the defendant and thereby enrich or advantage himself. This is not a boxing match: it is a long-term game of strategy. It is a game of a chess.

A defendant or suspect cannot use or compel the grand jury to hear his side of the story.

The Pieces and the Rules

Every criminal justice system has its own tools for use by the parties to prepare for trial. In the United States, the system is adversarial, and the opposite sides are given different tools. The differences are substantial.

First, we look at the tools for the prosecution. Perhaps the most important one is the grand jury, a body of citizens who meet several days a month for several months. Their role is to investigate a case. They hear evidence about the possible guilt of a suspect, and if they are satisfied that the evidence is sufficient to take the case to trial, they vote on an indictment against the suspect – who thereby becomes the defendant – identifying the charges and violations of law for which he will be tried.

The grand jury has the power to issue subpoenas, thereby compelling the production of documents, and to compel witnesses to come before it and to answer questions under oath. If a witness refuses to produce the documents requested, or to answer the questions presented to him, he may be held in "contempt of court" and be held in jail until he produces those documents or answers those questions. Because the questions must be answered

under oath, if the answers given are untrue, the witness may himself be prosecuted for perjury.

While a grand jury is officially an arm of the court, it is a prosecutor who acts as the counsel to the grand jury, giving it advice as to what documents should be sought, what witnesses should be heard, what charges should be considered, and what the law requires or permits before an indictment can be returned. In most respects, the grand jury is an arm of the prosecution as well as that of the Court.

A defendant or suspect cannot use or compel the grand jury to hear his side of the story. However, the fact that the grand jury is composed of citizens as opposed to law enforcement personnel provides a level of protection to a suspect from the possibility that an overzealous or biased prosecutor will bring unwarranted charges against him.

Another tool in the hands of the prosecution is the search warrant. Once sufficient evidence is presented (under oath) to a judge, a prosecutor may obtain a warrant to search for, and when found, seize evidence in a person's possession. A search warrant is not easy to obtain. A prosecutor must demonstrate not only that some evidence shows that an actual crime probably occurred, but that additional *specific* evidence is located at a *particular* place; will still be there at a *particular* time; and is relevant to proving the guilt or innocence of a suspect. If the judge is not satisfied that these conditions have been met, he cannot issue the warrant.

In the United States, perhaps the most important item for the defense is the Fifth Amendment of the U.S. Constitution.

A prosecutor works with investigators from various law enforcement agencies. Sometimes, they work at the direction of the prosecutor, but often they work on their own. In either scenario, the goals are the same: collecting evidence that will establish that a crime was committed and identifying who committed the crime. They accomplish these goals by various means, including interviewing witnesses, collecting forensic evidence such as fingerprints and handwriting samples, and examining documents that they or a grand jury may collect.

Finally, a prosecutor can *immunize* a witness, which means he can make a binding promise to a witness that, if the witness testifies at trial, the witness will not be prosecuted even if the witness participated in the crime. He can also make a "plea deal" with a witness who was a participant, which means that the prosecutor can make a promise that the witness will receive a reduced sentence after pleading guilty to a crime if the witness testifies against some other defendant, usually at trial, and usually against someone who is more culpable or responsible for the commission of the crime than the witness. These are tools in a prosecutor's "tool kit." Now, let us look at what is available to the defense.

In the United States, perhaps the most important item for the defense is the Fifth Amendment of the U.S. Constitution. This amendment contains a provision that prohibits the prosecution from compelling a suspect (or defendant) from being a witness against himself. This means the suspect does not have to tell the prosecution anything related to the crime or anything that might tend to prove that the suspect was involved in the crime – and the scope given to this prohibition is very broad. He may even refuse to testify at his trial (although he has the right to testify), and his refusal cannot be held against him by a judge or a jury. Thus, if the suspect was in some manner, directly or indirectly involved in the crime, the suspect may know more about the details of the criminal conduct than the prosecution knows or can learn – unless the prosecution decides to immunize the suspect (as discussed above) to obtain his information. In such instance, the suspect cannot then be prosecuted for the crime.

A defendant is also entitled to have an attorney assist him in his defense, and if he cannot afford an attorney, the court is obligated to appoint an attorney for him for this purpose. He or his attorney can hire investigators to interview potential witnesses – but without the use of a grand jury, he cannot force them to be interviewed or provide documents to him before trial. At trial, a defendant can issue subpoenas to compel witnesses to attend the trial and to testify and produce documents.

A party (usually) cannot compel the opposing party to tell what witnesses, or testimony, the other may have or plan

to use at trial. There are exceptions, most of which are beyond the scope of this article. One important exception that we will mention here is that the prosecution must give the defense any information that would tend to show that the defendant did not commit the crime, or that casts doubt on the veracity of a prosecution witness; and any written or recorded statements previously made that are relevant to the crime. Also, the defense has the right to examine the reports and findings of expert witnesses, and to challenge the authenticity and accuracy of documents to be used at trial.

Finally, the prosecution *and* the defense have the right to "cross" examine any person that the other party actually calls at trial. Thus, a witness' testimony, whether given on behalf of the prosecution or the defense, need not go unchallenged. We have now set up the game board. It is time to study the play.

The Game

The advantage of the defense is that it does not *have* to do anything. It can, if it chooses, "sit back" and force the prosecution to prove its case. If the prosecution cannot do this (and, in the United States, this means to prove its case beyond a reasonable doubt and to the unanimous satisfaction of a jury), then the defense will win. The burden is always on the prosecution to convince the judge and jury of the defendant's guilt.

So, when the element of "intent" is what must be proved, how does the prosecution evaluate its case without the pre-trial ability to interrogate the defendant? Let's take a clue from the science of engineering. When a new engineering design has been proposed for, say, a new plane or a bridge, the engineers create a "model" and then test it, perhaps in a wind tunnel or on a table where vibrations can be created and varied. Something similar is done by the prosecution before trial.

First, the prosecutor builds a model, which is a theory about what the defendant was thinking when he committed the crime. This is done through the collection of affirmative evidence, such as evidence that tends to show that the defendant said something later proven to be false, or that he engaged in conduct later shown to be misleading or deceptive. Investigators will interview witnesses, including (but not limited to) the victim. Documents written by or used by the defendant will be collected. A warrant may be used to enter a defendant's home or business office to search for and seize memoranda, diaries, recordings, or anything tangible that will cast light on what happened and about the defendant's state of mind at the time of the offense.

But a model built solely upon affirmative evidence is never enough (unless the defendant acknowledged his guilt in statements to someone who then provides them to the prosecution – a rarity).

Now, the grand jury becomes crucial. It allows the prosecution to test the model it has developed, trying out different justifications or good-faith explanations that a defendant might be able to use at trial. As a simple example, a possible defense might be that the suspect did in fact intend to fulfill a promise made to a victim, say to deliver goods that were paid for but never delivered. Notice that the simple failure to deliver goods as promised is a mere breach of contract by the defendant, but never intending to deliver the goods while collecting payment for them is fraud. The grand jury might ask questions of witnesses who knew *or would have had to have known* the preparations that the defendant had been making to deliver the goods. If no such preparation had been made – or such preparation was obviously a sham – then that defense has been eliminated.

The advantage of the defense is that it does not have to do anything. It can, if it chooses, "sit back" and force the prosecution to prove its case.

The defendant's prior practices might be explored, with the grand jury calling as witnesses other people who did business with the defendant and asking detailed questions of them. Did the defendant act differently in earlier transactions with them? If so, this will eliminate the defense that the defendant did not know how to properly execute the contract, and thus, his failure to do so here was not a mistake, or due to a misunderstanding, but rather done on purpose. Did the defendant need raw materials or components from suppliers to fulfill the contract? If so,

then the people who could have or would have supplied such products would be called to determine whether the defendant placed orders for those products for use on this contract. If not, then the defendant cannot claim that he was unable to complete the project due to unanticipated shortages. All alternate explanations that the defendant might offer to defeat the prosecution's theory of intent will be identified, tested, and, if the defendant is indeed guilty, eliminated.

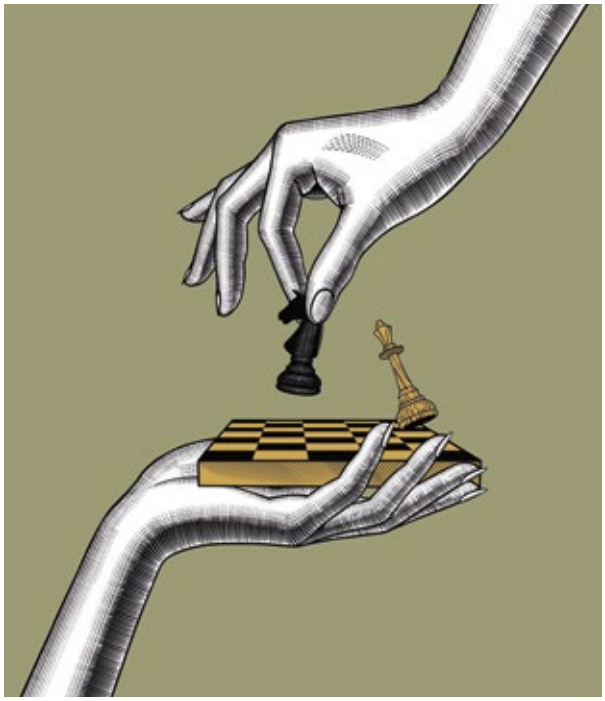
Another tool used in parallel with the grand jury is the use of expert consultants. These professionals are experienced in the field within which the fraud occurred, such as government contracting or commercial banking. They will be asked about the industry's standard business practices and to demonstrate whether the defendant's practices fell within or outside the norm of these standards. If the latter, then the defendant cannot say at trial that he acted in good faith because he dutifully followed normal business practices.

Similarly, a provision in a contract or a regulation might appear on its face to be ambiguous, and a defendant might claim that he interpreted the provision differently than the victim and the prosecution, doing so in good faith. An expert in the industry may be able to advise the prosecution (and later testify to a judge and jury) that the provision is a standard term, or a term-of-art, the intended meaning of which is known to everyone who bids on and executes these types of contracts or engages in these types of transactions.

An Example

Let me finish this article by telling you what I will call a "war story." It is from a case that I tried while I was prosecutor for the Department of Justice of the United States. I was trying an indictment of three officers of a defense contractor for defrauding their own company. The charges were serious, and the investigation had taken years. During opening statements, one of the defense attorneys told the jury why all three of the defendants were not guilty: there was a clause in a contract that allowed them to do what they did. When I heard this, I turned to my investigator who was with me and instructed him to leave the court room, to call the federal agency that administered this contract, and to have it send to us immediately the three particular employees who had been involved in that contract.

The next day, I started my case-in-chief by calling these witnesses, who contradicted the defendants' explanations. When it was time for the defense attorney to cross examine these witnesses, one of his first questions was, "When did the prosecutor first contact you about this issue on the contract?" Obviously, the attorney expected that the witness would say "last night," or "this morning," and the attorney would then argue to the jury that the prosecution had suggested the answers that the witness had just given.



Instead, the witness said, "When I got the subpoena, *a year and a-half ago*." The defense attorney stood silent for a very long time – which in a courtroom felt like ages. At that moment, the defense attorney realized that almost a year before he had been hired to represent his client, before he had heard about the case, before he had begun examining the evidence and evaluating the possible defenses, we had anticipated his defense, had called the critical witnesses to a grand jury, and were already prepared to meet his defense. Two of the three defendants were convicted by the jury. The third pled guilty on related charges before a different judge.

Conclusion

To win a fraud case, a prosecutor must be prepared for whatever claim a defendant might make – whatever he did – as to why he did not have the *intention* to commit a crime. The time to address these explanations is never when the trial has started. It must be done months or years before hand. The prosecutor must look at his "board," this being the circumstances of his case, where the evidence will be played, and the testimony will be given, and anticipate all the ways the defendant and his opposing counsel might use that evidence and testimony on that board to argue mistake or "lack of intent." He must out-think the other side. He must know how to play chess. ■

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Internal Investigations A Practical Guide

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La décision d'une entreprise d'ouvrir ou non une enquête interne, lorsqu'elle a découvert un acte répréhensible ou une faute potentielle, est loin d'être simple. Elle exige de peser soigneusement le résultat escompté, ainsi que les risques potentiels pour l'entreprise et son conseil d'administration. Pour garantir le succès de toute enquête interne, un certain nombre de facteurs doivent être pris en compte dès le début. Cet article vise à fournir un guide pratique des principaux problèmes et pièges à éviter.

La decisión de una empresa de iniciar una investigación interna, cuando ha descubierto una posible infracción o una mala conducta, no es en absoluto sencilla. Requiere sopesar cuidadosamente el resultado previsto, junto con los riesgos potenciales para una empresa, incluido su consejo de administración. Para garantizar el éxito de cualquier investigación interna, hay que tener en cuenta una serie de factores desde el principio. Este artículo pretende ofrecer una guía práctica de las principales cuestiones y escollos que hay que evitar.

Enforcement agencies and regulators worldwide increasingly look to companies to bear the burden of detecting and investigating economic corporate crime. A growing number of jurisdictions have sought to follow the approach in the United States ("US") of Deferred Prosecution Agreements ("DPAs"), which act as an alternative to criminal prosecution of a company (and in the US, also of an individual), with an agreement between a prosecutor and the entity that the prosecution will be suspended, if the company meets the requisite conditions.

Company boards are faced with a difficult dilemma when dealing with the discovery of both current and historic criminal conduct. Must they self-report the conduct? How much should they co-operate with the authorities, and 1) at what stage 2) in which jurisdictions, and 3) what form will that co-operation take, knowing that it is likely that the board itself will be subject to scrutiny? Will the board potentially be 'purged' as part of the process of co-operation? What employees and directors may, by the company's co-operation, be put at risk of criminal prosecution?

Much ink has been spilt on the consequences that may befall a corporation (and its directors) that discloses criminal conduct to an enforcement agency, with the aim of securing a DPA. Equally, corporations are faced by the sword of Damocles where they fail to do so; with the risk that the company might face lengthy, costly and damaging investigations (both reputationally and financially) by one or more prosecuting authorities, in potentially more than one jurisdiction. The fate of individuals facing criminal prosecution can have an equally damaging effect on the company.

Enforcement agencies and regulators have different approaches to internal investigations, affecting the steps a corporation should and can take and the timing of any self-report.

There is, of course, the risk that a corporation may, in hastening to co-operate, agree that its activities amount to misconduct where it would otherwise not be made out to the criminal standard of proof. This concern has been exposed in a number of cases in the United Kingdom ("UK"), following repeated failures by the UK Serious Fraud Office ("SFO") to prosecute individuals on the back of DPAs it has concluded with corporates.

It is in this context that company boards should carefully consider the issues before deciding whether or not to embark on an internal investigation, which can in and of itself be a difficult and disruptive process for the business. This article seeks to identify the key issues that need to be considered and any pitfalls to avoid.

A Successful Internal Investigation

The aim of an internal investigation will vary depending on the issue(s) at stake: whether this is conducting a risk

assessment of the business to ensure that its compliance procedures adequately target the financial crime risks it faces, remedying gaps in its systems and controls, or identifying whether there has been criminal conduct (and the extent of this), for which a self-report may or may not be appropriate or sufficient.

If the aim ultimately is to self-report – whether because this is a legal requirement, to secure leniency or to minimise financial and reputational harm – there are a number of factors that companies should consider at the outset:

- the objectives and scope of the internal investigation;
- the extent to which legal professional privilege applies to the internal investigation;
- the difficulties that arise from varied legal frameworks in the jurisdictions involved;
- securing and preserving data and any related data protection and privacy issues;
- whether it is appropriate and necessary to conduct employee interviews;
- whistle-blower protections and how to safeguard these;
- dealing with employment, disciplinary and regulatory issues of reference;
- what information to communicate and the timing of any communication;
- whether (and if so, how) a self-report may be required, to which prosecuting agency and when such a report should be made; and

- any necessary follow-on actions (e.g. does a self-report need to be made regarding potential money laundering offences, what is required in terms of remediation, including whether the company should review its compliance procedures and systems and controls).

Enforcement agencies and regulators have different approaches to internal investigations, affecting the steps a corporation should and can take and the timing of any self-report. A clear view of the potential outcome, which agencies and regulators may become involved, and in which jurisdictions, is therefore critical to ensuring that the internal investigation is successful. This is particularly the case in cross-border investigations, where it is important to identify the applicable domestic and foreign legislation that might be relevant either to the misconduct at issue or in connection with the investigative process itself.

The Purpose and Scope

Central to any successful internal investigation is understanding its purpose and scope, both at an entity and individual level.

First, it is necessary to determine the relevant corporate entity (or entities) within a business subject to investigation. This will assist not only in defining the 'client', but also in identifying who within the business has the requisite vested authority to oversee and formally instruct those conducting the investigation. Defining the specific corporation involved is a prerequisite to establishing the governance structure, preserving attorney-client legal privilege, and, most fundamentally, identifying the relevant legal framework that applies to the issues at hand.

Second, the early identification of employees and officers who may be involved in, or otherwise relevant to, the conduct under investigation, will be essential to maintain the integrity of the investigative process. For example, any senior employees and officers identified early on will need to be excluded from any involvement in the internal investigation, save to the extent that they may be called upon to provide witness accounts. This process will also inform any pre-emptive steps a company wishes to take, in connection with disciplinary procedures or evidence preservation; these are likely to play an important part in the internal investigation as well as any steps taken by law enforcement subsequently. A self-report will necessarily deliver up evidence against individuals, against whom enforcement action may follow. A company will therefore need to ensure that the internal investigation does not infringe upon an individual's rights to due process.

Third, understanding the nature of the alleged misconduct and where this is said to have occurred will shape the scope of the investigation, help establish its parameters, and identify any difficulties arising from the applicable laws of the relevant jurisdictions. Identifying conflicts of laws will help shape the approach that is likely to be taken both in terms of the internal investigation but also by the enforcement agency and/or regulator

in the relevant jurisdictions. Companies cannot be expected to conduct an audit of their entire operations (current and historic); defining the scope is central to a company taking a pragmatic approach and entering into an appropriate DPA.

Attorney-Client Legal Privilege

Rules and approaches to attorney-client legal privilege (or confidentiality, as known in some jurisdictions) vary considerably from country to country, but also from common law to civil law jurisdictions. In a cross-border investigation, a company should anticipate that there will be material differences. These differences will have an impact on how the privilege or confidentiality is established and maintained, whether it is possible to partially waive privilege or confidentiality (when reporting to, or cooperating with, enforcement agencies), how and whether it applies to foreign or in-house lawyers, and, in certain jurisdictions, whether it applies at all in the context of internal investigations.

To take one example, in the UK context there are two kinds of privilege: *legal advice privilege* and *litigation privilege*. In an internal investigation setting, there may be some overlap between the two. Legal advice privilege applies to communications (whether written or oral) that have been made between a client and a lawyer in confidence for the purpose of giving or obtaining legal advice or assistance. Litigation privilege applies to confidential communications (written or oral) between a client and their lawyer (or either a client or their lawyer and a third party) created for the dominant purpose of adversarial proceedings that are either pending, reasonably contemplated or existing at the time of the communication.

Under English law, the term "client" is interpreted narrowly. This is particularly so after the Court of Appeal decision in *Three Rivers District Council & Ors v Bank of England* [2003] EWCA Civ 474, which placed significant limitations on the scope and availability of *legal advice privilege* where the client is a corporate entity. In these circumstances, the client is deemed not to be the entire corporate entity but rather a narrow group of individuals employed by that entity who are charged with seeking and receiving legal advice on its behalf. For litigation privilege to apply, legal proceedings (which are adversarial rather than purely inquisitorial) must either be in existence or reasonably contemplated. Litigation privilege is unlikely to apply to investigations carried out before an enforcement agency is aware of a corporate entity's involvement in alleged wrongdoing.

Identifying the correct individuals within the legal entity is therefore key to preserving legal advice privilege in the UK context. Aside from the issue of whether the product of internal investigations will be protected by privilege, the enforcement agency may also seek to secure privileged documents and may try to pressurise companies into partially waiving privilege. The impact of a partial waiver in one jurisdiction may be highly prejudicial in another.

Securing Data and Document Preservation

Early on, a company should take steps to secure and preserve any documents that may be relevant to the issues under investigation. In general, difficulties will be mitigated if care is taken to determine what type of documentary evidence exists (whether hardcopy or electronic), where such documents are likely to be located (servers, storage, back-up tapes, in the jurisdiction or outside) and accessibility (whether the company owns or controls the data). A company can only secure and preserve information that belongs to the company.

Data protection and privacy laws can cause significant difficulties in the preservation and accessing of data. When gathering evidence across multiple jurisdictions, it is necessary to ensure that the internal investigation does not fall foul of stricter data protection and privacy laws. For example, significant penalties can be imposed for breaches of the European General Data Protection Regulation (2016/679) ("EU GDPR"). In addition, an increasing number of jurisdictions operate "blocking statutes", which prevent the removal of evidence from one jurisdiction to another; a breach of a blocking statute can be a criminal offence in and of itself.

The process of data and document preservation will usually include notifying any employees who might hold relevant information that documents must be preserved. The general principle should be to inform people on a limited basis. This must be weighed against the risk of tipping off employees. Similarly, any wider internal written communication about why the investigation is being conducted will not be privileged. It is therefore always safest to assume that whatever is communicated is at risk of becoming public.

Data protection and privacy laws can cause significant difficulties in the preservation and accessing of data.

Employee Interviews

Employee interviews give rise to a host of legal issues, many of which are further complicated in a cross-border investigation. These 'first accounts' are often a crucial part of an internal investigation, used to determine whether there has in fact been criminal conduct.

Even the question as to whether employees can be compelled to provide information in an interview is fraught with difficulty. In many jurisdictions employees will have a duty to cooperate and are likely to owe a duty of candour to their employer. However, an employee who has potentially been involved in unlawful conduct is also likely to be subject to a separate disciplinary process and

may be at risk of self-incrimination, with the product of any interview potentially being disclosed or disclosable to an enforcement agency. For example, in *United States v. Connolly* [2019 WL 2120523 (2 May 2019 S.D.N.Y.)] the employees of a bank sought a court order barring the U.S. government from using later the results of an interview given to corporate counsel at their criminal trial, on the grounds that this would violate their right against self-incrimination. Careful consideration will therefore need to be given to the steps a company takes before interviewing an employee, and what remedial steps can be taken against an employee who is either uncooperative or suspected of committing or believed to have committed some form of misconduct. Many jurisdictions also have specific whistleblower and anti-retaliation statutes that apply to employees that need to be considered as part of any internal investigation.

The importance of employee interviews is crucial not only for the company but also for any action taken by an enforcement agency. The 'first account' that a witness gives can be essential in assessing the relative weight of subsequent accounts and witness statements provided to the enforcement agency. In the UK, there have been diverging views on whether or not the notes of these 'first account' interviews are protected by attorney client privilege in the hands of the company conducting the internal investigation. The answer is likely to depend on whether or not litigation privilege can be said to apply, and this will be specific to each case.

Aside from whether these "first accounts" are protected by privilege; it is very likely that these will be of great interest to any enforcement agency. The UK's SFO was criticised by the High Court for failing to obtain the "first account"' of key witnesses from Sarclad, with whom it had concluded a DPA (*The Queen (AL) v Serious Fraud. Office & XYZ Ltd* [2018] EWHC 856). This was in the context of serious disclosure failings in the criminal prosecution of individuals accused of wrongdoing as a result. In other words, steps taken in the internal investigation may well create issues of, on the one hand, attorney-client privilege and whether it must be disclosed, and, on the other hand, what a court considers should be disclosed to ensure that a criminal defendant receives a fair trial. A company should therefore anticipate that an enforcement agency may well seek the disclosure of these as part of any settlement.

Reporting and Remediation

A company's decision whether to self-report will require, at an early stage, effective assessment of the risks and benefits of doing so. It will necessarily involve weighing up complex questions of fact and law. There are also considerations as to the timing of any report, as the approach taken by regulators and enforcement bodies even in the same jurisdiction can vary considerably. This question will also be influenced by a company's regulatory obligations; for example, if the company is listed or in the regulated sector. Where a corporation operates in multiple jurisdictions, any trigger of mandatory reporting obligations in one jurisdiction will require careful consideration of any corresponding mandatory or voluntary reporting in others – particularly in light of authorities' increasingly collaborative approach to (formal and informal) information-sharing.

The stakes for individuals are also high – particularly where a self-report will necessarily implicate individuals in potential criminal conduct, putting them at risk of criminal prosecution. It is noteworthy, that of the twelve DPAs concluded to date in the UK, none have yet resulted in convictions against individuals: a total of fourteen individuals have been charged; three await trial, six have been acquitted, the SFO offered no evidence against three, and two were found to have no case to answer.

Those working in companies regulated by the UK's Financial Conduct Authority (FCA) or the Prudential Regulation Authority (PRA) will also need to consider how the individual accountability regimes may provide those regulators with an easier route to regulatory enforcement action against them, in addition to any criminal and civil liability.

Finally, it would be remiss not to address the question of remediation and lessons learnt. This will be of critical importance to any enforcement agency considering a DPA or to a court in deciding the penalty. The board of the company will need to demonstrate that it has implemented such changes as required by the findings of any internal investigation. Companies that successfully demonstrate comprehensive remediation can significantly reduce penalties and may avoid criminal charges and a government-imposed monitor. In addition, and aside from these advantages, a company will want to address any shortcomings in its systems and controls to minimise further disruption and damage to the company in the future.

Conclusion

The key message for a company board is that there must be a clear objective for any internal investigation, and that it must carefully consider the expectations of any regulator or enforcement agency before commencing. Internal investigations that are viewed as prejudicing an investigation may well result in a company failing to secure a DPA, while exposing it to the very criminal proceedings it was seeking to avoid. ■

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Le procès des attentats du 13 novembre 2015 : réflexions sur un procès hors-normes

Matthieu CHIREZ **Thomas RICARD**

« Quand on veut rendre les hommes bons et sages, libres, modérés, généreux, on est amené fatalement à vouloir les tuer tous. »
Anatole France, *Les dieux ont soif.*

The trial for the 13 November 2015 attacks opened before the Paris *Cour d'Assises* on 8 September 2021. Beyond the emotion and the pain, this trial had required an unprecedented setup. While it is an extraordinary trial the overall objective is to apply justice "normally". This trial invites us to renew our approach on the relationship between *parties civiles* and Prosecutor, on evidence law and more generally on the adequacy between a procedural framework and the victims' expectations.

El juicio por los atentados del 13 de noviembre de 2015 se abrió ante la *Cour d'assise* de París el 8 de septiembre de 2021. Más allá de la emoción y del dolor, este juicio requirió una organización sin precedentes. Un juicio que se sale de lo normal cuando el objetivo es la justicia "normal". Este juicio invita a reflexionar sobre los vínculos entre las partes civiles y el ministerio público, sobre el derecho de la prueba y, más generalmente, sobre la adecuación entre un marco procesal y las expectativas de las víctimas.

Le procès des attentats du 13 novembre 2015 s'est ouvert devant la Cour d'Assises de Paris spécialement composée le 8 septembre 2021. Au-delà de l'émotion et de la douleur que ces attentats ont causé, ce procès a nécessité des moyens et une organisation sans précédent. Un procès en tous points hors du commun quand l'objectif est qu'une justice « normale » soit rendue : le premier impératif, qui a d'ailleurs été rappelé par le Président Jean-Louis PERIES lors de l'ouverture de l'audience, a été celui de respecter la « norme ».

Une salle d'audience temporaire a été construite au palais de justice, dans la salle des pas perdus, et 17 salles annexes ont été aménagées afin de permettre une retransmission des débats.

Cet article est écrit alors que nous sommes à mi-chemin des débats, lesquels doivent se prolonger a priori jusqu'au mois de juin 2021. Au-delà des aspects techniques exceptionnels mis en œuvre (**1**), ce procès a permis un changement procédural notable quant à l'articulation entre Parquet et parties civiles (**2**) et éclairé le débat sur le statut des « preuves de guerre » (**3**). Les délais écoulés et les contraintes du système français de l'instruction mènent à une réflexion sur l'efficacité du système français dans la prise en charge des victimes au stade de l'audience (**4**).

1. Un procès aux moyens exceptionnels : un procès hors normes ?

Les données brutes concernant le « procès du 13 novembre » soulignent en tous points le caractère exceptionnel des moyens mis en œuvre : 9 mois d'audience (soit *a minima* 144 jours d'audiences) ; 1 768 personnes (physiques et morales) constituées parties civiles ; environ 250 avocats (dont 33 en défense) ; un dossier de 542 tomes ; 22 accusés et une audience qui a permis, pendant quasiment un mois, les témoignages des parties civiles.

Une salle d'audience temporaire a été construite au palais de justice, dans la salle des pas perdus, et 17 salles annexes ont été aménagées afin de permettre une retransmission des débats. Dans la salle d'audience principale les colonnes de l'historique Palais de justice sont toujours apparentes, quelques statuts sont visibles, entourés de verre, manière d'instaurer une certaine continuité dans un décor ultra moderne.

L'accès aux débats est enfin permis, et c'est une première, via une « web radio » sécurisée, c'est-à-dire un système de diffusion sonore *via* une connexion internet. Les débats y sont retransmis avec un décalage de trente minutes et constituent une première en France où l'usage était de ne pouvoir suivre une audience qu'à condition d'y être en personne. Les conditions d'accès à la web radio sont très strictement encadrées et les sanctions sévères en cas de diffusion à des tiers[1]. Une ligne d'assistance psychologique a été mise en place.

2. Le rôle des parties civiles : vers une nouvelle articulation avec le Parquet ?

Le nombre des victimes pose une question importante dans un procès de cette ampleur : celui de le leur place. Dans la tradition française, les questions posées à un accusé font l'objet d'un ordre précis : Président / jurés, puis avocat de la partie civile, suivi de l'Avocat général et enfin de l'avocat de la défense. La difficulté, compte tenu du nombre d'avocats de parties civiles, a été de circonscrire cette parole pour qu'elle garde son efficacité – il a été constaté par le passé une prise de parole trop « longue » des conseils des parties civiles qui pouvait impacter sur la qualité de l'intervention du Parquet (ou que les thèmes abordés par les parties civiles viennent réduire *de facto* le champ des questions de l'accusation).

Il est apparu d'emblée nécessaire d'organiser, si ce n'est d'encadrer, la parole des avocats des parties civiles afin qu'ils secondent les représentants du parquet en intervenant « *au soutien de l'action publique* ». Il a donc fallu revoir l'ordre de parole et des questions posées par les parties au procès, afin que l'intervention des parties civiles se fasse après celle de l'Avocat général.

C'est une première en France et après plusieurs mois, cette solution paraît adaptée à un procès de cette ampleur. L'ordre dans la prise de parole a d'ailleurs fait l'objet d'un débat au début du procès, et ce qui fut l'occasion d'une relecture des textes applicables : si le seul impératif est que la défense ait la parole en dernier, l'article 309 du code de procédure pénale laisse au Président de la Cour d'Assises une grande latitude quant à l'organisation des débats, étant rappelé qu'il exerce « *la police de l'audience et la direction des débats* ». Surtout, l'article 312 du code de procédure pénale permet une lecture conforme à l'objectif poursuivi (et la chronologie est importante) puisqu'il est précisé que : « *le Ministère Public et les avocats des parties peuvent poser directement des questions à l'accusé, à la partie civile, aux témoins et à toutes les personnes appelées à la barre, en demandant la parole au Président* ». C'est notamment sur le fondement de ces éléments que l'ordre de prise de parole usuellement pratiqué a été revu, assurant ainsi une réelle cohérence au regard de l'ampleur du procès.

1. Selon l'article 802-3 du code de procédure pénale : « *[…] Le premier président de la cour d'appel peut décider, dans l'intérêt de la bonne administration de la justice […] d'une captation sonore permettant en différé, par un moyen de télécommunication garantissant la confidentialité de la transmission, aux parties civiles qui en ont fait la demande […]. Le fait d'enregistrer cette captation ou de la diffuser à des tiers est puni d'un an d'emprisonnement et 15000 d'amendes.* »

3. Les « preuves de guerre » : la nécessité d'un affinement du droit de la preuve français

Le procès du 13 novembre a été l'occasion d'un débat sur les « preuves de guerre »[2]. Il était demandé par la défense d'un des accusés le retrait de 6 pièces qui reposent toutes sur des éléments issus du renseignement administratif, les trois premières se rapportant à une « preuve de guerre » qui aurait été transmise par le Ministère de la Défense américain, les trois dernières émanant du renseignement pénitentiaire.

La question était de savoir si le renseignement administratif aurait été détourné de sa finalité : ne pouvant en principe avoir d'autre but que la préservation de l'ordre public et la prévention des infractions, il aurait été instrumentalisé pour la collecte de preuves d'infractions dans un cadre répressif, qui relève pourtant exclusivement de l'autorité judiciaire.

Les renseignements, selon la défense de l'accusé, auraient ainsi été versés dans une procédure judiciaire de manière irrégulière puisqu'ils n'étaient pas destinés à « orienter » les investigations judiciaires mais à se substituer à celles-ci.

La demande visant à écarter ces pièces a été rejetée par la Cour, sans qu'il soit préjugé de leur valeur probante. La Cour a constaté qu'aucune contestation n'avait été soulevée au moment du versement des pièces au dossier d'instruction, relevant qu'il résulte de l'article 427 code de procédure pénale que les infractions peuvent être caractérisées sur tout mode de preuve.

La « preuve de guerre » pose ainsi la question de l'intégrité, de la traçabilité et de la licéité d'une telle preuve, et de la nécessité de garantir un débat contradictoire quant à sa régularité et sa force probante. L'évolution du type de preuve appelle clairement à une évolution du droit français en la matière dans un souci de sophistication.

4. Un procès hors norme qui appelle à une évolution dans la prise en charge des victimes

A mi-chemin d'un procès dont on peut souligner jusqu'à aujourd'hui la rigueur et la sérénité, la longueur de l'instruction (plus de cinq ans) et la relative frustration quant aux véritables réponses que pourraient apporter l'audience (seul un membre du « commando » du 13 novembre a survécu) posent la question du rôle des victimes dans une telle procédure et de la prise en compte de leurs attentes. La possibilité d'une évolution anglo-saxonne (*impact statements* ou *inquests* notamment) ou d'une modification substantielle de la procédure d'instruction pour répondre de manière plus adaptée aux attentes des parties doit être envisagée. A la gravité des faits, le procès, sans que cela en constitue sa finalité, doit intégrer le processus de reconstruction des victimes. La justice doit en effet servir comme étape pour les victimes, et non pas être un obstacle. ■

Le procès du 13 novembre a été l'occasion d'un débat sur les « preuves de guerre ».

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2. Ces « preuves de guerre », recueillies sur le champ de bataille par les troupes de la coalition internationale, font partie des millions de traces abandonnées par les djihadistes (fichiers, téléphones, documents d'identité, ADN…) et mises à la disposition de plusieurs pays, dont la France, par les États-Unis, dans le cadre d'un vaste programme baptisé « Operation Gallant Phoenix ». Cette gigantesque base de données, située dans un data center en Jordanie, permet notamment de consolider certaines procédures judiciaires impliquant des djihadistes. De nombreux commentaires / *guidelines* existent sur le sujet, fournies par les Nations Unies, le DOJ américain, ou Eurojust. Sur cette dernière organisation, on pourra ainsi se référer Mémorandum d'Eurojust sur les preuves de guerre (septembre 2020) https://www.eurojust.europa.eu/document/eurojust-memorandum-battlefield-evidence.

Les restitutions par l'État français de biens culturels appartenant aux collections publiques

Judith BOUCHARDEAU

On the basis of the principle of the inalienability of French public collections, restitutions of cultural artefacts have been very rare. The vote for a specific and limited law has decided the viability of most of the claims addressed to successive French governments, revealing a long, difficult and emotional path until restitution. This is why the issue of provenance of the objects displayed in our museums is so important today, not only to maintain a fair and responsible market, but to explain under which conditions such objects entered in our public collections and help us understand why they should be returned in some cases.

Sobre la base del principio de inalienabilidad de las colecciones públicas francesas, las restituciones de objetos culturales han sido muy escasas. El voto de una ley específica y limitada ha decidido de la mayoría de las reclamaciones dirigidas a los sucesivos gobiernos franceses, revelando un largo, difícil y emotivo camino hasta la restitución. Por ello, la cuestión de la procedencia de los objetos expuestos en nuestros museos es tan importante hoy en día, no sólo para mantener un mercado justo y responsable, sino para explicar en qué condiciones entraron dichos objetos en nuestras colecciones públicas y ayudarnos a entender por qué deben ser devueltos en algunos casos.

Le 21 février 2022, a été votée la première loi autorisant la sortie d'œuvres des collections publiques pour les restituer à des particuliers, ayants droit de victimes juives spoliées avant et pendant la Seconde Guerre mondiale.

Quelques mois auparavant, avaient été restitués, à la suite d'une loi votée le 24 décembre 2020, au Bénin, 26 œuvres faisant partie du « Trésor de Béhanzin », prises de guerre du général Dodds lors de la conquête coloniale française du royaume du Dahomey en 1892, et au Sénégal, un sabre avec fourreau dit d'El Hadj Omar Tall.

Le point commun entre ces restitutions est la voie juridique retenue : celle d'une loi spécifique. Sans remettre en cause le principe d'inaliénabilité des collections nationales, la loi a permis d'autoriser ces œuvres à quitter le domaine public afin d'être restituées à leur légitime propriétaire.

Cet article propose de revenir sur le principe d'inaliénabilité des collections nationales, ainsi que sur le processus – long et douloureux – qui entoure les restitutions.

Retour sur le principe d'inaliénabilité applicable aux collections des musées.

En France, le principe d'inaliénabilité du domaine public existe depuis l'Ancien Régime. Il figure à l'article L.3111-1 du code général de la propriété des personnes publiques (CG3P) qui dispose que « *les biens des personnes publiques (…) qui relèvent du domaine public, sont inaliénables et imprescriptibles* ».

Le Conseil constitutionnel a confirmé la conformité à la Constitution de cet article dans une décision n° 2018-743 rendue le 26 octobre 2018 en réponse à une question prioritaire de constitutionalité, en rappelant que « *l'inaliénabilité prévue (…) a pour conséquence d'interdire de se défaire d'un bien du domaine public, de manière volontaire ou non, à titre onéreux ou gratuit. L'imprescriptibilité fait obstacle, en outre, à ce qu'une personne publique puisse être dépossédée d'un bien de son domaine public du seul fait de sa détention prolongée par un tiers* ».

Il résulte de ces dispositions « *qu'aucun droit de propriété sur un bien appartenant au domaine public ne peut être valablement constitué au profit de tiers* » et qu'un tel bien « *ne peut faire l'objet d'une prescription acquisitive en application de l'article 2276 du code civil*[1] *au profit de ses possesseurs successifs, même de bonne foi* ».

Selon l'article L.2112-1 du CG3P, font partie du domaine public mobilier les biens « *présentant un intérêt public du point de vue de l'histoire, de l'art, de l'archéologie, de la science ou de la technique* » soit notamment « *les*

1. « *En fait de meubles, la possession vaut titre. […].*»

archives publiques ; (…) les objets mobiliers classés ou inscrits (…) ; les collections des musées (…) ».

Depuis la loi n° 2002-5 du 4 janvier 2002 relative aux musées de France, le principe d'inaliénabilité des collections des musées est consacré à l'article L.451-5 du code du patrimoine qui prévoit que : « *Les biens constituant les collections des musées de France appartenant à une personne publique font partie de leur domaine public et sont, à ce titre, inaliénables. Toute décision de déclassement d'un de ces biens ne peut être prise qu'après avis conforme du Haut Conseil des musées de France.* »

La loi de 2002 introduisait ainsi une procédure de déclassement complexe, qui ne rendait possible, en tout état de cause, le déclassement par voie administrative que des biens d'une collection publique ayant perdu de leur intérêt historique, artistique, archéologique ou scientifique.

Autant dire une procédure inapplicable aux demandes de restitutions actuelles, alors que les biens concernés, qu'il s'agisse d'œuvres issues de pillages coloniaux ou d'œuvres spoliées à des victimes de persécutions antisémites, n'ont jamais perdu de leur intérêt de ce point de vue.

C'est dans ces conditions que le recours à la loi est apparu comme le meilleur moyen permettant de déroger, de manière limitée et circonstanciée, au principe d'inaliénabilité, ciment de notre législation patrimoniale. Ce principe n'ayant en effet pas valeur constitutionnelle, une loi spécifique permet de l'écarter.

Les restitutions intervenues par recours à la loi.

Précédemment, les parlementaires français ont eu recours à la loi dans deux cas portant sur des restes humains.

La loi du 6 mars 2002 est votée pour que « *(…) les restes de la dépouille mortelle de la personne connue sous le nom de Saartjie Baartman cessent de faire partie des collections de l'établissement public du Muséum national d'histoire naturelle.*» Née en 1789, la jeune femme appartient à l'ethnie sud-africaine des Hottentots. Exhibée comme bête de foire à partir de 1810, d'abord à Londres puis à Paris, en raison de fesses très larges et d'organes sexuels hors norme, elle décède à Paris en 1816 à l'âge de 27 ans. Son corps sera alors disséqué, certains de ses organes conservés dans des bocaux, et un moulage de son corps, réalisé par Cuvier, exposé au musée de l'Homme, place du Trocadéro à Paris, avec la reconstitution de son squelette. A la fin de l'apartheid en 1994, les « restes » de la Vénus Hottentote ont été revendiqués par l'Afrique du Sud et lui ont finalement été restitués par la loi n° 2002-323 du 6 mars 2002.

Le 19 octobre 2007, c'est une délibération de la ville de Rouen qui met le feu aux poudres en décidant de restituer à la Nouvelle-Zélande les têtes maories détenues par son musée d'histoire naturelle qui ne pouvaient appartenir au domaine public, l'article 16-1 du code civil prévoyant que « [l]e corps humain, ses éléments et ses produits ne peuvent faire l'objet d'un droit patrimonial ». Cette délibération est toutefois annulée par jugement du tribunal administratif, lequel est confirmé par arrêt de la cour administrative de Douai le 24 juillet 2008 sur le fondement du caractère inaliénable des collections publiques, qui ne pouvaient que faire l'objet d'une procédure de déclassement. C'est finalement la loi n° 2010-501 du 18 mai 2010 qui déroge à ce principe en décidant du retour de ces restes humains dans leur pays d'origine : « *Les têtes maories conservées par des musées de France cessent de faire partie de leurs collections, pour être remises à la Nouvelle-Zélande.* »

Enfin, la loi n° 2020-1673 du 24 décembre 2020 relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal est votée, trois ans après le discours du Président français Emmanuel Macron à Ouagadougou qui avait fait grand bruit en déclarant : « *je veux que d'ici cinq ans, les conditions soient réunies pour des restitutions temporaires ou définitives du patrimoine africain en Afrique* ».

En France, le principe d'inaliénabilité du domaine public existe depuis l'Ancien Régime.

Le Président de la République soulignait dans ce discours un enjeu majeur, celui de « *permettre aux Africains, en particulier à la jeunesse, d'avoir accès en Afrique et non plus seulement en Europe, à leur propre patrimoine et au patrimoine commun de l'humanité.* »

En effet, on découvrait alors, non sans stupeur, qu'environ 90 000 objets du patrimoine africain se situeraient en France, dont 70 000 au musée du Quai Branly, alors que les musées des pays africains n'en conserveraient qu'entre 3 000 et 5 000 objets[2].

Or, malgré ce constat éloquent, le vote de la loi portant sur un total de 27 objets (26 restitués au Bénin et 1 au Sénégal) a suscité d'importants débats sur lesquels il est intéressant de revenir.

En effet, si lors des différentes lois intervenues en matière de restitution, le vote a toujours été unanime, l'histoire des demandes de restitutions, quelle que soit la nature des œuvres concernées, révèle un processus long, et parfois douloureux.

Un long processus, qui fait débat.

Derrière toute restitution se cache un fort sentiment de dépossession et de perte, ainsi qu'une vision très « occidentale » des musées et de la conception de patrimoine culturel et artistique.

2. Rapport remis le 23 novembre 2018 par Benédicte Savoy, historienne de l'art française et Felwine Sarr, écrivain et économiste sénégalais, intitulé : « *Restituer le patrimoine africain : vers une nouvelle éthique relationnelle.* »

Derrière toute restitution se cache un fort sentiment de dépossession et de perte, ainsi qu'une vision très « occidentale » des musées et de la conception de patrimoine culturel et artistique.

Qu'il s'agisse de la dépouille de Saartjie Baartman ou de biens culturels africains, la même crainte est exprimée de vider les collections des musées en ouvrant la boîte de pandore des demandes de restitutions.

C'est flagrant s'agissant du patrimoine africain, pour lequel il est sans cesse rappelé, comme pour rassurer, qu'il ne s'agit pas de restituer l'ensemble des œuvres africaines présentes dans les collections publiques et privées françaises, mais d'examiner au cas par cas les demandes, qui sont nombreuses de la part d'autres pays africains (Madagascar, Côte d'Ivoire, Éthiopie, Mali et Tchad).

Et si l'intérêt d'une loi-cadre a été évoqué et souhaité lors du vote de la loi du 21 février dernier concernant les restitutions de biens spoliés, le débat sur la restitution des biens coloniaux complique incontestablement l'avancée de telles discussions.

Les restitutions votées par la loi du 24 décembre 2020 se sont, en outre, inscrites dans un contexte global de renforcement de la coopération culturelle et patrimoniale entre la France et l'Afrique, avec la mise en place de programmes de partenariat (formation des experts, création de filières professionnelles, échanges d'expertises, soutien financier à la création ou à la rénovation de musées, etc.).

Au Bénin, les 26 pièces du « Trésor de Béhanzin » ont vocation à être exposées dans un nouveau musée des amazones et des rois du Danhomè lorsque sa construction, soutenue par l'Agence Française de Développement, sera achevée.

A l'évidence, l'objectif poursuivi par la France d'engager un dialogue étroit avec ses partenaires africains dans les domaines culturel et patrimonial est louable, tout autant que celui d'apporter son aide financière et son expertise pour la réhabilitation des musées africains, l'amélioration des conditions de conservation et de rénovation, et la formation des acteurs culturels du continent. On ne peut toutefois manquer de s'interroger sur la légitimité à en faire une condition aux restitutions.

En effet, la question du devenir après leur restitution de ces œuvres, qui étaient pour la plupart des objets de cultes ou des objets usuels, a soulevé deux sortes de questions, sur lesquelles il est intéressant de revenir.

Premier axe de la discussion : dans quelles conditions ces objets vont-ils être exposés et conservés ? L'un des arguments avancés par les opposants à la restitution est celui de l'absence de musées dignes de ce nom en Afrique, voire de l'absence de conception patrimoniale tout court.

Ces arguments très contestés et contestables sont révélateurs d'une vision occidentale dominante des musées. Tout le monde s'accorde pour dire que les œuvres doivent circuler, que les musées « donnent à voir le monde »[3] dans sa diversité, et que rien ne serait plus triste qu'un musée qui n'exposerait que des œuvres nationales créées par des artistes locaux. On ne peut toutefois nier que si les œuvres du patrimoine africain exposées dans nos

3. Discours du Ministre de la culture, Franck Riester, 4 juillet 2019 à l'Institut de France.

musées sont un « patrimoine commun de l'humanité », pour le moment, nous en sommes les seuls « gardiens du temple » en décidant de la manière dont ce patrimoine doit être traité et dont il doit circuler.

On admet qu'un objet quitte le musée du Quai Branly pour qu'il retrouve un écrin équivalent à Dakar ou Abomey, mais on admet beaucoup plus difficilement qu'il quitte les vitrines de nos musées pour retrouver l'usage rituel, de pouvoir ou religieux qui était le sien.

Et c'est là un deuxième pan intéressant de la discussion. A l'occasion des débats sur la restitution de son patrimoine à l'Afrique, des voix se sont élevées pour demander à réfléchir à un processus qui permette à ces objets de retrouver leur fonction dans leur pays d'origine, ou d'en trouver de nouvelles, sans nécessairement passer par la voie d'une muséification.

Après tout, ces objets n'ont pas été pris dans des musées, mais le plus souvent dans des palais, des villages, à des communautés religieuses, politiques ou familiales et l'idée a ainsi été évoquée que vouloir absolument les remettre dans des musées similaires aux nôtres était très (trop) occidentale. D'autres formes de retours possibles ont été souhaitées, en rappelant qu'il appartenait, en tout état de cause, et à partir du moment où ces objets étaient restitués, de laisser les pays d'origine décider de leur sort.

Quelles que soient les raisons avancées, la passion que soulèvent les débats autour des restitutions démontre qu'il s'agit d'un enjeu majeur pour permettre à un pays, une communauté, une famille de retrouver une partie de sa mémoire et de son identité.

Alors, comment avancer ?

Apprendre pourquoi certaines œuvres ne nous appartiennent pas : l'importance de la provenance.

L'histoire des restitutions montre l'importance de la provenance.

En connaissant l'histoire d'un objet, sans se limiter à sa nature, son authenticité ou le nom de son auteur, mais en élargissant cette connaissance à son origine, les conditions de son acquisition et son parcours avant qu'il ne finisse dans les vitrines ou sur les murs de nos musées, on comprend pourquoi certains biens, dès lors qu'ils ont été volés, pillés ou illicitement saisis, ne nous appartiennent pas et doivent être restitués.

Les actes de restitution doivent donc s'inscrire dans un processus rigoureux de recherches croisées avec les pays d'origine, afin de retracer l'itinéraire des œuvres aujourd'hui exposées et conservées dans nos musées.

La restitution alors n'apparaîtra plus comme un « acte de repentance » ou de pénitence, ou comme le « fait du prince », mais comme s'inscrivant dans l'histoire d'une œuvre d'art ou d'un objet.

C'est la raison pour laquelle la question de la provenance apparaît aussi importante aujourd'hui, aussi bien pour maintenir un marché responsable que pour expliquer comment les objets aujourd'hui exposés dans nos musées y sont arrivés et dans quelles conditions ils ont été acquis. ■

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Los desafíos de la criminalidad organizada en Latinoamérica

German C. GARAVANO

Organized crime in its different forms and scopes has accompanied the development of different communities for at least the last few centuries. Today, however, a more integrated and communicated world and region have allowed for the consolidation and strengthening of this phenomenon, which in our region is a cause for concern.

Le crime organisé, sous ses différentes formes et étendues, a accompagné le développement de différentes communautés depuis au moins les derniers siècles. Aujourd'hui, un monde et des régions plus intégrés et interconnectés conduisent à consolider et renforcer ce phénomène qui, dans notre région, est devenu inquiétant.

Después de atravesar el apogeo y exposición de los Carteles de Narcotraficantes, la criminalidad organizada ha persistido y crecido en muchos casos por debajo de la superficie. Ya no se trata solo del tráfico de drogas, sino que la trata de personas, la corrupción, el contrabando, los ciberdelitos, y en definitiva diversos y a veces sofisticados mecanismos de lavado de dinero han permitido el avance de organizaciones delictivas que operan en varios países al mismo tiempo o al menos de forma interrelacionada.

Se trata como vemos de un catálogo de delitos que encuentran diversas tipificaciones en los códigos penales de los países de Latinoamérica, incluso estas caracterizaciones generales no se corresponden con los tipos penales en sí, sino que la corrupción o el medio ambiente como tales no están aun específicamente regulados. En algunos países, el medio ambiente lo protegen leyes contra el tráfico de especies y la violencia contra los animales o la regulación de los residuos peligros. En el mismo sentido, la corrupción no aparece como tal en muchos ordenamientos sustantivos, sino que se incluye delitos contra la administración pública y ahí se regulan los incumplimiento o abusos de los servidores públicos, las estafas que afectan al estado o los conflictos de intereses y las negociaciones incompatibles con la función pública. Esto conlleva una necesidad de actualizar muchas de estas regulaciones y definir correctamente los bienes jurídicos que la comunidad quiera proteger.

En muchos casos el provecho de los delitos cometidos en un país, se "invierten" en otro.

Ello, por cuanto cada vez más el fenómeno del delito no es individual, sino colectivo. Podríamos decir que difícilmente hoy una persona actúa en forma aislada. Las organizaciones delictivas toman control del territorio o de los "mercados" relacionados con los delitos. Esas mismas organizaciones dan cobertura y se encargan de la administración del "negocio", especialmente, en lo referente al lavado del dinero proveniente del mismo.

Es decir, hoy en Latinoamérica debemos enfrentarnos cada vez menos a delincuentes individuales y más a poderosos organizaciones, que cuentan con estructuras legales, procuran relacionarse y penetrar en el propio estado para asegurarse su impunidad, y en definitiva la continuidad del "negocio".

Estas organizaciones, por otra parte, operan en diversas jurisdicciones de un mismo país o en varios estados nacionales. En muchos casos el provecho de los delitos cometidos en un país, se "invierten" en otro. La utilización de herramientas cada vez más sofisticadas de lavado de dinero dificulta la identificación de los fondos provenientes del delito y el accionar de estas organizaciones criminales, pese al esfuerzo de los países por cumplir con las evaluaciones, recomendaciones y directivas del GAFI (Grupo de Acción Financiera y el grupo Regional GAFILAT).

Los numerosos esfuerzos que se están realizando para hacer frente a este fenómeno se realizan desde diversas organizaciones regionales. Por un lado, la Organización de Estados Americanos a través de sus áreas de Cooperación Internacional y de Seguridad impulsan acciones regionales para fortalecer las capacidades de los países de la región y generar información relevante para el desarrollo de políticas públicas.

En el marco de la OEA (Organización de los Estados Americanos), también funciona el CEJA -Centro de Estudios de Justicia de las Américas- que bajo las directivas de la REMJA -Reunión de ministros de Justicia de las Américas- trabaja para la mejora de la cooperación y el funcionamiento de los sistemas de Justicia de América.

Como mencioné previamente, el GAFILAT como organismo regional trabaja con las unidades de información o inteligencia financiera (UIFs) de los países para la coordinación, cooperación y cumplimiento de las directivas del GAFI sobre lavado de dinero.

La COMJIB, es decir, la Cumbre de ministros de justicia de Iberoamérica, impulsa el trabajo de los Ministerios de Justicia, coordina también la cooperación judicial de la región a través de la IBERED y genera informes y documentos de relevancia para hacer frente a éste y otros procesos que afectan a los países de la región.

La Cumbre Judicial Iberoamericana reúne a Cortes y Consejos de la Judicatura de los países de Iberoamérica, llevando adelante definiciones y compromisos sobre temas que hacen al mejor funcionamiento de los poderes judiciales, desde sistemas informáticos hasta políticas de género y acceso a justicia.

Por su parte la AIAMP, que es la Asociación de Ministerios Públicos de Iberoamérica, hace lo propio con los ministerios públicos, es decir las fiscalías de toda la región que han adquirido en las últimas décadas una gran relevancia por la implantación de sistemas adversariales en los procesos penales. Es decir, son los fiscales quienes llevan adelante las investigaciones criminales. Dentro de esta organización funcionan numerosos grupos de trabajos que reúnen a las fiscalías anticorrupción, las que protegen el medioambiente, las especializadas en cuestiones de género, e incluso las oficinas o áreas encargadas de la cooperación judicial entre fiscalías.

Con relación a la criminalidad compleja y la investigación de casos de corrupción, entre otros, han trabajado fuertemente teniendo en consideración la Convención de las Naciones Unidas contra la Corrupción, adoptada en Nueva York, el 31 de octubre de 2003, lo que les permitió lograr, entre otras cosas, el acuerdo de cooperación interinstitucional de la AIAMP suscripto en la Ciudad de México el 6 de septiembre de 2018 y las guías publicadas para su uso. Esto sumado al trabajo realizado por la red de fiscales especializados contra la corrupción que desarrollaron una serie de actividades para el fortalecimiento de las investigaciones patrimoniales y la cooperación entre los distintos ministerios públicos que componen la AIAMP.

Una nueva gestión y organización judicial basada en estándares de eficiencia y calidad ha sido un elemento central en muchas de las experiencias valiosas [...].

Todas estas organizaciones de segundo grado que reúnen a los poderes ejecutivos (en muchos casos representados por los Ministerios de Justicia y/o Seguridad), los poderes judiciales (Cortes y Consejos de la Judicatura o Magistratura) y ministerios públicos visualizan la problemática planteada y la necesidad de hacer frente a ella. Lo mismo sucede con otras organizaciones que reúnen fuerzas de seguridad.

El trabajo de estas organizaciones es apoyado y muchas veces financiado por proyectos de cooperación bilateral o multilateral. En esta línea podemos considerar los programas de la Unión Europea como Eurosocial y más específico el PACcTO (liderado por las agencias de cooperación de España, Portugal, Italia y Francia) o el nuevo lanzamiento de *Team Europe* (Equipo Europa). De igual modo el Banco Mundial, el Banco Interamericano o la vieja CAF, hoy Banco de Desarrollo de América Latina. Se suman muchas veces agencias de cooperación de los EEUU, Canada, Japón, Alemania, entre otras y fundaciones u organizaciones Internacionales (*Open Society, Friederich Neuman, Konrad Adenauer*, etc).

Estos esfuerzos, que permiten reseñar numerosas experiencias exitosas a lo largo y ancho de la región, debieran multiplicarse y coordinarse. Existe una posibilidad enorme de lograr cada vez mejores resultados, mediante una mayor coordinación y planificación de los proyectos desarrollados. De igual modo, identificar y difundir esas

experiencias exitosas, medidas y evaluadas, procurando su reproducción en aquellos lugares y condiciones que permitan su desarrollo.

El acceso a justicia y las experiencias desarrolladas en Argentina con los centros de acceso a justicia y asistencia a las víctimas permiten, al igual que las experiencias de justicia restaurativa y solución alternativa de conflictos, una forma para lograr la pacificación social y el válido ejercicio de derechos por parte de la comunidad. Ambas acciones, junto con la implantación del juicio por jurados permiten que la sociedad se integre al sistema de justicia y se reconcilie con él, logrando mayores niveles de cohesión.

Una nueva gestión y organización judicial basada en estándares de eficiencia y calidad ha sido un elemento central en muchas de las experiencias valiosas a la hora de enfrentar casos complejos y de criminalidad organizada. Sistemas de gestión de casos, mayores capacidades de litigación y organización de audiencias y jurados, capacitación especializada son ejemplos concretos de como transitar eficazmente estos procesos.

El fortalecimiento de la investigación de los fiscales y el desarrollo de fiscalías especializadas con nuevos esquemas de organización como el que funciona en las Fiscalías de la Ciudad de Buenos Aires, Salta y otras jurisdicciones de Argentina, o en Chile, Colombia, Brasil, entre muchas, permite lograr mayores estándares de enjuiciamiento criminal de casos complejos. Esto rompe la noción de impunidad y permite abrir una vía de trabajo sólida contra la criminalidad organizada. El ejemplo de la fiscalía contra el cibercrimen de la Ciudad de Buenos Aires permite mostrar muchas de estas herramientas en una única experiencia.

Las investigaciones en materia de narcotráfico, trata de personas, cibercrimen, corrupción, medioambiente, terrorismo, contrabando y tráfico de armas y bienes deben necesariamente complementarse con profundas pesquisas económicas que permitan identificar los bienes y el flujo de fondos de estas bandas criminales para lograr su neutralización mediante el embargo y decomiso del dinero proveniente del delito. Solo una efectiva inmovilización y secuestro del dinero aumentará los costos de operación de estas organizaciones y permitirá eliminarlas.

En este sentido, se necesita profundizar la línea de trabajo del GAFI promovida por la presidencia argentina en 2018 para lograr un trabajo coordinado entre reguladores, UIFs y Justicia.

Muchos son los ejemplos que nos permitirán fortalecernos y hacernos más efectivos para enfrentar los desafíos que implica la criminalidad organizada en sus distintas facetas, por ello es tan relevante proseguir y profundizar el trabajo que vienen realizando las diversas organizaciones y agencias al largo de la región.

Nuestros países comparten problemáticas delictivas comunes provocada por organizaciones delictivas transnacionales que, utilizan el lavado de dinero, para asegurar su provecho económico y los recursos necesarios para la operación criminal, afectando a la región en su conjunto.

Por ello, debe desatacarse también la importancia de la cooperación jurídica internacional como una herramienta fundamental en la investigación, persecución penal y juzgamiento de los delitos vinculados a la criminalidad organizada en todas sus formas, dándole en consecuencia un rol esencial a ella. Los ministerios públicos o fiscalías con la ayuda de las autoridades centrales de cooperación y las fuerzas de seguridad deberán liderar estos procesos.

Nuestra comunidad regional, enfrenta (y es lo que surge de las estadísticas de homicidios de las últimas décadas) los mayores desafíos para hacer frente a la criminalidad organizada. Nuestras fuerzas de seguridad, fiscalías y juzgados tendrán cada vez una mayor responsabilidad para lograr desarticular esas bandas criminales impidiendo que sigan dañando a la comunidad.

Para ello necesitan de la cooperación y apoyo de las autoridades ejecutivas: mediante mensajes claros y contundentes contra el delito; de los organismos regionales y sus donantes para contar con más elementos y organizaciones mejor gestionadas y preparadas para obtener resultados satisfactorios para la sociedad.

Los desafíos por delante son muchos, en un contexto cada vez más complejo. Se debe avanzar en la dirección señalada, para no permitir un crecimiento del crimen organizado, que sin dudas afectará la vida de todos los habitantes y a los propios sistemas democráticos de gobierno.

Por el contrario, definir políticas de estado contra la criminalidad organizada y expandir y consolidar la cooperación regional en la materia, permitirán progresivamente ir reduciendo y controlando este fenómeno delictivo. Contamos con las experiencias y capacidades para lograrlo y la población espera de sus líderes un compromiso ineludible para lograr sociedades más justas, inclusivas y pacíficas. ■

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Les sanctions pénales en matière de corruption : visions internationale, communautaire (UEMOA) et nationale (Sénégal)

Fatou DIOP SALL

Corruption is a recurrent phenomenon in the world, affecting all sectors of activity. If some countries are moderately affected by this scourge, other countries are in the Red Zone, i.e., very affected. The United Nations, through the Merida Convention, has taken the first steps in the fight against corruption. Regional and sub-regional organizations have followed suit, notably the WAEMU. And it is on the basis of these measures that each nation has provided for its own criminal sanctions in the fight against corruption.

La corrupción es un fenómeno recurrente en el mundo, que afecta a todos los sectores de actividad. Si algunos países están moderadamente afectados por esta lacra, otros se encuentran en la zona roja, es decir, muy afectados. Las Naciones Unidas, a través de la Convención de Mérida, han dado los primeros pasos en la lucha contra la corrupción. Las organizaciones regionales y subregionales han seguido su ejemplo, especialmente la UEMOA. Y es a partir de estas medidas que cada nación ha previsto sus propias sanciones penales en la lucha contra la corrupción.

Introduction

La corruption est un phénomène mondial dont aucun pays au monde ne peut prétendre s'affranchir totalement. Cependant, sa forme, sa portée et son impact varient considérablement d'un pays à un autre. Pour les pays de la région de la Communauté Economique des États de l'Afrique de l'Ouest (CEDEAO), la corruption est perçue à tous les niveaux et est souvent liée à d'autres infractions telles que, notamment, le trafic d'êtres humains, le trafic de drogue, le trafic de médicaments, le blanchiment de capitaux, le financement du terrorisme etc. Malgré les difficultés à éradiquer ces fléaux, le Sénégal s'est engagé à lutter efficacement contre les pratiques corruptives sous toutes leurs formes.

En doctrine, la corruption est définie comme l'utilisation, le détournement, la perversion d'un pouvoir reçu par délégation à des fins privées, comme l'enrichissement personnel ou celui d'un tiers. Elle consiste pour toute personne qui bénéficie d'un pouvoir de décision, à faire ou bien à faciliter quelque chose, du fait de sa fonction, en échange d'une promesse, d'un cadeau, d'une somme d'argent, d'avantages divers. Elle conduit en général à l'enrichissement personnel du corrompu ou à l'enrichissement de l'organisation corruptrice.

De façon générale, la corruption concerne aussi bien le secteur public que le secteur privé, car elle implique souvent une transaction entre acteurs des secteurs public et privé dans laquelle des biens publics sont indûment convertis en avantages privés. Ces avantages peuvent être de l'argent ou prendre la forme de protections, traitements de faveur, recommandations, promotions ou privilèges. Dans la plupart des cas, les transactions sont secrètes.

Il est donc pertinent d'analyser les sanctions pénales en matière de corruption sur un plan triptyque à savoir : d'abord au niveau international, ensuite au niveau communautaire (Union Economique et Monétaire Ouest Africaine – UEMOA) et enfin au niveau national (Sénégal).

Au niveau international

Sur le plan international, les principaux instruments de la lutte contre la corruption sont :

- le protocole de la Communauté économique des États de l'Afrique de l'Ouest (CEDEAO) sur la lutte contre la Corruption, adopté le 21 décembre 2001 et ratifié par la loi 2015-16 du 6 juillet 2015. Son article 10 *Sanctions et Mesures* dispose : « *1. Chaque État Partie devra prévoir des sanctions et mesures effectives et dissuasives proportionnées à l'infraction, incluant, lorsqu'elles sont commises par des personnes physiques, des sanctions privatives de liberté donnant lieu à l'extradition. 2. Chaque État Partie s'assurera qu'en cas de responsabilité établie en vertu de l'Article 11 ci-dessous, les personnes morales sont passibles de sanctions effectives, proportionnées à l'infraction et dissuasives de nature pénale ou non pénale, y compris des sanctions pécuniaires.* » ;

- la Convention de l'Union africaine sur la prévention et la lutte contre la corruption, adoptée le 11 juillet 2003 et ratifiée par la loi 2007-09 du 15 février 2007 : cette convention ne prévoit pas de sanction en matière de corruption. Elle se limite à la définir et à caractériser l'infraction, tout en laissant de larges prérogatives aux États membres pour prendre les dispositions nécessaires en matière de répression ;
- la Convention des Nations Unies contre la corruption (CNUCC), adoptée le 9 décembre 2003 à Mérida -Mexique et ratifiée par la loi 2005-11 du 3 août 2005, entrée en vigueur le 14 décembre 2005 : tout comme la convention de l'Union africaine susvisée, elle prévoit en son article 26.4 que : « *Chaque État Partie veille, en particulier, à ce que les personnes morales tenues responsables conformément au présent article fassent l'objet de sanctions efficaces, proportionnées et dissuasives de nature pénale ou non pénale, y compris de sanctions pécuniaires* ». L'article 30 relatif aux *Poursuites judiciaires, jugement et sanctions* poursuit que « *1. Chaque État Partie rend la commission d'une infraction établie conformément à la présente Convention passible de sanctions qui tiennent compte de la gravité de cette infraction.* » et le point 4 de ce même article renchérit : « *S'agissant d'infractions établies conformément à la présente Convention, chaque État Partie prend des mesures appropriées, conformément à son droit interne […].* »

L'Initiative pour le recouvrement des avoirs volés, engagée par la Banque Mondiale en partenariat avec l'Office des Nations Unies contre la drogue et le crime, a activement contribué au gel ou à la récupération de fonds volés […].

Ces différents instruments universels, régionaux et communautaires de lutte contre la corruption visent essentiellement la mise en place des mesures suivantes :

- élaboration de lois et règlements qui découragent la corruption des agents publics nationaux et étrangers ;
- élimination des opportunités de corruption dans les procédures administratives et financières;
- déclaration des biens et des revenus d'une catégorie d'agents publics ;
- création d'organismes indépendants et spécialisés de lutte contre la corruption ; protection de la liberté de la presse et du droit à l'information ;
- renforcement de la prévention de la corruption et des infractions assimilées à travers, notamment, l'élaboration de Codes de conduite pour les agents publics, l'encadrement du financement des partis politiques et des associations, l'accès du public à l'information, la protection des dénonciateurs, etc. ;
- renforcement de la répression à travers, principalement, l'incrimination de la corruption et des infractions assimilées dans les secteurs public et privé, la fixation de délais de prescription longs et l'application de sanctions dissuasives ;
- participation de la société civile et des organisations non gouvernementales (ONG) aux efforts de prévention et de détection des actes de corruption ;
- intégration des principes et règles de prévention de la corruption et infractions assimilées dans les programmes de formation des structures de formation et de perfectionnement des agents publics.

La ratification et la transposition de ces instruments internationaux dans le droit positif sénégalais ont permis de renforcer le dispositif institutionnel de lutte contre la corruption avec la réforme des structures de contrôle et la mise en place de structures spécialisées.

Sur le plan pratique, on peut prendre les exemples de lutte contre la corruption dans les projets financés par la Banque Mondiale.

Selon les données de la Banque Mondiale, entre 1999 et 2019, 956 entreprises et personnes ont été exclues des financements de la Banque, et 421 exclusions croisées avec d'autres banques multilatérales de développement ont été appliquées par la Banque Mondiale durant la même période, ce qui signifie qu'une entité qui vole une institution financière internationale est sanctionnée par les autres pour les mêmes actes. De plus, l'Initiative pour le recouvrement des avoirs volés, engagée par la Banque Mondiale en partenariat avec l'Office des Nations Unies contre la drogue et le crime, a activement contribué au gel ou à la récupération de fonds volés pour un montant que la Banque Mondiale indique être largement supérieur à un milliard de dollars. Dans le cadre de ce partenariat, la Banque Mondiale et l'Office des Nations Unies contre la drogue et le crime travaillent avec les pays en développement et les centres financiers afin d'essayer d'empêcher le blanchiment des produits de la corruption, et faciliter la restitution des avoirs volés.

L'Initiative pour le recouvrement des avoirs volés a organisé en 2017 un forum sur le recouvrement d'avoir au Nigéria au Sri Lanka, en Tunisie… Elle soutient actuellement l'établissement de bureaux de gestion et de recouvrement d'avoir en Ouganda, en Tanzanie, en Molavie et en Ukraine.

Au niveau communautaire (UEOMA)

La directive n° 01/2009/CM/UEMOA portant code de transparence dans la gestion des finances publiques au sein de l'UEMOA dans son chapitre VII sur l'intégrité des acteurs prévoit en son article 7.3 que « *Des sanctions, prononcées dans le respect des règles de l'État de droit, sont prévues à l'encontre de tous ceux qui, élus ou fonctionnaires, ont à connaître ou à gérer des deniers publics. La non-dénonciation à la justice de toute infraction à ces*

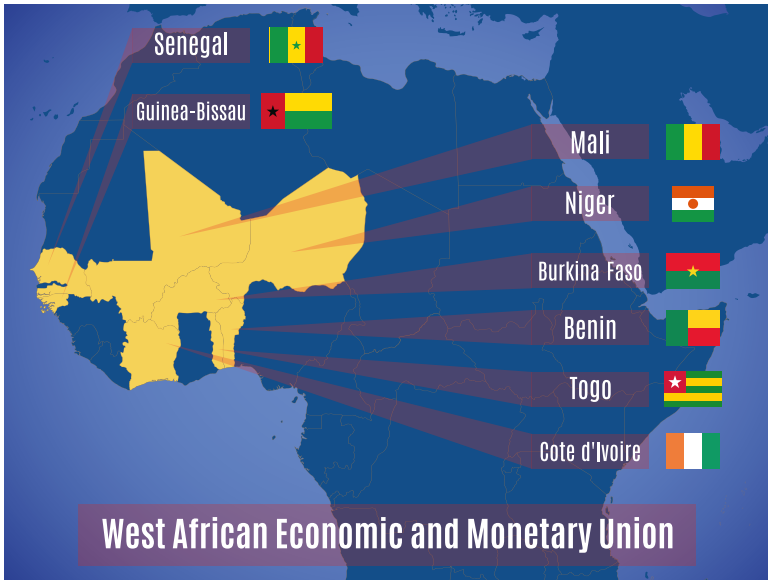
règles par un agent public qui en aurait eu connaissance est sanctionnée pénalement. »

De son côté, la directive n° 02/2015/CM/UEMOA relative à la lutte contre le blanchiment de capitaux et le financement du terrorisme dans les états membres de l'UEMOA dispose en son article 17 intitulé *Sanctions* que « *Les États membres veillent à ce que des sanctions efficaces, proportionnées et dissuasives s'appliquent aux auteurs de violation des dispositions visées aux articles 12 à 16 de la présente Directive.* » En effet, il est important de noter que les directives ou normes communautaires donnent des définitions et qualifications pour les infractions mais ne prévoient pas spécifiquement de sanctions, laissant le plus souvent la latitude aux États membres de prévoir des sanctions concernant ces infractions. C'est en ce sens que la directive n° 02/2015/CM/UEMOA précitée, dans son Chapitre III, *Mesures coercitives,* du Titre V relatif à la *Répression du blanchiment de capitaux et du financement ; terrorisme,* et plus précisément à l'article 113 « Peines applicables », prévoit que **«** *Les États membres prennent, dans le délai prévu à l'article 119 de la présente Directive, les dispositions législatives ou réglementaires relatives, d'une part, aux sanctions pénales applicables à toute personne physique ou morale ayant commis ou tenté de commettre une infraction de blanchiment de capitaux ou de financement du terrorisme et, d'autre part, aux mesures de confiscation des sommes d'argent et tous autres biens, objet desdites infractions.* »

Au niveau national

Au niveau national, la loi constitutionnelle n° 2016-10 du 5 avril 2016 portant révision de la Constitution du Sénégal du 22 janvier 2001 rappelle l'attachement du Sénégal à la transparence dans la conduite et la gestion des affaires publiques ainsi qu'au principe de bonne gouvernance. Le Sénégal s'est inspiré des normes internationales ratifiées et des référentiels élaborés au niveau africain pour adapter le cadre juridique de la lutte contre la corruption aux nouvelles formes de la criminalité financière, et doter le pays de règles de transparence. A cet égard, on peut citer notamment :

- la loi n° 61-33 du 15 juin 1961 relative au statut général des fonctionnaires, modifiée par la loi n 2011-08 du 30 mars 2011 ;
- la loi n°2012-22 du 27 décembre 2012 portant Code de Transparence dans la Gestion des Finances publiques ;
- la loi n° 2012-30 du 28 décembre 2012 portant création de l'Office national de Lutte contre la Fraude et la Corruption (OFNAC) ;
- la loi n° 2014-17 du 2 avril 2014 relative à la déclaration de patrimoine et son décret d'application n° 2014-1463 du 12 novembre 2014 ;
- la loi n° 2016-30 du 8 novembre 2016 modifiant la loi n° 65-61 du 21 juillet 1965 portant Code de procédure pénale ;



- la loi n° 65-60 du 21 juillet 1965 portant code pénal, modifiée par la loi n°2015-16 ci-après citée ;
- la loi n° 2015-16 du 06 juillet 2015 autorisant le Président de la République à ratifier le Protocole A/P3/12/01 portant sur la Lutte contre la corruption adoptée à Dakar, le 21 décembre 2001 ;
- la loi uniforme n° 2018-03 du 23 février 2018 relative à la lutte contre le blanchiment de capitaux et le financement du terrorisme.

Il existe deux types de corruptions, à savoir, la corruption active et la corruption passive. Ce phénomène est flagrant au Sénégal, tout comme dans bien d'autres pays au monde.

C'est dans cette optique que le législateur sénégalais a érigé en outil majeur le Code pénal, dont les dispositions réprimant la corruption révèlent une réelle volonté de lutter contre ce fléau. Ces dispositions du Code pénal répriment les agissements tant des fonctionnaires publics, que des employés d'entreprises privées qui, dans l'exercice de leurs fonctions, auraient perçu indûment des cadeaux, commissions, pots de vins et autres présents.

Il est important de noter que les directives ou normes communautaires donnent des définitions et qualifications pour les infractions mais ne prévoient pas spécifiquement de sanctions [...].

Le Code pénal définit ainsi la corruption active qui est le fait du corrupteur (articles 159 à 163) et la corruption passive, dite « concussion », qui est le fait du corrompu (art. 156 à 158).

Dès lors, au regard des articles 156, 157 et 158 du Code pénal sénégalais, il est strictement interdit aux agents in-

vestis de prérogatives publiques de solliciter ou exiger des dons, des présents ou des fonds, en vue d'accomplir ou de s'abstenir d'accomplir une tâche relevant de leurs fonctions. Cette interdiction de corruption dite « passive » est faite à tous fonctionnaires ou officiers publics, tous percepteurs de droits, de contributions ou de deniers publics, leurs commis ou préposés. La violation de ces dispositions expose les mis en cause à un emprisonnement de deux à dix ans, et leurs commis ou préposés à un emprisonnement d'un an à cinq ans. En outre, une amende pouvant aller de 250 000 à 500 000 francs CFA sera toujours prononcée, conformément à l'article 156 dudit Code (soit de 426 à 852 dollars américain et de 306 à 765 euros).

Ces sanctions peuvent s'accompagner de l'interdiction, en tout ou partie, de l'exercice de droits civiques, civils et de famille […].

Ces sanctions peuvent s'accompagner de l'interdiction, en tout ou partie, de l'exercice de droits civiques, civils et de famille, dont le droit de vote, d'éligibilité ou d'exercice de fonctions publiques pendant 10 ans maximum à compter de l'expiration de la peine résultant des sanctions précitées. De plus, les bénéficiaires seront punis comme complices, et dans tous les cas prévus à l'article précité, la tentative du délit sera punie comme le délit lui-même.

En ce qui concerne la corruption dite « active », les articles 159 à 163 du code pénal traitent des sanctions de la corruption des fonctionnaires publics et des employés des entreprises privées.

A cet effet, l'article 159 dispose que « *sera puni d'un emprisonnement de deux à dix ans et d'une amende double de la valeur des promesses agréées ou des choses reçues ou demandées, sans que ladite amende puisse être inférieure à 150 000 francs [CFA (26 euros/25 dollars américain)], quiconque aura sollicité ou agrée des offres ou promesses, sollicité ou reçu des dons ou présents […]* ». Ce même article énumère ensuite une liste d'actes qui sont sanctionnés à ce titre en fonction des mandats et postes occupés. Cela concerne, par exemple, le fait pour un arbitre ou expert nommé par le Tribunal ou par les parties, de rendre une décision ou donner une opinion favorable ou défavorable à une partie.

Cet article précise également que « *sera puni d'un emprisonnement d'une à trois années et d'une amende de 25 000 à 100 000 francs ou de l'une de ces deux peines seulement tout commis, employé ou préposé, salarié ou rémunéré sous une forme quelconque, qui, soit directement, soit par personne interposée, aura, à l'insu et sans le consentement de son patron, soit sollicité ou agréé des offres ou promesses, soit sollicité ou reçu des dons, présents, commissions, escomptes ou prises pour faire ou s'abstenir de faire un acte de son emploi.* ».

Il résulte du rapport de l'OFNAC (Office Nationale de Lutte contre la Fraude et la Corruption) sur la stratégie nationale de lutte contre la corruption 2020–2024 qu'un certain nombre d'indicateurs a été mis au point par la Communauté internationale pour mesurer le niveau de corruption par pays, les performances des gouvernements, la qualité des institutions et la perception des individus. Il faut toutefois préciser que ces indicateurs sont dispersés et n'ont pas souvent de liens entre eux. Malgré les progrès enregistrés, le Sénégal reste dans la zone rouge, c'est-à-dire parmi les pays où la corruption demeure préoccupante selon le classement de l'Indice de Perception de la Corruption (IPC) de *Transparency International* (TI), malgré les efforts déployés en matière de renforcement de la transparence. Il est à noter que *Transparency International* retient uniquement la corruption dans le secteur public et définit la corruption comme « *l'abus d'une fonction publique à des fins d'enrichissement personnel* ». De 1998 à 2009, le meilleur classement du Sénégal a été le 52 rang en 2000. A partir de 2012, le Sénégal a fait un bond qualitatif sur le classement IPC passant de la 94ème à la 67 position en 2018 sur 180 pays (soit le 7 pays d'Afrique). Selon le rapport de 2018, le Sénégal est crédité de 45 points par rapport à l'année.

Selon l'Indice MO Ibrahim de la gouvernance en Afrique (IIAG), outil qui mesure et suit annuellement les performances de gouvernance dans 54 pays africains, le Sénégal est cité parmi les pays africains ayant connu une amélioration au cours des quatre dernières années (+4 %).

En conclusion, les sanctions pénales en matière de corruption se présentent sur une échelle à trois (3) niveaux : international, communautaire et national.

Le Sénégal, en tant que membre d'une organisation sous régionale (UEMOA), est soumis à l'autorité de celle-ci en application du principe de la supranationalité et dans l'obligation de se conformer à ses règles impératives. Il convient de souligner que ces dispositions de droit communautaire sont, pour la plupart, le reflet fidèle des normes internationales de lutte contre la corruption, telles que la Convention de l'Union Africaine sur la prévention et la lutte contre la corruption et la Convention de l'Organisation des Nations Unies. ■

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Preventing Environmental Crime: An International Responsibility

Barbara BANDIERA

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La criminalité environnementale – allant de l'extraction et du commerce illégaux des forêts et des minéraux au défrichement illégal, en passant par le trafic de déchets – est une entreprise extrêmement rentable qui génère des milliards de dollars de gains criminels chaque année. L'impact de ces crimes contre l'environnement s'étend au-delà du coût financier et affecte notamment la planète, la santé et la sécurité publiques, la sécurité humaine et le développement économique et social. Ils alimentent également la corruption et convergent avec de nombreux autres crimes graves et organisés.

Los delitos contra el medio ambiente – que van desde la extracción y el comercio ilegal de bosques y minerales hasta el desbroce ilegal de tierras y el tráfico de residuos– son un negocio muy rentable que genera miles de millones de dólares en ganancias delictivas cada año. Las repercusiones de los delitos contra el medio ambiente van más allá del coste financiero para el planeta, la salud y la seguridad pública, la seguridad humana, el desarrollo económico y social, etc. También alimentan la corrupción y convergen con muchos otros delitos graves y organizados.

Introduction

Environmental crime, which covers a wide range of unlawful activities ranging from illegal logging to illegal wildlife trade and waste trafficking, is expanding rapidly, endangering not only populations of wildlife and their habitats, but also entire ecosystems, living environments, and financial systems.

According to Interpol and the United Nations Environment Programme, environmental crime is the fourth largest criminal activity in the world after drug trafficking, human trafficking, and counterfeiting. This type of crime is growing at a rate between 5% to 7% per year, which is two to three times the pace of global economic growth[1]. Because environmental crime transcends national boundaries, preventing it must be addressed both nationally and through international cooperation.

Impact

Human beings are now overusing the earth's biocapacity by at least 56%[2]. The value of illegal extraction and trade with natural resources and waste alone was estimated at between 91 to 259 billion USD annually in 2016[3].

Environmental crime is characterised by its impact on the natural environment. This impact, as indicated by Europol, manifests itself in increasing levels of pollution. Examples include: (1) the use of illegal chemicals in oil blending compromises the quality of the air, (2) mercury illegally released from mining operations impacts rivers and the sea, thereby endangering ecosystems and water supplies, and (3) waste illegally dumped into landfill sites

As wildlife crimes often span national borders, an international approach must supplement national.

1. UNEP-INTERPOL, *"Rapid Response Assessment: The Rise of Environmental Crime – A Growing Threat To Natural Resources Peace, Development And Security,"* June 2016. Link: https://www.unep.org/resources/report/rise-environmental-crime-growing-threat-natural-resources-peace-development-and.

2. World Wildlife Fund (WWF), *"Living Planet Report 2020."* Link: https://www.zsl.org/sites/default/files/LPR%202020%20Full%20report.pdf.

3. *"Opening Remarks"* by Dr. Marcus Pleyer, *"ACAMS - WWF Webinar,"* 18 September 2020. Link: https://www.fatf-gafi.org/publications/fatfgeneral/documents/2020-acams-wwf.html.

contaminates the soil where food is grown. Together, these types of pollution crimes threaten environmental sustainability, public health, safety, and the quality of life.

We are facing one million endangered species; only last September the U.S. Fish and Wildlife Service proposed delisting 23 species from the Endangered Species Act due to extinction. Yuri Fedotov, who served as Executive Director of the United Nations Office on Drugs and Crime (UNODC) from 2010 to 2019, concludes that "*Fragile ecosystems are destroyed and biodiversity is reduced.*"

These crimes may affect the accelerated spread of disease, negatively impact climate change, reduce plant and animal growth and life expectancies, cause the death of humans, and set the stage for an environmental disaster.

The private sector also has an important role in detecting financial flows from environmental crimes.

A subset of environmental crime is wildlife crime, wherein activities cause the degradation of wildlife, a reduction in biodiversity that affects ecosystems, and the disturbance of ecological balance, thereby affecting the health of plants and animals. Examples of wildlife crimes include the killing of elephants to harvest their tusks for the ivory trade and the export of endangered plant species, thereby further reducing their likelihood of survival in the wild. As wildlife crimes often span national borders, an international approach must supplement national.

Financial Crimes

Environmental crime is profitable and is expected to yield revenue ranging from 110 to 281 billion dollars (USD) annually. Sources of these ill-gotten gains include the extraction and trade of forestry and minerals, illegal land clearance, and the trafficking of waste[4], such as plastic.

Environmental crimes not only impact social and economic development, but they fuel corruption while converging with other serious crimes such as tax fraud, drug trafficking, and forced labour. Actors involved in these crimes vary from large, organized crime groups to multinational companies and individuals. Perpetrators rely on both the financial and non-financial sectors to launder their income stream. The "low risk, high reward" nature of environmental crime makes for a lucrative and safe source of revenue for criminals. Government actions to detect and disrupt these financial flows have not been proportionate to the scale of this threat.

Governments could prioritize crime prevention by investigating how this income is concealed and strengthening inter-agency, as well as international, cooperation between financial investigators and environmental crime agencies. In conducting more robust financial investigations, authorities should be trained to use investigative techniques and be ready to impose sanctions under anti-money laundering laws, which are often more impactful than environmental crime laws.

Financial investigations can help strengthen environmental crime investigations by drawing on investigative techniques and sanctions provided under anti-money laundering laws. Essentially, in each individual country, it is important to well select and utilize laws against the perpetrators with the most ability to prevent environmental crime, regardless of the legal label. The private sector also has an important role in detecting financial flows from environmental crimes. Under the United Nations Guiding Principles, one of the pillars is the corporate responsibility to respect human rights. Operational Principle 18 calls upon businesses to identify and assess actual or potential human rights impacts from their business activities, and the commentary includes environmental impact assessments.

Forms of Environmental Crimes

While there is no universal definition of environmental crime, it generally refers to criminal offences harming the environment. These offences, which may overlap, include: (1) illegal logging, which is harvesting, processing, transporting, buying, or selling timber in contravention of domestic and international laws, (2) illegal land acquisition or clearing for farming, building, or real estate speculation, (3) forestry crime occurring in the forestry sector, including land clearance and the entire logging supply chain, from harvesting and transporting to processing and selling, (4) illegal mining that is undertaken without state permission and in the absence of land rights, mining licenses, and exploration or mineral transportation permits, as well as mining activity with state permission obtained through corruption, and (5) waste trafficking, wherein there is the illegal export and/or illicit disposal of electronic waste (e-waste), plastics, and hazardous substances, among others. There are significant illegal markets for waste management, logging, and mining, including for precious metals and stones.

These crimes often have a contractual aspect, such as when contracts and concessions are secured through corruption or intimidation, when services involve fraudulent representations, including about the treatment of hazardous waste, and for logging/mining when extraction contravenes agreed contractual terms, such as quotas or other requirements.

Focus on Illegal Wildlife Trade

We are "humanizing" the planet, meaning we are sacrificing our forests and jungles for human consumption. Almost seven billion humans face one million species threatened with extinction. The ultra-overpopulation generates inequity. The more inequity, the more

4. FATF (2021), *"Money Laundering from Environmental Crimes,"* FATF, Paris, France. Link: https://www.fatf-gafi.org/media/fatf/documents/reports/Money-Laundering-from-Environmental-Crime.pdf.

corruption. Corruption is a form of manifestation of supra-subordination: "*What I want is done because I have power and I can buy justice.*" In the end, it is the abuser who gets his way, the return to the law of the strongest. Abuse is due to unfair conditions. The more inequity, the more asymmetry in power relations and more abuse. Inequality is exacerbated by corruption. Another vicious circle that nurtures illegal trafficking of timber and endangered species.

Environmental crimes also include the illegal wildlife trade (IWT), which is a major transnational organised crime that has a devastating impact on the ecosphere, particularly endangered species (animal species facing extinction). It also generates billions of criminal proceeds each year. IWT fuels corruption, threatens biodiversity, and can have a significant negative impact on public health by affecting the spread of infectious diseases, as well as growth, development, life expectancy, and the economy, wherein livelihoods depend on a healthy environment and where money laundering corrupts.

There is no internationally agreed to definition of IWT. The "wildlife trade" can be domestic or international, and legal or illegal. IWT refers to any of the below mentioned activities conducted in contravention of national or international laws and regulations. "Domestic trade" includes any commercial or non-commercial activity, including, but not limited to, offering, offering for sale, distribution, brokerage, or other forms of intermediary activity, sale, delivery, dispatch, consignment, transport, purchase, possession, donation, exchange, exhibition, or employment of any specimen of a wild protected species (or part thereof) within a territory under the jurisdiction of a given country. "International trade" means any export, re-export, or import and introduction from the sea of any specimen of a wild protected species (or part thereof)[5].

There are at least seven billion people consuming products made possible because of existing ecosystems with their biodiversity every day, in the form of food, cosmetics, pharmaceuticals, and pets. Millions of people depend on plants and animals for their livelihoods and survival, including indigenous communities. When trade in wildlife is legal, safe, and traceable, wildlife sustainability may be maintained, as well as serve as a driver in improving people's livelihoods, contributing towards achieving the UN Sustainable Development Goals. These goals provide qualitative and quantitative objectives for the next 15 years to prepare for the future and work towards achieving human dignity, stability, a healthy planet, fair and resilient societies, and prosperous economies.

Zoonotic diseases are derived from viruses, bacteria, and other pathogens that are transmitted between animals and humans. The products offered from the trafficked species for human consumption, by definition, escape any hygiene or sanitary control. As such, they pose even greater risks for infectious diseases. According to the World Health Organisation, some 60% of emerging infectious diseases that are reported globally are zoonotic (including Ebola, MERs, SARs, and COVID-19). The spread in recent years of zoonotic diseases underlines the importance of ensuring that wildlife is traded in a legal, safe, and sustainable manner, and the reduction of zoonotic diseases may be successful when countries remove the profitability of illegal markets.

Illegal trade in wildlife, including illegal trade in iconic African mammals, such as elephants and rhinoceroses, and lesser-known endangered species of reptiles, birds, and amphibians, poses a threat to the survival of some of the world's most charismatic species and many lesser-known species, often with devastating economic, social, and environmental consequences. Furthermore, the risk of zoonotic diseases in illegally traded wildlife that has evaded veterinary checks and inspections related to sanitary safety standards and regulations means transmitting diseases to humans is likely to be greater than for legal trade where such checks are routine.

The products offered from the trafficked species for human consumption, by definition, escape any hygiene or sanitary control.

In terms of IWT, there are two key types: (1) trade in species that are protected and prohibited from all national or international commercial trade, and (2) trade in volumes of specific species that have a wild origin making the health of the species unsustainable and in violation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) provisions or similar national provisions. Today, almost all countries are parties to CITES[6]. CITES aims to ensure that international trade of wild animals and plants is legal, sustainable, traceable, and does not threaten the survival of the species in the wild.

Despite CITES' efforts, the illegal wild animal trade is worth between 5 billion USD and 20 billion USD a year.

Timber Trafficking

Timber trafficking is valued at between 30 billion USD and 100 billion USD a year and accounts for 15 to 30 percent of the global timber trade. Yury Fedotov[7] wrote for the

5. FATF (2020), *"Money Laundering and the Illegal Wildlife Trade,"* FATF, Paris, France. Link: https://www.fatf-gafi.org/media/fatf/documents/Money-laundering-and-illegal-wildlife-trade.pdf.

6. Convention on International Trade in Endangered Species of Wild Fauna and Flora: (i) signed at Washington, D.C., on 3 March 1973; (ii) amended at Bonn, on 22 June 1979; (iii) amended at Gaborone, on 30 April 1983.

7. Yury Fedotov, *"How wildlife and forest crime undermines development and ravages global biodiversity. UN Chronicle."* Link: https://www.un.org/en/chronicle/article/how-wildlife-and-forest-crime-undermines-development-and-ravages-global-biodiversity.

UN the following example of the impact of wildlife and forest crime:

"In September 2013, poachers in Zimbabwe poured deadly cyanide into a watering hole frequented by a large elephant herd. The results were catastrophic for the local wildlife. Over 300 elephants, lions, vultures, painted dogs and hyenas were killed. The tragedy in Zimbabwe is a dismally familiar story. Throughout the world, wildlife is trapped, gunned down, poisoned, and slaughtered, while forests are stripped of their trees. The pace of this destruction is driving some species to the brink of oblivion."

Besides financing terrorists and paramilitaries through money laundering, poaching, and illegal wood logging, traffickers of endangered species (both flora and fauna) are also beneficiaries of this financial crime.

The Threat of Extinction

Trade in wildlife and wildlife products have expanded into the digital sphere. Sales of certain products, such as live reptiles and tiger bone products, have shifted to online platforms and encrypted messaging apps as traffickers have found new ways to connect with potential buyers. The online trade is particularly difficult to address due to lack of transparency, inconsistent regulatory frameworks, and limited law enforcement capacities.

Wildlife traffickers exploit weaknesses in the financial and non-financial sectors to move, hide, and launder their proceeds, enabling further wildlife crimes and damaging the financial integrity of institutions. One of the most effective ways to identify the broader criminal networks and take the profit out of this crime is to follow the financial trails of wildlife traffickers.

Despite the significant criminal gains involved, countries and private sectors are not prioritising efforts to trace and combat financial flows from this trade in line with the risks they present. To combat the financial flows from the IWT, countries should identify and assess their money laundering risks relating to the IWT and ensure that national laws and powers for law enforcement allow authorities to go after the finances of wildlife traffickers, and to pursue financial investigations.

The private sector also has an important role to play (1) in combatting financial flows from the IWT, (2) in detecting and reporting suspicious activity to the public sector, and (3) in reducing opportunities for wildlife traffickers to misuse their financial or non-financial services to launder their gains. Wildlife traffickers use services provided by financial institutions, including banks, payment institutions, and non-financial institutions, such as dealers in high-value goods (e.g., art, antiquities, auction houses, and other collectibles) to move and hide their illicit proceeds. Compliance officers in these businesses have access to information on client profiles and financial activity. They are well placed to identify and report suspicious transactions related to the IWT to the public sector.

Conclusion

Environmental crime affects all countries through its impacts on biodiversity, human health, security, and socio-economic development. Stopping the trafficking of wildlife species in particular is a critical step, not just to protect biodiversity and the rule of law, but to help prevent future public health emergencies. To protect people and the planet in line with the UN Sustainable Development Goals, and to build back from the Covid-19 crisis, we cannot afford to ignore wildlife crime[8].

In principle, the anti-money laundering obligations are plainly justified on behalf of the fight against organized crime financing. Moreover, our obligations do not stop at anti-money laundering. We must support the fight against the commerce of endangered species in every financial decision we make. It is necessary to improve international cooperation and cross-border investigations to combat environmental crime. The environment and everything involved around it is a responsibility of every one of us; it is about a human obligation. ■

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8. Ghada Waly, Executive Director at the UN Office on Drugs and Crime (UNODC) which produced the *"World Wildlife Crime Report 2020."*

Les crimes intrafamiliaux

Laurence KRIEF

The media coverage of violent deaths within couples, in all socio-professional categories, the liberation of the victims' word after years of amnesia, the organization of "grenelles des violences conjugales" (a conference on domestic violences) have led to the promulgation of six laws, in five years, in France. The new measures to prevent intra-family crime generate a new network of competences and encourage a transversal civil-criminal approach: coercive powers that were the prerogative of the criminal judge are conferred to the civil family judge and new powers, which were the prerogative of civil judges, are conferred to the criminal judge.

La cobertura mediática de las muertes violentas en la pareja, en todas las categorías socioprofesionales, la liberación de las voces de las víctimas tras años de amnesia, la organización de las "grenelles des violences conjugales" (conferencias sobre la violencia doméstica), han llevado a la promulgación de seis leyes en cinco años en Francia. Las nuevas medidas de prevención de la delincuencia intrafamiliar generan un nuevo entramado de competencias y fomentan la transversalidad civil-penal: se confieren al juez civil de familia poderes coercitivos que eran prerrogativa del juez penal y se confieren al juez penal nuevos poderes que eran prerrogativa de los jueces civiles.

Le droit pénal, après avoir été protecteur de l'institution de la famille (le lien familial garantissait une certaine immunité et le crime passionnel une certaine indulgence), se veut aujourd'hui protecteur de l'individualité des membres au sein de la famille.

La famille, lieu d'affection, d'éducation, de construction et d'insertion, peut aussi être un lieu criminogène.

Les morts violentes au sein du couple touchent toute catégorie socio-professionnelle.

En 2021, en France :

- 102 femmes sont décédées à la suite de violences exercées par leur compagnon
- 23 hommes ont été tués par leur partenaire
- 94 infanticides ont été commis, dont 53 dans la sphère intrafamiliale
- 14 enfants ont été tués lors de violences conjugales, dont 8 lors du meurtre d'un parent
- 1 français sur 10 déclare avoir été victime d'inceste.

Les crimes interviennent majoritairement dans un huis clos familial et le passage à l'acte est parfois précédé d'une dégradation des relations, donnant lieu à des scènes de violence, de manipulation ou de déstabilisation, d'humiliation d'un conjoint par l'autre.

Entre 2017 et 2022, plus de six lois ont été promulguées ou proposées[1], en France, pour prévenir ce risque de crimes intrafamiliaux.

Des études psychologiques révèlent qu'un enfant exposé à des violences commises sur un de ses parents souffre d'un stress post-traumatique pouvant être assimilé à celui des enfants en zone de guerre.

La loi du 21 avril 2021 a étendu la qualification aux faits commis par un grand-oncle et grand-tante et définit de viol incestueux […].

Les nouveaux textes, d'une part, augmentent les incriminations criminelles de faits commis dans l'enceinte familiale (I.) et d'autre part confèrent aux juges des pouvoirs transversaux, compte tenu de la nature hybride des faits : criminels et familiaux, autant lorsqu'il s'agit de sanctionner (II.) que de prévenir (III.).

1. Loi n° 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes ; Loi n° 2019-721 du 10 juillet 2019 sur les violences éducatives ordinaires ; Loi n° 2019-1480 du 28 décembre 2019 pour agir contre les violences au sein de la famille ; Loi n° 2020-936 du 30 juillet 2020 pour la protection des victimes de violences conjugales ; Loi n° 2021-478 du 21 avril 2021 visant à protéger les mineurs des crimes et délits sexuels et de l'inceste ; Loi n° 2022-140 du 7 février 2022 relative à la protection des enfants.

I. Extension des qualifications de crimes intrafamiliaux

Les crimes se distinguent des délits et contraventions par une peine encourue de réclusion criminelle, pouvant aller de 15 ans à la perpétuité. Constituent des crimes intrafamiliaux les infractions passibles de peine de réclusion criminelle, assorties d'une des circonstances aggravantes suivantes liées au statut de :

- mineur de moins de 15 ans ;
- ascendant légitime ou naturel, de parents ;
- conjoint ou concubin ou partenaire de l'auteur, ancien ou actuel ;
- auteur ayant autorité sur la victime.

L'on distingue les infractions portant atteinte à la vie ou de manière permanente au corps (A) des infractions à caractère sexuel (B).

A) Infractions portant atteinte à la vie ou de manière permanente au corps

Il s'agit des infractions suivantes :

- homicide volontaire, passible d'une peine de réclusion criminelle à perpétuité au lieu de 30 ans ;
- actes de torture et de barbarie, passibles de 30 ans de réclusion criminelle au lieu de 20 ans ;
- violences volontaires ayant entrainé une mutilation ou une infirmité permanente, passibles de 20 ans de réclusion criminelle au lieu de 10 ans d'emprisonnement ;
- violences ayant entrainé la mort sans intention de la donner, passibles de 30 ans de réclusion criminelle au lieu de 15 ans.

A l'égard de ce dernier crime, la loi du 3 août 2018 crée une nouvelle circonstance aggravante lorsque *« un mineur assiste aux faits et que ceux-ci sont commis par le conjoint ou le concubin de la victime ou le partenaire lié à la victime par un pacte civil de solidarité ou si la victime est mineure, par un ascendant légitime, naturel, adoptif ou par toute autre personne ayant autorité sur la mineur victime. »*

Une mesure d'incarcération, tant au titre de la détention provisoire qu'au titre de l'exécution d'une peine, n'est pas synonyme de privation du parent de son droit de visite à l'égard des enfants orphelins.

B) Infractions à caractère sexuel

Il s'agit des infractions suivantes, toutes passible de 20 ans de réclusion criminelle :

- Viol entre époux ;
- Viol incestueux ;
- Viol sur mineur par toute personne ayant sur la victime une autorité de droit ou de fait.

La loi du 21 avril 2021 a étendu la qualification aux faits commis par un grand-oncle et grand-tante et définit de viol incestueux *« comme tout acte de pénétration sexuelle, de quelque nature qu'il soit ou tout acte bucco-génital, commis par un majeur sur la personne d'un mineur ou commis sur l'auteur par le mineur, lorsque le majeur est un ascendant ou toute personne mentionnée à l'article 222-22-3 du code pénal ayant sur le mineur une autorité de droit ou de fait »*, c'est-à-dire outre l'ascendant *« un frère, une sœur, un oncle, une tante, un grand-oncle, une grand-tante, un neveu ou une nièce, le conjoint, le concubin d'une des personnes précitées ou le partenaire lié par un PACS à l'une des personnes mentionnées ci-dessus. »*

II. Nouveaux outils pour sanctionner les crimes intrafamiliaux

Ces nouveaux outils sont nés de réformes intervenues tant au pénal (A) qu'au civil (B).

A) Au pénal

Les successives réformes en droit pénal de la famille, applicables aux faits commis à compter de leur publication, se veulent dissuasives par la criminalisation de faits et l'aggravation de la peine encourue et la création de nouvelles infractions. Cette préoccupation s'est exprimée par des dispositions touchant le code pénal, mais également la procédure pénale pour mieux répondre aux victimes. Les crimes commis dans la sphère familiale, lors de la minorité de la victime, sont en effet souvent dénoncés après la majorité de celle-ci et ces faits sont, soit prescrits, soit difficiles à établir, compte tenu de leur ancienneté. Les réformes ont donc porté sur :

- le report du point de départ de la prescription des faits à la majorité de la victime mineure ;
- un allongement du délai de prescription à 30 ans pour les crimes commis sur mineurs (20 ans pour les autres crimes) ;
- un principe de prescription dite « glissante » qui reporte le délai de prescription dès lors qu'un même auteur agresse sexuellement ou viole ensuite un autre mineur.

A côté des peines privatives de liberté, le juge peut prononcer une mesure de retrait de l'autorité parentale du parent déclaré coupable de faits de crime ou de violence sur l'autre parent : les articles 222-31-2 et 227-27-3 du code pénal prévoient l'obligation des juges de se prononcer sur le retrait partiel ou total de l'autorité parentale, à titre de peine complémentaire lors de condamnation à des faits de viols incestueux ou agressions sexuelles. Par un arrêt récent, la Cour de cassation a rappelé que *« les atteintes au droit au respect de la vie privée et familiale doivent être nécessaires et proportionnées au but recherché, la cour, statuant seule sans l'assistance du jury, après condamnation à quinze ans de réclusion du conjoint reconnu coupable du meurtre de son conjoint, qui ordonne le retrait de l'autorité parentale, doit motiver sa décision quant à la nécessité de cette mesure en prenant en compte l'intérêt de l'enfant. »*[2]

2. Cass. crim., 20 oct. 2021, n° 20-86.321.

Le retrait total de l'autorité parentale emporte pour l'enfant dispense de l'obligation alimentaire.

La proposition de loi n° 4542 votée le 26 janvier 2022 permet à la juridiction saisie, lorsqu'elle prononce le retrait total de l'autorité parentale, de statuer sur le changement de nom de l'enfant, sous réserve du consentement de ce dernier s'il est âgé de plus de 13 ans.

L'article 221-9-2 du code pénal, créé par la loi du 30 juillet 2020, dispose : *« Les personnes physiques coupables des crimes … lorsque ces crimes ont été commis à l'encontre de leur époux assuré, encourent également la peine complémentaire d'interdiction de percevoir la pension due au conjoint survivant ou divorcé… Le prononcé de cette peine est obligatoire. Toutefois la juridiction peut, par une décision spécialement motivée, décider de ne pas prononcer cette peine, en considération des circonstances de l'infraction et de la personnalité de son auteur. »*

L'article 222-48-3 du code pénal, créé par la loi du 14 décembre 2020, reprend cette peine complémentaire pour les auteurs de violences volontaires.

B) Au civil

Un arsenal de mesures est mis en place :

- Retrait ou suspension de l'exercice de l'autorité parentale avant ou après condamnation

L'article 378 du code civil dispose de la faculté pour les juges de retirer totalement l'autorité parentale ou l'exercice de l'autorité parentale à l'égard du parent auteur ou coauteur d'un crime commis sur l'autre parent. L'article 378-2 du code civil, résultant de la loi du 28 décembre 2019, précise que cette mesure de retrait est susceptible d'être prononcée avant toute décision de condamnation : le juge peut suspendre de plein droit pendant une durée de six mois tout exercice de l'autorité parentale et les droits de visite et d'hébergement du parent poursuivi ou condamné, même non définitivement, pour un crime commis sur la personne de l'autre parent, à charge pour le procureur de saisir le juge aux affaires familiales dans un délai de huit jours.

L'autorité parentale du parent, auteur présumé du crime intrafamilial, peut être contournée et l'exercice de l'autorité parentale à l'égard des enfants mineurs orphelins confié à un tiers de confiance par une décision de délégation de l'autorité parentale ou de placement auprès de l'Aide Sociale à l'Enfance.

Une mesure d'incarcération, tant au titre de la détention provisoire qu'au titre de l'exécution d'une peine, n'est pas synonyme de privation du parent de son droit de visite à l'égard des enfants orphelins. Mais la victimisation croissante des enfants, témoins de faits de violences intrafamiliales, et la perspective de leur changement de statut, de témoin à victime, risque de fragiliser le maintien du lien parent-enfant.

- Délégation de l'autorité parentale

Selon l'article 373-3 alinéa 2 du code civil, le juge peut, à titre exceptionnel, « *confier l'enfant à un tiers, choisi de préférence dans sa parenté… Dans ces circonstances exceptionnelles, le juge aux affaires familiales… peut décider, du vivant même des parents, qu'en cas de décès de celui d'entre eux qui exerce cette autorité, l'enfant n'est pas confié au survivant. Il peut dans ce cas, désigner la personne à laquelle l'enfant est provisoirement confié…* »

L'article 380 du code civil, modifié par la loi du 28 décembre 2019, prévoit des modalités de désignation du tiers de confiance après retrait total ou partiel de l'autorité parentale ou perte de l'exercice de l'autorité parentale, si l'autre parent est décédé, à charge pour le tiers de requérir l'organisation d'une tutelle.

- Suppression de l'obligation alimentaire

L'article 205 du Code civil dispose que *« les enfants doivent des aliments à leur père et mère ou autres ascendants qui sont dans le besoin »*. Initialement, seul le retrait total de l'autorité parentale pouvait dispenser l'enfant de son obligation alimentaire. Désormais, depuis la loi du 30 juillet 2020 « *En cas de condamnation du créancier pour un crime commis sur la personne du débiteur ou l'un de ses ascendants, descendants, frères ou sœurs, le débiteur est déchargé de son obligation alimentaire à l'égard du créancier, sauf décision contraire du juge.* » L'enfant dont un des parents a été tué dans le cadre de violences conjugales sera donc dispensé de subvenir aux besoins alimentaires du parent survivant, auteur condamné. Cette suppression de l'obligation alimentaire est unilatérale : l'auteur des violences reste débiteur de toutes ses obligations alimentaires envers les membres de sa famille.

Le crime intrafamilial est généralement précédé d'antécédents de violences conjugales, menaces de mort ou harcèlement et est souvent l'aboutissement d'une trajectoire de violence qui s'est intensifiée.

- Déclaration d'indignité à succéder

La loi du 30 juillet 2020 a ajouté aux deux cas d'indignité à succéder de plein droit, obligatoires, qui résultaient d'une condamnation à une peine criminelle pour avoir volontairement donné la mort au défunt ou d'une condamnation à une peine criminelle pour homicide involontaire sur le défunt, un cas facultatif d'indignité *: « Celui qui est condamné, comme auteur ou complice, à une peine criminelle ou correctionnelle pour avoir commis des tortures et actes de barbarie, des violences volontaires, un viol ou une agression sexuelle envers le défunt »* pourra être déclaré indigne et, par conséquent, se voir déchu de ses droits à succession. Ce cas d'indignité facultative nécessite l'introduction par un des héritiers ou à défaut, par le ministère public, d'une action auprès du tribunal judiciaire du lieu d'ouverture de la succession dans les six mois suivant soit la date du décès si la décision de condamnation est antérieure au décès, soit la date de la décision de condamnation si celle-ci est postérieure au décès.

- Annulation d'une donation pour ingratitude

Si le donataire a porté atteinte à la vie du donateur, s'il s'est rendu coupable envers lui de sévices, délits ou injures graves et s'il lui refuse des aliments, ces faits peuvent caractériser l'ingratitude qui cause une éventuelle révocation de donation, prévue à l'article 955 du code civil. L'action en révocation de donation doit être introduite dans un délai d'un an à compter du jour du délit imputé par le donateur au donataire ou du jour où le délit aura pu être connu par le donateur. La révocation des donations, et notamment les donations aux conjoints survivants, n'a pas été étendue aux avantages matrimoniaux.

III. Nouveaux moyens pour prévenir le risque de crime intrafamilial

Le crime intrafamilial est généralement précédé d'antécédents de violences conjugales, menaces de mort ou harcèlement et est souvent l'aboutissement d'une trajectoire de violence qui s'est intensifiée. Dès la dénonciation de faits de violence, des mesures protectrices de la famille et préventives du risque d'escalade criminelle peuvent être définies :

- Ordonnance de protection

Depuis la loi du 28 décembre 2019, la délivrance d'une ordonnance de protection à la personne victime de violences conjugales a été accélérée. Cette mesure s'applique à tous types de couples, anciens ou présents, avec ou sans cohabitation ; la protection est élargie aux enfants, du couple ou d'un membre du couple seulement. Les violences sont entendues au sens large : physiques ou psychologiques.

Le juge aux affaires familiales peut être saisi soit par la personne en danger, soit avec l'accord de celle-ci, par le ministère public, sans condition d'une plainte pénale préalable. Une fois saisi, il doit souverainement apprécier la vraisemblance des violences alléguées et du danger sur la victime. Le juge peut solliciter du conjoint violent son accord pour le port d'un bracelet anti-rapprochement. Il dispose également de pouvoirs d'interdiction de détention d'une arme et peut ordonner la remise des armes au service de police désigné.

Le but de la délivrance d'une ordonnance de protection est de définir, pour une durée de six mois, renouvelable, un cadre juridique protecteur, le plus rapidement possible, afin d'éviter que les violences ne dégénèrent. Le juge aux affaires familiales doit statuer dans un délai maximal de 6 jours à compter de la fixation de la date d'audience, date obtenue dans un délai inférieur à 48 h suivant la demande (antérieurement, le juge devait statuer simplement *« dans les meilleurs délais »*).

- Levée du secret médical

La loi du 30 juillet 2020 dispose de la possibilité de levée du secret médical aux médecins et professionnels de santé « *lorsque les violences mettent la vie de la victime majeure en danger immédiat et que celle-ci se trouve sous l'emprise de son auteur* ». L'article 226-14 3° du Code pénal prévoit en outre que ceux-ci peuvent désormais en informer le procureur de la République mais doivent toutefois s'efforcer d'obtenir l'accord de la victime ou à défaut, l'informer du signalement effectué.

- Bracelet antirapprochement

Dans la lignée du téléphone grave danger (TGD), ce nouveau dispositif technologique vise à préserver la victime d'apparitions intempestives de l'auteur de menaces ou de violences. Introduit par la loi du 28 décembre 2019, le juge pénal et le juge civil disposent de la faculté de proposer et de recueillir l'accord de l'auteur de violences conjugales pour la pose d'un bracelet antirapprochement (BAR).

En 2021, moins de 500 BAR auraient été activés en France.

Le juge d'instruction ou le juge des libertés et de la détention peut, par une décision motivée, décider d'assortir le contrôle judiciaire d'une interdiction de se rapprocher de la victime, du port d'un BAR. Le juge de la condamnation ou le juge d'application des peines est également doté de cette faculté, dans le cadre de l'aménagement de peine. Dans un avis, la Cour de cassation indique que *« lorsqu'elles permettent l'aménagement d'une peine d'emprisonnement en cours d'exécution, ces dispositions s'appliquent aux condamnations prononcées pour des faits commis avant leur entrée en vigueur, soit avant le 30 décembre 2019 »*[3].

- Accès aux armes à feu

La loi du 30 juillet 2020 confère aux officiers de police judiciaire le pouvoir de saisir, d'office ou sur instructions du procureur de la République, les armes détenues par la personne suspectée d'avoir commis des infractions de violences ou celles mises à sa disposition, peu importe le lieu où se trouvent ces armes. Bien que non prévue par la loi, la saisie est désormais systématique, dès le premier dépôt de plainte.

- Réduction du délai de préavis pour congé bail d'habitation

La loi du 30 juillet 2020, modifiant l'article 15, I 3° de la loi du 6 juillet 1989 tendant à améliorer les rapports locatifs, a réduit le délai de préavis de 3 à 1 mois en faveur du locataire victime de violences intrafamiliales.

En conclusion, la France a exprimé une réelle volonté politique et a pris des mesures concrètes de lutte contre les crimes intrafamiliaux. Cependant, à côté de la nécessité de doter la police et la justice de davantage de moyens, la formation de chacun des intervenants à tous les stades des violences familiales est une nécessité, pour une meilleure réactivité, prévention et protection des victimes. ■

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3. Cass, crim, avis, 29 septembre 2021, n° 21-96.001.

Facing Company Fraud and Internal Investigations in Belgium: Some Key Considerations

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Les entreprises du monde entier sont de plus en plus souvent victimes de fraudes dont l'un des auteurs est actif au sein de l'entreprise. Cet article présente plusieurs considérations clés non exhaustives lorsqu'un avocat est engagé pour mener une enquête interne pour fraude sur une telle entreprise. Bien que l'accent soit mis ici sur une perspective belge, les principes ont une application plus large. Différents aspects sont abordés, tels que la sélection des membres de l'équipe chargée de l'enquête interne (qui peut varier au cours de l'enquête), le processus de collecte des preuves (qui doit être effectué à tout moment dans le respect des exigences légales applicables, par exemple, en ce qui concerne le traitement des données) et l'importance d'un rapport diligent des conclusions de l'enquête à des fins futures. En outre, les actions disciplinaires à l'encontre des auteurs doivent être programmées avec soin. Enfin, les auteurs examinent aussi brièvement la possibilité ou l'obligation de déposer une plainte pénale et de récupérer les avoirs.

Las empresas de todo el mundo son cada vez más víctimas de fraudes en los que uno de los autores actúa desde dentro de la empresa. Este artículo expone varias consideraciones clave, no exhaustivas, cuando se contrata a un abogado para que lleve a cabo una investigación interna de una empresa de este tipo por fraude. Aunque se centra en la perspectiva belga, los principios tienen una aplicación más amplia. Se discuten diferentes aspectos, como la selección de los miembros del equipo encargado de la investigación interna (que podría variar durante la investigación), el proceso de recopilación de pruebas (que debe realizarse en todo momento respetando los requisitos legales aplicables, por ejemplo, en lo que respecta al tratamiento de datos) y la importancia de informar con diligencia de los resultados de la investigación para fines futuros. Además, las medidas disciplinarias contra los autores deben ser cuidadosamente programadas. Por último, los autores también consideran brevemente la oportunidad u obligación de presentar una denuncia penal y recuperar los activos.

Carefully Consider your Circle of Trust

If fraudulent actions are suspected, it is important to first consider the composition of the team involved to investigate the fraud so as not to endanger or compromise the evidence gathering and the recovery possibilities. For instance, in the event of suspicions of invoicing fraud (i.e. payment of false invoices) it is obviously essential to first assess the potential involvement of the accountancy department employees who have processed the invoices. In case of doubt, it is advised not to include such persons in the Circle of Trust (i.e. the scope of persons who are entrusted with the internal investigation) in the initial instance. In general, this Circle of Trust should be, at least at the start of the investigation, as small as possible. The team might vary from time to time as facts are revealed.

When assembling a Circle of Trust, companies should seek the assistance of independent outside counsel to ensure that the internal investigation, its processes and in particular any final report that is issued, are appropriatel for their purpose from a legal point of view. This is crucial to avoid that the results and reports of the internal investigation cannot be used as evidence in litigation. Outside counsel shall also outline a strategy for the recovery of embezzled funds or property. It must be remembered that outside counsel serves the company's interests, and not those of the individual directors. In case of a conflict of interest, individual directors should rely on their own separately engaged counsel.

In addition, it could be useful to rely on external forensic consultants such as IT consultants (for e-discovery) or auditors (for financial analysis). Such forensic consultants often contribute heavily to the fact-finding and evidence-gathering, which is at the centre of an internal investigation. Also, their reports can be relied upon in court (e.g. seizure proceedings), insofar these reports are well-documented and reflect a fair, balanced and thorough investigation.

In sensitive matters it could also be beneficial to involve a communication team from the outset to have a statement drawn up in anticipation of a media storm and to ensure a clear line of external communication, and otherwise respond to press inquiries as appropriate.

Confidentiality and Legal Privilege

Client confidentiality is a shared concern and ethical obligation across jurisdictions. In Belgium, Article 458 of the Criminal Code obliges Belgian attorneys to maintain professional secrecy. This provision prohibits making any disclosure of information that is protected by attorney-client privilege. A breach of this obligation can be criminally sanctioned. The obligation covers communications between a client and the attorney.

The company should also bear in mind that a written report can also be used against it, since it may describe shortcomings within the company related to the criminal offences.

The benefit of this confidentiality is, amongst other things, to allow the company to consider future actions or investigations based on the privileged information, without having compelling deadlines. Indeed, timing is essential in internal investigations. Tackling i.e. sanctioning certain behaviour might impact an investigation on related matters, and jeopardize recovery. On the other hand, certain legal or contractual requirements impose swift actions as from the discovery of certain facts or behaviour. Consideration needs to be given to the particular witness interviewed and their role with the company to understand what may be maintained as professional secrecy and what may not be covered.

Where a cross-border investigation is involved, there may be choice of law issues, and local counsel should be consulted.

Evidence Gathering

Essentially, the investigation process is evidence gathering. To ensure that this process is conducted properly, several steps should be taken. Firstly, the scope and approach of the internal investigation must be determined: What are the irregularities to be investigated? Who are the persons potentially involved and their inter-relations? What methods of collecting evidence will be used? The answers to these questions shall enable investigators to maintain focus in the investigation.

Secondly, the evidence (both documents and electronic/digital data) must be both preserved and secured. Depending on the circumstances it may be advisable to make secured copies of mailboxes or laptop hard drives, which could be afterwards examined by IT forensic specialists. It may also be appropriate to secure or restrict access to the company's premises, confidential data and bank accounts. Since these actions may leave a paper trail (e.g. the revocation of bank account mandates communicated to banks), this must be carefully considered together with the timing of the disciplinary actions. Subsequently, the actual investigative measures are taken, such as (depending on the circumstances) (i) interviews with (potential) witnesses and, at a later stage, suspects, and (ii) analysis of data collected (e.g. financial data).

When gathering evidence, legal requirements must be taken into account. For instance, internal investigations often entail the analysis of emails and messages sent by employees through a company laptop or phone, security feed from the company's premises and searches in the offices. These actions very often imply the processing of personal data or electronic communications, which in Belgium triggers the obligation for investigators to adhere to (amongst others): (i) GDPR, (ii) the Belgian Act of 30 July 2018 on the protection of natural persons with regard to the processing of personal data, and (iii) the Belgian Criminal Code. Specifically as regards the employer's supervision of the use of electronic means of communication in the workplace, specific regulations are in place and the Belgian Data Protection Authority issued useful recommendations (e.g. Recommendation 8/2012 of 2 May 2012). In view of the above, companies must carefully bear in mind not to outstep the legal boundaries while conducting their investigation to avoid (criminal and administrative) sanctions themselves.

Reporting

The purpose or intended use of the final written internal investigation report is determining the scope of the report. The report can be very useful for the process of the criminal investigation, if the company decides to file a criminal complaint (or if the public prosecutor has initiated an investigation). The degree of objectivity and thoroughness of the investigation as reflected in the report may (amongst others): (i) increase the 'eagerness' of the authorities to pursue the matter and bring the perpetrators to justice, (ii) greatly reduce the duration of the criminal investigation which is in general rather lengthy for internal company fraud (approx. 1 to 3 years), and (iii) limit the scope of the criminal investigation to avoid having the criminal investigators also examine other matters within the company. Hence, it can pay off to properly invest in the internal investigations report.

Civil proceedings are based on documentary evidence filed with the court, implying the necessity of a written internal investigations report. Although in Belgium the court can summon witnesses, the court in general only relies on the documentary exhibits provided by the parties to render its judgment. Note that an internal investigation report, regardless of how thorough and concise it may be, has no specific evidentiary value (as opposed to, e.g. a police report). Hence, the court will freely assess the value of the report and the findings reflected therein.

In the framework of criminal matters the investigating judge may always appoint other (external) experts to perform additional (technical) investigations. The same applies in civil proceedings, whereby a civil court may also appoint external experts if one of the parties – convincingly – challenges the validity or correctness of the internal investigation. To reduce the risk of such additional appointment it is important to conduct a fair, balanced and thorough internal investigation, thereby also taking into account the rights of the suspects / perpetrators.

The company should also bear in mind that a written report can also be used against it, since it may describe shortcomings within the company related to the criminal offences (e.g. practice of 'black money' triggering fiscal sanctions). It is advisable that outside counsel acts as an intermediary to mitigate this risk and to be able to (confidentially) examine it before sharing a report externally.

A useful format outline of the report is as follows: (i) Executive summary, (ii) Timeline of actions and investigation methods applied, (iii) List of people involved and witnesses interviewed, (iv) Findings, constituting the main section of the report in which the findings on each topic investigated are detailed, including the facts and evidence presented, any inconsistencies found with explanations where applicable, reasons why certain evidence is preferred over other, any mitigating circumstances and any risks identified, as well as topics that could not be investigated and the reason why, (v) Conclusion: it cannot be stressed enough that the report should be factual and impartial to preserve its objectivity and credibility. It is not up to the investigators to draw conclusions or to qualify the facts as a (criminal) offence or breach of contract, and finally (vi) Annexes. It is recommended to discuss the entirety of documents be reviewed during the course of the internal investigation, together with witness statements and other relevant documentary evidence to the report.

Time Your (Disciplinary) Actions

If the internal investigation demonstrates the involvement of certain persons within the company, disciplinary actions will be taken to avoid further damage to the company. In general, companies shall immediately terminate their cooperation with the perpetrator(s) as soon as the fraud is demonstrated following the internal investigation. It is essential that first the contractual relationship with the perpetrator is thoroughly examined: Is the perpetrator an employee or does he/she render services based on an independent contractor agreement?

This exercise is important. Pursuant to Belgian labour law, a dismissal for serious cause of the employee imposes the obligation on the company to terminate the employee contract within three working days after the day on which the person having authority to dismiss becomes aware of the act constituting the serious cause. The company must thus carefully assess the date in time on which it has sufficient knowledge of the facts to decide on the dismissal. Having sufficient knowledge does not mean the company must be in a position to prove the fraud. Hence, the company may await supporting evidence when confronted with suspicions of fraud, insofar such evidence is necessary to obtain sufficient knowledge of the facts and can be obtained within a reasonable time. But as soon as the company has certainty about the facts, it must proceed with the termination within three working days. In addition, the dismissed employee must be informed through written notice within three working days after the dismissal for serious cause with the reasons for the termination (i.e. the justification). If the company does not comply with these legal requirements, the dismissal shall be considered unlawful, forcing the company to pay an indemnity to the (fraudulent) employee. Outside counsel can ensure compliance with these strict rules.

If the perpetrator is an independent contractor, Belgian common contract law applies based on which a contract can be unilaterally terminated for serious cause.

If the perpetrator is an independent contractor, Belgian common contract law applies based on which a contract can be unilaterally terminated for serious cause. The burden of proof lies with the company which will have to demonstrate that the fraudulent actions of the contractor qualify as a serious cause, following which the contractual relationship cannot be continued properly. In principle, no strict notice periods apply to terminate the agreement for cause, but in general it is accepted that the company should act diligently and swiftly when confronted with fraud.

Usually contracts with independent contractors also contain express termination clauses, setting out the circumstances following which the contract can be terminated immediately without court intervention or compensation. It is essential to closely examine such clause and circumstances to assert whether or not the contract can be terminated. Sometimes an express termination clause stipulates that the company may terminate the contract if the contractor is convicted for fraud by a criminal court. *A contrario*, the contractor could argue that mere suspicions or even a pending criminal

investigation would be insufficient for the company to rely on such express termination clause. In such case, other legal alternatives may be relied upon.

Disclosure to enforcement authorities?

When someone becomes aware of a criminal offence, the questions rises to which extent such person must report this to the public prosecutor's office. In Belgium, no general obligation to disclose criminal offences to the public prosecutor's office exists, save for (i) those who have witnessed an assault against the public safety or against a person's life or property, (ii) a public entity, public officer or civil servant who becomes aware of a criminal offence in the performance of their duty, (iii) the private investigator who becomes aware of a crime or criminal offense during the execution of a mission, and (iv) a judge dealing with a civil matter who notices/becomes aware of a criminal offence. Further, it should be noted that no one can be obliged to incriminate oneself. As such, in Belgium, a company does not have an obligation to report a criminal offence to the public prosecutor's office if this would incriminate the company (e.g. in the event the fraud committed by the employee/independent contractor would be (first) allocated to the company).

In addition to these general principles, some specific sector/ transaction-related laws impose reporting duties (e.g. the money-laundering legislation, competition law,..). Finally, both in criminal and civil proceedings, the judge or the acting magistrate can order to submit certain information, including an internal investigation report.

Criminal complaint?

If there is no obligation for the company to report the identified fraudulent actions to the public prosecutor's office, the company can freely decide whether or not to file a criminal complaint. Such complaint is often filed in case of more serious and complex fraud for purposes like (i) fact finding: the criminal investigators have greater powers to conduct a full investigation (e.g. house searches, access to bank accounts of the perpetrators, wiretapping,..); (ii) asset tracing, and (iii) safeguarding the reputation of the company: either to avoid the impression of a 'cover-up' or to send a clear signal to other employees and third parties that the company does not tolerate fraud.

Notwithstanding the advantages mentioned above, companies must also take into account that, following the criminal complaint, they shall no longer be in control of the investigation, which is entirely handed over to the public prosecutor's office and the investigating judge. Also note that the civil claim of the company (and as the case may be the civil proceedings) shall be suspended during a criminal investigation and criminal proceedings ("*le criminel tient le civil en état*").

Recovery

The recovery phase shall focus on both asset tracing and asset securing through seizures (on movable goods, real estate and claims on third parties). Seizure measures are essential for recovery purposes and should be discussed together with outside counsel timely to trace the perpetrator's assets and proceed with seizure measures once appropriate and legally possible. Again timing is essential. Most, if not all, conservatory measures will be notified to the debtor/perpetrator. The debtor will thus be aware of the moment on which the company had knowledge of the facts. As indicated above, such knowledge triggers other questions as to the termination of the relationship. ■

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Legal Ruminations Following the **Pandora Papers**

The Rule of Law is impacted by the secretive financial actions of powerful individuals, contrary to their projected personal persona, and that may be unethical, illegal, or both. Here, we use the release of the Pandora Papers to explore how these behaviors influence the stature of our profession through the eyes of well-respected lawyers in the United States, Europe, and South America.

L'État de Droit est affecté par les actions financières secrètes d'individus puissants, contraires à leur image personnelle, et qui peuvent être contraires à l'éthique, illégales, ou les deux. Nous profitons ici de la publication des *Pandora Papers* pour explorer comment ces comportements influencent la stature de notre profession à travers les yeux d'avocats très respectés aux États-Unis, en Europe et en Amérique du Sud.

El Estado de Derecho se ve afectado por las acciones financieras secretas de individuos poderosos, contrarias a su imagen personal proyectada, y que pueden ser poco éticas, ilegales o ambas. Aquí, utilizamos la publicación de los *Pandora Papers* para explorar cómo estos comportamientos influyen en la estatura de nuestra profesión a través de los ojos de abogados muy respetados en los Estados Unidos, Europa y América del Sur.

A U.S. Perspective

STEVEN M. RICHMAN

The Pandora Papers is a massive collection of some 11.9 million leaked documents revealing offshore accounts of various prominent current and former political figures and other well-known persons, initially published by the International Consortium of Investigative Journalists (ICIJ) on 3 October 2021. Per its website,[1] the ICIJ is a non-profit entity that consists of a network of investigative reporters from multiple countries and territories, which "partner[s] with more than 100 media organizations, from the world's most renowned outlets." It claims its Pandora Papers report is "[t]he largest investigation in journalism history [that] exposes a shadow financial system that benefits the world's most rich and powerful."

In this instance, the investigation encompassed over 600 reporters and disclosed offshore records of some 35 past and present "world leaders" and over 300 other former and current public officials. The ICIJ's database on the Pandora Papers "contains 2.94 terabytes of confidential information from 14 offshore service providers." Among its key findings, that find resonance in the United States, is the ICIJ's claim that: "South Dakota and more than a dozen U.S. states have become leaders in the business of selling financial secrecy – even as the U.S. blames smaller nations for enabling tax avoidance and dirty money flows."

These activities are not limited to politicians. "Celebrities," including Shakira, Ringo Starr, and Julio Iglesias, set up companies in offshore tax havens like the British Virgin Islands.[2] The cited ICIJ article notes that these financial practices are not "victimless," even if legal, as follows:

> By routing income and other assets, at least on paper, to offshore jurisdictions with low tax rates, the rich and powerful shift more of the tax burden to ordinary citizens who pay taxes where they work and live, leaving them to bear the cost of services and infrastructure like schools and paved roads. Economists say that offshore

1. ICIG.org.

2. Sean McGoey, *"5 ways celebrities in the Pandora Papers use the offshore system"*, 4 October 2021, https://www.icij.org/investigations/pandora-papers/shakira-sachin-julio-celebrities-use-offshore/.

holdings deprive governments of hundreds of billions of dollars in tax revenue every year.

It should be noted, though, that ownership of investment assets in an offshore company might not save these people from paying any taxes. For U.S. residents, there is worldwide tax on income whether through the offshore company or not. Particularly with the routine exchange of tax information by the British Virgin Islands with other jurisdictions due to Global Forum initiatives over the last decade, ownership of BVI companies is probably visible to most Organizations for Economic Cooperation and Development (OECD) countries.

Among the more notable individuals exposed in the Pandora Papers was that of former UK prime minister Tony Blair, of the Labour Party. The ICIJ reports that Blair and his wife, a lawyer, set up a UK-registered company that bought a subsidiary of a company owned by the Bahrain Minister of Industry and Tourism. This subsidiary owned a building in London valued at $8.8 million. The result:

> *"By acquiring a company that owns a property, instead of acquiring the property directly, the Blairs were not required to pay property taxes, according to experts consulted by The Guardian, an ICIJ partner. The arrangement – which is legal – allowed them to save more than $400,000, according to The Guardian".*[3]

From an appearance perspective, these practices are troubling. As of this writing, the draft Registration of Overseas Entities Bill that was published in 2018 with its framework, requiring the public registration of beneficial ownership of offshore entities owning property in the UK, remains pending.[4] This bill has yet to be put to Parliament.

The point here was not to single out Tony Blair, Shakira, Ringo Starr, or Julio Iglesias – and as noted, nothing illegal has been alleged – but to consider the questions of appearances and propriety, separate from legality. These concerns about transparency persist across the range of political systems, including two of the longest standing "democracies," the United Kingdom and the United States. The call for more transparency in the United States is growing, and the Pandora Papers exposed the extent of the problem. However, if it is still acceptable for private citizens to maintain confidentiality as to their financial affairs, this may beg the question of why it should be unacceptable for public citizens not to have the same rights. It may be that the answer is more political than legal, that is, as political leaders make rules for their own countries and preach enforcement, even at hardship to their electorate, their taking advantage of such offshore jurisdictions that most people do not have meaningful access to undercuts the message and can lead to a loss of confidence and credibility.

While individual Americans were not prevalent among those named in the disclosures, it is arguable that this is mainly because "the cost-benefit of hiding offshore accounts from the IRS is not favorable." Furthermore, "[t]he United States itself is a tax haven, if not the single largest tax haven on the planet."[5] According to Forbes Magazine, "[t] he emphasis on U.S. jurisdictions in the Pandora Papers also stands in stark contrast with U.S. rhetoric, if not its actions."[6] In this vein, the credibility of the American Bar needs to be considered as well as concerns about preservation of attorney-client confidentiality. The organized bar needs to be cognizant of having its deeds match its statements.

The Financial Action Task Force (FATF), an intergovernmental body that sets standards for prevention of money laundering and terrorist financing, has issued recommendations for reporting. Yet, the United States has not adopted the Common Reporting Standard (CRS), setting it at odds with the European Union.[7] The FATF Mutual Evaluation Report (December 2016),[8] describes the United States as having an anti-money-laundering and terrorist financing regime that is generally "robust" but as having "serious gaps" in the U.S. legal framework because there is "no requirement to systematically make beneficial ownership information (either through the incorporation or the banking processes available to law enforcement agencies (LEAs)...".

The Pandora Papers have again raised to the fore the need for the American legal community to analyze the extent to which disclosure must be made by attorneys. The American Bar Association has taken the position that Suspicious Activity Reports (SARS), required from financial institutions under the Bank Secrecy Act, would, if imposed on lawyers, impose undue economic burdens on attorneys and undermine attorney-client confidentiality.[9]

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3. https://www.icij.org/investigations/pandora-papers/power-players/. The report notes the response of Cherie Blair. *"When reached for comment, Cherie Blair said that her husband was not involved in the transaction and that 'all the arrangements made were for the express purpose to bring the company and the building back into the UK tax and regulatory regime and all taxes have been paid ever since and all accounts openly filed in accordance with the law'"*. Note that this has also been described as a stamp duty and a "stamp duty and tax." See https://www.theguardian.com/news/2021/oct/03/tony-and-cherie-blair-bought-property-via-offshore-firm-and-saved-300000-in-tax#:~:text=5%20months%20old,Tony%20and%20Cherie%20Blair%20bought%20property%20via%20offshore,saved%20%C2%A3300%2C000%20in%20tax&text=Tony%20and%20Cherie%20Blair%20saved,by%20a%20prominent%20Bahraini%20minister.

4. *"Will 2022 be the year that the Registration of Overseas Entities Bill finally becomes law?"*, https://www.jdsupra.com/legalnews/will-2022-be-the-year-that-the-1964146/#:~:text=To%20recap%2C%20the%20draft%20Registration,the%20UK%20(UK%20Register).

5. JHay Adkisson, *"Why So Few Rich Americans in the Pandora Papers?"*, *Forbes*, 31 Oct. 2021, https://www.forbes.com/sites/jayadkisson/2021/10/31/why-so-few-rich-americans-in-the-pandora-papers/?sh=171b6a8e4cbc.

6. *"The Pandora Papers Shed New Light on the U.S. As A Tax Haven,"* https://www.forbes.com/sites/insider/2021/10/12/the-pandora-papers-shed-new-light-on-the-us-as-a-tax-haven/?sh=6b0d36c1f598.

7. Noam Noked, *"Should the United States Adopt CRS?"*, *Michigan Law Review Online*, July 2019, https://michiganlawreview.org/should-the-us-adopt-crs-2/.

8. Available at: https://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-states-2016.html.

9. https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/gatekeeper-factsheet-july-2020.pdf?logActivity=true. See also generally ABA Task Force on Gatekeeper Regulation

It is recognized that in the United States, there is distinction between the professional conduct (ethical) obligation to maintain client confidentiality, and the more limited evidentiary attorney-client privilege as it relates to compelled disclosure in certain proceedings. The use of the word privilege here in the European context is in the context of ethical obligations of professional conduct.

A second set of issues raised by the Pandora Papers in terms of transparency involves when, if ever, U.S. lawyers should facilitate transactions that are illegal or when U.S. lawyers should decline to facilitate transactions that might be legal but are unseemly or are conducted for the benefit of unseemly clients (e.g., autocrats, human rights violators, traffickers).

The Pandora Papers have therefore again highlighted a decades-old issue. In response to the 1989 formation of FATF, in 2010 the ABA, in collaboration with other organized bars, issued "A Lawyer's Guide to Detecting and Preventing Money Laundering." Its purpose was to set forth a risk-based approach and identify factors for lawyers to consider in performing client due diligence in the engagement phase as well as during the representation. Practice areas highlighted are real estate transactions, management of client money and assets, management of bank accounts, and formation, management and sale of companies. By identifying risk factors, the guidelines are meant to facilitate the lawyer's due diligence and, provide a basis for analyzing the appropriateness of action pursuant to ABA Model Rule 1.16, relating to representation and withdrawal of counsel. In more formal fashion, the ABA's Standing Committee on Ethics and Professional Responsibility has issued Formal Opinion 491 (29 April 2020) setting forth ethical obligations for lawyers to avoid counseling or assisting in a crime or fraud in non-litigation settings. Essentially, the opinion notes:

> *"a lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d). Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule. Whether the facts known to the lawyer require further inquiry will depend on the circumstances".*

The release of the Pandora Papers puts all the above-described activities in perspective. While no one would disagree over the merits of fighting money laundering and terrorism financing, the Pandora Papers revealed much that is lawful, if perhaps morally questionable. On the other hand, the law matters, and indignation by some does not render a legal practice illegal. And on occasion, journalists sometimes err in their presentation, and lines become blurred. From a business perspective, certain use of offshore structures may be lawful and entirely transparent to appropriate tax and governmental authorities and advantageous for efficient capital markets. This observation must be balanced by the notion that abuse can lead to the breakdown in institutional confidence and ultimately have a negative impact on the rule of law.

For law to have general support, it must be credible. It matters that lawmakers are credible. When political leaders are perceived as saying one thing and doing another, the resultant cynicism may lead to a breakdown in respect for and compliance with the rule of law. To cite one such incident, some years ago, it was revealed that then Massachusetts Senator John Kerry docked his family's $7,000,000 yacht in Rhode Island rather than Massachusetts, thereby avoiding some $500,000 in Massachusetts taxes. Assuming there was no unlawful tax evasion, the perception of exploitation of tax havens that are not available on that scale to "regular" people becomes a basis for to the erosion of the rule of law. Many will remember the "60 Minutes" episode, "Anonymous Inc.," which exposed the apparently greedy reactions of several lawyers to a "fake" client seeking to park money offshore. So, while the legal issues are being addressed, what remains a disturbing aspect of the Pandora Papers is the divide between political and societal "influencers" on the one hand, and the rest of the population. In the U.S., there have been increasing reactions to what has been called "rules for me but not for thee," where the population is told to make sacrifices, and then leaders are seen to be publicly acting contrary to their own dictates

If it is still acceptable for private citizens to maintain confidentiality as to their financial affairs, this may beg the question of why it should be unacceptable for public citizens not to have the same rights.

The Corporate Transparency Act, passed in the U.S. in 2021, is a step in the right direction to towards transparency as it requires the reporting of beneficial ownership information and regulations to implement that are now in progress. The organized bar in the United States is also monitoring these proposals, with particular attention paid to legitimate protections of attorney-client confidentiality.

At the end of the day, perception becomes reality, and as leaders are perceived to be gaming the system for personal benefit, credibility is lost. Without credibility and consistency, the rule of law is jeopardized. Consequently, apart from what the spate of newly launched investigations will reveal, the more fundamental concern is how this impacts policy making and governance in the future. For many, after the initial condemnations, nothing will be done, and they will remain enriched by a system little understood by most. ■

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and the Profession, https://www.americanbar.org/groups/criminal_justice/gatekeeper/.

A European Perspective

KATO AERTS

It has been said that what matters in life is not *what* you know, but *who* you know. This saying seems particularly true for the rich and famous owning offshore companies. In recent years, there has been a strong global push for measures to combat financial structures in tax havens. Nevertheless, and as shown by the Pandora Papers, the rich and famous continue to use offshore structures to escape taxation, successfully keeping many of those structures under the radar. Some argue that this is, at least partially, because they have been advised by large, global law firms accused by some of *"having used their lobbying and legislation-drafting know-how to shape financial laws around the world and help their clients benefit from them."*

Pressure on Legislative Bodies and the Role of Lawyers as Gatekeepers

After their well-known predecessors, including the Panama Papers, the Pandora Papers once again put their finger on the legal obstacles that continue to exist in the establishment of a fair tax system and have again put pressure on legislative bodies around the world. The European Parliament for its part has taken a stand against these practices and called on all parties involved to act. The Parliament states that this conduct leads to unfair tax competition, an unfair distribution of the tax burden, and distorts the internal market. To this end, the Parliament adopted a resolution on the Pandora Papers on 21 October 2021.

Law firms are also targeted by this resolution. Some argue that even if this leak has shown one thing, surely it is the role of prominent law firms in sustaining the existing system. According to these critics, law firms do not only assist their clients in setting up offshore structures, but also frequently make use of their position to lobby and influence legislative initiatives in favor of said clients. As a result, lawyers are considered the gatekeepers and enablers of this system, which lacks the internal controls and oversight of traditional financial institutions.

The Tension Between Attorney-Client Privilege and Anti-Money Laundering (AML) Procedures

The International Consortium of Investigative Journalists (ICIJ) report highlights the role of lawyers in creating and maintaining tax havens but also points to the possibility for lawyers to use their attorney-client privilege, as that term is understood in Europe. Put simply, attorneys must ensure the confidentiality of information provided to them, but at the same time, be required to report suspicious flows of funds in several situations. As a result, suspecting a law firm of money laundering is controversial. It is precisely this balance, or rather this tension, between attorney-client privilege and lawyers' reporting obligation that can be questioned.

Lawyers have a legal and ethical obligation to abide by their confidentiality and professional secrecy duties and must act in the best interest of their clients. Attorney-client privilege is a general principle of law and fundamental to the right of defense. Without it, no relationship of trust can be established between a lawyer and their client. Consequently, lawyers may not disclose confidential information without asking their clients for permission first.

AML obligations require lawyers to thoroughly identify the client before entering into a business relationship and report suspicious money flows. This is not a general obligation (there are exceptions), as it follows from the exhaustive list of situations to which it applies.

Voices have been raised that the combination of both jeopardizes the functioning of the legal profession. Attorney-client privilege is of great importance for the public administration of justice. It ensures the client's candor and trust, which facilitates the lawyer-client relationship. This necessary relationship of trust can only be established and maintained if the client has a guarantee that what the client entrusts to their lawyer will not be disclosed.

Yet the attorney-client privilege risks being seen by legislative bodies as merely an obstacle in the fight against money laundering as if it were a simple constraint,

rather than an effective tool to safeguard the right to a fair trial and the protection of private life. For example, the European Parliament called on lawyers to adopt a methodology whereby professional secrecy would not be an obstacle to the adequate reporting of suspicious financial flows. The European Parliament also calls on the European Commission to draw up guidelines for the legal profession regarding the interpretation and application of the principle of attorney-client privilege and to establish a clear dividing line between traditional legal advice and the execution of financial transactions by lawyers.

Should we not ask ourselves what the profession of lawyers would be worth if this professional secrecy were to be further eroded? After all, the above puts a core value of the profession at risk, even though the European Court of Human Rights (ECHR) and legal doctrine agree that professional secrecy and efficient legal protection are inextricably linked.

Moreover, the anti-money laundering regulations in Europe have had a major impact on the practical operation of all law firms in Europe. On the one hand, the money laundering prevention rules encourage a better inquiry into the motives and backgrounds of clients and can be seen as an accessory to a professionalization of any law firm's services. On the other hand, to avoid suspicions, lawyers may feel pressured to identify each client cautiously and proceed with Know Your Customer (KYC) checks, even for activities that are not strictly targeted. A thorough due diligence is now the rule. This is not only a big administrative burden for most firms, but this may result in the client being less inclined to fully confide in their lawyer. Logically, this has an impact on the effectiveness of the administration of justice.

It goes without saying that lawyers have an important role to play when it comes to public outcry following disclosures like the Pandora Papers. We are advising and advocating for our clients daily to help them achieve their goals while staying within the confines of the law. Our interventions range from mitigating risks to actively pursuing compensation. More often than not, financial considerations are at stake. We have an ethical and legal duty to ensure that when doing so, we are not participating in any crimes. We must be careful when identifying our clients: knowing who you work for has become and will continue to become increasingly important.

As a result, lawyers are considered the gatekeepers and enablers of this system, which lacks the internal controls and oversight of traditional financial institutions.

At the same time, let's not forsake the core of our profession either. Attorney-client privilege remains of paramount importance for the proper performance of our role. At least for lawyers, this seems to be true: what matters in life is both *what* and *who* we know. ■

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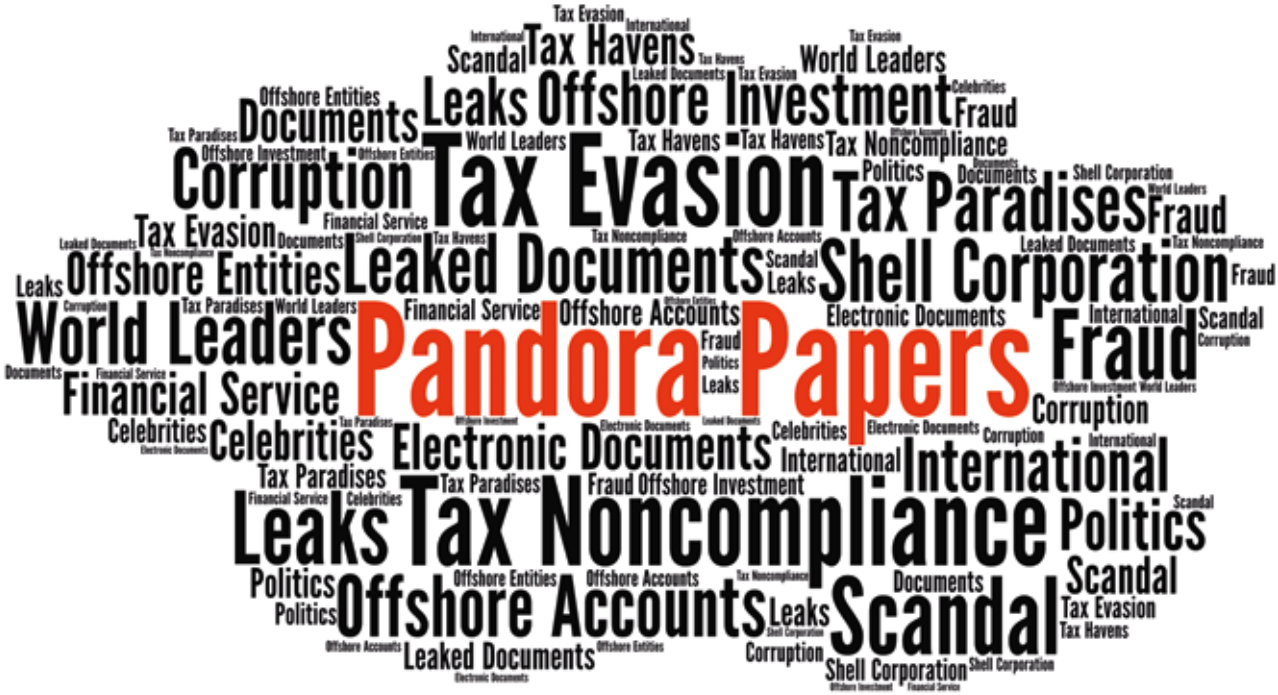

A Center and South American Perspective

MARIO A. GARCIA MARINO

According to Greek mythology, Pandora's box contained all the evil things of the world, and it should not be opened because they would be liberated. According to the legend, in the bottom of the box laid the spirit of hope. But should we have hope? The publication by the International Consortium of Investigation Journalists, related to different matters such as tax evasion, money laundering, and wealth, which was kept in secret by some of the richest and most powerful people of the world, invites us into a deeper inquiry. This leaking mainly exposed more than 330 politicians of 90 countries, who were reportedly using secret offshore companies to hide their wealth. Specifically in South America, we have the cases of Argentina, Chile, Colombia, Ecuador, and Paraguay, where the leaked information referred to several people active in politics in those countries, who had accounts and enterprises hidden in offshore operations.

To answer the question about hope, we must place ourselves geographically and politically in the pertinent region where those countries are located. South America in general, and specifically Paraguay, have relatively new democracies, where the opinion of the small society is the factor that every now and then removes the dust under the rug. In that way, we help our system to improve the justice and transparency standards. It is important to keep in mind that for our legislation to have accountability and for citizens to have shares in companies created in offshore paradises, this does not amount to direct illegal behavior. But what is strictly legal is not always ethical or moral, much less in countries where the impunity, corruption, and leak of confidence toward the authorities is very broad and generalized.

We could mistakenly think that the ethics only referred to individual aspects of the person and that it is not broadly linked with the protection of the society. It is important to understand that there is an individual ethic that applies to the common citizen, but that is not the same ethical standard that measures those who have important posts in the public administration, since the responsibility of the latter is rooted within the public ethics and not the individual one. The public ethic must be aimed toward the benefit of the society and not the personal benefit. This amounts to saying that the behavior performed by public figures can only be considered as something positive when it is performed taking into consideration the common good of the whole society.

We now must refer to aspects related to groupal matters. It is there where the concept of morals is born, so that it can basically be said that it is the union of customs and rules which are considered "good." This set of basic aspects is used as principles that leads to facilitate judging the behavior of the people within the society.

As far as the information exposed by the Pandora Papers, we can ask ourselves if such behavior would be considered as good: the commercial activity of people politically exposed in placing in a secret or at least discrete way, huge amounts of active wealth abroad. The answer from the moral point of view would be negative, since the public opinion would be that placing wealth abroad would have the goal of hiding the ownership of such wealth or at least evading taxes, which could be invested in the benefit of the society. This leads to a negative opinion related to the origin of such wealth, a situation that creates a lack of trust toward the political class, which in turn delays the development of the country involved.

From a legal perspective, we could understand that legislation is not necessarily created having a base concept such as ethics and morals. But it is an important point of departure that generates investigation and debates, which can then be inserted in rules protected within a legal scenario. As mentioned above, specifically in Paraguay, it is not illegal to have an offshore company, and it is not a crime per se. But from a constitutional point of view, we have the legal rule that obliges all public officers, much more the ones in high posts to render a sworn declaration of wealth at the beginning and at the end of every public post.

As a conclusion, the leaking of the so-called Pandora Papers revealed that people resorted to such mechanisms in tax havens to hide their wealth, and it is very worrisome that such people are our representatives. This situation generates a loss of confidence as far as the way such wealth is handled. In our understanding, such situation is alarming, and we must focus on using this experience as a point of departure aimed to improve the political consciousness of the authorities and countries. It can also be used as a basis to create more mechanisms aimed to improve the transparency of the people in public posts, such as the step of creating an efficient registry of people linked to public posts, who create these offshore accounts and companies with the goal of hiding their wealth, so that we can also improve the tracing and follow up of such hidden wealth. ■

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A Primer on Animal Agriculture, Methane, and Climate Action

Daina BRAY

Cette décennie est cruciale pour la réponse de l'humanité face au changement climatique. Il est essentiel de réduire à court terme les émissions de méthane, un puissant agent de réchauffement, comme en témoigne la «promesse mondiale sur le méthane» lancée par plus de 100 pays lors de la COP26 à Glasgow. Bien que l'on estime que l'élevage animale produit au moins 14,5 % de toutes les émissions de gaz à effet de serre d'origine humaine et un tiers des émissions de méthane d'origine agricole, elle est souvent absente des discussions sur la politique climatique. Il est urgent de comprendre et de traiter le rôle de l'élevage animale industriel dans ces émissions de gaz – en particulier de méthane.

Esta década es crítica para la respuesta de la humanidad al cambio climático. La reducción de las emisiones de metano – un potente agente de calentamiento – a corto plazo es esencial, como lo demuestra el «compromiso mundial sobre el metano» lanzado por más de 100 países en la COP26 de Glasgow. Aunque se estima que la ganadería produce al menos el 14,5% de todas las emisiones de gases de efecto invernadero causadas por el hombre, y un tercio de las emisiones de metano de la agricultura, suele estar ausente de los debates sobre política climática. Es urgente comprender y abordar el papel de la ganadería industrial en las emisiones, sobre todo de metano.

Voices from all over the world, from all generations, and from all areas of expertise are shouting that this decade is critical for humanity's response to climate change. The tone of policymakers, young people, indigenous communities, climate scientists, island nations, conservationists, and many others is becoming increasingly urgent. A recent Hollywood film used an incoming destructive comet as a metaphor for the immediacy of the crisis.

We have known for decades that the warming of our planet is caused by greenhouse gases (GHGs) that trap heat in the atmosphere. While there are several types of GHGs, the collective focus of mitigation efforts has mainly been on carbon dioxide, which indeed is responsible for most global warming. We increasingly understand, though, that other GHGs – particularly methane and nitrous oxide – have even more potent warming effects in the near-term.

The critical role of methane is increasingly coming into focus. The United Nations Environment Programme (UNEP) estimates that a quarter of all global warming is caused by methane emissions. Methane is more than 80 times more powerful as a warming agent than carbon dioxide over the first 20 years after its release.[1] Despite this potency, methane creates an important opportunity: it breaks down relatively quickly. By contrast, carbon dioxide can persist in the atmosphere for hundreds or even thousands of years.

Thus, in this critical decade, if the tide could be turned as to methane, that could buy time to steer the tanker ship of our reliance on carbon in a renewable direction. In its most recent report issued in August 2021, the Intergovernmental Panel on Climate Change recognized the potential pivotal role of limiting methane emissions. One of the lead reviewers of that report observed, "Cutting methane is the biggest opportunity to slow warming between now and 2040. We need to face this emergency."[2]

To achieve necessary emissions reductions, action will be required as to all human activities that contribute significantly to the problem. But agriculture – and particularly animal agriculture – has been notably absent from many policy discussions, despite the fact that animal agriculture produces at least 14.5% of all human-caused GHG emissions. The following comparisons may be helpful in understanding the scale of animal agriculture's contributions: the world's top five meat and dairy companies combined are estimated to emit more GHGs per year than ExxonMobil, and the top 20 combined are estimated to emit more than the entire country of Germany.[3] As to methane specifically, agriculture is the

1. *"Reducing Methane Emissions Vital for Climate Action"*, U.N. News (31 Oct. 2021), https://news.un.org/en/story/2021/10/1104492.

2. Fiona Harvey, *"Reduce Methane or Face Climate Catastrophe, Scientists Warn"*, *Guardian* (6 Aug. 2021), https://www.theguardian.com/environment/2021/aug/06/reduce-methane-or-face-climate-catastrophe-scientists-warn.

3. Oliver Lazarus *et al*, *"The Climate Responsibilities of Industrial Meat and Dairy Producers"*, *165 Climatic Change* 30 (2021).

largest anthropogenic global source and, according to the UNEP, one-third of total agricultural methane emissions are from industrialized animal agriculture.

Animal agriculture is a major contributor to GHG emissions, both because it produces all the GHG emissions attendant to the farming of crops – which must be fed to farmed animals – and because it has additional, significant emission pathways. Growing plants contributes to GHG through land-use change (clearing and deforestation), farming activities (tilling soil and machinery use), and off-farm activities (such as fertilizer production and transport).

Additionally, animal agriculture causes significant emissions from grazing (more land clearing and release of carbon from soils), enteric fermentation (ruminant animals belching methane), manure, and slaughter. As a result, on average, animal-based foods create about twice the GHG emissions of plant-based foods.[4] We must focus on fossil fuels and their contribution to climate change, but if we do not also curb emissions from animal agriculture – and move quickly on methane in particular – the chances of averting catastrophic climate change are very much in doubt.[5]

At the 26th United Nations Climate Change Conference held in Glasgow in November 2021 (COP26), an E.U. and U.S. – led coalition of more than 100 countries adopted the "Global Methane Pledge," committing to reduce methane emissions by 30% by 2030. Much of the early discussion around the pledge has focused on shoring up oil and gas infrastructure, such as repairing leaks. But the UNEP's Global Methane Assessment shows that reducing emissions from agriculture will also be necessary to meet the pledge targets.

While both the plans of the European Union and the United States reference the need to improve efficiency (reduce emissions) in animal agriculture, only the European Union pairs that with a recognition that a dietary shift toward plant-based foods is needed and will benefit the environment through reduced methane emissions. Not only does the U.S. methane action plan fail to recognize that reality, it also does not include any significant steps to regulate methane emissions from animal agriculture, instead focusing on subsidizing "voluntary" and "incentive-based" approaches.[6] Increasing the climate efficiency of animal agriculture without reducing overall production will not achieve the necessary emissions reductions, particularly as meat consumption continues to increase both in the United States and globally.

Just as climate activists remain frustrated with the lack of more aggressive collective action, animal activists point out that the failure to confront the climate impacts of animal agriculture is a missed opportunity that will harm us all. Bringing together these threads in her 2021 short film #ForNature, climate activist Greta Thunberg drew the connections between climate change, biodiversity loss, and industrialized animal agriculture. Thunberg points out that 83% of the world's agricultural land is used to feed livestock, but livestock only produce 18% of our calories, and that shifting to a plant-based diet could dramatically reduce GHG emissions and allow us to feed ourselves with much less land – thereby leaving space for biodiversity to recover and reducing the risk of future zoonotic pandemics. For those who worry that government and corporate policy is not changing fast enough, reducing consumption of animal products is one of the most powerful things an individual can do for the climate and for our collective future. ■

The UNEP's Global Methane Assessment shows that reducing emissions from agriculture will also be necessary to meet the pledge targets.

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4. Xiaoming Xu et al., *"Global Greenhouse Gas Emissions from Animal-Based Foods Are Twice those of Plant-Based Foods"*, Nature Food 724 (2021).

5. Fredrik Hedenus et al., *"The Importance of Reduced Meat and Dairy Consumption for Meeting Stringent Climate Change Targets"*, 124 *Climatic Change* 79 (2014).

6. Viveca Morris, *"The Cow-Shaped Hole in Biden's Methane Plan"*, *Politico* (17 Nov. 2021), https://www.politico.com/news/agenda/2021/11/16/methane-emissions-cows-agriculture-climate-change-522550.

México - Programa especial de cambio climático 2021-2024

Héctor HERRERA ORDÓÑEZ

On 8 November 2021, the Special Climate Change Program 2021-2024 was published in the Official Gazette of the Federation. This program indicates that it contributes to the fulfillment of the Nationally Determined Contributions, with the purpose of moving towards a less carbon-intensive economy and reducing Greenhouse Gas emissions to a level that does not increase the planet's temperature above 2°C, in accordance with the United Nations Framework Convention on Climate Change and the global objectives of the Paris Agreement. Unfortunately, public policies in Mexico in this regard do not correspond to this goal.

Le 8 novembre 2021, le programme spécial sur le changement climatique 2021-2024 a été publié au Journal officiel de la Fédération. Ce programme indique qu'il contribue à la réalisation des contributions déterminées au niveau national, dans le but de passer à une économie à moindre intensité de carbone, en réduisant les émissions de gaz à effet de serre à un niveau qui n'augmente pas la température de la planète de plus de 2°C, conformément à la convention-cadre des Nations unies sur les changements climatiques et aux objectifs globaux de l'Accord de Paris. Malheureusement, les politiques publiques mexicaines en la matière ne correspondent pas à cet objectif.

El 8 de noviembre de 2021 se publicó en el Diario Oficial de la Federación *el Decreto por el que se aprueba el Programa Especial de Cambio Climático 2021-2024*, que entró en vigor al día siguiente de dicha publicación y, que es obligatorio para las dependencias y entidades de la Administración Pública Federal.

En esa misma fecha se publicó en el citado Diario el *Programa Especial de Cambio Climático 2021-2024*, (PECC-2021-2024) elaborado por la Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT), con la participación de la Comisión Intersecretarial de Cambio Climático (CICC).

El PECC-2021-2024 tiene los siguientes 4 Objetivos Prioritarios:

1. Disminuir la vulnerabilidad al cambio climático de la población, los ecosistemas y su biodiversidad, así como de los sistemas productivos y de la infraestructura estratégica mediante el impulso y fortalecimiento de los procesos de adaptación y el aumento de la resiliencia.

2. Reducir las emisiones de gases y compuestos de efecto invernadero a fin de generar un desarrollo con bienestar social, bajo en carbono y que proteja la capa de ozono, basado en el mejor conocimiento científico disponible.

3. Impulsar acciones y políticas sinérgicas entre mitigación y adaptación, que atiendan la crisis climática, priorizando la generación de beneficios ambientales, sociales y económicos.

4. Fortalecer los mecanismos de coordinación, financiamiento y medios de implementación entre órdenes de gobierno para la instrumentación de la política de cambio climático, priorizando la creación de capacidades e inclusión de los distintos sectores de la sociedad, con enfoque de derechos humanos.

Si se desagregan por sector de emisión, el que tuvo una mayor contribución a la emisión total en 2015 fue el sector de energía, que participó con el 70% del total de las emisiones.

También incluye 24 Estrategias y 169 acciones puntuales. Dicho programa indica que abona al cumplimiento de las *Contribuciones Determinadas a nivel Nacional* (NDC) por sus siglas en inglés), teniendo como finalidad el tránsito hacia una economía menos intensiva en carbono, reduciendo las emisiones de Gases de Efecto Invernadero (GEI) a un nivel para no aumentar la temperatura del planeta por encima de los 2°C, de conformidad con la Convención Marco de las Naciones Unidas sobre el Cambio Climático y los objetivos globales del Acuerdo de París. Lamentablemente, las políticas públicas en México a este respecto no corresponden a dicha finalidad.

Efectivamente, el Ejecutivo Federal ha promovido diversas disposiciones jurídicas, cuyo común denominador es que violentan el Estado de Derecho, particularmente en lo relativo al derecho humano al medio ambiente y al desarrollo sustentable, muy en especial en lo relativo a la emisión de GEI, que son los principales causantes del cambio climático.

Dichas disposiciones promueven el uso de combustibles fósiles, desalentando el uso de combustibles y tecnologías más limpias, violando con ello importantes disposiciones constitucionales en la materia ambiental de la transición energética, así como instrumentos internacionales en los que México es parte, tales como la *Convención Marco de las Naciones Unidas sobre el Cambio Climático*, el *Acuerdo de París*, el *Tratado entre los Estados Unidos Mexicanos, los Estados Unidos de América y Canadá*, también conocido por su siglas en español como "TEMEC",[1] *el Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe*, también conocido como "Acuerdo de Escazú",[2] entre otros. A manera de ejemplo citamos algunas de esas disposiciones promovidas por el Ejecutivo Federal:

1. El *Acuerdo para garantizar la eficiencia, calidad, confiabilidad, continuidad y seguridad del sistema eléctrico nacional, con motivo del reconocimiento de la epidemia de enfermedad por el virus SARS-Cov2 (Cocid 19)*, publicado el pasado 29 de abril de 2020 por el Centro Nacional de Control de Energía.

2. El *Acuerdo por el que se emite la Política de Confiabilidad, Seguridad, Continuidad y Calidad en el Sistema Eléctrico Nacional publicado por la Secretaría de Energía*, publicado el 15 de mayo de 2020 en la versión vespertina del Diario Oficial de la Federación.

3. El *Decreto por el que se reforman y adicionan diversas disposiciones de la Ley de la Industria Eléctrica*, publicado en el Diario Oficial de la Federación el 9 de marzo de 2021.

4. El *Decreto por el que se reforman y adicionan diversas disposiciones de la Ley de Hidrocarburos*, publicado el 4 de mayo de 2021 en el Diario Oficial de la Federación.

5. El *Acuerdo por el que se instruye a las dependencias y entidades de la Administración Pública Federal a realizar las acciones que se indican, en relación con los proyectos y obras del Gobierno de México considerados de interés público y seguridad nacional, así como prioritarios y estratégicos para el desarrollo nacional*, en lo sucesivo, publicado en el Diario Oficial de la Federación el 22 de noviembre de 2021.

De las emisiones globales de gases de efecto invernadero por consumo de combustibles fósiles, en 2015 la gran mayoría (74% del total) proviene del sector de energía, seguido muy de lejos por la agricultura (13%) y los procesos industriales (8%)".[3]

En el caso de México, entre 1990 y 2015 las emisiones totales pasaron de 444.7 a 683 megatoneladas de CO2 equivalente, lo que es igual a un crecimiento de 53.6% a una tasa de crecimiento anual de 1.73%. Los sectores que en México tuvieron el mayor crecimiento en su volumen de emisión entre 1990 y 2015 fueron los de residuos (265.8%), el de procesos industriales y uso de productos (65.9%) y el de energía (59.5%). Si se analiza la evolución de la emisión de los distintos gases de efecto invernadero, los gases cuyos volúmenes de emisión crecieron en términos relativos en mayor grado entre 1990 y 2015 fueron los hidrofluorcarbonos (HFC; 1,559%), el hexafluoruro de azufre (SF; 502.4%); el CO2 (56.8%) y el CH4 /47.7%. Sin embargo, en términos absolutos, el CO2 fue el gas que incrementó mayormente su volumen de emisión en los veinticinco años que considera el inventario: pasó de 315 a 494.1 megatoneladas emitidas. Si se desagregan por sector de emisión, el que tuvo una mayor contribución a la emisión total en 2015 fue el sector de energía, que participó con el 70% del total de las emisiones.[4]

Muchos de los residuos de las actividades humanas se liberan a la atmósfera en forma de gases y pueden permanecer suspendidos en ella unos pocos días (como en el caso del material particulado y el carbono negro), por décadas (como los clorofluorocarbonos) o incluso siglos, tal como ocurre con algunos gases de efecto invernadero (el dióxido de carbono, por ejemplo). Aunque algunos contaminantes pueden degradarse en la atmósfera, depositarse en el suelo o en los océanos, o integrarse en los ciclos biogeoquímicos, sus emisiones crecientes han sido la causa de algunos de los problemas ambientales más importantes que enfrentamos en la actualidad: la degradación de la capa de ozono estratosférico, el cambio climático y el deterioro de la calidad del aire en las zonas urbanas. La contaminación atmosférica es de vital importancia porque incide negativamente en la salud de la población, y de la biodiversidad en general, por lo que su efecto puede verse reflejado en la disminución de la calidad de vida, reducir la productividad y tener impactos no deseados en la economía.[5]

Por todo lo anterior, a pesar del reconocimiento internacional (particularmente en el seno de la ONU) y de la SEMARNAT en México, sobre la evidencia científica respecto de los efectos negativos del cambio climático, causados por los GEI, particularmente el CO2, resulta sorprendente que el Ejecutivo Federal en México siga promoviendo disposiciones jurídicas que contravienen: (i) el tránsito hacia una economía menos intensiva en carbono; (ii) la reducción de emisiones de GEI; y, (iii) las disposiciones ambientales de la transición energética expresamente establecidas en la Constitución Política de los Estados Unidos Mexicanos. ■

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1. Decreto Promulgatorio del Protocolo por el que se Sustituye el Tratado de Libre Comercio de América del Norte por el Tratado entre los Estados Unidos Mexicanos, los Estados Unidos de América y Canadá, hecho en Buenos Aires, el treinta de noviembre de dos mil dieciocho, publicado en el Diario Oficial de la Federación el 29 de junio de 2020.
2. Decreto Promulgatorio del Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe, hecho en Escazú, Costa Rica, el cuatro de marzo de dos mil dieciocho, publicado en el Diario Oficial de la Federación el 22 de abril de 2021.
3. SEMARNAT. *Informe de la Situación del Medio Ambiente en México, edición 2018*. Compendio de Estadísticas Ambientales, Indicadores Clave, de Desempeño Ambiental y de Crecimiento Verde. México, 2019, p. 326. https://apps1.semarnat.gob.mx:8443/dgeia/informe18/tema/pdf/Informe2018GMX_web.pdf
4. Ibídem p. 329 a 331.
5. Ibídem p. 281.

Beyond Conventional Ways of Corporations Financing - Upstream and Cross-Stream Financing Under Algerian Law

Samir BOUKIDER

Il est essentiel, pendant un processus de levée de fonds, qu'une société n'enfreigne pas la réglementation applicable en matière de financement alternatif. Un mécanisme se situe dans le périmètre du groupe de sociétés par distinguant avec clarté suffisante entre les transactions légales de celles illégales. Tracer la ligne de démarcation entre les transactions financières légales et illégales n'est pas évident. Le financement *upstream* et *cross-stream* du secteur bancaire font partie des points de vigilance à considérer avec sérieux. La société, pour éviter la mise en cause de sa responsabilité, a intérêt à s'assurer qu'une *legal due diligence* est en place avant de s'engager dans ce type de transaction.

Es fundamental durante el proceso de captación de fondos que la empresa no viole la normativa aplicable en caso de financiación alternativa. Un mecanismo se ubica dentro del perímetro del grupo de empresas al distinguir con suficiente claridad entre transacciones legales e ilegales. Sin embargo, trazar la línea divisoria entre estas transacciones financieras no es una tarea fácil. La financiación *upstream* y *cross-stream* del sector bancario se encuentran entre estas delicadas preocupaciones que deben tomarse en serio. La empresa debe asegurarse de que se establezca *legal due diligence* antes de embarcarse en tales transacciones para evitar cualquier responsabilidad.

I. Introduction

To avoid relying heavily on commercial banks, borrowing corporations are encouraged to look for other financial alternatives. Inevitably, businesses face drawbacks in pursuing such alternatives, since often they create different categories of secured and unsecured debt. The company, whether as the parent or subsidiary, seeking to mitigate the risk of default and debt reorganization, may choose to utilize lending with acceptable ratios of indebtedness by seeking alternative financing options. The most far-reaching types of financing alternatives within the framework of a family of companies involves so-called upstream and cross-stream transactions. While generally straightforward, there are some complicated hidden issues of which the involved companies must be aware.

The upstream situation occurs when a subsidiary makes a loan to its parent company or at a lower degree, commits to guarantying the parent company's obligations. The company board of directors' decision to engage in such a course of action is largely impacted by a myriad of factors. For example, these include situations in which the parent company requires additional funds to meet exploitation costs or expand its territorial reach by taking new ventures, and could not afford the necessary financing, due to past restrictions or limitations stipulated under existing debentures still in force. Another example is where there is an insufficiency of collateral belonging to the parent company itself. The subsidiary involvement as guarantor offers comfort to lenders for repayment of the loan in such circumstances.

Generally speaking and assuming the transactions are arm's length, there is no per se restriction on upstream and cross-stream financing, providing the underlying financial benefits swing from time to time between parent company and group other subsidiaries.

Another type of financing is known as cross-stream financing. Under such scheme, a sister-sister company relationship exists, because two entities belong to the same parent company. To an extent, the considerations converge with those involved in upstream financing.

The cross-stream arrangement is like upstream financing with the difference that it involves a sibling company, either as lender or guarantor. The financial status of the sibling company is relevant. So rather than being directed vertically to the parent company, the loan instead is directed horizontally towards the sibling company of the same group. It is to be noted that the bifurcation between upstream and cross-stream does not preclude the eventuality of financial collection that flows from a sibling company to a parent company with the end result that it

is diverted and redistributed to another sibling company in need of financing.

As a matter of law, one should not take a risk by assuming interchangeability of both mechanisms without going into an in-depth analysis of the surrounding circumstances that are special to each. It is fact-sensitive, so beyond this scope of this article to provide guidance as whether such a particular situation is like another, or to judge the legal validity of each.

However, generally speaking and assuming the transactions are arm's length, there is no *per se* restriction on upstream and cross-stream financing, providing the underlying financial benefits swing from time to time between parent company and group other subsidiaries.

II. Legality of Upstream and Cross-Stream Financing

Due to lack of explicit legislative consecration of upstream and cross-stream financing it is pertinent verifying their enforceability under Algerian law.

As far as judicial reaction is concerned, it is not entirely clear either, because of scarcity of court decisions dealing expressly with the subject matter's key issues. As, upstream, and cross-stream financing have not received sufficient judicial review. Such judicial passivity militates against any tendency for development of a body of rules that should be applicable to this sensitive issue situated at the intersection of different laws.

The legal position is clarified for some banking groups of companies to effectuate credit operations under an umbrella of cash pooling and treasury arrangements.

Arguably, the lack of judicial activity towards formulation of effective tests for assessing the enforceability of these transactions is of less importance since the parties directly involved in the process were responsible to perform due diligence prior to entering the transactions. However, such an argument is insufficient when the parties are confronted with a contractual relationship that ultimately is unenforceable as a matter of law due to mistake or overreaching. As consequence, development of such effectiveness tests to judge upstream and cross-stream financing becomes more than necessary when it directly concerns protection of minority shareholders.

It remains a commercial matter as to the question of whether a right to infer a benefit is obligatory or not, such as to sustain enforceability of the loan or guaranty. Consequently, the intrinsic commercial character of the relationship between subsidiaries of the same group must be such that dealings between related companies have to be concluded on arm's length transaction. Intra-group agreements such as loans and guaranties, in particular, can be a source for generating unreasonable profits by way of charging an interest or fees respectively for the subsidiary benefit, and not meet arm's length standards.

1. Banking Law, Upstream and Cross-Stream Financing

Readers shall be accustomed with the definitions of a group of companies having a plurality of definitions found in the Algerian laws. The idea behind a group of companies differs according to whether one is in syllogism of tax law, accounting law, commercial law or banking law. In principle, such an idea results in an artificial elimination of the group members' respective legal personalities to attain consolidation of accounting means of different financial books in single balance sheet.

Hence, questions arise as to what type of definition should be retained once confronted with upstream and cross-stream financing. Is it a legal corporate definition or instead a more restrictive definition adopted in the Algerian Tax Code that shall? Differences between the two statutory regimes are significant and it is difficult to address them all here. As a result, apart from a tax consolidation that may result in draconian conditions, it is suggested in principle that the corporate legal definition of a group of companies should be retained for rest of other area of laws, including the banking sector.

The similarity of upstream and cross-stream financing in the group of companies' context with conventional banking operations requires a brief review of what is intended by banking operations. Banking operations are defined by Ordinance n° 03-11 dated 26 August 2003, pertaining money and credit, (Ordinance n° 03-11). Article 70 provides: *"Except banks are authorized to carry out as a usual activity all operations described in articles 66 to 68 above"*.

Furthermore, Ordinance n° 03-11, article 66 held: *"Banking operations include: funds reception from public, credit operations, as well as supply and provision of means of payment for banks' customers and its management"*.

Likewise, article 68§1 of Ordinance n° 03-11 defines credit operations as follows: *"Any act given for consideration (not gratuitous) by which a person places or promises to place funds available to another person or, in the interest of that person, takes an undertaking by signature such as endorsement, guarantee or bond"*.

Out of these three banking operations, credit operations have common features with upstream and cross-stream financing. Despite the definition given, the concept remains flexible. Such flexibility is inspired at a greater extent from Ordinance itself, by drawing a line of distinction between pure credit operations from ordinary credit operations. Among financial operations excluded from banking operations no reference is made to upstream or cross-stream financing. The categorization of credit operations deduced from Ordinance n° 03-11, allows us to infer the following preliminary conclusions:

- Fund Placements or Deposits by a Bank in the Account of Another Bank

There is nothing to prevent fund placements or deposits by a bank in the account of another bank to take shape of financial support. The only condition required is that the depositor of funds is an existing shareholder of the company, as agreed by banks or financial institutions. As a consequence, the legal nature of those funds is beyond pure credit operations. In effect, article 67§2 of Ordinance n° 03-11 is explicit on this: *"However, the following are not considered as funds received from the public: - Funds remitted or deposited in the account by shareholders holding at least 5% of the capital, directors and managers"*.

- Upstream and cross-stream financing are not being not excluded from pure credit operations.
- This is implied from article 67§2 that such a way of corporation financing can be assimilated to pure credit operation and consequently be caught by prohibition imposed by article 67§2, unless otherwise stated.

2. Exception to Banking Activity Monopoly

Upstream and cross stream financing appears authorized under certain conditions for credit operations that might otherwise not get done, because of the prohibition set out around banking operations and to credit operations particularly to get done, as per article 79 of Ordinance n° 03-11. Thus, an exception of importance to the restrictions against some activities (described essentially as banking operations that constitute a monopoly for banks and financial institutions), by allowing a group of companies (not operating necessarily in financial and banking sector) to engage in transactions that might be otherwise deemed "banking operations" without fear of infringing applicable banking laws.

Article 79 of Ordinance stipulates: *"Notwithstanding prohibition dictated by article 76 hereunder, a company can: proceed with cash-pooling and treasury arrangements with other companies having with it directly or indirectly shares capital relationship, conferring to one company a real power of control upon the other companies"*.

As result, the legal position is clarified for some banking groups of companies to effectuate credit operations under an umbrella of cash pooling and treasury arrangements. Against this background, groups of companies acting in the financial and banking sectors are less fortunate, as it seems from literal interpretation of Ordinance n° 03-11 legal provisions. A thorny question arises for a group of companies operating in the field of banking and finance possibility of making banking operations between themselves.

The awkward position under which such groups of companies, acting in the financial and banking sector, are left with formulation of article 104§1 of Ordinance n° 03-11 can be explained by the Algerian legislature's fears for avoiding systemic collapse of businesses, following insolvency of the group's principal company. Introduction of article 104§1 in Ordinance n° 03-11 therefore did not arise in a vacuum, after the economic quagmire left behind by the insolvency of two private banks.

Therefore, for sake of preserving sound and stable banking and a financial place that inspires confidence amongst economic players, Algerian legislation allowed another exception. This time, groups of companies operating exclusively in the banking and finance sectors, were subject to a wide range of prohibitions which tended to provide intra-financial assistance. In other words, while the legislation is meant to provide flexibility, the concern remains that a group of companies will improperly take advantage of the exception.

Article 104§1 read as follows: *"It is prohibited for a bank or a financial institution to grant loans to its board members and shareholders or to the bank or financial institution group of companies"*.

It is fundamental to clarify that the above legal provision shall neither be construed in a restrictive manner against banks and financial institutions' freedom, nor be interpreted as to hinder their ability, either as holding or subsidiaries in group of companies, to interfere financially into its or other group members through loans and guaranties. Therefore, any attempt to maintain extravagant interpretation without subjecting its wording into a refinement process, with consequences of classifying nearly all inner operations including upstream and cross-stream financing, conducted within banking group of companies as prohibited actions, will lead nowhere, apart from destabilizing the market.

Furthermore, financial assistance given to subsidiaries of the same group, acting exclusively in financial and banking sector is not just permissible but also crucial for survival of the group [...].

Only after interplay of the controversial article with other legal provisions of Ordinance n° 03-11, that it has been certified the essence of article 104§1, as not imposing general interdiction, may be understood. At first sight, banks and financial institutions are legally allowed to hold stake in shares capital of other companies, according to article 74 of Ordinance n° 03-11.

From the foregoing, we can at least confirm that there is no single "one size fits all" approach as to the legality of upstream and cross-stream in the banking and financial sector the answer to the issue depends largely on how article 104§1 should be read. It is for sure that the locking device introduced by article 104§1 is not general in such way as to include a wide range of financing and banking operations.

It is possible to upheld that a bank or financial institution, as a holding (parent) or subsidiary company in a group of companies, operating exclusively in the financial and banking sector, within framework of cash-pooling and

treasury arrangements, cannot provide financial support except as down-stream and cross-stream financing thus without fear of infringing article 104§1, provided that such other companies of the group are operating also in a banking and financial sector. Whereas upstream financing in the context of banking sector, there is strong evidence that suggests such an operation can be prohibited, as result of generality of the word *"shareholders"* mentioned in article 104§1. Indeed, the word *"shareholders"* is vague to include:

- Different shareholders acting either in banking and financial sector or not.
- Legal entity or natural person shareholders
- Another hurdle includes situations involving a shareholder's spouse and 1st degree relatives.
- Shareholders with variety of shares ownership thresholds

While there is no ownership ceiling rate, the lowest rate has been determined that is equal to 10% of the bank's shares capital or voting rights, according to Bank of Algeria's defining a shareholder. There is no clear indication whether such lower rate limitation may have exonerated companies engaging lawfully with upstream financing as between bank's shareholder(s) with less than 10% stake holding of the bank's shares capital from whom the former is seeking financial assistance.

Overall conclusions drawn above from article 104§1 interpretation, seems reasonably in concordance with other legal provisions of Ordinance n° 03-11. As a matter of law, there is more than one reason that justify such finding.

One of the reasons has been mentioned above, where we have concluded that an explanation of article 67§2 of Ordinance n° 03-11, that funds remittance and deposits in the account of bank by shareholders holding at least 5% of capital, are not deemed, as pure credit operations. For this reason, it is suggested that upstream or downstream financing is not concerned by article 104§1.

Furthermore, financial assistance given to subsidiaries of the same group, acting exclusively in financial and banking sector is not just permissible but also crucial for survival of the group, as whole, in financial crises. Taking into consideration huge amounts of capital required for rescuing a bank from collapse, the aim cannot be achieved without involvement of existing shareholders also players in banking sector. Said argument is in full harmony with article 99 of Ordinance n° 03-11.

Another valid argument that strengthens the above conclusion, relates to interpretation of the word *"companies"* of the group bank or financial institution) referred to in article 104§1 Ordinance n° 03-11. The word should not be read in isolation, but once again, in conjunction with legal provisions of article 79 of Ordinance n° 03-11. As you may recall, article 79 sets out an important exception to banking monopoly by allowing companies not operating necessarily into sphere of banking and financial sector to effectuate banking operations such as cash-pooling and treasury arrangements in the framework of group of companies. Therefore, the word *"companies"* mentioned in article 104§1 shall be used in particular context, which is *companies not operating necessarily in financial and banking sector*. This argument, militate clearly to validate cross-stream financing in the banking sector.

It appears critical before engaging into upstream and cross-stream financing to pay heed to following scenarios, which can fall foul under prohibition imposed by article 104§1 Ordinance n° 03-11:

- If financial support emanates from bank or financial institution, as subsidiary, to another company as parent company, regardless of whether operating in banking and financial sector or not.
- If financial support emanates from bank or financial institution, as subsidiary, to another company as sister company, not operating in banking and financial sector, even if the financial support is originated from cash pooling and treasury arrangements. ■

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An Overview of the Judiciary **in the United States**

PETER M. REYES, JR.

Le système judiciaire des États-Unis comprend un réseau complexe de tribunaux aux niveaux fédéral, étatique, administratif, militaire et même législatif. Les tribunaux américains appliquent généralement la *Common Law*. Le système procédural américain est accusatoire. Les tribunaux de juridiction de droit commun jugent une grande variété d'affaires. Il existe également des tribunaux spécialisés en charge des affaires civiles, pénales, commerciales, d'immigration, fiscales, familiales, d'amirauté, de commerce international et bien d'autres domaines. Tous les tribunaux américains doivent suivre et respecter la Constitution des États-Unis, les Constitutions des États le cas échéant, ainsi que les lois fédérales et des États concernés.

El sistema judicial de Estados Unidos incluye una compleja red de tribunales a nivel federal, estatal, administrativo, militar e incluso legislativo. Los tribunales de EE.UU. generalmente siguen el *Common Law*. Los Estados Unidos tienen un sistema acusatorio. Los tribunales de jurisdicción general pueden conocer de una gran variedad de casos, pero también existen tribunales especializados que conocen de asuntos civiles, penales, comerciales, de inmigración, fiscales, de familia, de almirantazgo, de comercio internacional y de otras áreas. Todos los tribunales de EE.UU. deben seguir y acatar la Constitución de EE.UU. y las constituciones estatales, cuando sean aplicables, así como las leyes federales y estatales.

The judiciary in the United States spans a complex network of federal, state, administrative, military, and legislative courts, among others. The most well-known are federal and state courts, which have a similar structure, although in the state court system, at the trial court level, the courts tend to separate civil and criminal matters, and certain other specialty areas, such as family and probate law.

Generally, the federal courts fall under Article III of the U.S. Constitution. The federal courts of first impression are the 94 U.S. District Courts located throughout the country. If one or more parties wants to appeal the decision by a U.S. District Court, it may do so to one of the 13 appropriate U.S. Courts of Appeals. An appeal from the decision by the Court of Appeals may be made by petition for a writ of certiorari to the highest court in the nation, the U.S. Supreme Court. The Supreme Court has the discretion as to which cases it will hear on appeal. It typically hears appeals of approximately 100-150 cases a year out of the more than the 7,000 cases appealed[1].

Most but not all states follow a format like the federal court, with state district or circuit courts hearing the initial case, and if an appeal is brought, to one or more intermediate appellate courts (depending on the population size of the state), and a state supreme court.

Federal courts are courts of limited jurisdiction. Specifically, they can only hear cases that either involve a federal question or involve diversity of citizenship. A case raises a federal question if it involves federal laws, the U.S. Constitution, or the U.S. government. A case has diversity of citizenship if it involves parties from different states or different countries and the alleged damages are at least $75,000. If neither one of these criteria are met, the federal court has no jurisdiction to hear and decide the case.

In addition to Article III federal courts, the U.S. federal judiciary also has courts that hear specific matters, such as bankruptcy and immigration courts. There are also several U.S. courts of special jurisdiction, such as the Court of Appeals for the Armed Forces, the Court of Federal Claims, the Court of International Trade, the Court of Appeals for Veterans Claims, the Judicial Panel on Multidistrict Litigation, and the Tax Court.

Decisions from these courts, in addition to patent, trademark, and copyright decisions from federal district courts, can be appealed to the Court of Appeals for the Federal Circuit. The exceptions are appeals from the Court of Appeals for the Armed Services, which are heard by the U.S. Supreme Court, and appeals from the Tax Courts, which are heard by the appropriate Appellate Tax Court.

Of particular interest is the U.S. Court of International Trade, which has jurisdiction over civil cases involving the United States, a U.S. agency, or a U.S. representative as

1. See https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about.

a party when it involves an issue related to international trade. The International Trade Court is situated in New York City, New York, but it can hold hearings anywhere in the U.S., as well as in other countries.

In contrast, state courts are courts of general jurisdiction. As such, state courts can hear any case that does not fall under the specific jurisdiction of the federal courts. For example, federal courts have jurisdiction over patent, trademark, and copyright cases because they are embedded in the U.S. Constitution. Nevertheless, state courts will often hear cases involving other U.S. Constitutional issues when they also involve similar state constitutional issues. State courts also do not hear cases that fall under the jurisdiction of federal courts of special jurisdiction. As noted above, different state courts can hear civil, criminal, family, real property, contract, personal injury, custody, juvenile, and insurance cases, among other types of cases. State courts occasionally hear cases that have international implications or involve parties from other countries.

All courts must follow and abide by the U.S. and state Constitutions, as well as federal and state statutes. But even then, the courts will first interpret the constitutions and statutes.

Because the U.S. and its states follow the common law system, except for the state of Louisiana, which is a mix of common law and civil law, they rely on and build upon prior judicial decisions. All courts must follow and abide by the U.S. and state Constitutions, as well as federal and state statutes. But even then, the courts will first interpret the constitutions and statutes. Once a constitutional provision or statute is interpreted by a court, that will become a binding, precedential court decision that must be followed by the other courts going forward. Many claims are based on common law rights that are not articulated in a statute or Constitution. However, not always appreciated in the federal system is that a state interpreting its own constitution may come to a different conclusion on a particular point of state law than the U.S. Supreme Court interpreting the federal constitution on an analogous legal issue.

Common law rights are based solely on judicial decisions stating that a party has a particular right that is enforceable. For example, some states recognize a "common law marriage," holding that, even if two people have not entered into a formal civil marriage recognized under a state statute, they can be considered married by virtue of the time they have been together. Common law rights continue unless and until a court decides that those rights no longer exist, or the legislature passes a statute abrogating the common law right.

The U.S. court system is an adversarial system, rather than an inquisitorial system, in which the parties present their case to a judge or jury for a decision. The judge as a neutral magistrate oversees the proceedings and ensures that the parties abide by the applicable rules of procedure, but generally does not question the parties or witnesses. In addition, U.S. courts generally follow "the American Rule" with respect to attorney fees, in which each party pays their own legal fees regardless of who prevails. Attorney fees can be required to be paid by the losing party only in certain situations, such as if a court rule, statute, or constitution allows for attorney fees, or if the parties previously agreed by contract to allow the prevailing party to recover attorney fees. Courts also have certain inherent authority to impose sanctions for inappropriate behavior that can include limited attorney fees for the infraction.

In the United States, although not required for certain courts, judges generally have a law degree, have practiced law for several years, and then are either appointed or elected to the judiciary. Article III federal judges are generally recommended by the U.S. senators from their state to the U.S. President, who then nominates a judicial candidate to the U.S. Senate. The U.S. Senate vets the candidate, holds hearings, and then votes on whether to appoint the candidate, who must receive a majority vote from the 100-person Senate. Article III federal judges receive a lifetime appointment. In some instances, bar associations, such as the American Bar Association, will "rate" the nominee or candidate. However, these ratings are a non-binding expression of opinion.

States vary widely in their judicial selection process. Some states follow a process like the federal system. Others have a state judicial selection committee that makes recommendations to the governor, who then appoints the candidate. Some states hold elections for judges. Yet other states have a mix of appointments, followed by general elections or retention elections. States also vary widely in terms of the length of the appointment. In addition, many states require judges to retire by a certain age.

Judges in the U.S. are addressed as "Judge" (or "justice" depending on the court or jurisdiction), "Your Honor," (short for the Honorable Judge [name]), or "Judge [name]." Legal proceedings in U.S. Courts of Law follow strict formal procedures by which lawyers must abide, even when hearings are held virtually. ■

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Overview of the Public Prosecutor System **in China**

YE YUAN

Cet article explore le rôle des procureurs en Chine, en discutant des mesures qu'ils prennent, ainsi que de leurs obligations et de leur pouvoir discrétionnaire dans les affaires pénales.

Este artículo explora el papel de los fiscales en China, discutiendo las acciones que llevan a cabo, así como sus obligaciones y discreción en los casos penales.

Introduction

Prosecutors in China have long played an important role in criminal matters. On the one hand, Chinese prosecutors have the authority to file cases and investigate certain types of crimes directly. On the other hand, they have the power to review whether to arrest suspects and file charges against them. Also, prosecutors appear in criminal trials for public prosecution. The scope of Chinese prosecutors' duties include supervision and redress of illegal activities in all types of criminal litigation activities. This article gives a brief introduction to the role of prosecutors in criminal procedure in China and reveals some key issues in Chinese judicial practice.

I. The Authority to File a Case and Investigate Certain Types of Crimes

According to Chinese law, criminal investigation is generally conducted by police bureaus. It is noteworthy that a prosecutor has the authority to file a case and investigate certain types of crimes, including illegal detention, extortion of confessions by torture, illegal search, and other illegal activities conducted by judicial officers who take advantage of their functions and powers.

However, in practice, it is not common for a prosecutor to file a case and investigate the crimes mentioned above. Only when the relevant crimes reach certain degrees of seriousness will the prosecution initiate the investigation. For minor violations, the prosecution may merely issue some legal advice to the suspect.

II. Early Involvement of the Prosecution in Investigatory Stage

For major cases, the prosecution often engages in an investigatory procedure in advance and appoints prosecutors to participate in case handling or provide consultation regarding investigating and collecting evidence. Article 87 of the Criminal Procedure Law of the People's Republic of China provides the legal basis for such practice, which prescribes that "When necessary, the prosecution may send prosecutors to participate in the police bureau's discussion of major cases."

Early involvement of prosecutors is obviously for the purpose of assisting the investigatory organ to (1) investigate, (2) collect sufficient evidence in a proper way, and (3) facilitate the filing of charges in a later stage. The problem is that there are no specific provisions on the subject, time, procedure, method, and scope of early involvement, which could lead to arbitrariness. The early intervention by the prosecution would be considered (mainly by criminal suspects) that the defendants may not be treated fairly in the subsequent prosecution.

III. Issuing an Arrest Warrant

In most cases, the police bureau will file a case and then conduct the investigation. If there is enough evidence, the police bureau will detain the suspect. After a certain detention period, the police bureau will transfer the case to the prosecution and apply for an arrest warrant. Generally, the prosecution would approve the issuance of the arrest warrant. As a result, the suspect would continue to be detained. If the prosecution decides not to issue the arrest warrant, the suspect will be released on bail, but the case will continue to be investigated within a one-year time limit.

Recently, given the high detention ratio of criminal suspects in China, more and more voices have called for measures to reduce the detention ratio. In response to such request, the Supreme People's Procuratorate of the People's Republic of China issued a regulation, requiring prosecutors at all levels not to make arrest decisions for minor crimes. However, further steps need to be taken. In particular, it is essential to specify the definition of minor crimes. On the whole, the number of arrest warrants issued by the prosecution remains high, and the proportion of suspects in custody is quite large.

IV. Review for Prosecution

After investigating a case, the police bureau may transfer the case to the prosecution to examine whether the basic facts of the case have been ascertained. To determine whether it is proper for filing charges against an individual, the prosecution shall focus on: whether the facts are clear, whether the evidence is sufficient, whether the charge is correctly determined, whether there is any crime that has been omitted or any other suspect whose criminal liability shall also be investigated and so forth.

Recently, given the high detention ratio of criminal suspects in China, more and more voices have called for measures to reduce the detention ratio.

The time limit for such review before prosecution is generally one month, which may be extended to six months or an even longer period for various reasons. During such period, the prosecutor interrogates the criminal suspect and hears the suspect's statements. These activities are recorded.

Two key issues are worth mentioning during the period of review for filing charges: one is guilty pleas, and the other is the review of the necessity of detention.

Under Chinese law, a criminal suspect who pleads guilty may obtain a document issued by the prosecutor regarding a suggestion for lenient punishment. Guilty pleas ought to be based on voluntariness of the defendant. However, concerns arise that some prosecutors might threaten suspects who do not plead guilty with more severe penalties, considering that there are no constraints and supervision regulating such activities at present. Fortunately, when the defendant stands trial, the judge will ask the defendant whether the confession is voluntary. Therefore, if the defendant suffers coercion to give a confession against the defendant's free will, said individual still has a chance to re-express the individual's true will at trial and revoke the guilty plea accordingly.

Meanwhile, because of the high proportion of detention in China as mentioned above, attorneys often apply for a second review of the necessity of detention during the period of review for prosecution, aiming to get the suspect temporarily released from the detention. Overall, the likelihood to get approval for such an application is still low.

If a prosecutor considers that the facts of a crime have been ascertained and the evidence is reliable and sufficient, the prosecutor shall make a written decision to initiate a prosecution and transfer the case file to the court. If the prosecutor considers that there are no facts indicating a crime is committed or that the impacts of the crime are minor, the prosecutor may decide not to initiate such prosecution.

V. Appearing in Court to Prosecute

Here are the general stages of a criminal trial. First, a prosecutor would read charges to the defendant in open court, and then the defendant may present his/her case about the crime charged. Next, the prosecutor may interrogate the defendant. Subsequently, the prosecutor would introduce evidence to prove the crime. With the participation of the defendant's attorney, the evidence would be investigated and verified. Also, judges would investigate on their own. Finally, the prosecutor would give a comprehensive opinion of prosecution, summarizing the process of the court investigation, elaborating the facts, evidence, provisions of the law and logic to determine the crime, analyzing the defendant's motive and the crux of the crime, and making specific sentencing suggestions, etc. Correspondingly, the defendant would offer a closing argument.

Interestingly, a prosecutor "wears two hats" in criminal proceedings. The prosecutor does not only file charges against the suspect, but also takes the role of "legal supervisor", by supervising the whole criminal proceedings, which would put pressure on the court and the defense attorney. Normally, the court and the defense attorney would not pay too much attention to the so-called supervision during the trial. Instead, they would treat it as the prosecutor's attempt to obtain privileges in the court. Since China adopts an inquisitorial system, judges would preside over the trial, in which both the prosecutor and the defense attorney must follow the directions of the judge in accordance with Chinese criminal procedure law.

VI. The Independence of Prosecutors

It is generally held that prosecutors in China do not have absolute independence when handling cases. For major and complex cases, the prosecutor often submits the case to the procuratorial committee (an organization established within the prosecution to discuss major cases and generally composed of the chief procurator, deputy chief procurator and senior prosecutors) and should obey the opinions of the procuratorial committee unconditionally.

If a case is handled in a seriously wrong way, the prosecutor will be held liable whenever such wrong is found. However, if it is proved that the prosecutor takes action pursuant to the procuratorial committee's final decision, the prosecutor is unlikely to be held liable. Therefore, if a prosecutor is uncertain about a case, the prosecutor tends to submit the case to the procuratorial committee for the final decision as to whether to determine the crime, to prosecute, to release the suspect on bail, etc.

The practice of submitting the case for the procuratorial committee's determination originates against the background that in the past, not all prosecutors received adequate legal education or obtained judicial qualification. Thus, such practice would help ensure the quality of case handling. ■

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What is the Day of the **Endangered Lawyer**?

Steven M. RICHMAN

24 January is marked around the world as the Day of the Endangered Lawyer (DEL). Begun in 2010 by two Dutch lawyers, Symone Gaasbeek-Wielinga and Hans Gaasbeek as a result of their investigation into the 1990 treatment of lawyers in the Philippines, they created this commemorative day to shine a light on the intimidation and murder of lawyers around the world. The date of 24 January was selected because on that day in 1977, four labor lawyers in Spain were murdered in Madrid in the so-called Massacre of Atocha.

The foundation they established, *Foundation The Day of the Endangered Lawyer*, is based in Haarlem, Netherlands, and has as its purpose to focus attention of the global community on the threats to lawyers seeking to do their jobs. It pursues this purpose by selecting particular countries and reporting on countries where lawyers are impeded in their ability to defend the human rights of their clients. Their thrust is commemorative and memorial, including the observation of the day, promoting cooperation among relevant stakeholders, and maintaining information on particular regimes. Information may be found at the organizations website, http://dayoftheendangeredlawyer.eu.

In 2022, the focus is Colombia. The report[1] provides a good example of their approach. It notes that "Colombia remains the country with the highest number of murdered human rights defenders in Latin America... " After going through various individual cases and the overall environment, it concludes with demands and recommendations, including compliance by Colombia with the Havana Convention (available at https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers).

Over twenty years ago, the Havana Declaration set forth the Basic Principles on the Role of Lawyers, calling on governments to ensure "efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction," and "the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons."

The UIA Institute for the Rule of Law (IROL) co-signed the 2022 report on Colombia and publicized it as part of the global effort and supports the day each year.

Among other recommendations are a continued monitoring and voice by the global organized bar. While lawyers in many countries do not generally face the same physical threats as lawyers in the countries previously singled out by DEL – Azerbaijan (2021), Pakistan (2020), Turkey (2019 & 2012), Egypt (2018), China (2017), Honduras (2016), the Philippines (2015) and Iran (2010) – the day is a reminder that the threat to one is a threat to all, and one never knows how changes in leadership can affect a particular country. Vigilance remains critical, and that is what the Day of the Endangered Lawyer causes all lawyers to focus on. ■

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1. https://www.lrwc.org/wp-content/uploads/2022/01/DOEL.Final-Report2022.Colombia_DEF.EN_.UPDATED.pdf

Kimberly Potter Conviction

Following a jury trial, former veteran police officer, Kimberly Potter, was found guilty of both first-and second-degree manslaughter on 23 December 2021 in Minneapolis, Minnesota. She fatally shot Daunte Wright following a traffic stop. It was learned after the stop that Daunte had an outstanding warrant for a weapons possession charge. Potter is a white female; Wright was a black male.

Officer Potter had pulled her firearm instead of her taser while exclaiming, "Taser, Taser, Taser" to Wright. Wright was killed during the time period in which former police officer Derek Chauvin was on trial for killing George Floyd in Minneapolis, Minnesota, a murder that sparked international attention and the re-examination of how race impacts outcome in the American justice system.

Ghislaine Maxwell Conviction

Ghislaine Maxwell, the daughter of media mogul Robert Maxwell, who herself traveled in powerful and elite circles in the UK and US, was convicted of sex trafficking a minor, as well as other crimes, on December 29, 2021. At trial,it became known that Maxwell, together with indicted financier Jeffrey Epstein (who reportedly committed suicide prior to trial), exploited underage girls for a decade. According to testimony at her trial, Maxwell recruited and groomed young girls to provide sexual services, sexually assaulted them, and trafficked them.

This case was closely followed internationally given both Maxwell's and Epstein's relationships with well-known politicians, royals, academics, and business executives. On June 28, 2022, Maxwell was sentenced to 20 years in prison by U.S. District Judge Alison J. Nathan. The Judge also imposed a $750,000 fine.

Within at least the US, in some quarters, this verdict and sentence represent rare accountability for this conduct at certain levels. For example, Hollywood's principal player, Harvey Weinstein, was not brought to justice for many years despite a perception that his activities were an open secret.

Nigeria: Jumia

Founded in Nigeria in 2012, Jumia provides services in 14 African countries. It is a company sometimes compared to Amazon. Services include being an online marketplace, a logistics service, and a payment service. In 2017, MIT picked it as among the top 50 smartest companies. By April 2019, it was listed on the New York Stock Exchange. This was followed by a class action about material misrepresentations of financial metrics in a Securities and Exchange Commission filing. Jumia has 5,100 employees and is regarded as an influential brand.

Congress of Brazil approves accession to the Budapest Convention

On 15 December 2021, the Senate of Brazil approved accession to the Budapest Convention. This step permits the Government of Brazil to deposit the instrument of accession and become a Party to this treaty any time, and therefore to cooperate on cybercrime and electronic evidence with currently 66 other countries.

Nouvelle loi française relative à la protection des enfants

La nouvelle loi française relative à la protection des enfants est entrée en vigueur le 8 février 2022. Le vœu de rendre l'avocat d'enfant obligatoire en assistance éducative pour une meilleure protection de l'enfant constitue, depuis de nombreuses années, une préoccupation majeure de la profession d'avocats. Cette réforme attendue est donc une occasion manquée par le parlement d'inscrire dans la loi le principe « *un avocat, un enfant* » en lui opposant des contingences économiques au détriment des droits fondamentaux des enfants et, d'une manière plus large, des droits de la défense.

Si certaines avancées peuvent être relevées, le CNB regrette un texte qui ne garantit pas à tout enfant un accès effectif au droit et à la justice, quels que soient son âge, son sexe, ses origines et sa capacité de discernement.

Pour aller plus loin :

- LOI n° 2022-140 du 7 février 2022 relative à la protection des enfants JORF n°0032 du 8 février 2022
- Résolution du Conseil national des barreaux portant sur le projet de loi relatif à la protection des enfants adoptée par l'assemblée générale du 2 juillet 2021
- Rapport sur le projet de loi « protection de l'enfance »

Respect des restrictions liées au Covid par les membres des gouvernements

En 2021, alors que le monde respirait au rythme des contaminations, certains ont cru pouvoir échapper aux mesures sanitaires. Sanna Marin (PM finlandaise), Erna Solberg (PM norvégienne), Boris Johnson (PM anglais), Antonio Horta-Osorio (alors CEO de Crédit Suisse) et Novak Djokovic (n°1 mondial de tennis masculin) ont tous violé une norme s'y rapportant. En conséquence, certains ont dû se retirer ou payer une amende, alors que d'autres se maintiennent encore à leur poste. A noter que l'amende infligée à Erna Solberg a été aggravée du fait de son rôle clé dans l'imposition des restrictions dans son pays.

France : Médiation

France : décret n° 2022-245 du 25 février 2022 (publié le 26 février) favorisant le recours à la médiation et portant application de la loi n°2021-1729 du 22 décembre 2021 (Loi pour la confiance dans l'institution judiciaire), avec (i) injonction à la médiation (2) versement de la provision entre les mains du médiateur directement (3) médiation devant la Cour de cassation (4) modification du champ d'application de la tentative de règlement amiable obligatoire (5) création de la procédure applicable à l'apposition de la formule exécutoire par le greffe sur l'acte d'avocat constatant un accord issu d'un MARD.

Bitcoin in Latin America

As it is known, El Salvador is the first country in this region and in the world, to recognize the pioneer cryptocurrency, Bitcoin, as one of the official currencies in the country. Although the adoption rate in El Salvador is smaller compared to that of other countries in the region, such as Venezuela, the government has made efforts to accelerate the adoption by offering its citizens wallets with an initial charge in Bitcoin equivalent to $30 USD.

At a regional stage, other countries have not remained passive to the advance of the cryptocurrency and are presently implementing or planning to do so, rules that aimed at regulating the flow of transactions or production of Bitcoin under several legal alternatives, such as the issuance of licenses to miners or the compulsory registration of them in entities responsible for money laundering.

United States: Dobbs v. Jackson Women's Health Organization

In 1973, the United States Supreme Court issued *Roe v.Wade*, which established that woman had a right under the United States Constitution to an abortion, subject to certain parameters. Essentially, this took away the ability of states to regulate abortion under the federal system in the United States.

On June 24, 2022, the Court issued its decision in Dobbs v. Jackson Women's Health Organization that challenged *Roe v. Wade's* assertion of that Constitutional right and to return the power to regulate abortions to the states. The case involves a Mississippi law banning abortions after five weeks. Following an apparent violation of the Court's protocols, a draft majority opinion by Justice Samuel Alito was leaked to the press. The final decision showed a 6-3 split on the court. The majority opinion overruled *Roe v. Wade* and *Planned Parenthood v. Casey*, primarily holding that there is no discernible Constitutional right to abortion, and that such a right was the province of the states. In other words, state legislatures have responsibility for defining the scope of abortion rights, and the federal constitutional protection of abortion rights, sometimes characterized as a reproductive freedom, was found not to exist. This means that individual states could either restrict or ban abortions, or allow them within certain parameters, similar to what Roe v. Wade had done with its categorization of rights dependent upon which trimester the pregnancy was in. It also means that legislation in those states that have legislated broader abortion rights are unaffected.

The case presented an issue relating to *stare decisis*, that is, the role of precedent, which the majority opinion addressed. The United States Supreme Court has abandoned precedent in certain notable cases, such as those that has sustained segregation. There are those that contend that if this long-term precedent is overturned, other right viewed as settled in the U.S. may be impacted, too. Others have viewed this more in terms of the Court setting out the parameters of its jurisdiction and returning the issue to the state legislatures under the Constitution.

In 2022, Senegal will host the UIA's first Congress in Sub-Saharan Africa in a location with one of the most successful economies in the region: Dakar, a vibrant and flourishing city.

SCAN ME

Ne manquez pas le 66e congrès annuel de l'UIA !

Découvrez sur notre chaîne YouTube UIA, les surprises qui vous attendent à Dakar.

El Congreso de la UIA, ¿qué es?

Vivan de nuevo los momentos más destacados del Congreso de Madrid y experimenten todo lo que pueden esperar de un Congreso UIA.

SCAN ME

Bienvenue à Dakar !

Située à l'extrémité ouest du continent africain et face à l'océan Atlantique, Dakar se déploie, dans des contrastes saisissants, entre modernité et authenticité. Ses marchés animés, sa vie nocturne, ses îles paisibles juste au large, ses sites chargés d'histoire, ses authentiques villages de pêcheurs, forment un kaléidoscope surprenant. Vivante et chaleureuse, Dakar est une ville captivante qui ne cesse de se réinventer.

Dakar, c'est :

- La *Teranga* ou l'hospitalité authentique de la population sénégalaise
- Une ville d'art et de culture
- Un patrimoine universel
- Une nature plurielle avec des sites d'exception à seulement quelques kilomètres
- Une gastronomie haute en couleurs et en saveurs
- Une offre hôtelière de premier choix
- Une ville résolument tournée vers l'avenir, à la pointe de la tendance.

El Centro Internacional de Conferencias Abdou Diouf (CICAD)

Inaugurado en el 2014, el edificio del CICAD guarda un equilibrio perfecto entre estética, usabilidad y versatilidad. Cuenta con las instalaciones y la tecnología necesaria para llevar a cabo un evento de esta magnitud y para recibir a los participantes de la mejor manera. El CICAD está ubicado en Diamniadio, una ciudad nueva a 30 kilómetros de Dakar.

Programme scientifique

2 thèmes principaux

- La gouvernance des ressources minières et énergétiques en Afrique et au-delà
- L'efficacité et la pertinence de nos systèmes judiciaires

30 séances de travail des commissions

8 sessions spéciales

- Sénat international des Barreaux / Forum des membres collectifs
- Session UIA-IROL
- Session jeunes avocats
- Session du comité des femmes
- Session UIA-ABA
- Session spéciale sur les violences sexuelles dans les zones de conflit
- Session LexisNexis
- Session UIAdvance (réservée aux cabinets membres du réseau UIAdvance)

Hot Legal Topics

This year, several commissions join efforts to foster the debate on a wide array of collaborative sessions, cutting legal issues and topics, such as:

IT and Contracts – What the Business Lawyer Needs to Know
- *Contract Law / Information Technology Law*

Climate Change and Legal Risk Management
- *Agrifood Law / Health Law / Insurance Law*

Corporate and Tax Trends in M&A Transactions in the "New Global Situation"
- *Corporate Law / Mergers & Acquisitions / Tax Law*

Coordination of Immigration and Estate Planning Advice
- *Immigration and Nationality Law / International Estate Planning*

The Impacts of Agricultural and Food Waste: A Multi-Perspective Discussion
- *Agrifood Law / Environment and Sustainable Development Law*

Fashion as an Emerging Industry in Africa, and How IP Rights can be a Tool for the Development of the Industry
- *Fashion Law / Intellectual Property*

Foreign Investment and Human Rights
- *Foreign Investment / Human Rights*

Fraud, Fantasy, and Fighting Crime in Real Estate
- *Criminal Law / Real Estate Law*

Investment and Commercial Arbitration in OHADA and Natural Resources
- *International Arbitration / OHADA Law*

Establishing and Operating a Successful Law Firm Ready for the 21st Century
- *The Future of the Lawyer / Management of Law Firms*

Monitoring and Enforcing Health Law to Achieve Human Rights
- *Health Law / Human Rights*

Focus on Networking on the Opening Day

On the very first day of the Congress, participants are invited to attend discussions and debates focused on issues lawyers face in specific regions or based upon affinity of languages: Arabic-speaking lawyers' forum, French-speaking lawyers' forum, German-speaking lawyers' forum, Portuguese-speaking lawyers' forum, Spanish-speaking lawyers' forum, African lawyers' forum, Asian lawyers' forum, Forum of lawyers from Central and Eastern European countries, Latin-American lawyers' forum, Common Law forum.

Eventos sociales del Congreso

¡El Congreso es la ocasión para reunirse nuevamente con sus colegas en el ambiente acogedor que caracteriza a la UIA!

- **Ceremonia de inauguración** bajo la Presidencia de Su Excelencia el Presidente de la República de Senegal, Sr. Macky Sall.
  26 de octubre - 9:30
- **Velada informal** con la participación especial el cantante senegalés más famoso, Youssou N'Dour. Artista internacionalmente reconocido, Youssou N'Dour es uno de los mayores embajadores de la música africana en el mundo.
  27 de octubre - 20:00
- **Cena de gala** en el exclusivo hotel Terrou-Bi, frente al mar.
  28 de octubre - 20:00
- **Ceremonia y cóctel de clausura**
  La entrega de la presidencia del actual Presidente, Hervé Chemouli, a la Presidenta Electa, Urquiola de Palacio, será un momento significativo en el transcurso de la ceremonia de clausura.
  29 de octubre - 16:30

Young Lawyers' Happenings

Young lawyers under 35 benefit at UIA Congresses. A working session will be dedicated to issues they are facing:

- Motivating and engaging younger employees – How to retain the talent you have acquired?
- How will legal technology affect the role of young lawyers, and how do we ensure that younger employees do not become obsolete?

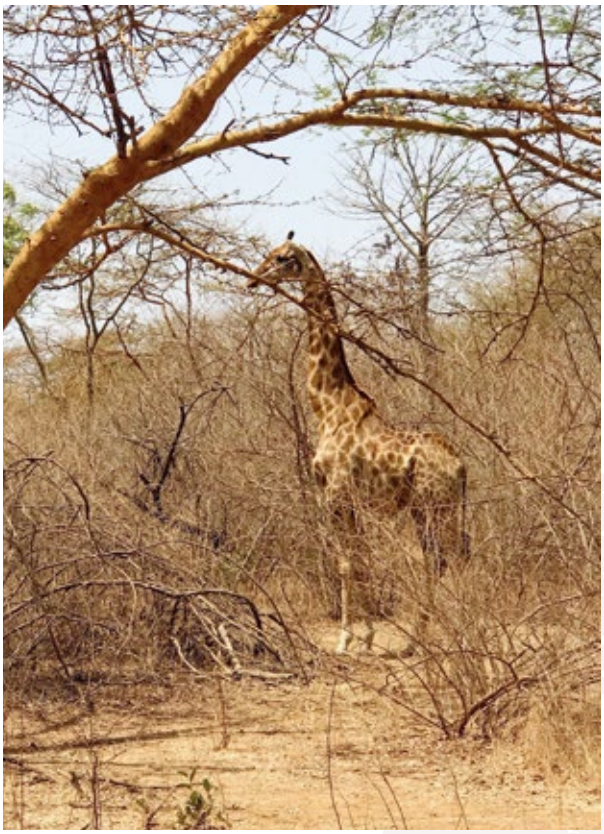
Special fun activities are also planned:

- Sports activities: football game, golf tournament
- Young lawyers' cocktail party (October 26)

Excursion générale à la réserve de Bandia

30 octobre

De par sa grande biodiversité, le Sénégal compte de nombreux parcs et réserves naturelles. Située à seulement 65 km de Dakar (environ une heure de route), la réserve de Bandia et ses 3.500 hectares de nature grandiose mettent la mythique faune africaine à la portée de tous. La matinée sera consacrée à un safari inoubliable où vous pourrez observer de près les animaux sauvages dans leur habitat naturel. L'excursion sera aussi l'occasion de voir de nombreux baobabs de toutes sortes, le baobab étant un arbre emblématique du Sénégal. Après la visite, vous déjeunerez au restaurant qui domine le point d'eau de la réserve. Le retour à Dakar se fera dans l'après-midi.



Discover Senegalese Culture, Tradition and Landscapes: Suggestions for your Accompanying Persons

- Gorée Island (UNESCO World Heritage Site)
- Pink Lake
- Decorative Art Manufacturers in Thiès
- Senegalese cooking class

Do Not Miss the Early-Bird Registration Fees!

- To benefit from the most preferential rate, register in the Congress section at **www.uianet.org before September 4**!
- Online registration helps you save time.
- You can also book your accommodation through **http://www.uiacongress.bnetwork.com, www.uia-congress.bnetwork.com**
- For more information, please contact the UIA team at uiacentre@uianet.org.

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Realest8 Technologies
The Future of Real Estate Transactions

UIA/LexisNexis 2021 Legal Tech Inspiration Award

Realest8 Technologies – an Austrian Legal Tech start-up

Realest8 Technologies is an Austrian start-up making completely digital real estate transactions possible – simple, cost-efficient and fast. The project won the UIA/LexisNexis Inspiration Legal Tech Award 2021 for its new approach to executing real estate transaction as well as the first test transactions that were done 100% digitally without physical presence by any of the contracting parties.

"*The best way to move the world forward is by trusting innovative new ideas.*" This motto is most definitely appropriate for Realest8, that developed a digital platform for real estate transactions - without any media discontinuity. This means that one entire transaction can be executed on only a single platform: no great deal of apps or websites necessary.

How does the Realest8 platform work?

The process of the transaction is fairly easy and was eventually made possible by COVID-19-legislation. Up until that point a notary acts had to be done face-to-face – and under Austrian law an entry in the land register is only legitimate on the basis of notary acts. However, due to the pandemic and the risk for infection, the Austrian legislator made digital notary acts possible. For these the contracting parties identify themselves on the computer through a webcam. e.g. with a passport or other identity card.

Browsing on the platform

But not only the transaction itself takes place on the Realest8 platform. As a first step, there is the possibility of browsing through real estate offers (as a purchaser) or publishing your own advert (as a seller). The seller can also use a so-called name request (*Namensabfrage*), which is a service provided by the Austrian land register. The seller types in their name and subsequently all their property (in Austria) will pop up on the screen: they can then simply pick which property they want to advertise on the platform. This is useful, because the risk that e.g. a parking spot relating to the real estate or other bordering property simply is forgotten in the purchase process will be completely eliminated. In case the seller

does not want to use this name request option, they can also simply type in the address of the property, they might want to sell.

Contacting each other on the platform

In case of an interesting piece of property, the potential purchaser can contact the seller directly via the Realest8 platform, which has an integrated chat function similar to communication apps like WhatsApp. The program Web-ID is used to identify themselves in case of legitimate interest; subsequently the contract negotiations can commence: The parties can do this by themselves or involve lawyers – all contact can be conducted directly on the platform.

The contract provided by the Realest8 platform

A template of a purchase agreement will be provided by Realest8, which includes all possible variations of such a contract, e.g. apartment ownership, that underlies special rules in Austria, a group of buyers or sellers, etc. The parties can then adapt the provided template agreement to their needs and liking. The template further includes instructive and informative comments, which is especially useful if the parties are not including attorneys in their contract drafting. They can read through the contract, find the passages that may be deleted or kept and decide on how to proceed after being briefed by the comments, which have been – as well as the entirety of the template agreement – drafted by real estate attorneys with years of transaction experience.

Digital signing via the platform

After finalizing all the contracts and both parties are happy, the documents that are to be signed are available in a data room, that is connected to a videocall application. This is all happening via the Realest8 platform. The signing of all necessary documentation will happen through this videocall application; even the notary public will identify the parties through this app and create the necessary notary acts for an entry in the land register.

Connection to the land register and FinanzOnline

Through Realest8's cooperation with the Austrian Federal Computing Centre (*Bundesrechenzentrum*), the platform can be connected to the Austrian land register for quick and unproblematic entry of the new owner as well as Austrian's tax platform "FinanzOnline". The so-called self-calculation (*Selbstberechnung*) of taxes, which is done in Austria to determine the real estate transfer tax (*Grunderwerbsteuer*) as well real estate income tax (*Immobilienertragsteuer*), will be carried out through the Realest8 tax tool. Data from the tax tool will be sent by the Realest8 platform directly to FinanzOnline.

So what are the advantages of Realest8?

The possibility of executing the entire transaction via one platform, including contract negotiations, browsing of real estate, signing of all documents, paying necessary taxes and requesting the entry into the land register, makes Realest8 a one-stop-shop solution for real estate transactions. This makes the inclusion of external service providers practically obsolete, however, it is still possible to involve lawyers and/or tax consultants.

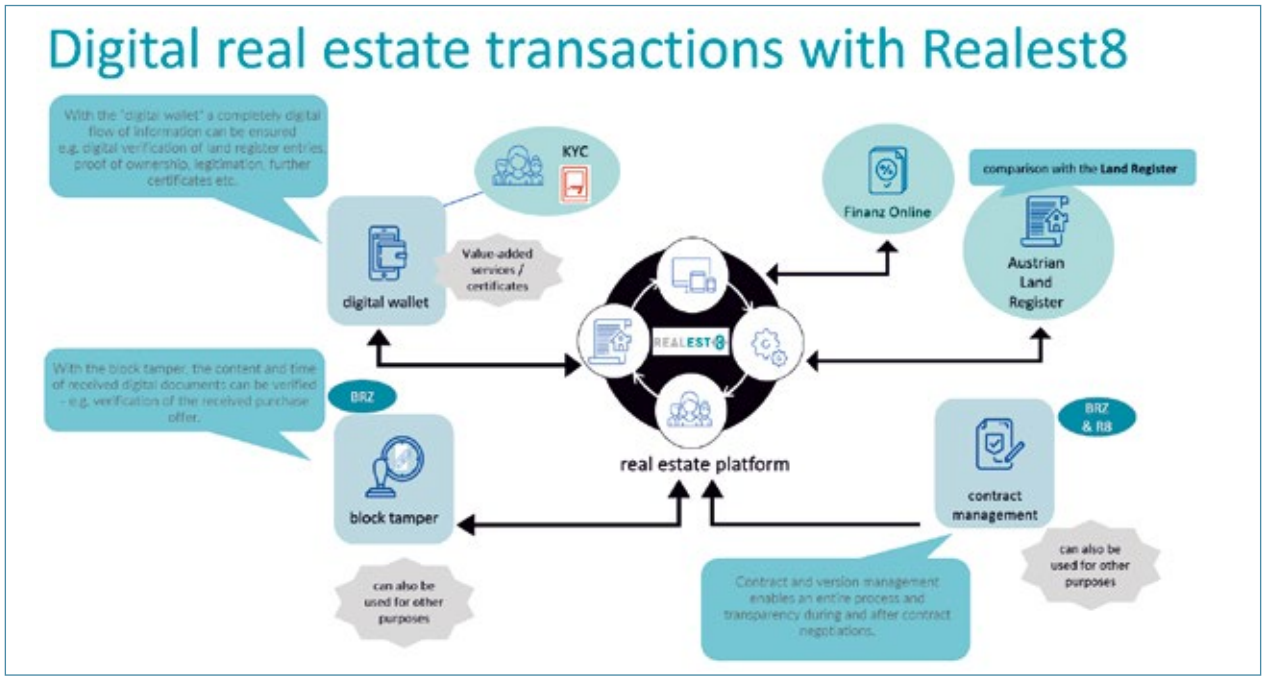
Realest8 inter alia also supports people with disabilities via the completely digital process in a self-sufficient management of their real estate, since they will not have to make exhausting trips to the seller's location, to the notary or to public authorities, but can rather make purchases completely online. This of course helps in creating a more independent life without the necessity of relying on caretakers in such important life decisions.

Founders of Realest8

The UIA/LexisNexis Inspiration Legal Tech Award 2021 was accepted by Thomas Seeber, founder and CEO of Realest8 and attorney at Kunz Wallentin Rechtsanwälte in Vienna, specialized in real estate, banking and corporate law as well as New Technologies. Thomas regularly acts as speaker and/or moderator for (Legal Tech) events and has around 100 publications around his areas of expertise.

His founding colleagues are:

- Peter Kunz, attorney and Founding Partner at Kunz Wallentin Rechtsanwälte in Vienna; areas of expertise: real estate, corporate and trust fund law.
- Lena Brunner, candidate for Master of Banking and Finance at the University of St. Gallen, Switzerland and currently working at an investment bank.
- Manuel Schweiger, prae doc at the University of Economics, Vienna; areas of expertise: real estate and insolvency law.
- Emmanuel Ruez: software engineer and IT-consultant with big clients in the sectors of marketing, tourism and banking; currently working for the federal state of Vorarlberg, Austria.



UIA International Association of Lawyers

LexisNexis

UIA/LexisNexis LEGALTECH INSPIRATION AWARD 2022

Because innovation is crucial to the continuing success of any organization, the UIA and LexisNexis are attributing an annual UIA/LexisNexis LegalTech Inspiration Award in order to encourage innovation in the legal field and reward the organizations or individuals that bring new ideas to the legal world which change lawyers' outlook, practice or working methods.

This is a purely symbolic prize, without any financial endowment, that is aimed at publicly acknowledging and publicising the award-recipients for their ideas and actions. It will be awarded once a year and the second edition will take place in the last quarter of 2022.

TERMS AND CONDITIONS

UIA – 9 rue du Quatre-Septembre – 75002 Paris (France)
E-mail : uiacentre@uianet.org / Web : www.uianet.org

NOMINATIONS

✓Nominations can be submitted until **31 August 2022** with the official nomination form in one of the three UIA working languages (English, French or Spanish) in Word Format. Incomplete forms, forms submitted beyond the deadline or forms that do not fulfill the requirements outlined below shall not be considered.

✓All the nominees must have made significant and recent contribution to innovation, either:
- Legal Tech Companies: for the development of a tool with a high impact on the legal system or legal practice which has contributed to (or has the potential to) transform the sector.
- Law Firms: for embracing innovation and developing innovative actions like legal tech developments, new services, etc.

Emphasis should generally be on the nominee's recent work.

✓**Criteria**
- Degree of innovation.
- Practical impact on the innovator and their clients.
- Economic aspects (cost, time and process)
- Environmental aspects (energy efficiency, sustainability)

✓In all cases, the nominations must reflect the UIA's values and goals (cf. Art. 2 and 3 of UIA's Statutes).

✓A nominee whose application was submitted in a previous year may again be submitted, making sure to add any additional and updated information important for this year's consideration. A nominee cannot receive the Award more than once.

PROCEDURE FOR THE PRE-SELECTION OF NOMINATIONS

✓All complete nomination forms received by the provided deadline shall be examined by a Nomination Committee consisting of the:
- UIA President
- Revenue Director
- Director of the Digital Strategy
- Coordinator of UIAdvance Law Firm Programme
- President of the UIA Future of the Lawyer Commission
- President of the UIA Management of Law Firms Commission
- President of the UIA IT Law Commission
- Two technology leaders from our partner LexisNexis

✓The Nomination Committee, in its sole discretion, may seek additional information with respect to any or all nominees.

✓The nominator will be informed of decisions made with respect to his/her/its nominee.

AWARD CEREMONY

The UIA/LexisNexis LegalTech Inspiration Award shall be given to the recipient or his/her/its representative by UIA and LexisNexis representatives, at a UIA event, the date and time of which is to be determined each year.

By accepting the Award, the winner authorizes UIA and LexisNexis to use his/her/its name, statements made relating to the Award, photographs and videos of the Award ceremony, and other likenesses of the winner for promotional purposes without further compensation, except where prohibited by law.

WHAT IS INNOVATION?

An innovation is an idea that has been transformed into practical reality. It can be a product, process, or business or technological concept, that produces new profits and growth for the organizations that implement or use it.

NOMINATE YOUR CANDIDATE NOW!

30e anniversaire du Forum UIA mondial des centres de médiation

We are looking forward to you joining us and our colleagues from around the globe for the 30th Forum in magnificent Malaga, Spain. Since 2001, the Forum has been an enjoyable and educational event worthy of attending by mediators as well as lawyers and other professionals interested in learning more about mediation.

This 30th edition will gather professionals from multiple nations with another outstanding lineup of presentations and speakers with significant mediation expertise.

We hope you are able to take advantage of this unique opportunity to develop or renew friendships with mediation colleagues and to leave with new insights and information which will help you be even more informed about the mediation process.

Fabienne VAN DER VLEUGEL

Ross W. STODDARD

Le Forum UIA mondial des centres de médiation fêtera son 30è anniversaire à Malaga, Espagne, du 16 au 17 septembre 2022, à l'occasion de son premier retour en présentiel après la crise sanitaire.

Nous écouterons d'abord Ramón Peña González-Concheiro, Urquiola de Palacio del Valle de Lersundl, Mercedes Tarrazon, Fernando Bejerano et Yaiza Araque qui partageront leurs analyses pratiques pour mieux comprendre l'évolution de la médiation en Espagne.

Ensuite, Álvaro Mendiola, Marlen Estevez et Paulino Fajardo nous éclaireront sur le positionnement du droit espagnol vis-à-vis de la médiation judiciaire et la médiation ad hoc.

Stefano Pavletič (Italie), Fang Wang (Chine), Marta Lazaro et Antonietta Marsaglia (Italie) ouvriront la 3è session, et nous aideront à appréhender la médiation intégrant des parties médiées ou des avocats de Chine.

Notre traditionnelle session « Mining the Minds » sera menée par Jeffry S. Abrams (USA), Catherine Leclercq (France), Thiruvengadam BC (Inde) et Kim L. Kirn (USA).

La médiation n'est pas seulement un outil stratégique à utiliser de façon réfléchieC'est aussiun art à gérer de façon modeste, conduisant les médiateurs les plus expérimentés à devoir faire face à des situations inattendues exigeant maîtrise de soi et recul. Ross W. Stoddard, III (USA) mènera cette session, avec Eric Daubricourt (France), Michael J. Schless (USA) et Kimberlee Kovach (USA).

La journée de vendredi se terminera avec Susanne Schuler (UK), James South (UK), Sven Stuermann (Esp) et Mona Hanna (Liban) qui nous sensibiliseront à la diversité culturelle.

Le "game show" de Kimberly Schreiber (USA), David Adams (USA) et Cezary Rogula (Pologne) débutera la journée de samedi.

Trois jeunes diplômés de Harvard – Richard G. Allemann (Suisse), Mira Hanninen (Finlande) et Lucy Stewardson (Belgique) – nous éclaireront sur les dynamiques positions/intérêts conduisant à la construction de solutions.

Sara Sandford (USA), Lisa Savitt (USA), et Georges Hanot (Belgique), nous décriront des exemples concrets liés à leurs expériences pratiques impliquant des parties médiées du Japon et d'autre pays d'Asie, hors Chine.

En raison de la crise sanitaire, le monde de la médiation s'est adapté, nourri et enrichi de défis inattendus. Christine Layne Harter (USA), Gerard Kuyper (Belgique), Erick Boyadjian (France) et Mercedes Tarrazon nous donneront des idées pratiques pour les médiations en ligne qui – Covid ou pas – se poursuivront.

F. Peter Phillips (USA) mènera la session avec Carles Garcia Roqueta, Dima Alexandrova (Bulgarie) et Fang Wang (Chine) en soulevant des interrogations sur des questions d'éthique que certaines médiations nous conduisent à devoir gérer.

Nous terminerons avec la session consacrée aux entreprises, modérée par Sophie Romaniello (Belgique), avec la participation de Céline Haye-Kiousis (BPCE, France), Marie-Aude Ziadé (France) et Denis Musson (France).

Ne manquez pas le 30e anniversaire du Forum qui promet d'être riche en partage d'expériences et d'enseignement. Participer au Forum c'est savoir qu'on en partira avec un réseau enrichi, de réelles nouvelles connaissances pratiques, plein d'idées, de bons souvenirs et un bel enthousiasme.

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War in Ukraine

In this *Juriste International* issue, and the next, we will address how the war in Ukraine impacts the Rule of Law, but also impacts other aspects of civil society both inside and outside of Ukraine.

Dans ce numéro du *Juriste International*, et dans le prochain, nous nous pencherons sur sur l'impact de la guerre en Ukraine sur l'État de droit, mais aussi sur d'autres aspects de la société civile à l'intérieur et à l'extérieur de l'Ukraine.

En este número de *Juriste International*, y en el siguiente, nos centraremos en cómo la guerra en Ucrania impacta en el Estado de Derecho, sino también en otros aspectos de la sociedad civil tanto dentro como fuera de Ucrania.

Global Food Supply Chain Disruption

Diego SALUZZO

Dans cet article, le Président de la commission droit agroalimentaire de l'UIA partage son point de vue sur les implications mondiales résultant des perturbations liées à l'approvisionnement alimentaire.

En este artículo, el Presidente de la comisión derecho agroalimentario de la UIA comparte su perspectiva sobre cómo la interrupción del suministro de alimentos tiene implicaciones globales.

Ukraine, the second largest country in the European region and first in terms of arable land area, is known as the region's breadbasket thanks to its highly fertile black "chernozem" soil, representing 25% of the relevant world's volume.[1] As the leader in exports of sunflower oil, the key ingredient for hundreds of foodstuffs, Ukraine represents the fourth largest exporter of corn, barley, rye, and potatoes worldwide and it is among the top ten exporters of wheat, honey, and chicken eggs.

As a key agricultural country Ukraine meets the food needs of 600 million people, which is important for the European Union (UE). Between January 2020 and December 2021, EU imports of food from Ukraine increased by 54.8 %[2]. The food supply suddenly diminished due to the devastation and lack of sowings caused by the ongoing conflict. Even more affected were low-income countries in Africa and the Middle East who largely depend on Ukraine grain supplies and are now compelled to pay a lot more for alternative sources[3].

Parallel to that, the European food industry is suffering not only because of the lack of Ukrainian products, but also because of massive energy and transportation cost increases. This has occurred in a sector already affected by the impact of Covid-19, with a food chain disrupted at first by shortages of labour to produce and process food and transport restrictions and, at a later stage, characterized by an increasing struggle of farmers to access the market and largely increased costs of shipping, sometimes even exceeding the value of transported goods.

Moreover, sanctions adopted against Belarus and Russia and countersanctions imposed by Russia impacted the cost of fertilizers. Belarus and Russia account for one-third of all global supplies. Russia was a key supplier for Europe's agri-food export market, which focused on high value-added processed products, such as wines and spirits. Although food products remain excluded from financial sanctions,

1. https://ukraineinvest.gov.ua/industries/agrifood/.

2. Source: Eurostat.

3. FAO Information Note, *"The importance of Ukraine and the Russian Federation for global agricultural markets and the risks associated with the current conflict"*, at https://www.fao.org/3/cb9236en/cb9236en.pdf.

exporters experience difficulties with settling payments with partners mainly working through sanctioned Russian banks[4]. And the price of fuel, which is essential to agricultural activities, has skyrocketed since the Russian invasion.

Consequently, Ukraine really also is important from an agri-food perspective. Together with Russia, the world's largest exporter of wheat, Ukraine plays a crucial role in global agri-food and related trade. Both are global powerhouses in oilseeds and grains compartments and are vital to large consumer markets for food products.

Worldwide continuous rises in grain, vegetable oil, and fertiliser prices are generating a spiralling cost inflation in food supply chains, leading to more demand and higher prices from other regions and affecting especially brewers, bakeries, and the feed industry. Western corporations operating in those markets are facing an uncertain future, making it difficult deciding whether to keep operations in that part of the world. Some may be operating on a reduced scale, while others are leaving the market completely.

Paying attention to consequences for the EU system, we can only ascertain that the Ukraine war, like the Covid-19 pandemic before, is incentivising self-sufficient agri-food systems[5]. EU Farm to Fork strategy will probably make more realistic expected reductions of chemical fertilizer use by 2030, and cultivations are more generally expected to change or be rerouted, reintegrating quickly grown crops for biofuels and animal feeds, produced on farms or regionally.

On the other hand, current emergencies may result in the postponement of some other targets to attain food safety, and the EU resilience and recovery funds shall necessarily be remodulated in many respects. European countries closer to the war and more dependent on oil and gas still coming from Russia can also be more negatively impacted by a reduction in household consumption.

It is not an easy situation to be managed, not only in terms of industrial, financial, and legislative perspective, but also from a social point of view, with consumers around the world suffering from the impact of war in terms of higher prices. But this represents just part of a more complex puzzle. For the time being, we are obviously more focused on direct human costs, which regretfully seem to be immense and incalculable. ■

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4. *"Ukraine war 'will be painful' for EU food and farming, Commission official warns"*, at https://www.politico.eu/article/eu-commission-warns-of-major-food-and-farming-impact-of-russia-ukraine-war/.

5. *"Russia's war on Ukraine: EU-Ukraine trade in agri-food products"*, at https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2022)729322.

Lessons Learned from the **Sunflower Oil Crisis**

Joanna KRAKOWIAK

La guerre en Ukraine devrait entraîner de nouvelles pénuries alimentaires. Ces pénuries n'affecteront pas seulement l'Ukraine, mais perturberont également les exportations et les importations ukrainiennes. Un exemple de la façon dont le manque d'exportations alimentaires de l'Ukraine affecte les autres pays est que s'ils substituent des huiles alimentaires à l'huile de tournesol dont l'utilisation est actuellement approuvée dans une variété de produits alimentaires, la production de ces produits alimentaires avec une huile alimentaire de substitution pourrait violer les exigences d'étiquetage de divers gouvernements. Cette situation appelle des solutions non standard et des innovations.

Se supone que la guerra en Ucrania provoque más escasez de alimentos. Esta escasez no sólo afectará a Ucrania, sino que también perturbará las exportaciones e importaciones ucranianas. Un ejemplo de cómo la falta de exportaciones de alimentos de Ucrania afecta a otros países es que, si sustituyen el aceite de girasol actualmente aprobado para su uso en diversos productos alimentarios, la producción de esos productos alimentarios con un aceite alimentario sustituto podría violar los requisitos de etiquetado de diversos gobiernos. Esta situación exige soluciones no estándar e innovaciones.

Introduction

Before the Russian attack on Ukraine on 24 February 2022, Ukraine was the main supplier of corn and wheat in Europe. It supplied approximately 9.2 million tons of maize, which is about 57 percent of total maize imports to the European Union, and approximately 1 million tons of wheat, which is about 30 percent of wheat imports to the European Union.

In 2021, 86 million tons of a variety of grains were harvested in Ukraine. Now, it is predicted that spring 2022 sowings could be half of what they were in 2021 and cover approximately 7 million hectares instead of the 15 million hectares that were planned before the war began.

Ukraine's food imports will also be impacted. Poland exports to Ukraine 43 percent of Ukraine's gluten, 22 percent of Ukraine's pasta, and 9 percent of Ukraine's cheese exports. The ability of Ukraine to purchase Poland's exports could impact Poland's economy.

The effect of the war in Ukraine is also visible and impactful outside of Europe. At least 50 countries are dependent upon Ukraine and Russia for more than 30 percent of their wheat imports. As of 9 March 2022, the price of wheat was already 50 percent higher on the Chicago Board of Trade than before the Russian invasion of Ukraine.

As a result of the war, to protect food for Ukrainian consumption, Ukraine banned the export of barley, rye, millet, and buckwheat, as well as sugar, salt, and meat. To export these products, Ukrainian manufacturers must now apply for special export licenses authorising them to sell wheat, corn, and sunflower oil abroad.

Sunflower Oil Becomes Unavailable

One of Ukraine's specialty exports is sunflower oil. This ingredient is widely used in the composition of foods such as pastries, meat products, fish products, and snacks. Sunflower oil has suddenly become unavailable because the options of other countries to purchase it from Ukraine suppliers has been affected by the war. For other countries wishing to continue production and supply their products to consumers, immediate product reformulations are needed. One option is to substitute sunflower oil with rape seed oil. This may be easy in a domestic kitchen, but not in the strictly controlled food industry.

Changes in Composition Versus Product Labels

Replacing one ingredient with another means that a producer must comply with various government regulations so that consumers are properly informed, otherwise this process may trigger serious regulatory risks for the producer. The labels on each product with a changed composition must also be changed to reflect this. In practice, this process is complex, expensive, and time-consuming.

Within the EU, Regulation (EU) n° 1169/2011 of the European Parliament and the Council of 25 October 2011 addresses this replacement issue under the provision of food information to consumers. Practices in EU member states are not fully unified. In Poland, there is a rigorous approach requiring the stating of the list of ingredients that a product contains, as to simply say it is a vegetable oil is too general.

Also, grace periods to make changes in labels are not accepted because the Polish authorities expect that information included on labels (e.g., on composition) will always comply with the actual composition of the product, which means that from day one of the changed composition, the applicable label is also changed. In cases of non-compliance, severe sanctions may be imposed that include stopping sales of incorrectly labelled products as well as administrative penalties of up to 10 percent of the turnover in the financial year preceding the financial year in which the fine is imposed.

Sunflower oil has suddenly become unavailable because the options of other countries to purchase it from Ukraine suppliers has been affected by the war.

A Non-Standard Situation Requires Non-Standard Solutions

If a change in composition is necessary to ensure continuous supplies of a product when there is a shortage of the ingredients due to the war in Ukraine, must penalties be imposed? Unless a change of composition triggers a risk to public health, the current restrictive approach should be relaxed in this extraordinary situation, much like the government of the United Kingdom (UK) has done.

On 24 March 2022, the UK's Food Standards Agency issued a rapid risk assessment about allergic reactions following the substitution of sunflower oil with rape seed oil. The Food Standards Agency found that the frequency of allergic reactions from this substitution would be very low and the level of severity negligible.

The UK assessment represents a strong argument that in this extraordinary situation, product labels do not have to be changed immediately, but can be done as a step-by-step process. Also, if the need arises, it should be possible to allow an alternative method of providing information to consumers, such as QR codes, announcements on websites of the manufacturers, retailers, and/or authorities, or even via information provided over social media.

Country governments and regulatory agencies need a flexible and innovative approach towards fulfilling their important regulatory requirements while being able to continue to instill consumers' confidence in the food supply. A flexible approach should not mean compromising product safety but could allow new forms of communication with well informed and observant consumers that are aware of the war in Europe and its impact on human lives. ■

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Hacking Each Other to Death

Cyber-War and the Russia-Ukraine Conflict

Jean-François HENROTTE

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La guerre ne se déroule plus seulement sur le terrain, elle se joue dans le cyberespace. Aussi, nous plaidons pour l'adoption d'un protocole additionnel à la Convention de Genève pour tenir compte de cette nouvelle réalité. Bien sûr, le principe fondamental de l'effet utile des conventions internationales peut conduire à une condamnation des cybercrimes de guerre, mais un texte de droit positif réduirait l'incertitude juridique actuelle.

La guerra ya no se libra sólo sobre el terreno, se juega en el ciberespacio. Por ello, abogamos por la adopción de un protocolo adicional a la Convención de Ginebra que tenga en cuenta esta nueva realidad. Por supuesto, el principio fundamental del efecto útil de las convenciones internacionales puede llevar a una condena de los crímenes de ciberguerra, pero un texto de derecho positivo reduciría la actual inseguridad jurídica.

While pictures of bombed buildings and fleeing refugees circle the globe, digital war is less visible, but potentially just as deadly. The day the Russian invasion began, ViaSat (a satellite internet service) was affected by malicious software, crippling the Ukrainian army's communications. Banks' websites were made inaccessible, causing the spread of panic among Ukrainians.

Retaliation followed, when Anonymous (an army of civilian hackers) declared stealth cyberwar on Russia. Computer systems are now hacked by both sides, with not only denial of service attacks, but also with deception and disinformation rampant. A fake video of Vladimir Putin declaring peace with Ukraine caused chaos online, while another clip shows a deepfake of Volodymyr Zelensky surrendering to Russia.

The distinction between civilian and military can be blurred in a cyberwar. Distance from the battlefield is inconsequential. Experts typically condemn civilian hackers, but some make exception for the cyber-warriors aiding the Ukraine. Others view these civilian volunteers as active combatants, potentially unwittingly complicit in war crimes.

The Geneva Convention of 12 August 1949 (and its amendments) governs the conduct of war, but this body of law does not address cyberspace as a theater of conflict. The Convention sets out the fundamental principles of international humanitarian law: the principle of proportionality, the principle of military necessity, the principle of humanity, and the principle of distinction. Thus, under the Geneva Convention, war crimes are assessed based on proportionality (is the attack proportional to the threat); necessity of an attack, which entitles the parties to do the minimum necessary to obtain a military advantage; prohibition of unnecessary suffering, injury, and destruction; and the distinction between attacks on a military target as compared to a civilian one. In cyberwar, these criteria can be hard to discern.

A direct cyberattack on a hospital causing civilian casualties is a war crime, but what about taking out an electrical grid or the access to the internet that supplies a hospital and results in patient deaths from lack of needed medical treatment? The fundamental principle of the effectiveness of international conventions should lead us to interpret the Convention in this sense.

In February 2017, Brad Smith, Microsoft CEO, called for a "Digital Geneva Convention" to stem the flow of state cyber operations. Others believe a robustly developed international law already exists. Everyone agrees that enforcement will be a problem regardless of which bodies of law are referenced.

In 2021, NATO-sponsored legal experts began work on a project to determine the bounds of international cyber conflicts, which will culminate in the third edition

of the *Tallin Manual*, to be published in 2026. While the manual will not be legally binding, it will address issues such as which hacks are legally defensible and when it is appropriate to retaliate.

Treaties addressing cyberwar include the Budapest Convention on Cybercrime of 23 November 2001 (of which Russia is not a party, but even so proposed the adoption in 2021 of a United Nations Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes), and the pending African Union Convention on Cyber Security, as well as Personal Data Protection of 27 June 2014. Together with the Geneva Convention, these limited treaties, together with the *Tallin Manual*, provide guidance as to how existing international laws can be interpreted to fit cyber conflicts.

The time has come to regulate cyberspace. As Western sanctions mount against Russia and its oligarchs, the world holds its collective breath waiting for retaliatory cyberattacks to proliferate throughout the world.

If we are to avoid cyber-apocalypse, the time has come for international law to clearly and decisively address cyber weapons aimed at civilian populations. It will not be easy, but it is critical to world peace. ■

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Sanctions: The United Nations, Russia, and Ukraine

Face à l'agression de la Russie contre l'Ukraine, qui comprend des actes pouvant être considérés comme un génocide, les auteurs ont examiné les recours possibles, offerts par le droit international et divers tribunaux de droit international, pour tenir la Russie responsable. L'enquête ne laisse pas beaucoup d'espoir quant à la possibilité de demander des comptes à la Russie dans ces scénarios.

Ante la agresión de Rusia contra Ucrania, que incluye actos que pueden considerarse genocidio, los autores consideraron los posibles recursos para responsabilizar a Rusia que ofrecen el derecho internacional y diversos tribunales de derecho internacional. El estudio no arroja muchas esperanzas de que Rusia rinda cuentas en esos supuestos.

The more relevant aspects of international law that are implicated by the Russian invasion of Ukraine are provided herein, with the bombing of children's hospitals and the apparent mass execution of civilians in Bucha, among other reported atrocities potentially implicate several aspects of international law. First, by these actions, Russia arguably has brought itself within Paragraph 139 of the 2005 World Summit Outcome Resolution A/60/L.1, which addresses the responsibility of the international community through the United Nations (UN) "to use appropriate diplomatic, humanitarian and other peaceful means" per the UN Charter "to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." This UN resolution sets out the norm of the global "Responsibility to Protect (R2P)," which provides a basis for action of the Security Council. However, Russia's seat on the Security Council and veto power makes any hopes for enforcement of this resolution futile.

Second, and of note, the UN General Assembly has already overwhelmingly adopted a resolution demanding Russia cease its military operations in Ukraine and unconditionally withdraw. However, the resolutions of the UN General Assembly are recommendations and not legally binding, except to the extent they are relevant to internal UN budgetary issues or directions to other UN agencies.

Third, consider the International Court of Justice (ICJ), the main judicial organ of the UN, decides disputes between nations brought before it and gives advisory opinions, but has no meaningful enforcement authority. Ukraine has filed allegations of genocide against Russia before the International Criminal Court (ICC), and the ICJ has opened an investigation as to Russian actions in Ukraine. However, it must be recognized that the ICJ lacks meaningful enforcement authority. The ICJ is primarily a civil court addressing country-to-country disputes. The ICC is a permanent court with criminal jurisdiction to prosecutes individual actors.

This has not deterred the ICJ from taking several steps. On 16 March 2022, the ICJ issued a ruling on provisional measures that ordered that Russia (1) "shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;" (2) "shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above;" and (3) "[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve." The first two provisions were on a 13-2 vote; the last was unanimous. As noted, enforcement authority is conspicuously lacking.

A fourth approach revolves around bringing Russian President Putin and other individual actors before the ICJ or other specially established ad hoc criminal tribunals, but these are subject to the basic principles that require that potential parties to the court have voluntarily submitted to the jurisdiction of the court. In this instance, Russia has not agreed to the jurisdiction of the ICJ or other likely candidate courts. This would seem to be fatal to notions of bringing Russia to justice in a legal fashion. These are two disabling shortcomings.

Other options to hold Russia accountable include the establishment of a temporary ad hoc criminal court (a special tribunal) under Article 41 of the UN charter, but even the creation of an ad hoc court remains subject to Russia's veto in the Security Council, which means a tribunal is unlikely to be established. While the ICC as well has opened an investigation into potential Russian war crimes, jurisdiction also remains an issue, as neither Russia nor Ukraine are parties to the Rome Statute that established the ICC in 2002. An example of an ad hoc tribunal for prosecution of individuals in a specific instance is the International Criminal Tribunal for Rwanda, which was a temporary tribunal. Other examples include tribunals relating to the former Yugoslavia, and situations like Nuremberg where proceedings occur after the defendants were defeated, deceased or out of power.

For the time being international law would seem to offer but scant hope for a rule-of-law resolution to Russia's war against Ukraine. ■

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The Impact of the International Sanctions Against Russia on the French Insurance Market

Frédérique BANNES

Depuis qu'elle a envahi la Crimée en 2014, la Russie fait face à de nombreuses sanctions internationales. Ces sanctions ont été renforcées depuis l'agression de la Russie contre l'Ukraine en février 2022. Quel impact ces régimes de sanctions – internationaux ou nationaux – peuvent-ils avoir sur les (ré)assureurs, les courtiers en (ré)assurance, leurs clients et leurs partenaires commerciaux français ?

Desde que invadió Crimea en 2014, Rusia se ha enfrentado a numerosas sanciones internacionales. Estas sanciones se han reforzado desde la agresión de Rusia contra Ucrania en febrero de 2022. ¿Qué impacto pueden tener estos regímenes de sanciones – internacionales o nacionales – en las aseguradoras y corredores de seguros franceses, sus clientes y socios comerciales?

When President Putin characterized Russia's aggression in the Ukraine to be not a war, this statement affected foreign company exposure from an insurance perspective given that wars were often excluded from insurance policy coverage. Foreign companies however were in the position of growing risks related to assets confiscation, currency, local strikes and riots, together with major repetitional risk factors if maintaining their activities in Russia resulted in accusations of their supporting the Russian military operations in Ukraine.

For the moment the insurance programs are impacted by an array of international sanctions targeting the Russian (and Belarusian) government, entities, and individuals, and by the losses suffered by the foreign companies due to their Ukrainian exposures. The sanctions regimes are heterogeneous, quickly evolving, and they include many exemptions and implementation schedules, making the interpretation of the executive orders difficult. The insurance market strives to manage its impact on their business activities and their clients' ones.

These sanctions are falling into three main categories:

I. The Sectoral Sanctions

These sanctions target not only the business activities of military defense, energy, IT technology, finance, aeronautics, maritime, road and air transport, as well as dual-use civilian and military goods, but also wide lists of banned products, the related financial services such as an insurance coverage of these banned products being also prohibited.

The sanctions are already reverberating in the area of insurance coverage. In the aviation sector, for example, European companies no longer fly to Russia, which has closed its airspace to planes from 36 countries in retaliation for Western sanctions. In turn, the EU has ordered bans on overflight of airspace and access to airports in the EU for all types of Russian carriers. (Regulation n° 2022/335 of 28/02/2022 Article 4 e). The results on the insurance market are threefold: (1) flights to and from Russia are no longer insurable, (2) financial flows (collecting insurance premiums, settling the claims) are blocked, and (3) insurance coverages are either suspended or cancelled.

II. The Embargoes

These are U.S. specific embargoes on oil, gas, and coal imported from Russia, such as the one imposed by the USA on 8 March 2022, including the U.S. financing to companies investing in energy production in Russia. A similar embargo was implemented by the EU. It's important to notice that even though Russia is not under a total embargo for the moment, some insurers at the request of their reinsurers decided to exclude Russia and Ukraine from the renewals or the new insurance policies. Ukrainian exposures were already subject to sub-limits in the insurance policies. Since the Russian invasion in Crimea in 2014, and the present situation increasing the risks, the (re)insurers are worried about their financial capacity to face an important volume of losses and claims.

III. The Financial Sanctions

These are a series of heavy financial sanctions imposed by mainly the European Union, the United States, Canada, and

the United Kingdom against Russia and, to a lesser extent, against Belarus. Notably, Switzerland and Monaco have adopted the European financial sanctions. These sanctions target political figures, oligarchs, public and private companies, and their directors across many sectors, including but not limited to: (1) energy, (2) transport, (3) defense, (4) fertilizers, (5) telecommunications, (6) luxury goods, (7) real estate, (8) ships, (9) aircrafts, (10) banks, and (11) certain Russian insurers.

Individuals and entities classified as Specially Designated Nationals (SDNs) are subject to a freeze on their assets, funds, and economic resources, to a ban on financial transactions, and to the seizure of movable property and real estate. Consequently, some banks and insurers in Europe, worried about running the risk to unwillingly breach any sanctions regime, decided to stop their financial operations, or to not renew insurance contracts, not only with Russian SDN listed but also with not listed Russian citizens domiciled in the EU! In addition to this, certain Russian banks are barred from using the SWIFT system and the financial transactions with the Russian Central Bank have been blocked. As a result, some insurance players (Generali, Marsh, Willis, AON), have decided to close their local offices or to withdraw from Russia even though for the moment there is no disruption in the services to clients. In turn, Russia adopted a law on 14 March 2022 prohibiting the reinsurance of local policies by the Russian public reinsurer with this having a direct impact on the international programs of insurance for foreign companies exposed in Russia. The EU insurers now recommend that their clients set up pluri-annual insurance policies and stand-alone insurance policies underwritten and reinsured locally in Russia for their local exposures if any.

The EU insurers now recommend that the clients set up pluri-annual insurance policies and stand-alone insurance policies underwritten and reinsured locally in Russia for their local exposures if any.

Many insurance coverages underwritten in France have been suspended, with the amounts of premiums and indemnities being placed by the (re)insurers and the (re) insurance brokers concerned in dedicated bank accounts until the French Treasury Administration reaches a determination concerning said assets. Many credit insurance policies underwritten by private companies to guarantee their investments and exports to Russia and Belarus are beginning to be activated due to the freezing of transactions with Russian banks and the payment defaults. This could lead to disputes over how insurance contracts are interpreted and implemented, depending on how they are drafted.

In France, the (re)insurers and the (re)insurance brokers are bound by the same legal and regulatory requirements as other financial institutions, such as banks, regarding compliance issues and international sanctions. The logic of the international sanctions mechanism is based on the principle of a direct or indirect association with Russia. Consequently, it is not enough for the (re)insurers and the (re)insurance brokers, or their clients, to simply analyze their exposure regarding their activities in Russia, but rather to carry out a risk analysis including their clients, the beneficiaries of insurance services, the business partners, the service providers, the suppliers, and subcontractors.

They will be expected to know whether they are of Russian nationality, operate in Russia, or have a direct or indirect link with Russia. The (re)insurers and the (re)insurance brokers, like the banks, carry out "know your client/know your supplier" security checks before collecting premiums or financial commissions or settling indemnities, so as not to run the risk of being at the origin of a prohibited financial flow. These risk analysis measures also apply to Belarus. In addition, the insurance actors must evaluate whether their operations in Russia or connections with Russian clients/partners put their clients at risk and must ensure that the latter have analyzed the lawfulness of their operations and obtained the necessary authorizations from the French Treasury Administration.

In France, the (re)insurers and the (re)insurance brokers, like their clients, have an obligation with respect to the enforcement of the sanctions and the asset freeze regimes. Under French law, if a company does not comply with the European sanctions regime, it exposes itself, its directors and officers, and its employees, to civil and criminal penalties that could be up to five years of jail and a fine equivalent to twice the amount of the offence.

Thus, any employee of an insurance company, or a broker within a claims handling delegation, who breaches the EU sanction regime by making for instance an unauthorized payment of a claim would risk civil and criminal liability, to itself as well as its employers and directors (Art. 131-27 and 131-39 of the French Criminal Code; Art. L. 574-3, L 562-4, L. 713-16 of the French Monetary and Financial Code; Art. 459 of the Customs Code). Likewise, if any foreign subsidiary of a French group breaches the sanctions regimes, whichever it might be, its director and the directors of the parent company would incur their liability. In 2015, the French bank BNP Paribas was fined a record $8.9 billion USD for circumventing, between 2000 and 2010, the US embargos on Cuba, Iran, Sudan, and Libya.

Some exceptions to the sanctions regimes exist without requiring permission from the French Treasury Administration based on the principle of the respect for fundamental rights, such as children's school insurance, health expenses, and car insurance premiums (car insurance being a legal compulsory insurance coverage). Similarly, the freezing of assets does not affect the right to a real and effective defense. Assets can be unfrozen for legal expenses and lawyer's fees that are considered justifiable. In addition, private non-governmental organizations (NGOs) providing humanitarian aid may be exempt, subject to the validation by the French Treasury Administration. Finally, people affected by an asset freeze measure and who cannot find

an insurer may benefit from a third-party action mechanism for the following four categories of compulsory insurance: (1) motor vehicle civil liability, (2) construction insurance, (3) natural disaster coverage, and (4) medical malpractice liability insurance.

Regarding sensitive issues such as international sanctions, the fight against money laundering, and the financing of terrorism (AML-FT) or anti-bribery, the (re)insurers and (re) insurance brokers, as regulated professionals, are subject in France to the provisions of the Monetary and Financial Code, as well as those of the French Insurance Code. They must be able to refrain from entering into or pursuing a business relationship following a risk analysis of a client or a partner in order to avoid any legal, financial, and reputational risk. In any case, the decisions to initiate, maintain, or withdraw from a risky business relationship must be validated on a case-by-case basis by the governance of the companies concerned, whether they are insurance companies, insurance brokers, their clients, or partners at the heart of the regulatory risk prevention and management systems with the support of their lawyers and experts. ■

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Entreprises françaises en Russie : une responsabilité morale ou pénale ?

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On 21 March 2022, the Ukrainian army firmly condemned the decision of Leroy Merlin to keep its stores opened in Russia, accusing the company of being the first *"in the world to finance the bombing of its own stores and killing its own employees"*. While the continued presence of French companies in Russia is without a doubt morally questionable, it is not certain that it would be sufficient to characterize an act of complicity for the crimes committed in Ukraine. One could also wonder if these companies could also be placed on the European sanctions list, in light of the existing criteria.

El 21 de marzo de 2022, el ejército ucraniano condenó firmemente la decisión de Leroy Merlin de mantener sus tiendas abiertas en Rusia, acusando a la empresa de ser la primera *"del mundo en financiar el bombardeo de sus propias tiendas y en matar a sus propios empleados"*. Si bien la permanencia de las empresas francesas en Rusia es sin duda moralmente cuestionable, no es seguro que sea suficiente para caracterizar un acto de complicidad por los crímenes cometidos en Ucrania. También cabe preguntarse si estas empresas podrían figurar también en la lista de sanciones europeas, a la luz de los criterios existentes.

Le 21 mars 2022, l'armée ukrainienne a fermement condamné la décision de l'entreprise française Leroy Merlin de continuer à opérer en Russie, l'accusant d'être « *la première société à avoir financé le bombardement de ses magasins et le meurtre de ses employés.* » C'est aussi un des messages qu'a adressé le Président ukrainien, Volodymyr Zelensky, au Parlement français lors de son allocution du 23 mars 2022, demandant aux entreprises de « *cesser d'être les sponsors de la machine de guerre russe et de financer le meurtre d'enfants et le viol de femmes* ». Alors que les images de corps de civils et les témoignages de victimes de viols continuent d'affluer, il semble de plus en plus évident que les forces armées russes intervenues en Ukraine le 24 février 2022 ont commis et continuent de

commettre des crimes de guerres. La pression ne cesse ainsi d'augmenter sur les entreprises ayant fait le choix de maintenir leurs activités, Leroy Merlin n'étant pas la seule entreprise française présente en Russie puisqu'au moins 27 sont encore en activité (Auchan, Danone, Saint-Gobain, Vinci, Lacoste, etc.).

Si la présence de ces sociétés en Russie soulève sans aucun doute un risque réputationnel, leur responsabilité pénale pourrait-elle être engagée au cours de procédures en France ? À ce jour, les juridictions pénales internationales ne se sont pas encore saisies de la question de la responsabilité pénale des personnes morales. En effet, aucun tribunal international ou hybride ne s'est vu reconnaître une compétence à l'égard des personnes morales, pas plus que la Cour Pénale Internationale, malgré des propositions faites en ce sens lors de sa création.

En droit français, la responsabilité pénale des personnes morales est établie de façon générale par l'article 121-2 du Code Pénal. Il n'est donc pas exclu de poursuivre en France une entreprise pour crime de guerre ou crime contre l'humanité, *a minima* comme complice. La Cour de cassation a eu récemment l'opportunité de se pencher sur ces questions dans le cadre de la mise en examen de la société Lafarge pour complicité de financement du terrorisme et complicité de crimes contre l'humanité commis par l'État Islamique en Syrie. À cette occasion, c'est une définition assez souple de la complicité qui a été retenue, la Cour ayant considéré que s'agissant de l'élément intentionnel, une simple connaissance de l'intention de commettre ou de la commission d'un crime contre l'humanité suffisait à caractériser l'élément intentionnel de la complicité.

L'on pourrait être tenté de faire un parallèle entre les deux situations et considérer que le choix délibéré des entreprises étrangères de continuer à opérer en Russie constitue un financement indirect du gouvernement russe et des crimes qu'il commet en Ukraine. Il convient toutefois d'être prudent. En effet, d'un côté, le maintien de certaines entreprises en Russie contribue à fournir au pays des sources de revenu et participe ainsi au financement de la guerre et il leur serait impossible de nier ne pas avoir eu connaissance des atrocités commises sur le territoire Ukrainien, mais d'un autre, il n'est pas certain que cela suffise à caractériser un acte de complicité.

On rappellera que s'agissant de Lafarge, l'entreprise est accusée d'avoir non seulement continué à opérer en Syrie au cœur des affrontements armés, mais surtout directement versé plusieurs millions de dollars à l'État islamique, une organisation dont l'objet « *n'est que criminel* », comme l'a justement rappelé la Cour. La situation est sans aucun doute différente s'agissant des entreprises ayant choisi de se maintenir en Russie et à qui on ne reproche pas un financement direct, mais une participation à l'activité économique du pays.

Un autre parallèle pourrait être fait avec l'une des catégories de personne pouvant faire l'objet de sanctions économiques européennes, récemment introduite par la décision du Conseil européen du 24 février 2022, à savoir « *des personnes morales, des entités ou des organismes ayant une activité dans des secteurs économiques qui fournissent une source substantielle de revenus au gouvernement de la Fédération de Russie.* »

Ne pourrait-on pas envisager le placement sur la liste des sanctions les entreprises étrangères ayant fait le choix de se maintenir en Russie et de contribuer, notamment par le paiement d'impôts et de charges, à nourrir les caisses de l'État. ■

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