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Rights of women and minorities

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In this issue

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University of Tartu Journal of International Law and Human Rights

The Journal of International Law and Human Rights is an academic law journal focused on questions of international law and human rights. Its first part deals with general issues, treaties and recent cases relevant in International Law and Human Rights, such as the implementation of the Universal Declaration of Human Rights, the Vienna Conventions and the International Court of Justice case law. The purpose of this part is to review International Law in the most extensive and elaborate way within the scope of human rights.

While its second part is focused on a theme meticulously chosen by the editorial board to reflect the ever-changing world. In this part, the authors have the opportunity to focus more deeply on one subject area currently discussed by scholars.

The Journal is student-run by master's students at the University of Tartu who are elected to the editorial board.

The Journal was founded at the initiative of Delphine Saint-Martin as she strived to give the opportunity to fellow law students to have enable them to research issues and questions of international law through the scope of human rights.

The opinions expressed in the Journal of International Law and Human Rights of the University of Tartu are the authors only.

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Editors

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Advisory board

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Outline

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Editorial

We live in turbulent times. The birth of this journal cannot be timelier and more relevant. International law generally and protection of human rights specifically face considerable challenges today including war in Europe, climate change, pandemic, etc. Although both international law and human rights protection have been under criticism for a while, current events in Europe have shown that when needed there is also considerable solidarity to defend principles and rules of international law and human rights – to defend humanity. This journal is published in Estonia. International law has always played a significant role for Estonia. President Lennart Meri (1992-2001) in an interview in 1998 provocatively noted that “the nuclear bomb of small states is international law”. One could argue that today this applies to small and big states desiring peace, security and true respect for human dignity and rights. In this first volume, authors reflect on some of the current topical issues in depth.

António Guterres stated on International Mother Earth Day that: "We have proven that together, we can tackle monumental challenges. And the right to a healthy environment is gaining traction." He also noted that we need to do much more, much faster to avert climate catastrophe. This volume is opened with a valuable account on interpretation of the UN Charter and legal framework in the light of climate change. It also shows how small states can offer valuable interpretative tools to tackle the change and protection of human rights at the UN level. One can argue that the second article in this volume is also on the related theme, talking about the “environment” for protection of rights of indigenous peoples whose culture and habitat has been threatened in many parts of the world. It explains the important connection between protection of intellectual property rights and protection of human rights.

The third article rightly claims that: “Children are the most important part of every community. They are not only members of the next generation, but also play an essential role in the formation of the future of the society.” While dealing with combating involvement of children in armed conflicts, child soldiers, it also deals with the future social environment when these war scared children play a role. The article is also a valuable reminder of the long-term adverse effects of war on individuals and societies. This is something that we will face for decades also in Europe.

The International Covenant on Civil and Political Rights states that: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Although sexual exploitation and domestic violence may concern different categories of victims, such as women, men, children and the elderly, historically these phenomena have affected women and girls more. Three articles in this volume deal with legal, human rights issues related to prostitution, domestic violence as a form of ill treatment or torture and domestic violence during the pandemic. The UN High Commissioner for Human Rights Michelle Bachelet, when presenting the 2021 annual report of the work of her office mentioned that in 2021 the “COVID-19 pandemic continued its rapid spread, with new and more dangerous variants destroying lives and livelihoods. It exposed — and deepened — existing inequalities.” Last article specifically reflects on domestic violence during the COVID-19 pandemic.

To conclude, not only academic curiosity and diligence, but an actual, real life need of investigation has driven these articles on international law and international human rights law. I am confident that when these components keep meeting, this journal will have continued success and impact on the field.

Merilin Kiviorg

Associate Professor in International Law

On the evolution of the United Nations through the Pacific Island States

Delphine Saint-Martin

Abstract

The United Nations is one of the most, if not the most, predominant and influential international organisation. It can be argued that it may be in an ideal position to tackle climate change as it gathers the highest number of Member States across the globe and is comprised of various bodies specialised in different fields and with various prerogatives. However, the United Nations was not founded to tackle climate change, and its Charter was not drafted with that purpose in mind. Therefore, evolution is necessary if the United Nations is to address climate change. Such can be done through an evolution of the interpretation of the United Nations Charter and the will of the Member States. This is the role that has been and is played by the Pacific Islands States. As they are the most adversely impacted by climate change, they are at the forefront of the discussion and promotion of such an evolution. The Pacific Island States do so through various legal, political, and moral means, intending to push for an evolution at the United Nations to effectively address climate change.

Introduction

The founding members of the United Nations (UN) have made it purposefully difficult to amend the UN Charter. However, it does not mean that they were against the UN evolving, or that the UN Charter could not be interpreted as a living instrument. To some extent, interpretation of any legal document requires to analyse the understanding of it, which is not necessarily the same as the drafters. Moreover, in 1945, climate change was not a primary concern of the drafters. These are situations and threats which were not foreseen by the drafters.¹ For such an International Organisation to retain legitimacy and be relevant on the international plane it ought to address it, especially as it threatens human rights, or at least their enjoyment.²

For this matter, it is relevant to analyse how the UN came to this evolution. The various organisation of island States such as the Pacific Island Forum (PIF), Small Island Developing States (SIDS)³ and Alliance of Small Island States (AOSIS) have influenced the negotiations of treaties, the demand of an Office of the United Nations High Commissioner for Human Rights (OHCHR) Report on the link between climate change and human rights, which lead to several UN bodies to take up the issue of climate change as their own.

Through their negotiation techniques and their moral ground that climate change is a question of life or death, these States have managed to put pressure on the developed and most polluting States, even if they are not among the most powerful economically and most populated. This

¹ UNSC Research Report, The UN Security Council and Climate Change, 21 June 2021, page 4

² OHCHR Report 2009

³ SIDS: <https://www.unwto.org/sustainable-development/small-islands-developing-states>

demonstrates how each State may have a voice and influence in the UN, that one State equals one vote. Each State may express their opinion and views within the UN.

These Pacific Island States (PIS) were not successful in obtaining all their demands, but the mere fact that they were successful in some of them is already an important step to be reckoned with. These are States that used to be considered by the UN to be not developed enough to be fully independent and were placed under the trustee system. Therefore, the evolution of these PIS and the evolution of the UN are intrinsically linked together.

For this paper, it is to be recalled that change entails a rupture, a drastic transformation, it is defined as making something radically different.⁴ While evolve means a process through them that requires different steps to be taken, it is defined as developing slowly often into a better, more complex, or more advanced state.⁵ There are different kinds of shifts possible, some through changing the writing of the constitutive treaty of the UN and some through an evolutive interpretation of the UN Charter and practice. Thus from this stems the research question of this paper: how does the UN change and evolve through the PIS?

Firstly, this research paper will analyse the difficulty of the UN to go through changes. Secondly, it will go into analysing the possibilities of evolution.

I. Difficult changes

A. Vision of founding members

Changing the UN Charter is especially difficult as amendments to it have been made purposefully arduous by the drafters, articles of the UN Charter set the requirements for the amendments, such as a 2/3 majority vote at the UN General Assembly (UNGA).⁶ This was done arguably to ensure the stability of the international legal order. It is quite difficult to modify the UN Charter. This explains the low number of amendments to the UN Charter. These amendments are mostly procedural and about the number of members of various UN bodies, such as the Economic and Social Council (ECOSOC).⁷

The question of legal change also goes back to the powers given to the organisation and the vision of the founding members. There are mainly three schools of thought on the subject: the attributed powers are those in the constituent treaty; the inherent powers are the powers of the organisation because of its « objective legal personality »; while the implied powers are those of the organisation because of its function, it is a middle ground between the two.⁸ This plays into the changes of the organisations' powers depending on the schools of thought. It is much easier to make changes to the organisation's powers by grounding it in the inherent powers or the implied powers; rather than the attributed powers which are limiting the scope of the

⁴ Merriam-Webster dictionary: <https://www.merriam-webster.com/dictionary/change>

⁵ Merriam-Webster dictionary: <https://www.merriam-webster.com/dictionary/evolve>

⁶ Articles 108 and 109 of the UN Charter

⁷ S. Chesterman, I. Johnstone, and D. M. Malone, *Law and Practice of the United Nations Documents and Commentary*, 2nd Edition, 2016, Sustainable development, chapter 17, page 643

⁸ S. Chesterman, I. Johnstone, and D. M. Malone, *Law and Practice of the United Nations Documents and Commentary*, 2nd Edition, 2016, page 114

organisation and demanding a necessary formal reform of the constitutive treaty. This is the case for the powers which the UN has used later on but were not explicitly written in the UN Charter, such as the peace operations, and the creation of the international criminal tribunals.

When it comes to the vision of the drafters on « international peace and security »,⁹ it is not clearly defined in the Charter and the UN Security Council (UNSC) is entailed to determine what it entails,¹⁰ as the organs of the UN are the ones interpreting the parts of the UN Charter which concerns them.¹¹ The evolution goes through the interpretation of the UN Charter, it was established during the San Francisco conference that « each United Nations organ interprets such parts of the Charter as are applicable to its functions ». ¹² The founding members intended that the UN Charter may only be interpreted by these organs and that the International Court of Justice (ICJ) may interpret it within an Advisory Opinion. However, the ICJ cannot declare it a misinterpretation or *ultra vires* powers.¹³ The founding members did not wish for a government of judges in the ICJ to be able to interpret too broadly the UN Charter and change its meaning from what the founding members had originally agreed upon. Any interpretation of the UN Charter regarding the powers of the various bodies of the UN will have to be from these UN bodies in particular.

As to whether these UN bodies can address climate change, the primary responsibility of the UNSC is the maintenance of international peace and security,¹⁴ thus « [i]f a member State wants the Security Council to act in that area, it must make the case that the action is for the purpose of maintaining international peace and security. ». ¹⁵ Another way has been argued that regarding Article 34, the UNSC could potentially investigate any dispute and situation which may lead to endangering the maintenance of international peace and security, which would encompass social and human rights matters.¹⁶ Thus the UNSC would take a preventive approach to the endangerment of international peace and security by taking measures to combat climate change. In the past, the UNSC has made such broad interpretation of its responsibility such as in creating *ad hoc* tribunals,¹⁷ unprecedented measures following the

⁹ Article 24(1) UN Charter

¹⁰ C.K. Penny, 'Climate Change as a "Threat to International Peace and Security"', In C. Ku and S. V. Scott (eds.), *Climate Change and the UN Security Council*, 2018, page 34

¹¹ Statement of Committee IV/2 of the San Francisco Conference, Report of Committee IV/2 of the United Nations Conference on International Organisation, San Francisco, 12 June 1945, UNCIO Doc. 933, IV/2/42(2), page 7; 13 UNCIO Documents, page 703, at 709–710

¹² Statement of Committee IV/2 of the San Francisco Conference, Report of Committee IV/2 of the United Nations Conference on International Organisation, San Francisco, 12 June 1945, UNCIO Doc. 933, IV/2/42(2); 13 UNCIO Documents, p. 703, at 709–710.

¹³ S. Chesterman, I. Johnstone, and D. M. Malone, *Law and Practice of the United Nations Documents and Commentary*, 2nd Edition, 2016, page 127: « The implication is that the ICJ was not given the power to pass judgment on whether another UN organ misinterpreted the Charter, nor was it given the authority to declare that the Council or General Assembly acted *ultra vires*, or beyond their competence. »

¹⁴ Article 24(1) UN Charter

¹⁵ S. Chesterman, I. Johnstone, and D. M. Malone, *Law and Practice of the United Nations Documents and Commentary*, 2nd Edition, 2016, page 127

¹⁶ E. Luck, 2014, *Change and the United Nations Charter*, In I. Shapiro and J. Lampert, *Charter of the United Nations Together with Scholarly Commentaries and Essential Historical Documents*, page 129

¹⁷ United Nations Security Council Resolution 827 (1993) and United Nations Security Council Resolution 955 (1994)

1991 Gulf War,¹⁸ broad peace operations,¹⁹ coercive intervention under the ‘responsibility to protect’,²⁰ sanctions against individuals alleged to be associated with terrorist organisations,²¹ and binding obligations on all States in a broad issue area for an indefinite period.²²

Moreover, on the potential limitation, as the Tribunal noted in the Tadic case where there are examples and no suggested limitation, the Article does not state what can or cannot be beyond it, a broad interpretation can be made.²³

The situation is different for the UNGA as the articles regarding the UNSC have to be interpreted « in contrast to Article 10, which grants to the General Assembly the authority to discuss “any matter within the scope of the Charter”. [...] ». ²⁴ It appears more intuitive for the UNGA to interpret within its scope that it could address climate change, provided that the UN Charter is interpreted as being able to address climate change. Nevertheless, the ICJ made an extensive interpretation of the UN Charter stating that the UNGA could take action regarding international peace and security, provided that it would not be while the UNSC is dealing with the issue at the same time.²⁵

When it comes to the vision of the drafters it was settled because it is for the stability of the legal order, it is to be noted that States may not wish to change the UN Charter because it would go jeopardise the whole system of international peace and security, of the functioning of the international community. Furthermore, the Member States do not wish to raise too political debate on changing core elements, because their aim is cooperation, as encouraged by the UN Charter.²⁶ There are different interpretations of the main principles of international law. It is a mutual understanding and agreement that States do not agree on the specific definitions of principles and notions, such as justice, peace, security and dignity.

Therefore, different UN bodies can evolve and encompass climate change, through interpretation and practice, but change through amending the UN Charter will be difficult, if not inadvisable.

¹⁸ United Nations Security Council Resolution 687 (1991) on Iraq

¹⁹ United Nations Security Council Resolution 2147 (2014) on MONUSCO; United Nations Security Council Resolution 1244 (1999) on Kosovo and United Nations Security Council Resolution 1272 (1999) on East Timor

²⁰ United Nations Security Council Resolution 1973 (2011) on Libya; United Nations Security Council Resolution 1975 (2011) on Ivory Coast

²¹ United Nations Security Council Resolution 1267 (1999) Establishing the Sanctions Committee

²² United Nations Security Council Resolution 1373 (2001) on Terrorism; United Nations Security Council Resolution 1540 (2004) on the Establishment of 1540 Resolution Committee, and United Nations Security Council Resolution 2178 (2014) on Foreign Fighters

²³ *PROSECUTOR v. TADIC (APPEAL ON JURISDICTION)* (ICTY APPEALS CHAMBER, 2 OCTOBER 1995), §35

²⁴ S. Chesterman, I. Johnstone, and D. M. Malone, *Law and Practice of the United Nations Documents and Commentary*, 2nd Edition, 2016, page 127

²⁵ Certain expenses of the United Nations (article 17, paragraph 2, of the Charter) (Advisory Opinion) (1962) ICJ Reports 151

²⁶ Article 1, Article 11, Article 13, and Chapter IX, Charter of the United Nations (1945)

B. Lack of political will to change

As analysed in the previous section, the UN organs may address climate change, the question analysed in this section is whether there is enough political will for them to do so. For there to be a change, political will is necessary, which depends on the bodies of the organisation and Member States. Hence, to push for change in favour of the UN addressing climate change, PIS have adopted several approaches to spark political will within the UN.

The fact that the political will of the Member States is necessary for the organisation to evolve may be explained by the principle of speciality to start with. The ICJ analysed it as the organisation having the power granted to them by the States.²⁷ The function of these powers being the promotion of the common interests that States entrusted to the organisation.

In the long run, what matters is the will of the Member States to make the organisation function well, protecting its founding visions and ensuring its adaptiveness. As Brierly argued, what matters is not how the constitutive treaty is drafted, but the circumstances and what the members do with the treaty.²⁸ One could argue that the interpretation of the constitutive treaty has to be evolutive and adaptive. As the UN Charter was drafted in 1945, when the last bombs of WWII were dropped, the current context is much different.

The League of Nations was created as a system of cooperation in which Member States retained their sovereignty, it was unable to address the context of the time. However, the UN has more prerogative and its organs may take binding resolutions. This is to ensure that the UN is a functioning and effective organisation that fulfils its principles such as the protection of international peace and security, and human rights. The UN has the capacity to address climate change and its bodies may evolve to encompass it, whether the organisation evolves depends largely on the will of the Member States.²⁹ However, the UN is composed of Member States from all over the world, finding a common political will may be challenging, as States have different approaches of law and understanding of obligations.³⁰

As a reason for the lack of political will for groundbreaking changes in the UN structure and developed-developing countries relations, PIS in arguing for climate change have had to develop strategies. Historically these PIS have been marginalised by the international community and by larger States of the developing world within their respective regional groups from debate and negotiations.³¹ They were placed under the trusteeship system, as they were deemed to not be sufficiently developed to be independent.³² With their common experience, these States created the AOSIS to regroup States particularly vulnerable to adverse climate

²⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) (1996) ICJ Reports 679, §25

²⁸ J. L. Brierly, 1946, *The Covenant and the Charter*, page 84

²⁹ J. L. Brierly, 1946, *The Covenant and the Charter*, page 85: « [An association] may be effective for its purposes, but that will depend on the conduct of the members individually, upon their ability and willingness to honour the obligations they may have undertaken [...] »

³⁰ S. Wertheim, 2012, *The League of Nations: a retreat from international law?*

³¹ J. W. Ashe, R. Van Lieropb, and A. Cherian, 1999. 'The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFclimate changeC)', 23, *Natural Resources Forum* (1999), page 210

³² Article 73 and 76 UN Charter

change and with comparable levels of development.³³ Their cooperation gave them more weight within the UN and with the international community. It can be argued that the PIS alone would not have a strong influence within the UN if they did not join forces to create a group with likeminded States facing climate change.³⁴ They were able to agree on their argumentation and place themselves as victims of climate change and particularly vulnerable, putting moral pressure on developed States responsible for the most greenhouse gas emissions.³⁵

The strategy to draw the UN's attention adopted by the PIS differs from the Inuit petition filing at the Inter-American Commission on Human Rights.³⁶ There are various techniques to be used, but the most commonly used in the international community is that of structural leadership strategies which the AOSIS is lacking.³⁷ Hence their difficulties to make their discourse widely heard, in addition to being historically marginalised.³⁸ Leverage in terms of negotiations pointed out are the coalition with different States and scientific institutes; the use of diplomatic and negotiation initiatives, tactics, and skills;³⁹ arguments founded on sciences, and based on domestic politics and practices to prove the ambition, legitimacy, and implementation levels.⁴⁰ This increases the legitimacy and leverage of such States, also in

³³ J. W. Ashe, R. Van Lieropb, and A. Cherian, 1999. 'The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFclimate changeC)', 23, *Natural Resources Forum* (1999), page 210

³⁴ J. W. Ashe, R. Van Lieropb, and A. Cherian, 1999. 'The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFclimate changeC)', 23, *Natural Resources Forum* (1999), page 212

³⁵ J. W. Ashe, R. Van Lieropb, and A. Cherian, 1999. 'The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFclimate changeC)', 23, *Natural Resources Forum* (1999), page 219; and T. Ourbak and A. K. Magnan, 'The Paris Agreement and climate change negotiations: Small Islands, big players', 18 *Regional Environmental Change*, (2017), page 2204

³⁶ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), available at [http://www.inuitcircumpolar.com/files/uploads/iclimate change-files/FINALPetitionIclimate change.pdf](http://www.inuitcircumpolar.com/files/uploads/iclimate%20change-files/FINALPetitionIclimate%20change.pdf). The petition was filed by Sheila Watt-Cloutier, the chair of the Inuit Circumpolar Conference, on behalf of herself, sixty-two other named Inuit, and "all Inuit of the arctic regions of the United States and Canada who have been affected by the impacts of climate change described in this petition." Id. at 1.

³⁷ I. de Águeda Corneloup and A. P. J. Mol, 'Small island developing States and international climate change negotiations: the power of moral « leadership »', *International Environmental Agreements* (2013), page 284

³⁸ J. W. Ashe, R. Van Lieropb, and A. Cherian, 'The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFclimate changeC)', 23, *Natural Resources Forum* (1999), pages 209–220

³⁹ I. de Águeda Corneloup and A. P. J. Mol, 'Small island developing States and international climate change negotiations: the power of moral « leadership »', *International Environmental Agreements* (2013), page 285

⁴⁰ M. Andersson, and A. P. J. Mol, 'The Netherlands in the UNFclimate changeC process— Leadership between ambition and reality '2(1) *International Environmental Agreements: Politics, Law and Economics* (2002), pages 49–68

gathering UN Member States under their argumentation in the Copenhagen Agreement negotiation for example.⁴¹

Thereafter, the strategy has been to get bodies to make reports on climate change as supported by the organised States and the developed States, such as the Federated States of Micronesia putting forward a proposal in 2018 for the inclusion of a topic on the Long-Term Programs of work of the International Law Commission (ILC) entitled « Legal Implication of Sea-Level Rise »⁴² which was used by the ILC.⁴³ The PIS also put a Declaration⁴⁴ for the OHCHR to draft a report on the link between climate change and human rights.⁴⁵ It did so through the Human Rights Council,⁴⁶ an effective strategy of the AOSIS within the UN being to go through an organ of the UN to gather more influence, and eventually obtain the drafting of a binding Convention addressing climate change and PIS concerns.⁴⁷ John Knox analysed⁴⁸ that the Report noted that even if the international human rights treaties did not formally recognise the right to a safe and healthy environment, their monitoring bodies « the intrinsic link between the environment and the realization of a range of human rights ».⁴⁹

Furthermore, since various organs may address climate change, PIS have strived to push for these organs to make reports and resolutions to influence the UN as a whole.⁵⁰ This led to the drafting of the United Nations Framework Convention on Climate Change, in which the AOSIS developed their concerns and succeeded in having them incorporated in the legally binding Convention.⁵¹ They managed to integrate 10 of their 12 objectives, mainly to address

⁴¹ I. de Águeda Corneloup and A. P. J. Mol, 'Small island developing States and international climate change negotiations: the power of moral « leadership »', *International Environmental Agreements* (2013), page 287

⁴² Document ILC(LXX)/LT/INFORMAL/1 of 31 January 2018

⁴³ International Law Commission on Sea Level Rise Annex B, A/73/10 Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018)

⁴⁴ Male' Declaration on the Human Dimension of Global Climate Change, Nov. 14, 2007

⁴⁵ OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/ 10/61 (Jan. 15, 2009)

⁴⁶ U.N. Human Rights Council Res. 7/23, in U.N. Human Rights Council, *Report of the Human Rights Council on Its Seventh Session*, at 65, U.N. Doc. A/HRC/ 7n78 (July 14, 2008).

⁴⁷ J. W. Ashe, R. Van Lieropb, and A. Cherian, 'The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFclimate changeC)', 23, *Natural Resources Forum* (1999), page 210

⁴⁸ J. H. Knox, 'Linking Human Rights and Climate change at the UN', 33 *Harvard Environmental Law Review* (2009), page 486

⁴⁹ HCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/ 10/61 (Jan. 15, 2009), 1 §18

⁵⁰ United Nations General Assembly Resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development, and resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21 December 1990 and 46/169 of 19 December 1991 on protection of global climate for present and future generations of mankind; provisions of General Assembly resolution 44/206 of 22 December 1989 on the possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas and the pertinent provisions of General Assembly resolution 44/172 of 19 December 1989 on the implementation of the Plan of Action to Combat Desertification

⁵¹ J. W. Ashe, R. Van Lieropb, and A. Cherian, 'The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change

climate change, encourage more cooperation, ensure the precautionary principle, oblige environmental impact assessment, recognise the concerning situation of PIS, and ensure their Member States interest.⁵² It sparked an evolution in the approach of climate change and environmental law within the UN. This is also the case in the UN approach to the environment in general, such as in its peace operation, daily functioning, but more importantly in its subsequent legal documents and policies, acknowledging the threat that climate change poses.⁵³

II. Triggers for evolution

A. Grave crisis

As analysed in the previous part of this paper, UN bodies may evolve in their practice to address climate change and be at the origin of a legally binding convention on climate change, following the spark in the political will by the PIS. This part will analyse triggers for evolution in the UN from the grave crisis to the failures to function.

The UN Charter was made difficult to amend to protect the stability of the international legal world order. However, in case a grave crisis threatens it, the UN ought to evolve and adapt to modern times. In the past, there are various examples in which in the face of a grave crisis the UN was led to evolve. For such purpose, the UN Charter was interpreted as a living instrument capable of evolution. A prime example of this is peace operations and their different forms, even though they were never explicitly mentioned in the UN Charter.⁵⁴

As recognised by the UNGA « climate change is one of the greatest challenges of our time »⁵⁵ in one resolution as well as the Declaration SAMOA Pathway taken by the UNGA in Resolution 69/15.⁵⁶ The UNGA in that resolution « [emphasised] that adaptation to climate change represents an immediate and urgent global priority ».⁵⁷ This recognition was initiated

(UNFclimate changeC)', 23, *Natural Resources Forum* (1999), page 209: The Member States of the AOSIS have succeeded in their efforts to « develop a specific negotiating agenda addressing areas which are of overriding concern to them and succeeded in having those concerns incorporated in a legally binding Convention of historic importance ».

⁵² J. W. Ashe, R. Van Lierop, and A. Cherian, 'The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFclimate changeC)', 23, *Natural Resources Forum* (1999), page 219

⁵³ United Nations Five-year review of the Mauritius strategy for the further implementation of the programme of action for the sustainable development of small island developing States (2010): The UN acknowledged that climate change was a question of: "the very physical survival of some island developing states"

The UNFCCC was followed by several Conference of the Parties (COP), such as the 21st COP which saw the drafting of the Paris Agreement (2015)

⁵⁴ United Nations Security Council Resolution 2147 (2014) on MONUSCO; United Nations Security Council Resolution 1244 (1999) on Kosovo and United Nations Security Council Resolution 1272 (1999) on East Timor

⁵⁵ United Nations General Assembly Resolution 68/288 (2012), The Future We Want, §190

⁵⁶ United Nations General Assembly Resolution 69/15 Declaration SAMOA Pathway 2014 Climate Change section, page 8

⁵⁷ United Nations General Assembly Resolution 68/288 (2012), The Future We Want, §190 and Declaration SAMOA Pathway 2014 Climate Change section, page 8

by the United Nations Framework Convention on Climate Change under the influence of the various island States. The recognition of this grave crisis and the call for climate change adaptation by the UNGA globally is an influential strong stance. It is one of the steps demanded by PIS towards legally binding obligations of climate change adaptation, international cooperation and mechanisms.

The small island nations can influence the UN by calling upon it to help in the appropriate ways to adapt to climate change, to address and integrate their priority into the UN's strategic and work plan,⁵⁸ and fund climate change adaptation of small island developing States.⁵⁹ They also call for different bodies commitment to addressing climate change in various areas such as the Secretary General, United Nations Department of Economic and Social Affairs (UN DESA), the Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (OHRLLS).⁶⁰ It is important to note that these PIS were able to broaden the scope of the issue of climate change so that different organs could take this issue up as within the scope of their prerogatives, such as the UNSC,⁶¹ the UNGA,⁶² the UNCHR,⁶³ and OHCHR.⁶⁴ These have also been tremendously influential within the UN system to bring about change and for each body to put forward their approach and recommendation for climate change. SIDS were influential in defining climate change as an international peace and security issue and linking climate change with human rights.⁶⁵ Hence, it was argued that AOSIS, « relative to their size, [had] a disproportionate influence on the climate change regime ». ⁶⁶ This influence may be explained by the policy of one State equalling one vote, the UN practice allows for small States to have broad influence despite their lesser weight economically and earlier stage of development.⁶⁷

However, no matter how influential States may be, as the ICJ recognised it is better for the Organisation to take action.⁶⁸ Thus encouraging Member States to push UN bodies to take action, especially since SIDS were not successful in all their demands, especially in the face of

⁵⁸ Mid-Term Review of the SAMOA Pathway High Level Political Declaration, page 8 §a

⁵⁹ Mid-Term Review of the SAMOA Pathway High Level Political Declaration, page 8 §h

⁶⁰ Mid-Term Review of the SAMOA Pathway High Level Political Declaration, page 9

⁶¹ United Nations Security Council, Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing over 50 Speakers (2007)

⁶² United Nations General assembly, expressing deep concern, invites major United Nations organs to intensify efforts in addressing security implications of climate change (2009)

⁶³ UN Human Rights Council (1996) Human rights and climate change and Resolution 10/4 (2009)

⁶⁴ OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/ 10/61 (Jan. 15, 2009)

⁶⁵ I. de Águeda Corneloup and A. P. J. Mol, 'Small island developing States and international climate change negotiations: the power of moral « leadership »', *International Environmental Agreements* (2013), page 291

⁶⁶ C. Betzold, P. Castro and F. Weiler, 'AOSIS in the UNFclimate changeC negotiations: from unity to fragmentation?' 12, *Climate Policy* (2012) , pages 591–613

⁶⁷ S. Chesterman, I. Johnstone, and D. M. Malone, *Law and Practice of the United Nations Documents and Commentary*, 2nd Edition, 2016, page 151: « An interesting feature of this process is that all member States of the United Nations or relevant specialized agency have the right to participate in the negotiation and adoption of the treaty. »

⁶⁸ *PROSECUTOR v. TADIC (APPEAL ON JURISDICTION)* (ICTY APPEALS CHAMBER, 2 OCTOBER 1995) §36

developed States which do not wish to be held liable for their greenhouse gas emissions,⁶⁹ in getting significant grants,⁷⁰ or in agreeing on the goal of -1,5°C warning by the end of the century compared to pre-industrial levels for greenhouse gas.⁷¹

UN bodies have taken the issues as their own such as the Committee on the Elimination of Discrimination against Women (CEDAW).⁷² Later on, the Human Rights Council made a report on an issue closely related to climate change, linking human rights and States obligations,⁷³ even going as far as arguing for a UNGA Resolution recognising the right to a healthy environment,⁷⁴ and calling on States cooperation.⁷⁵ Furthermore, all further OHCHR Reports mention climate change and the role of the PIS.

B. Failure to function

Another reason for the UN to evolve is when the law in force or the practices are not effective, nor functioning well to address a situation such as climate change. When a situation does not function properly to respect the objectives of the UN Charter, there ought to be an evolution as argued by the Small Island States to have international cooperation and calling for the UN to effectively act. The aim of the PIS to have the UN change and evolve is for it to address climate change, allocate funds and mechanisms, encourage international cooperation, and for UN bodies to take into consideration climate change.

A prime example that also concerns PIS is the trusteeship system,⁷⁶ which was rendered obsolete with time and its inadequacy, such as following the Declaration on the granting of independence to colonial countries and peoples,⁷⁷ which enunciates the right to self-determination. The evolution of the UN was necessary, even if the trusteeship system was in

⁶⁹ Another goal of the AOSIS was the recognition of loss and damage in the Paris Agreement, which was included in article 8. However, paragraph 51 of decision 1/CP. 21 makes clear that: « the Article 8 of the Agreement does not involve or provide a basis for any liability or compensation » Paragraph 51 of decision 1/CP. 21

⁷⁰ T. Ourbak and A. K. Magnan, 'The Paris Agreement and climate change negotiations: Small Islands, big players', 18 *Regional Environmental Change*, (2017), page 2203

⁷¹ T. Ourbak and A. K. Magnan, 'The Paris Agreement and climate change negotiations: Small Islands, big players', 18 *Regional Environmental Change*, (2017), page 2203

⁷² Committee on the Elimination of Discrimination against Women General Recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change CEDAW/C/GC/37

⁷³ United Nations Human Rights Council 37/59 (26 February - 23 March 2018) Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clear, healthy and sustainable environment

⁷⁴ United Nations Human Rights Council 37/59 (26 February - 23 March 2018) Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clear, healthy and sustainable environment, §16

⁷⁵ United Nations Human Rights Council 37/59 (26 February - 23 March 2018) Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clear, healthy and sustainable environment, §36 -37

⁷⁶ Article 73 and 76 UN Charter

⁷⁷ Declaration on the granting of independence to colonial countries and peoples, GA RES. 1514(XV) (1960)

the UN Charter, it was not functioning in adequacy with the times. Thereafter, the organisation needs to be in the capacity to evolve, to not follow strictly its constitutive document when a mechanism does not work. In obtaining their economic social political independence and pursuing their development, PIS could argue that following the trusteeship system which did not function, and their little greenhouse gas emissions, they could be entitled to require from the UN to push for international cooperation and assistance to PIS.

This poses the question of how the UN evolves with human rights, as seen before climate change and human rights are linked and the UN is evolving through time to address climate change.⁷⁸ Since the UN has broad and State-like functions,⁷⁹ « the question of whether the United Nations is required to abide by basic human rights standards has become more pressing. »⁸⁰ In the 1993 Vienna Declaration, it was acknowledged that the UN activities should promote and protect human rights and they should be financed with increased resources.⁸¹ Even if the national governments are the primary responsible for the protection of human rights, the UN activities strive to protect human rights and ensure the resources for that purpose. A report of the United Nations Secretary General addressed the question of human rights and climate change stating that « 26. [...] The United Nations supports the development of a holistic sustainable human development agenda that addresses the challenges related to inclusive growth, social protection and the environment. In such an agenda, the rule of law must play a critical role in ensuring equal protection and access to opportunities. »⁸² This statement may be understood as a reflection on the UN having a broad approach to human rights and taking into consideration the environment. It is an evolution compared to the previous interpretation of human rights in relation to climate change. The UN was able to conclude that as in the past when a mechanism did not function, there needed an evolution. In the present case, that evolution is through addressing climate change as per the initiative of PIS.

⁷⁸ United Nations General Assembly Resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development, and resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21 December 1990 and 46/169 of 19 December 1991 on protection of global climate for present and future generations of mankind; and United Nations General Assembly Resolution 44/206 of 22 December 1989 on the possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas and United Nations General Assembly Resolution 44/172 of 19 December 1989 on the implementation of the Plan of Action to Combat Desertification

⁷⁹ S. Chesterman, I. Johnstone, and D. M. Malone, *Law and Practice of the United Nations Documents and Commentary*, 2nd Edition, 2016, page 512

⁸⁰ S. Chesterman, I. Johnstone, and D. M. Malone, *Law and Practice of the United Nations Documents and Commentary*, 2nd Edition, 2016, page 507

⁸¹ Vienna Declaration and Programme of Action, as Adopted by the World Conference on Human Rights, UN Doc. A/Conf.157/23 (1993), §35: « 35. The full and effective implementation of United Nations activities to promote and protect human rights must reflect the high importance a climate change ordered to human rights by the Charter of the United Nations and the demands of the United Nations human rights activities, as mandated by Member States. To this end, United Nations human rights activities should be provided with increased resources. »

⁸² Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels (Report of the Secretary General), 16 MARCH 2012 UN Doc A/66/749 (2012), §26

Conclusion

It is important to note that change and evolution of the UN are triggered and occur through legal disposition and practice. Through legal disposition, such as the drafting and the implementation of the United Nations Framework Convention on Climate Change and its subsequent document acknowledging the role of the international community, and the UN being at the forefront of the climate change adaptation through this Convention. It is to be noted that the legal change through the amendment of the UN Charter is not a path advisable as it is arduous. However, the evolution of the UN may occur through practice as the UN Charter is reinterpreted and the UN bodies take the issue of climate change as their own, following the initiative of PIS.

It may be questioned whether this is for the sake of appearances and no real change is taking place. However, one may look at the presidency of the UNGA, which is a representative of a small island state,⁸³ and see how the role of these States have evolved throughout history and the evolution of the UN. The PIS used to be placed under the trusteeship system and have little say in negotiation, with time they have sparked political will for evolution in the UN to address climate change and take into consideration the vulnerable situation of PIS.

⁸³ Abdulla Shahid is the Minister of Foreign Affairs of the Maldives

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Protection of the Intellectual Property Rights of Indigenous Peoples

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Abstract

The intellectual property rights of indigenous peoples often seem to be unclear. This paper aims to clarify the international approach to the rights of indigenous peoples. The research question is what are the problems that indigenous peoples face regarding the protection of intellectual property rights and how could these problems be solved. This research will introduce the international approach on the intellectual property rights of indigenous peoples and landmark cases. The paper has a brief discussion of the indigenous people as a whole and additionally focus on the Sámi people living in Finland. The protection of the intellectual property rights of the Sámi people in Finland and the challenges that have arisen from the will be addressed. One of the main issues is that indigenous peoples, in this case the Sámi people, lack adequate protection of their intellectual property. Therefore, possible remedies for amending this issue will be analyzed to fix the issue of not having adequate legal protection.

Introduction

It is well known that generally intellectual property rights are protected but one of the problems that emerge from different intellectual property rights is free-riders.⁸⁴ From the legal perspective, intellectual property comprises the protection of the rights that are legally granted in relation to creations, such as artistic works, symbols, and inventions.⁸⁵ Intellectual property includes patents, copyright, trademarks, and trade secrets. Furthermore, indigenous people face problems and breaches regarding intellectual property rights as well. However, these breaches differ from usual breaches of intellectual property rights, since in this case the breach is targeted at a group of people. Meaning that a certain property is collectively owned. The intellectual property and in general the traditional and artistic cultural expressions (TCE) of indigenous people comprise the information, practices, beliefs, and philosophy that are distinctive to every indigenous culture.⁸⁶ Additionally, TCE may comprise expressions such as designs, art, symbols, handicrafts, and names.⁸⁷ The intellectual property rights of indigenous people have been internationally recognized and protected; however, several indigenous people are not able to exercise the rights that they have been granted.⁸⁸ The art and sacred materials of indigenous people are used without the consent of the indigenous person or people.⁸⁹ The

⁸⁴ P. Drahos, Intellectual Property, *Indigenous People and their Knowledge*, Cambridge University Press (2014), p 6.

⁸⁵ Karanja, 'The Legitimacy of Indigenous Intellectual Property Rights 'claims'', 1 *Strathmore Law Review* (2016), p 165.

⁸⁶ Leaflet No. 12: WIPO and Indigenous Peoples, p 1.

⁸⁷ Karanja, 'The Legitimacy of Indigenous Intellectual Property Rights 'claims'', 1 *Strathmore Law Review* (2016), p 170.

⁸⁸ Leaflet No. 12: WIPO and Indigenous Peoples, p 1.

⁸⁹ *Ibid*

removal of traditional knowledge from an indigenous community, that has been a part of an indigenous community for years, results in the indigenous community losing control over the utilization of that knowledge.⁹⁰

This research paper will examine the intellectual property rights of indigenous people. The research question is: what are the problems that indigenous peoples face regarding the protection of intellectual property rights and how could these problems be solved. This paper will briefly discuss indigenous people as a whole and focus on the Sámi people living in Finland. International legal instruments, books, journal articles, legal cases and websites will be used to examine these questions and answer them. The research methodology comprises the analysis of the different sources used in the light of the research question.

I. International approach and landmarks cases

Solely two international laws will be discussed in this chapter, including two landmark cases.

1. The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples briefly touches on the intellectual property rights of indigenous people. Indigenous people shall have the possibility for redress regarding intellectual property rights “...that have been taken without their free, prior, and informed consent or in violation of their laws, traditions and customs”⁹¹ and “...the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”.⁹² This is an important article because it clearly lays down what the intellectual property rights of indigenous people are and that they include cultural heritage, traditional knowledge, and traditional cultural expressions. What is also beneficial is that this article stresses the importance of consent and states the different types of consent that in this case is free, prior, and informed consent.

2. Convention Establishing the World Intellectual Property Organization

It is onerous not to recognize the absence of the definition of the intellectual property rights of indigenous people in international conventions such as the Convention Establishing the World Intellectual Property Organization (WIPO).⁹³ This can be easily viewed as a problem regarding the fact that indigenous people lack general protection and therefore, this solely makes the situation worse.

3. Protecting aboriginal art

⁹⁰ *Ibid*

⁹¹ United Nations Declaration on the Rights of Indigenous Peoples 2007, Article 11 (2).

⁹² *Ibid*, Article 31 (1).

⁹³ Karanja, ‘The Legitimacy of Indigenous Intellectual Property Rights ‘claims’, 1 *Strathmore Law Review* (2016), p 181.

It is good to bring about the famous case of *Milpurrurru and Others v Indofurn Pty Ltd* which deals with the legal protection of Aboriginal art.⁹⁴ It was significant that in this case the Court by acknowledging the notion of cultural harm and awarding damages instituted an example for the future regarding the cultural aspect of the harm that indigenous communities experience.⁹⁵ This factor makes this case stand out since the cultural aspect can easily be forgotten especially by the people who do not belong to an indigenous community. As seen from the size of this problem regarding the indigenous communities, the importance of the cultural aspect is not solely forgotten but often the existence of it is not even known. It may even be hard to realize the significance of the cultural aspect if one does not have experience from being a part of an indigenous community and having an indigenous culture in such a strong and visible role in one's life. This is something that would be hard to fix without focusing on educating people and spreading information about indigenous cultures. Primarily, people should be familiarized with indigenous cultures and customs. Referring back to the case of *Milpurrurru*, Von Doussa J, the presiding trial judge, brought up that "under copyright law damages can only be awarded as the 'pirating' causes a loss to the copyright owner resulting from infringement of copyright. Nevertheless, in the cultural environment of the artists the infringement of those rights has, or is likely to have, far-reaching effects on the copyright owner. Anger and distress suffered by those around the copyright owner constitute part of that person's injury and suffering."⁹⁶ Here, Von Doussa J brings up the fact that the infringement in a cultural environment can possibly affect the copyright owner in a more drastic manner compared to infringements that do not take place in a cultural environment. It is important that he adds that the anger and distress that the ones around the copyright owner go through shall also be viewed as a fragment of the injury and suffering experienced by the person in question.

4. Protection of the original versions of songs

Another noteworthy case is the *Mbube* case concerning a song called 'Mbube' that was written in Zulu and which was later translated into English and reworked and used for example in the Disney musical *The Lion King* without giving recognition to Solomon Linda who initially recorded the original version of this song.⁹⁷ The settlement of this case displayed that the reversionary interest under the Imperial Copyright Act of 1911 can be enforced in all countries of the former British Empire and not solely by their heirs in South Africa.⁹⁸

⁹⁴ Karanja, 'The Legitimacy of Indigenous Intellectual Property Rights 'claims'', 1 *Strathmore Law Review* (2016), p 181.

⁹⁵ *Ibid*, p 183.

⁹⁶ *Milpurrurru and Others v Indofurn Pty Ltd*, 1994.

⁹⁷ Karanja, 'The Legitimacy of Indigenous Intellectual Property Rights 'claims'', 1 *Strathmore Law Review* (2016), p 185.

⁹⁸ *Ibid*

II. Protection of the intellectual property rights of the Sámi People in Finland and problems arising from it

In 2019, Finland received news from the United Nations Human Rights Committee that it had violated the rights of the Sámi people by infringing the right to political participation as an indigenous community.⁹⁹ Even though this case was about Finland infringing the rights belonging to the representatives of the Sámi Parliament by allowing candidates that the Sámi Parliament had rejected earlier and not about intellectual property rights it foreshadows the general position that the Sámi people have in Finland.¹⁰⁰ One of the most general problems in Finland regarding the Sámi people is that the knowledge of Finnish people regarding the Sámi people and their culture is nearly nonexistent.¹⁰¹ Finns simply are not familiar with this culture, which is strange regarding the fact that the Sámi people live also in Finland.¹⁰² Jaana Kanninen, one of the writers who wrote a book about Sámi people, states in an interview how shocked she has been when she learned how little even officials know about the rights of indigenous people. According to Kanninen, many Finns even in decision-making positions are not familiar with the collective rights of indigenous people granted by international law. Additionally, Kanninen and Rantanen's book "Vastatuuleen" shows how the Sámi people are forced to become Finnish and their rights to keep their culture have not been respected.¹⁰³ Throughout the writing process Kanninen got to learn how important it was to write this book, to raise more awareness about indigenous people.¹⁰⁴

1. Lack of intellectual property protection that Sámi people face

The Sámi people are indigenous people who are spread over four States: Finland, Sweden, Norway and Russia.¹⁰⁵ There is a problem with the protection of intellectual property of the Sámi people. In this research paper the main focus will be on the duodji-handicrafts and the Sámi dresses.¹⁰⁶ According to Tuomas Mattila there is a lack of practical examples regarding the protection of traditional Sámi clothing and handicrafts by using copyright.¹⁰⁷ There is a predicament resulting from the lack of using copyright to protect the Sámi clothing and handicrafts.¹⁰⁸ It raises a lot of questions regarding the lack of using copyright and trademark rights when it comes to the Sámi people because as Mattila demonstrates, there is potential to exploit copyright and trademark rights in this situation.¹⁰⁹ However, there has been an attempt to use trademark to protect the Sámi culture, when the Sámi duodji trademark was registered

⁹⁹ United Nations Human Rights. Available online:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24137&LangID=E>
(15.3.2021)

¹⁰⁰ *Ibid*

¹⁰¹ Yle Uutiset. Available online: <https://yle.fi/uutiset/3-11027109> (20.3.2021)

¹⁰² *Ibid*

¹⁰³ Yle Uutiset. Available online: <https://yle.fi/uutiset/3-11027109> (accessed 20.3.2021)

¹⁰⁴ *Ibid*

¹⁰⁵ Baer, 'The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi', 2-3 *International Journal on Minority and Group Rights* (2005), p 247.

¹⁰⁶ Mattila, 'Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks', *Publications of the Ministry of Education and Culture* (2018), p 37.

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*

¹⁰⁹ *Ibid*

in Sweden by the Nordic Saami Council.¹¹⁰ Even though this is a good attempt the problem relies in the fact that trademark was never registered in Finland and has, therefore, been used as an unregistered trademark. However, the Sámi duodji association in Finland manages the use of this trademark.¹¹¹

2. Human rights aspect of the intellectual property rights of indigenous communities

When discussing the TCEs of indigenous people it is difficult to not come across the human rights aspect of this issue. Furthermore, it is beneficial to have a wider perspective of the problems that these breaches entail and what areas they affect. Neglecting the TCEs of indigenous people dispossesses them from the possible financial benefits but additionally, it dispossesses them of their dignity that every human is has.¹¹² Dignity is seen as one of the fundamental human rights that lays down the core for other human rights.¹¹³ Therefore, it is important to note that this is not solely a financial issue but also a breach of fundamental human rights. As is seen, one breach can lead to other breaches of for example international law. This strengthens the need to already tackle the problem of breaches of intellectual property rights before the snowball effect happens and results in a much bigger problem. However, this does not mean that breaches of intellectual property rights should not be taken seriously and that they would be viewed as smaller breaches compared to other rights.

What makes this human rights factor even more noteworthy is that indigenous peoples have constantly received inadequate treatment such as racism, forced assimilation and demolition of their cultures.¹¹⁴ They have also experienced situations where their land and resources have been robbed from them.¹¹⁵ Due to this type of treatment indigenous peoples experience the constant threat of losing their culture and a huge part of their identity.¹¹⁶ This demonstrates the real size of the problem and shows how intellectual property rights of indigenous people are intertwined with other issues, even though human rights are mainly public rights while intellectual property rights are often private rights.¹¹⁷ This link between breaches of different rights reveals the importance of tackling a problem as rapidly as possible to prevent it from causing breaches in other areas of law.

However, even though breaches in both human rights and intellectual property rights are linked, they are still distinguished from each other. One of the main differences is that human rights are ingrained in the human being, while intellectual property rights are ways in which States aim to bestow inducements for being inventive and creative.¹¹⁸ The fact that human rights are ingrained in the human being means that human rights do not have to be acquired, instead, human beings inherently have human rights for being human. While intellectual

¹¹⁰ *Ibid*

¹¹¹ *Ibid*

¹¹² Polymenopoulou, 'Indigenous Cultural Heritage and Artistic Expressions: "Localizing" Intellectual Property Rights and UNESCO Claims', 1 *Canadian Journal of Human Rights* (2017), p 124.

¹¹³ Henk ten Have, B. Gordijn, Editors(eds.), *Handbook of Global Bioethics*, (14th ed., 2014), p. 45.

¹¹⁴ Oguamanam, 'Indigenous Peoples 'Rights at the Intersection of Human Rights and Intellectual Property Rights', 2 *Marquette Intellectual Property Law Review* (2014), p 267.

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ *Ibid*

¹¹⁸ Oguamanam, 'Indigenous Peoples 'Rights at the Intersection of Human Rights and Intellectual Property Rights', 2 *Marquette Intellectual Property Law Review* (2014), p 267.

property rights shall be acquired separately, meaning that intellectual property rights are not ingrained in the human being in the way human rights are. Another drastic difference is that human rights belong to each human being and are not temporary compared to intellectual property rights that tend to be temporary and that can be revoked, licensed, or assigned to another person.¹¹⁹

3. Nordic Sámi Agreement

Currently, the legal protection of the intellectual property rights of the Sámi people is deficient. However, a positive fact is that the Finnish Ministry of Justice has drafted a Nordic Sámi Agreement in 2009, which evaluates the Finnish Constitution, other Finnish law, and international human rights obligations that Finland is a part of.¹²⁰ This draft brings up several defects regarding the protection of the Sámi people for example in the Finnish Constitution and the Berne Convention for the Protection of Literary and Artistic Works.¹²¹ The negotiations of this Agreement commenced in 2011 and were concluded in 2016.¹²² The draft was discussed in a meeting that constituted of the Finnish, Swedish and Norwegian ministers specialized in issues regarding the Sámi people and the Sámi Parliament.¹²³ By now it has been agreed that the Agreement will be signed at the end of Spring in 2021. After this, the States can start the ratification process of the agreement.¹²⁴ It is great to see that this Agreement also aims to fix the structural problem, that results in different breaches of the rights of the Sámi people, by stating that according to Article 26 (3) of this Agreement the national curricula for schools shall be done in cooperation with the Sámi Parliament.¹²⁵ Additionally, the curricula shall be adapted in accordance with the cultural background and needs of the Sámi children and young people.¹²⁶ In Finland this does not require any amendments that should be done to the law, instead, it can be executed within the framework of the current legislation.¹²⁷

This Agreement sounds quite promising, and it can be assumed that it will advance the intellectual property and other rights of the Sámi people, not only in Finland but also in Norway and Sweden. It is likely that the hopes are high for this Agreement to visibly advance the overall rights of the Sámi people. Therefore, it is important that the implementation of this Agreement is done carefully to avoid any possible mistakes. That effect and possible benefits of this Agreement will be revealed in the future. A tremendous advantage is that this Agreement is not solely for the Sámi people in Finland but also in Norway and Sweden.

¹¹⁹ *Ibid*, p 288.

¹²⁰ Oikeusministeriö: Available online: [https://oikeusministerio.fi/hanke?tunnus=OM025:00/2017\(22.3.2021\)](https://oikeusministerio.fi/hanke?tunnus=OM025:00/2017(22.3.2021))

¹²¹ Oikeusministeriö, Luonnon pohjoismaiseksi saamelaisopimukseksi 2009, p 62.

¹²² Oikeusministeriö: Available online: [https://oikeusministerio.fi/hanke?tunnus=OM025:00/2017\(22.3.2021\)](https://oikeusministerio.fi/hanke?tunnus=OM025:00/2017(22.3.2021))

¹²³ *Ibid*

¹²⁴ *Ibid*

¹²⁵ Oikeusministeriö, Luonnon pohjoismaiseksi saamelaisopimukseksi 2009, p 103.

¹²⁶ Oikeusministeriö, Luonnon pohjoismaiseksi saamelaisopimukseksi 2009, p 103.

¹²⁷ *Ibid*

III. Possible remedies for the future regarding Sámi People and indigenous peoples as a whole

As seen from the cases presented in this paper, it can be noted that the rights of indigenous people are not taken into close consideration and the problem of copying or using the works of indigenous people is not seen as a breach in the eyes of an individual. As was explored, there is a possibility to use already existing methods, such as copyright and trademark protection while protecting the intellectual property rights of indigenous communities. Furthermore, there is the possibility to explore other options as well. Before other options are explored it is vital to explore some of the possible reasons that have led to neglecting the protection of the intellectual property rights of indigenous communities. The reason for individuals not seeing a breach in copying or using the works of indigenous people without permission may also purely be a result of the lack of knowledge of the intellectual property rights of indigenous people. It is most probable that this issue has several causes and therefore it is relevant to explore the different possible reasons resulting in this issue.

1. Alternative trademark regarding the Sámi duodji trademark

There has been a recommendation of having an alternative trademark that could be aligned with the Sámi duodji trademark.¹²⁸ This new alternative trademark would generally show the Sámi origin, leaving the Sámi duodji trademark to specify that not only is the product Sámi but additionally it adheres to the rules of traditional duodji.¹²⁹ This would be beneficial in advancing the Sámi origin, if it is to be adopted in the future. However, there has been discussion that the sole registration of a trademark would not be able to provide the needed amount of protection.¹³⁰ Additionally, it is challenging to manage and defend the Sámi duodji trademark when a cohesive structure is lacking.¹³¹ Even the Sámi Parliament has brought up that the protection that the trademark provides is not enough in relation to copied products and further stated that the Sámi duodji trademark “cannot in an adequate manner protect Sámi handicrafts or Sámi culture from economic exploitation”.¹³² There is also a challenge to make sure that consumers know how to recognize the mark to be able to choose the authentic product, specifically in the area of tourism.¹³³ It can be noted that even the question of an alternative trademark is not a clear and perfect solution due to multiple aspects that need to be taken into account when looking for a suitable solution. However, it is beneficial that the alternative trademark would still display the Sámi origin, since as stated it would advance the Sámi origin and it would make the Sámi origin more known and people more aware of it. Furthermore, despite there being Sámi people in Finland, still, the majority is not familiar with the Sámi origin and culture.

¹²⁸ Mattila, ‘Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks’, 1 Publications of the Ministry of Education and Culture (2018), p 38.

¹²⁹ *Ibid*

¹³⁰ *Ibid*

¹³¹ *Ibid*

¹³² Sámediggi, The Sámi Parliament: Statement of the Sámi Parliament on the use of traditional Sámi clothing (2010), p 10.

¹³³ Mattila, ‘Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks’, 1 Publications of the Ministry of Education and Culture (2018), p 38.

2. Protecting Sámi rights through copyright and trademark rights

Since copyright and trademark rights are used to protect intellectual property rights, it is natural to explore those possibilities in this case as well and find out whether they could be used to protect TCEs. For traditional Sámi clothing and duodji handicrafts to enjoy copyright protection they must be regarded as works of art and they must be independent and original.¹³⁴ Therefore, if it is seen that the Sámi clothing and the duodji handicrafts fulfil these criteria, then copyright protection would be a suitable way to protect TCEs and in this case especially the TCEs of the Sámi people.¹³⁵ Nevertheless, a possible problem that may be encountered is that the standards the handicrafts should fulfil are relatively excessive.¹³⁶ However, a positive factor, in this case, is that the duodji handicrafts are constantly seen as aesthetically more valuable, which makes it more likely to see them as art and not solely as generic handicrafts.¹³⁷

Trademark could possibly provide adequate protection for the property of the Sámi people.¹³⁸ Nevertheless, every option has its downside and the problem regarding trademark is that its protection is limited to commercial use and neglects the cultural and social aspect that plays an important role in the traditional Sámi clothing.¹³⁹ A trademark does not protect the traditional Sámi clothing that is not used in a commercial manner and solely registering a trademark does not itself prevent the unauthorized use of the item in question, in this case, the traditional Sámi clothing.¹⁴⁰

The gaps that both the copyright and trademark protection leave behind are quite problematic, since it adds to the different issues that need to be taken into consideration when trying to protect intellectual property and especially when aiming to protect TCEs. Trademark offers protection from violations in commercial use but the problem that arises is that the application of trademark has vital resources that are needed for the trademark protection to function properly, where solely lodging in an application for trademark protection is not enough.¹⁴¹ The requirements for using trademark would include a preparatory inspection to observe how trademark protection would work in a community.¹⁴² Whether it would fulfil the required needs of the community and what would the possible social influence be.¹⁴³ However, there is never a perfect solution that would not have any downsides to it. On the other hand, when observing both options as a whole, it can be seen that both copyright and trademark offer adequate protection and it is very beneficial that both can possibly be used to protect the intellectual property rights of indigenous people. Due to the lack of protection of the intellectual property rights of indigenous communities, copyright and trademark protection have not been studied in much detail nor is there a lot of experience of their use. Therefore, it is challenging to say how much and how high-quality protection copyright and trademark would provide for

¹³⁴ Mattila, 'Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks', 1 Publications of the Ministry of Education and Culture (2018), p 38-39.

¹³⁵ *Ibid*, p 39.

¹³⁶ *Ibid*

¹³⁷ *Ibid*

¹³⁸ *Ibid*, p 41.

¹³⁹ *Ibid*

¹⁴⁰ *Ibid*

¹⁴¹ *Ibid*

¹⁴² Mattila, 'Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks', 1 Publications of the Ministry of Education and Culture (2018), p 41.

¹⁴³ *Ibid*

indigenous communities and especially in this case for the Sámi people. Even though these possibilities may sound practical, it is important to be cautious and to be prepared that there are possible risks that may emerge.¹⁴⁴ Mattila brings up an important aspect that Miranda Forsyth has brought up and states that “the application of “ownership” to traditional contexts and the centering of “ownership” to certain party – who are supported by the government and law – could be problematic for traditional regulatory systems such as customary rules and practices and questions concerning ownership should first be determined within the community”.¹⁴⁵

3. Increasing knowledge

It might not be that clear what the rights of indigenous people are and, in this case, specifically the intellectual property rights of indigenous people and what they encompass. It could be the case that many are not even aware that the works in question belong to an indigenous group of people and therefore, do not take into consideration the intellectual property rights that are involved. A good example of this is the Sámi people. As Kanninen stated in her interview that the knowledge that Finns have of the Sámi people is extremely minimal. Therefore, it is very likely that one of the biggest issues is that people are just unaware of the rights that in this case, the Sámi people possess.¹⁴⁶ Consequently, the rights of indigenous groups of people should be brought up more, as Kukka Rantanen and Jaana Kanninen aimed to do in their book “Vatstatuuleen” which deals with the Sámi people.¹⁴⁷ Having more conversations regarding the intellectual property rights of intellectual peoples would also help the indigenous communities to know about their rights because not all intellectual property rights infringements are even identified because the indigenous people might not be aware of the rights that they have. On the other hand, it is also problematic that the indigenous communities themselves should constantly keep an eye on possible infringements of their intellectual property rights. On the positive side, indigenous people are becoming more aware of their rights in general, including rights provided by international law, which will help in reducing possible infringements also regarding the intellectual property rights of indigenous communities.¹⁴⁸ Additionally, the earlier mentioned Nordic Sámi Agreement is predicted to increase the knowledge on the Sámi people by tackling the school curricula.

3.1 International level

One of the problems is the lack of mentioning indigenous people in the first place, as seen from WIPO that was discussed earlier. Since the intellectual property rights of indigenous peoples differ from general intellectual property rights, it would make sense to mention them separately and to clearly lay down the intellectual property rights of indigenous communities for indigenous people to be aware of their rights and for others to be aware of the intellectual property rights of indigenous communities.

¹⁴⁴ *Ibid*

¹⁴⁵ *Ibid*

¹⁴⁶ Yle Uutiset. Available online: <https://yle.fi/uutiset/3-11027109> (20.3.2021)

¹⁴⁷ Yle Uutiset. Available online: <https://yle.fi/uutiset/3-11027109> (20.3.2021)

¹⁴⁸ Janke, ‘Managing Indigenous Knowledge and Indigenous Cultural and Intellectual Property’, 1 Australian Academic and Research Libraries (2013), p 95.

4. Actions of States

To achieve better international protection one aspect that could be focused on is being more critical of States' actions, referring also to the case of Finland regarding the violation of the rights of the Sámi people living in Finland that the UN Human Rights Committee raised. It is easier for States to continue committing the same breaches if they are not publicly notified about it, since that adds more pressure for the States to take a closer look at their own actions and rectify their actions. Often the problem is not caused by one single act, but it is rather a structural problem. This is seen expressly in this case regarding Finland and the Sámi people, due to the lack of overall protection and knowledge of the Sámi people.

Conclusion

In conclusion, according to the knowledge that has been collected for this paper, it can be concluded that the knowledge of indigenous peoples, their culture and their rights are extremely minimal, even in Finland regarding the Sámi people and their culture. When it comes to the Sámi people, steps in the right direction have been taken and it is left for time to tell whether these steps that have been taken are enough.

There is still improvement that needs to be done at the international level to ensure that similar breaches do not keep on repeating themselves. To ensure a better protection for all indigenous communities, the rights of indigenous peoples must be paid more attention to and changes must be done, for example by increasing knowledge and paying close attention to the actions of States as brought up in this paper. It takes time to conduct such changes, implement them and see the results. These are changes that need to be done to ensure that previous mistakes are not repeated.

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Regulation of legal age for becoming a soldier: Problematic issues regarding child soldiers

Elkhan Heydarli

Abstract

As a vulnerable group, the protection of children and their rights was at the centre of attention during the last century. The adoption of the United Nations Convention on the Rights of the Child (‘the UNCRC’) in 1989 was a huge leap forward in the history of children protection. At the regional level, there also were developments with the African Charter on the Rights and Welfare of the Child and the European Convention on the Exercise of the Children’s Rights. One of the major issues concerning the protection of the children is their participation in armed conflicts. Such involvement can vary from duties in combat, organizational and support functions to domestic and sexual services. The article will analyze the problems concerning child soldiers from the perspective of regulation of age for recruitment of children focusing on international documents, critically examining them, and will exchange the points of view on how international instruments criminalized the recruitment of children as a way of protection of children.

Introduction

Children are the most important part of every community. They are not only members of the next generation, but also play an essential role in the formation of the future of the society. Investing in them for a better prospect by means of education and culture is now a vital goal of every State. International community tried to achieve the protection of children through several international instruments, but the problems emerging in the field did not stop, and today still remains an unsettled issue. Despite strong language of treaties and conventions,¹⁴⁹ the issue of child soldiers was one of the worrying problems of the field of the child rights. According to the United Nations Children’s Fund (‘UNICEF’), there are approximately 300,000 child soldiers in the world involved in conflicts in more than 30 countries today.¹⁵⁰ In her latest report, Special Representative of the Secretary-General for Children and Armed Conflict stressed her concerns for the scale and severity of grave violations because of the participation of children in armed conflicts.¹⁵¹ There can be many reasons resulting in the joining of children

¹⁴⁹ The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49; European Convention on the Exercise of Children's Rights (adopted 25 January 1996, entered into force 1 July 2000) ETS 160

¹⁵⁰ UNICEF Ireland, ‘Child Soldiers’ <<https://www.unicef.ie/stories/child-soldiers/>> (accessed 13 April 2022)

¹⁵¹ UN General Assembly, ‘Report of the Special Representative of the Secretary-General for Children and Armed Conflict’ 74th Session UN Doc A/74/249 (2019) para 66

to armed forces and groups. Children can participate in armed conflicts voluntarily or after forceful recruitment. The reasons for voluntary involvement can vary from the culture of violence, the need for food, revenge for the death of family members or for national liberation. Lee classifies mainly three motives for it; being the fight for justice, socio-economic grievances and benefitting from military recruitment.¹⁵² Girls being subject at a higher degree, all child soldiers are susceptible to sexual exploitation in armed groups facing a risk of contracting sexually transmitted diseases.¹⁵³ Bearing in mind the horrific situation, the United Nations General Assembly created the mandate of the Special Representative for Children and Armed Conflict ('the Special Representative') in December of 1996 for bolstering international cooperation for the protection of children affected from the armed conflicts.¹⁵⁴ Regarding international documents that concern the issue, the main source of International Humanitarian Law ('IHL'), Geneva Conventions of 1949 ('Geneva Conventions') do not provide any specific provisions on child soldiers, although touches upon the issue of special protection of children. The Fourth Geneva Convention in its 17 provisions touches upon the matter of safety of children and identifies four different age groups, namely seven, twelve, fifteen and eighteen (eighteen being for the provision of the death penalty).¹⁵⁵ However, Additional Protocol I ('Protocol I') and II ('Protocol II') of 1977 to the Geneva Conventions included special norms about child soldiers, requiring Contracting Parties not to recruit children below 15 years of age with Articles 77¹⁵⁶ and 4,¹⁵⁷ respectively. Subsequent international agreements and principles, discussed below in Part 1, also dealt with the matter, each having its own positive elements, but also lacking some points that affect the safeguards of children.

1. International instruments on the age of child soldiers: 15 or 18?

Firstly, it is worth mentioning that setting standards for the minimum age for child soldiers is essential, especially on the background of the present warfare, where there is an increasing number of child soldiers in non-international armed conflicts. Even in the 17th century, there was a custom in Europe establishing that children under 12 should be kept out of conflict

¹⁵² Ah-Jung Lee, 'Understanding and Addressing the Phenomenon of 'Child Soldiers': The Gap Between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People's Military Recruitment' (2009) 52 Working Paper Series Refugee Studies Centre, University of Oxford 20

¹⁵³ Ranjana Ferrero, 'Prohibition on the Use of Child Soldiers: How Real' (2009) 9 ISIL YB INT'L HUM & REFUGEE L 279, 287

¹⁵⁴ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'History' <<https://childrenandarmedconflict.un.org/about-us/mandate/history/>> (accessed 13 April 2022)

¹⁵⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Article 14, 23, 24, 38, 50, 51, 68, 89, etc.; See further Barbara Fontana, 'Child Soldiers and International Law' (1997) 6 AFR SEC REV 51

¹⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Article 77

¹⁵⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Article 4

areas.¹⁵⁸ It was a topic of heated debates among scholars and in international organizations. For instance, Kuper argued that there should be special norms regulating the age criterion for direct and indirect participation of children as they are a vulnerable group.¹⁵⁹

The examination of current international agreements shows that they are very controversial on the regulation of the legal age for the involvement of children in armed conflicts. As mentioned above, Additional Protocols brought the concept of 15 as a minimum age for participation. Nevertheless, it had many disadvantages. Although Article 77 of Protocol I stressed that children are entitled to special protection and gave priority to the recruitment of older children if this is necessary, and asked Contracting Parties to take just 'feasible measures' in order to prohibit the direct participation of children under the age of 15 in armed conflicts.¹⁶⁰ The language of the Article is very contentious. Firstly, in the view of the author, accepting that a person is a child below 18, nevertheless, allowing his or her participation at the age of 15 is appalling. Secondly, the notion of 'feasible measures' is problematic, as it does not require States any specific action, and therefore, leaves it to their appreciation.¹⁶¹ Moreover, the use of the term 'direct participation' signals that indirect participation is acceptable which is challenging. As there is no definite answer to what precise act constitutes 'direct participation' agreed by all States, it can produce disputing positions. For instance, it can be the case that children work in mines that financially support the very existence of State armed forces through its resources that directly causes harm providing some specific goods for military activity and its destruction will give definite military advantage to one of the parties to the conflict. Then children are placed in extremely dangerous situation as they can be targeted assuming they are directly taking part in hostilities because of the nexus between their activity and survival of belligerent army.¹⁶² Interestingly, Additional Protocol II in its Article 4 uses the same language with Additional Protocol I with one difference. It prohibits both types of participation, whether direct or indirect, of children as it just states children are not 'allowed to take part in hostilities' under 15 years of age.¹⁶³

The legal age matter became the focus of attention again when the Working Group drafted the UNCRC. Being 'a landmark in the struggle for children' in the words of Hammarberg¹⁶⁴ and the international human rights treaty that is ratified more than any other in history,¹⁶⁵ it is a complete disappointment when it comes to Articles on the participation of children in armed conflicts. Initially trying to establish the minimum age as 18, Article 38 of the final version of the UNCRC ended up with 15, despite some countries like Spain, Netherlands, Colombia and

¹⁵⁸ Thomas W Bennett, 'Using Children in Armed Conflicts: A Legitimate African Tradition? & Criminalizing the Recruitment of Child Soldiers' (1998) 32 MONOGRAPH 34

¹⁵⁹ Jenny Kuper, 'Children and Armed Conflict: Some Issues of Law and Policy' in Deirdre Fottrell (ed.), *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (The Hague: Kluwer Law International 2000) 105

¹⁶⁰ Protocol I (n 8) Article 77

¹⁶¹ See for example Joseph N Madubuike-Ekwe, 'The International Legal Standards Adopted to Stop the Participation of Children in Armed Conflicts' (2005) 11 ANN SURV INT'L & COMP L 29

¹⁶² For nexus element please see: Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: The ICRC 2009) 16

¹⁶³ Protocol II (n 9) Article 4.3(c)

¹⁶⁴ Thomas Hammarberg, 'The UN Convention on the Rights of the Child - and How to Make It Work' (1990) 12 HUM RTS Q 97, 99

¹⁶⁵ UNICEF United Kingdom, 'What is the UN Convention on Child Rights?' <<https://www.unicef.org.uk/what-we-do/un-convention-child-rights/>> (accessed 13 April 2022)

Uruguay stating their disagreement with such an early age.¹⁶⁶ The Article also copied the language of Protocol I on direct participation and feasible measures. While the first Article of the UNCRC recognizes that any person under 18 years of age is deemed to be a child, and then accepting that children between 15 and 18 can take part in dangerous armed conflicts, somehow creates cognitive dissonance. According to Cantwell, there is a frustratingly ridiculous story behind it; the Chair of the Working Group was under a time constraint to catch his flight, wanted to summarize the discussion and just decided that consensus on minimum denominator was agreed as 15.¹⁶⁷ The non-existence of any norm on the derogation clause makes the situation more unclear, although the Committee on the Rights of the Child ('the Committee') provided in its Report that there is no derogation from the general principles set out in Articles 2-to 4.¹⁶⁸ This can be interpreted in two ways. The first one is that as it is not prohibited at all under the UNCRC and the Committee's Report, States can submit a derogation notification and recruit children even below 15. However, the second interpretation can be that no derogation from this norm is allowed in times of emergency, since it will be contrary to the spirit of the UNCRC. Argument in favor of this position would be that first of all, the Committee's Report only gives examples of general principles with Articles 2- to 4. Then, the prohibition of recruitment of children below 15 is the norm of the treaty and customary International Humanitarian Law as there is no opposing State practice.¹⁶⁹ Lastly, Article 38, in essence, prohibits direct participation in hostilities, which is already an extraordinary situation. Therefore, it would be a 'double derogation' and undermine the achievement of the objectives of the UNCRC, if it was acceptable.

Nonetheless, the UNCRC has its positive elements. To begin with, Article 39 covering the rehabilitation of children obliges States to take all steps for the social reintegration of children who suffered as a result of armed conflict and their physical and psychological recovery.¹⁷⁰ Furthermore, it pronounces in Article 41 that States Parties can have more conducive norms than instituted by the UNCRC which means despite the minimum age of 15, the denominator can be higher in national legislations.¹⁷¹

There were shortcomings of the UNCRC on the age point and something had to be done. Therefore, international human rights and humanitarian organizations, such as Save the Children, the International Committee of Red Cross ('the ICRC') and UNICEF, took advocacy actions for changing the situation.¹⁷² As a result of long-lasting dialogues, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ('the OPAC') was adopted which founded the 'straight-18' position in the binding document.¹⁷³ In its substantive Articles 1- to 4, the OPAC raised the minimum age level for compulsory

¹⁶⁶ International Committee of Red Cross, 'Rule 136: Recruitment of Child Soldiers' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule136> (accessed 13 April 2022)

¹⁶⁷ Nigel Cantwell, 'Words that Speak Volumes: A Short History of the Drafting of the CRC' in: Jane Connors, Jean Zermatten and Anastasia Panayotidis (eds), *18 Candles: The Convention on the Rights of the Child Reaches Majority* 25-26 (Sion: Institut international des droits de l'enfant, 2007) 26

¹⁶⁸ The Committee on the Rights of the Child, Report of the Second Session (1992) UN Doc CRC/C/10 para 67

¹⁶⁹ The International Committee of Red Cross, (n 17)

¹⁷⁰ The UNCRC (n 1) Article 39

¹⁷¹ Ibid UNCRC Article 41

¹⁷² Karl Hanson, "International Children's Rights and Armed Conflict" (2011) 5 HUM RTS & INTL LEGAL DISCOURSE 40, 47

¹⁷³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) A/RES/54/263

recruitment to 18, but kept the rest of the detrimental elements stressed above. The new and positive aspect brought by the OPAC is establishing the requirement towards armed groups not to recruit children below 18 under any circumstances in Article 4, thus protecting children in non-international armed conflicts.¹⁷⁴ In order to achieve this goal, States must adopt domestic legislative frameworks for criminalizing such actions.¹⁷⁵

Forbidding compulsory recruitment below 18, the OPAC demands States Parties to raise the age for voluntary recruitment from 15 as currently regulated under the UNCRC.¹⁷⁶ This means that under Article 3, States are able to recruit soldiers between 16 and 18, if they join armed forces genuinely voluntarily meeting the preconditions that it must be with the consent of parents or legal guardians, fully acquainted with his or her military duties and proof of age.¹⁷⁷ It not only generates the difference between armed groups and State forces, which armed groups would not favor. Additionally, the last point can be very problematic, as in some countries, especially in Africa which also has a high rate and history of child soldiers,¹⁷⁸ people do not have identity cards or birth certificates.¹⁷⁹ Moreover, military schools are exempt from this rule as they can have children aged between 15 and 18.¹⁸⁰ Consequently, all these loopholes make the accomplishment of the initial goals of the OPAC difficult.

Another international document that is worth mentioning is the Convention No 182 of International Labor Organization on Worst Forms of Child Labor ('the Convention').¹⁸¹ The Convention requires States to 'take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency'.¹⁸² Within the framework of the Convention, a child is defined as any person that is under 18 and it classifies forced recruitment of children in armed conflicts as one of the worst forms.¹⁸³ In fact, the Convention was the first internationally binding document that prohibited compulsory recruitment of children below 18.

Regarding regional instruments, for the moment the only one that addresses the issue of child soldiers is the African Charter. In fact, it provides better protection for children than international mechanisms. In addition to recognizing that every human below 18 is a child, the African Charter further goes on in its Article 22 that States will take all 'necessary measures' so

¹⁷⁴ The OPAC (n 25) Article 4

¹⁷⁵ Ibid OPAC

¹⁷⁶ Ibid OPAC Article 3

¹⁷⁷ Ibid OPAC

¹⁷⁸ UNICEF, "Build Back Better Lives: Advocacy Note Protecting children from grave violations in West and Central Africa" (2021) 3

¹⁷⁹ Centre of Excellence for CRVS Systems, "Improving birth registration for an inclusive Africa" (<<https://crvssystems.ca/blog/improving-birth-registration-inclusive-africa#:~:text=In%20sub%2DSaharan%20Africa%2C%202015,they%20won't%20legally%20exist.>> accessed 01 June 2022)

¹⁸⁰ Magali Maystre, *Les enfants soldats en droit international: Problématiques contemporaines au regard du droit international humanitaire et du droit international pénal* (Paris: Editions Pedone, 2010) 61

¹⁸¹ International Labour Organization (ILO), Worst Forms of Child Labour Convention, C182 (adopted 17 June 1999, entered into force 17 June 1999)

¹⁸² Ibid ILO Convention Article 1

¹⁸³ Ibid ILO Convention Article 3

that no child directly takes part in hostilities.¹⁸⁴ Here, as noted by Madubuike-Ekwe, the language is stronger as it asks not for 'feasible measures' but for necessary ones.¹⁸⁵

There are other soft-law instruments too that address the protection of child soldiers. Even though they are non-binding, they are authoritative, standard-setting and they express the intention of the parties that endorse them which can be useful in future interpretation of parties' activities and agreements. Among such documents are Cape Town Principles and Best Practices¹⁸⁶ ('the Cape Town Principles') concerning child recruitment in Africa, Maputo Declaration on the Use of Children as Soldiers,¹⁸⁷ The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups¹⁸⁸ ('the Paris Commitments') and the Paris Principles¹⁸⁹ that are complementary to them, and the European Union Guidelines on Children and Armed Conflicts.¹⁹⁰ Indeed, the Cape Town Principles was the first international document that gave the definition of 'child soldier' as 'any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members' including girls engaged for sexual and forced marriage purposes'.¹⁹¹ Among soft-law instruments, there is a Deed of Commitment under Geneva Call for Protection of Children from the Effects of Armed Conflict according to which, non-State armed groups undertake to abide by the norms of International Humanitarian Law and not to recruit any person under 18 years of age.¹⁹²

The legal age matter still continues to be one of the major problems when it comes to regulating the situation of child soldiers. Claire Breen emphasizes that in any case, the minimum age level for participation in armed conflicts set by the international agreements is too low if we pay attention to anthropological findings.¹⁹³ Therefore, there is a need to update the documents in accordance with the evolving society and its transforming requirements. Especially, taking into account that current armed conflicts have predominantly non-international character, the focus must shift to the possible enforcement mechanisms for non-state actors to abide by the UNCRC and the OPAC as States already have national legislations for enforcement to some extent.¹⁹⁴

¹⁸⁴ The African Charter (n 1) Article 22

¹⁸⁵ Madubuike-Ekwe (n 13) 41

¹⁸⁶ UNICEF, Cape Town Principles and Best Practices (1997)

¹⁸⁷ African Conference on the Use of Children as Soldiers, Maputo Declaration on the Use of Children as Soldiers (1999)

¹⁸⁸ Free Children from War Conference, Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups (2007)

¹⁸⁹ Free Children from War Conference, Paris Principles to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups (2007)

¹⁹⁰ European Union, EU Guidelines on Children and Armed Conflict (2003) Doc 15634/03

¹⁹¹ The Cape Town Principles (n 38)

¹⁹² Geneva Call, Deed of Commitment for Protection of Children from the Effects of Armed Conflict (2010)

¹⁹³ Claire Breen, 'When is a Child Not a Child? Child Soldiers in International Law' (2007) 8(2) HUM RTS REV 71-98.

¹⁹⁴ Gabriella Venturini, "From International to Non-International Armed Conflicts: IHL and the Changing Realities in the Nature of Armed Conflicts" (2019) 42nd Round Table on Current Issues of International Humanitarian Law on the 70th Anniversary of the Geneva Conventions (San Remo) 1

2. Criminalization of recruiting children in armed conflicts

We have witnessed atrocities committed throughout the 20th century which also resulted in the development of both International Humanitarian Law and International Criminal Law. Enforcement of international legal norms gained solid ground with the foundation of international criminal tribunals, starting with International Military Tribunals in Nuremberg and Tokyo and continuing with International Criminal Tribunal for former Yugoslavia and for Rwanda, which prosecuted those who breached them.

For the first time in history, the matter of criminalizing the recruitment of children into armed conflicts was legislated in the Rome Statute. In its Article 8(2)(b)(xxvi), the Rome Statute criminalizes ‘Conscripting or enlisting children under the age of fifteen years’ or ‘using them to participate actively in hostilities’ in case of State armed forces,¹⁹⁵ and armed groups.¹⁹⁶ Thus, addressing both international and non-international armed conflicts. The Statute of the Special Court for Sierra Leone (‘the SCSL’) also mirrored this language.¹⁹⁷ As a matter of fact, the first person that was prosecuted before the International Criminal Court (‘the ICC’), using the Rome Statute, was for the crime of recruiting child soldiers.¹⁹⁸

The Rome Statute followed the language of the UNCRC regarding the legal age issue, setting it at 15 years. However, there are some differences even in this regard. Unlike the UNCRC and the OPAC, it used ‘conscripting and enlistment’, but not the ‘recruitment’. While enlisting means ‘to enroll on a military service list’, conscripting refers to ‘to oblige to military service, to enlist compulsorily’.¹⁹⁹ Therefore, it means enlisting captures also voluntary joining to armed forces or groups. Although Happold argues that the usage of the terms in the UNCRC and the Rome Statute are similar,²⁰⁰ it might create a problem in State practices. For example, even though Azerbaijan has not ratified the Rome Statute, it is a party to the OPAC which allows recruitment of children only at the age of 18. In case Azerbaijan decides to ratify the Rome Statute, the problems may arise and there may be a need for respective legislative changes. According to Article 6 of its Law on Military Duty and Military Service, every male citizen attaining 15 years of age must go through initial conscription, but the real military service begins at the age of 18.²⁰¹ Hence, alleging that these terms have the same meaning can create controversy and result in the change of legislation.

The Rome Statute is different from the UNCRC and the OPAC also in utilizing the term ‘active’ participation, not ‘direct’. From the point of view of the ICRC, the concept of ‘direct participation’ emerged as a result of the phrase ‘taking no active part in hostilities’ belonging to

¹⁹⁵ UN General Assembly, ‘The Rome Statute of the International Criminal Court’ (adopted 17 July 1998, last amended 2010) Article 8(2)(b)(xxvi)

¹⁹⁶ Ibid Rome Statute Article 8(2)(e)(vii)

¹⁹⁷ UN Security Council, The Statute of the Special Court for Sierra Leone (adopted 16 January 2002) Article 4

¹⁹⁸ *Prosecutor v. Thomas Lubanga Dyilo* (ICC, Decision on Confirmation of Charges) ICC-01/04-01/06 (29 January 2007)

¹⁹⁹ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003) 377

²⁰⁰ Matthew Happold, ‘Children Participating in Armed Conflict and International Criminal Law’ (2011) 5 HUMAN RIGHTS & INTERNATIONAL LEGAL DISCOURSE 82, 89

²⁰¹ Law on Military Duty and Military Service 2014 (AZE) Article 6

common Article 3 of Geneva Conventions.²⁰² Additionally, it is suggested by the ICRC that while the English version of Geneva Conventions of 1949 and Protocol I and II use both 'direct' and 'active', consistent usage of '*participent directement*' in French signals that they have the same meaning.²⁰³ The ICRC provides elements of 'direct participation' in its authoritative Guidance as:

- 1) Such participation must be likely to have a negative effect on military operations or capacity of a party to a conflict (threshold of harm);
- 2) There should be direct causal link between it and the harm resulting from it (direct causation);
- 3) Specific designation of an act to cause threshold of harm (belligerent nexus).²⁰⁴

On the other hand, the Preparatory Committee preceding the Diplomatic Conference in Rome gave somehow similar, but not the same definition:

"The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, the use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included in the terminology'.²⁰⁵

While the scope of this article does not cover the details of the elements of crime, it is worth to stress that the material elements of the crime (*actus reus*) captures all militaries, be it national armed forces, militias and voluntary corps belonging to the party, and as the non-international armed conflicts are also captured by the Rome Statute,²⁰⁶ armed groups as well. Nevertheless, problems can emerge since armed groups do not keep official records for enlistment and conscription. That is why, the Appeals Chamber of the SCSL held in the *Prosecutor v Fofana and Kondewa* case that bearing in mind that armed groups are not conventional military organizations, the enlistment must be understood not only as formal process, but also in broader context as accepting a child as a member of military unit, including participation in operations.²⁰⁷

Regarding the subjective elements of the crime (*mens rea*), Elements of Crimes of the Rome Statute requires that the culprit 'knew or should have known' that a recruited person is under 15 years of age.²⁰⁸ Some scholars claim that the wording 'should have known', which means

²⁰² Melzer (n 14) 43

²⁰³ Ibid Melzer 43

²⁰⁴ Ibid Melzer 16

²⁰⁵ Draft Statute for the International Criminal Court, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (1998) Addendum, Part One, A/CONF.183/2/Add.1 21

²⁰⁶ See for example Rome Statute (n 47) Article 8 (c) to (f)

²⁰⁷ *Prosecutor v Fofana and Kondewa*, (The SCSL, Trial Chamber I, Judgment) SCSL-04-14-T1 (2 August 2007) para 144

²⁰⁸ The ICC, 'Elements of Crime' 2011 Article 8(b)(xxvi) and Article 8(e)(vii)

perpetrator negligently recruited a child, collides with the definition of 'knowledge' which is provided by Article 30 of the Rome Statute²⁰⁹ as awareness of the existing circumstance.²¹⁰ Nevertheless, it was not the position taken by the ICC. In *Prosecutor v Katanga and Ngudjolo* case, ICC Pre-Trial Chamber I stated that the negligence standard of 'should have known' encapsulates two elements:

- 1) The criminal did not have knowledge about the age of the victim when the victim took part in hostilities;
- 2) The criminal was short of such knowledge because he or she did not act with due diligence in the related environment.²¹¹

The Appeals Chamber of the SCSL came to the same conclusion too, emphasizing that in this circumstance, 'due diligence' means that if there is a doubt regarding the age of a child, the perpetrator bears incumbent responsibility to ascertain the age.²¹²

Despite its shortcomings, the Rome Statute developed a set of norms that criminalized recruitment of children presenting a step for the prevention of the commission of it and also prosecution of perpetrators of war crimes, thus protecting children and restoring justice.

3. Conclusion

The involvement of children in armed conflicts urged the international community to adopt norms that would protect them. Because such participation means that the future of mankind is in danger. In the words of Brett and McCallin, the life of a child soldier is full of transitions to an adult soldier, to a former soldier and then dead. Though irrelevant, such an individual change is a continuous process and has cumulative effects on the society that he or she is part of.²¹³ The setting rules itself is not enough, their implementation is crucial. The Committee was consistent in its approach during the State review process pushing them to move forward to the achievement of 'straight-18' for the recruitment of children to armed conflicts in national State practices. For example, it asked the Netherlands to raise the age level to 18 reconsidering its policies²¹⁴ and urged Belize to set conscription age as 18 instead of 16 in 1999.²¹⁵ Today both of the countries ratified the OPAC.²¹⁶

²⁰⁹ Rome Statute (n 47) Article 30

²¹⁰ Happold (n 52) 97

²¹¹ *Prosecutor v Katanga and Ngudjolo Chui* (The ICC, Decision on the Confirmation of Charges) ICC - 01/04-01/07-717 (30 September 2008) para 251-252

²¹² *Prosecutor v Sesay, Kallon and Gbao* (The SCSL, Trial Chamber I, Judgment) SCSL-04-15-T (2 March 2009) para 1704

²¹³ Rachel Brett and Margaret McCallin, *Children: The invisible soldiers*, (Stockholm: Rädda Barnen (Swedish Save the Children) 1996) 46

²¹⁴ The Committee on the Rights of the Child, 'Concluding Observations: Netherlands' (1999) UN Doc CRC/C/15/Add.114 para 24

²¹⁵ The Committee on the Rights of the Child, 'Concluding Observations: Belize' (1999) UN Doc CRC/C/I5/Add.99 para 14

²¹⁶ Office of the United Nations Office High Commissioner for Human Rights, 'Status of Ratification: Interactive, Dashboard' <<https://indicators.ohchr.org>> (accessed 13 April 2022)

Current warfare and ongoing conflicts around the world show that children are engaged in hostilities despite the criminalization of conscripting or enlisting them by major instruments. In order to achieve the main goal of keeping children out of armed conflicts, firstly, all States should abandon the practice of recruitment of persons below 18. Secondly, the process should embrace armed groups and dialogues must be carried out with them so that respect for International Humanitarian Law is established. Last, but not least, States should acknowledge that the best way of handling child soldiers in the aftermath of the conflict is to conduct rehabilitative activities so that the society and children embrace each other and gradually progress, except where the violations are gross and children bear utmost responsibility in their commission²¹⁷.

²¹⁷ Although Article 38 to 40 of UNCRC and Article 6.3 of OPAC do not specifically mention how children should be distinguished, but in general terms say that children should go through a rehabilitative process and according to Article 40 should be penalized if committed a crime.

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Prostitution policies in Romania: Human Rights issues within neo-abolitionism, liberalisation and collaborative governance frameworks

Valeria Găvoază

Abstract

The issue of prostitution remains a taboo subject in most of the countries around the world. However, the changing social perceptions on the phenomenon in the last decades have contributed to the fact that prostitution is gaining importance on the political and social agenda of States and some international organisations. In the Occident, debates on prostitution have evolved from an approach that fights against those who sell sexual services to one that allows for support and protection of their human rights, promoting such models as liberalisation, (neo)abolitionism, or collaborative governance. However, the situation may vary in particular countries such as Romania, where the current legislation is seriously deficient in protecting the prostitutes under the International Human Rights Law, indirectly sustaining their exploitation. Therefore, the present study aims to investigate the impact of the current legislative model concerning prostitution in Romania from the perspective of human rights and gender equality, as well as to anticipate the advantages and disadvantages of a possible future change of its prostitution policies.

Introduction

At the global level, the emergence of human rights is associated with the end of the Second World War and the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948. Nevertheless, it is only after the 1980s, in the context of increasing inter-ethnic conflicts and cases of genocide and violence against civilians, that bilateral and multilateral actions to ensure better integration of human rights into development assistance programs are taking place.²¹⁸ As far as gender equality is concerned, in recent years the European Union (EU) has adopted a range of measures to assist the integration of the concept of gender mainstreaming into the national policies of the Member States. *However, this area remains within the sphere of supporting competencies at this stage, and the primary responsibility lies on the Member States.* The same applies to the issue of prostitution, where the EU and other international institutions can speak out in favour of respecting the human rights or access to social services of prostitutes, but its practical implementation depends largely on the domestic policies of each country.

However, it is even more complicated for States to decide on a particular framework/policy for regulating prostitution that can be applied consistently, as there is no specific position

²¹⁸ Jack Donnelly, *The Globalization of World Politics: An Introduction to International Relations. Human Rights*, ed. by John Baylis and Steve Smith, Sixth edition (Oxford; New York, NY: Oxford University Press, 2014), p. 468.

among international organisations on how prostitution should be addressed to provide quintessential human rights protection for the sex workers. For example, in August 2015, Amnesty International adopted a resolution favouring decriminalising all consensual aspects of sex work while condemning human trafficking and other forms of sexual exploitation and calling on States to take appropriate measures to prevent sexual exploitation and abuse of children.²¹⁹ This was the first step towards decriminalising prostitutes at the international level, giving them the status of political subjects with social rights, access to health care, protection, and other social services. However, the problem is that this approach contradicts the position adopted at the European level, which calls for the criminalisation of the purchase of sexual services as the only model that can determine a complete eradication of prostitution.

Comparably, the debates in the literature on prostitution regarding sexual exploitation and its impact on gender equality is shaped around two positions. Some researchers believe that it is everyone's right to decide what they want to do with their own body, while others, proponents of the Swedish model (the abolitionist model), believe that voluntary prostitution should not be encouraged as a legitimate activity because it contravenes fundamental rights including equality between women and men. In Romania, a step towards changing the approach to prostitution was taken in 2014, when, with the amendment of the Penal Code, prostitution was no longer treated as a crime, but started to be punished with a fine. Nevertheless, this has not resulted in significant changes in terms of respect for the human rights of prostitutes or their perception by society, as they continue to be strongly stigmatised.

Therefore, the research problem of this paper tackles the issue of prostitution in Romania from a human rights and gender equality perspective. The relevance of the study is based on the fact that although the phenomenon is still closely debated by human rights activists, feminist organisations, politicians, and researchers, such as Roger Matthews and Hendrik Wagenaar, the fact that in contemporary society the State should ensure respect for the human rights of all citizens cannot be overlooked. Thus, identifying the optimal ways of framing prostitution in this sense is of vital importance. Hence, this article aims to assess how the problem of prostitution is framed at the Romanian level, by reviewing how the problems faced by prostitutes are dealt with from the legal perspective, and by analysing how the current prostitution policies could evolve in Romania.

Therefore, the research questions that the study aims to answer are what are the impacts of prostitution policies in Romania on those who sell sexual services in terms of human rights and gender equality, and what models should be followed to solve the current problems? Thus, this paper argues that policies on the criminalisation (including contravention) of prostitution are not in line with human rights, and the adoption of one of the three models which provide legal protection for prostitutes (neo-abolitionism, liberalisation, and collaborative governance) would contribute to improving the situation of prostitutes in terms of human rights and gender equality.

Accordingly, two hypotheses will be explored in this paper. The first research hypothesis upon which the paper starts is the higher the level of stigmatisation of prostitutes is, the higher the level of their social marginalisation and vulnerability, and sex workers are facing more circumstances in which their human rights are being violated. The second hypothesis states that adopting an approach based on control may harm the social status of prostitutes while choosing an approach based on collaborative governance can be a factor in the creation of

²¹⁹ Judith R. Walkowitz, 'The Politics of Prostitution and Sexual Labour', *History Workshop Journal*, 82.1 (2016), 188–98 (pp. 1–2) <<https://doi.org/10.1093/hwj/dbw029>>.

effective policies to protect the human rights of prostitutes that Romania should follow in spite of possible obstacles.

Concerning the structure of this paper, it is organised as follows: literature review, theoretical framework, methodology, legal framework at the EU and Romanian level, problems with the current Romanian legal framework, perspectives of legalization of prostitution in Romania, and conclusions. The first part literature review, investigates how the debates on the phenomenon of prostitution have evolved as well as the contributions and gaps in the literature. The theoretical framework will focus on defining the concept of prostitution, identifying its main dimensions in relation to human rights, thus revealing useful analytical frameworks to answer the research question. At the same time, the methodology section outlines the working method concerning the research problem and the case study. The following chapters will present the research findings from operationalizing our model of analysis on how stigma, the control paradigm, and the collaborative governance paradigm influence the human rights situation of prostitutes. The conclusions section summarises the main findings and outlines the limitations of the study and future directions for research.

Literature on prostitution policies and Human Rights issues

The research problem of this paper is the phenomenon of prostitution in Romania, with a focus on policies addressing prostitution and their connection with human rights and gender equality. Therefore, this section investigates how the literature deals with the issue of prostitution by highlighting the evolution of the debates surrounding the phenomenon of prostitution. It mainly focuses on the new elements introduced in the literature as a result of the shift in the paradigm through which the phenomenon is approached: from the stigmatisation and criminalisation of women involved in prostitution to a more humane approach that takes into account their basic rights and freedoms. The importance of the issue derives from the fact that prostitution is one of the most worldwide phenomena and despite theoretical and legislative efforts, no country has yet succeeded in its eradication. Thus this section will summarise authors' opinions on prostitution such as Roger Matthews or Hendrik Wagenaar, then identify the gaps or shortcomings found in the literature.

Furthermore, we should mention the change in the public perception of prostitution as being an invisible issue towards the reality after 1980 when the prostitution attracted the public attention. Roger Matthews cites a series of factors that have been contributing to the change of the interest towards the prostitution phenomenon. One of the factors is the growing number of supporters of prostitutes for the protection of their rights. And another factor is the public demand to control street prostitution, to avoid any type of street violence, which over time has led to a perception of prostitutes as victims and a shift in public hostility towards male clients.²²⁰ In addition, preoccupations with human trafficking and child prostitution generated growing concerns about sexual exploitation and sexual abuses that prostitutes are subjected to.²²¹ Hence, regarding the structural characteristics of the phenomenon of prostitution, Hendrik Wagenaar, Helga Amesberger, and Sietske Altink shared their positions on the connection between the stigma of prostitution and its relation with the idea of women's control. According to them, the stigma of prostitution shapes laws, regulations, practices, institutions, and politics perpetuating the structural violence against women in general and prostitutes, in particular.

²²⁰ Roger Matthews, *Prostitution, Politics and Policy* (Abingdon: Routledge-Cavendish, 2008), pp. 7–9.

²²¹ Matthews, p. 15.

The same principle applies to the control-driven approach to prostitution: while it is claimed that the goal is to control prostitution, in reality, it controls the sexual behaviour and the position of women in society.²²² Thus, the stigma of prostitution and the idea of ‘controlling’ contribute to the social marginalisation of prostitutes, which puts them in an even more precarious situation from the perspective of human rights.

The particular framing of prostitution, which implies the unwillingness of governments to protect the labour rights of prostitutes, determines the fact that the exploitation is generally accepted by both the prostitutes and the society.²²³ Thus, the problem of trafficking appears, more specifically, when it is framed into the terms of migration, since it generates a move to stop the migration, and policy initiatives are misdirected. On the other hand, when it is framed as exploitation, it targets perpetrators instead of the victims.²²⁴ That is the reason why the literature mentions an urgent need to differentiate between the concepts of prostitution, trafficking, and migration; as the confusion in terms determines the fact that the law targets migrants and positions them in more precarious situations while denying their rights.²²⁵

Other authors concentrate on the debate between the two approaches considered to be the most effective regarding the protection of the human rights of prostitutes: neo-abolitionism (sex-dominated position), criminalising the purchase of sex services versus liberalisation (sex-work position), which argues in favour of the decriminalisation of consensual sex work. On the one hand, supporters of the neo-abolitionist model state that all forms of prostitution should be considered forced prostitution; thus, to combat trafficking, we need to reduce prostitution in general. On the other hand, the proponents of the second position advocate a distinction between consensual sex work, which should be seen as a human rights issue, and trafficking as sexual exploitation, by that targeting trafficking but not the prostitution itself.²²⁶ Furthermore, the rise of transnational sex migration,²²⁷ also called the foreignisation of prostitution is challenging the liberal position, because victim protection has become significantly complicated.

While examining the phenomenon of prostitution, the literature identifies four models: the deviance framework, which is associated with the stigmatisation of sex work, social control, and discriminatory treatment; the oppression paradigm – sees prostitution as an expression of patriarchal gender relation;²²⁸ the empowerment paradigm – perceives prostitution as an opportunity for women to gain financial independence; and polymorphous paradigms – more sensitive to complexities. Moreover, among the concrete regulations targeting prostitution, following measures should be mentioned: the removal of street prostitution, addressing demand, helping women to exit, decriminalising soliciting, and halting trafficking, exploitation,

²²² Hendrik Wagenaar, Helga Amesberger, and Sietske Altink, *Designing Prostitution Policy: Intention and Reality in Regulating the Sex Trade* (Bristol Chicago, IL: Policy Press, 2017), pp. 29–30.

²²³ Wagenaar, Amesberger, and Altink, p. 214.

²²⁴ Wagenaar, Amesberger, and Altink, pp. 222–24.

²²⁵ *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*, ed. by Kamala Kempadoo, Jyoti Sanghera, and Bandana Pattanaik, 2nd ed (Boulder, Colo: Paradigm Publishers, 2012), pp. 108–9.

²²⁶ Seo-Young Cho, ‘Liberal Coercion? Prostitution, Human Trafficking and Policy’, *European Journal of Law and Economics*, 41.2 (2016), 321–48 (p. 322) <<https://doi.org/10.1007/s10657-015-9519-7>>.

²²⁷ Judith R. Walkowitz, ‘The Politics of Prostitution and Sexual Labour’, *History Workshop Journal*, 82.1 (2016), 188–98 (p. 9) <<https://doi.org/10.1093/hwj/dbw029>>.

²²⁸ Ronald Weitzer, ‘Sociology of Sex Work’, *Annual Review of Sociology*, 35.1 (2009), 213–34 (p. 214) <<https://doi.org/10.1146/annurev-soc-070308-120025>>.

and child involvement.²²⁹ These objectives are more or less reflected in policies targets prostitution depending on the model adopted. The regulatory approach aims to limit the visibility of street prostitution while having the same goal: legalization including non-criminalisation and control.²³⁰ The prohibition refers to the criminalisation of the exchange of sexual services for payment,²³¹ usually targeting women while the decriminalisation sees women as victims of abuses or neglect.²³² However, in practice, a distinct model is never applied, there are always different elements that are combined to respond as adequately as possible to the prostitution-related problems in the country in question. For example, in France we can observe the evolution from a prohibitionist model towards decriminalisation, through the gradual introduction of measures aimed at protecting victims or rescuing them by the State.²³³

As the previous set of literature shows, the stigma related to prostitution and the aversion to immigrants contribute to the perpetuation of labour/sexual exploitation. Although, until now, all of the policy models, influenced by the control-driven approach, used to address the phenomenon of prostitution failed in protecting the human rights of prostitutes; moreover, they damaged the social position of prostitutes.²³⁴ Due to these facts an alternative approach is required, one that introduces the voice of prostitutes in the design and implementation of prostitution policies – collaborative governance,²³⁵ as a way to achieve an effective and humane prostitution policy. According to this approach, sex workers advocacy has the power and legitimacy to address the wider climate of hostility towards prostitutes by influencing the political agenda and the decision-making process and by working in cooperation with the State.²³⁶

In terms of highlighting the contributions of the literature to the research problem at hand, it is important to note that various authors address both ideological issues, in particular the stigma attached to prostitutes, and conceptual issues. Thus, they are pointing out the importance of the difference between prostitution, migration, and trafficking, by highlighting the main elements of the debate between the oppression paradigm and the empowerment paradigm. In addition, it is worth mentioning the authors' contributions on the different policy models that are currently used to address the problem of prostitution as well as Hendrik Wagenaar's contribution on the introduction of a collaborative governance model, which offers potential solutions to the current policy impasse in the regulation of prostitution.

Therefore, even though taking into account the contribution of the literature on the issue of prostitution, there are still several gaps. Firstly, much of the research has focused on the analysis of the prostitution phenomenon in Western Europe, which has largely abandoned the idea of criminalising the sale of sex. Focusing more on the main debate between the neo-abolitionist and liberal models, criminalisation remains under-researched. Secondly, there is limited research on the challenges faced by States when deciding to change criminalising policies in

²²⁹ Matthews, pp. 122–37.

²³⁰ Matthews, p. 100.

²³¹ Matthews, p. 112.

²³² Matthews, p. 102.

²³³ Isabel Crowhurst, Joyce Outshoorn, and May-Len Skilbrei, 'Introduction: Prostitution Policies in Europe', *Sexuality Research and Social Policy*, 9.3 (2012), 187–91 (p. 188) <<https://doi.org/10.1007/s13178-012-0100-7>>.

²³⁴ Hendrik Wagenaar, 'Why Prostitution Policy (Usually) Fails and What to Do about It?', *Social Sciences*, 6.2 (2017), 43 (p. 10) <<https://doi.org/10.3390/socsci6020043>>.

²³⁵ Wagenaar, p. 3.

²³⁶ Wagenaar, Amesberger, and Altink, pp. 237–39.

favour of neo-abolitionist or liberal ones. Finally, there is a limited number of studies addressing the case of Romania, so the gaps addressed in this study are both of a theoretical and an empirical nature. Therefore, this study addresses both the situation in Romania at the current time and the challenges that Romania might face in the event of a potential decision to reform current policies on prostitution.

Theoretical framework

The aim of the study is to answer these two questions: what is the impact of prostitution policies in Romania on those who sell sexual services in terms of human rights and gender equality; and what is more likely to happen in terms of prostitution policies models to solve the current problems? Accordingly, the paper is organised around the research argument stating that policies on the criminalisation (including contravention) of prostitution are not in line with human rights, and Romania is no exception, and the adoption of one of the three models which provide legal protection for prostitutes (neo-abolitionism, liberalisation, and collaborative governance) would contribute to improving the situation of prostitutes in terms of human rights and gender equality. The study will consider both advantages and disadvantages of these three models and under which conditions they would be adopted.

In this respect, to test the empirical validity of the research arguments, based on the theoretical approaches covered in the literature, the theoretical framework that will be used to analyse the research problem is made up of four important concepts: *stigma*, *control*, *exploitation*, and *collaborative governance*. These are also the main concepts applied to the case study. *Criminalisation* underpins the model of analysis and is considered to be the underlying cause of the perpetuation of human rights violations of the prostitutes, a problem that can be addressed through two different lenses. The first pattern is the continuation of the stigmatisation of prostitutes and the insistence on control over them, which only continues their exploitation to a greater or lesser extent depending on the chosen paradigm (oppression or empowerment). Accordingly, the second way would be to introduce collaborative governance that allows sex workers to participate in the process of designing and implementing prostitution policies.

First of all, it is necessary to understand the elements that differentiate the concept of *prostitution* from *sex work* and the terms *prostitute* from a *sex worker*. Even if the terms are used interchangeably in politics, media as well as at the individual level, one should be aware that the choice of the words reflects different positions on how the phenomenon in question should be approached. For example, those who support the abolition of the sex trade prefer to use the term of *those who sell sexual services* or *prostituted women*, to express their belief that no act of prostitution can be consented to by the woman since she is in an inferior social and economic position comparing to her clients. Therefore, they prefer to avoid the term *prostitute*, as historically it was used to attack and degrade women's sexuality, thus having a negative connotation. Similarly, the usage of the term *sex work* which is putting the phenomenon in a labour framework, by that admitting the free choice of women to sell sexual services,²³⁷ is widely used by those who advocate for liberalisation.

Besides, different international organisations and institutions use one term or another depending on their position on the phenomenon, for instance, the European Parliament uses

²³⁷ Daniela Danna, *Report on Prostitution Laws in the European Union*, 2013, p. 5

<<https://documentation.lastradainternational.org/laidocs/3048-EU-prostitution-laws.pdf>> [accessed 29 December 2021].

the term of *prostitution* and *forced prostitution* and defines them as forms of slavery incompatible with human dignity and fundamental human rights and both a cause and a effect of gender inequality for women.²³⁸ At the same time, the World Health Organisation uses the term of *sex workers* and defines it as including female, male and transgender adults and young people (18 years of age and above) who receive money or goods in exchange for sexual services, either regularly or occasionally, pointing out that sex work should be consensual sex between adults.²³⁹ Considering everything that was mentioned above and in order to avoid possible confusions with the liberalisation approach, that could occur while using the term sex work, in this paper, the term of prostitution will be used. The concept of prostitution/prostitutes, which is to be understood as the practice of engaging in sexual activity in exchange for payment, would be more appropriate. However, when the discussion deals with the liberal approach the term sex work/sex worker will be used.

As far as it concerns the policy-making process in the area of prostitution, it is almost entirely determined by ideology, thus the goals of the policies themselves are often subordinated to ideological goals. In other words, policy changes in the field of prostitution, both progressive and repressive, are the result of a change in doctrine or political regime. This is why it can be considered a type of morality politics,²⁴⁰ driven, most of the time, by social stigmatisation directed towards prostitutes. This contributes to the creation and perpetuation of a wide climate of hostility towards prostitution, it influences laws, regulations, practices, institutions, and policies and by shaping prostitution as physical and moral contagion, it contributes to the enforcing of the structural violence against prostitutes in general.²⁴¹ Moreover, historically, it is this way of perceiving prostitution that contributed to the implementation and maintaining of the policy model that criminalises the selling of sex. Thus, it contributed to the perpetuation of the social marginalisation of prostitutes, by that upholding violation of their human rights and civil liberties.

Unfortunately, the stigma of prostitutes persists even in societies that abolished the criminalisation model of prostitution, and this is mainly because of the control-driven approach, central to the policy-making process. If this paradigm explicitly targets prostitutes, it implicitly affects all women. By defining gender roles and hierarchies, and by controlling sexual behaviour and the position of women in the society,²⁴² it states a discriminatory treatment, and encourages prostitutes 'exploitation. For example, by considering that the exploitation (in prostitution) has the same connotation as the concepts of trafficking and migration, the law targets migrants and position them in a more precarious situation. Limiting migration does not decrease the trafficking,²⁴³ and prostitutes continue to accept being exploited because of their economic dependence on the pimps or brothel managers.

This conceptual confusion between prostitution, exploitation, trafficking, and migration also shapes the main debate about the two ways of stopping the sexual exploitation of women:

²³⁸ European Parliament, *European Parliament Resolution on Sexual Exploitation and Prostitution and Its Impact on Gender Equality, 2013/2103(INI)*, 2014 <https://www.europarl.europa.eu/doceo/document/TA-7-2014-0162_EN.html> [accessed 2 January 2022].

²³⁹ World Health Organization, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries: Recommendations for a Public Health Approach* (Geneva: World Health Organization, 2012), p. 12 <<https://apps.who.int/iris/handle/10665/77745>> [accessed 30 December 2021].

²⁴⁰ Wagenaar, p. 3.

²⁴¹ Wagenaar, Amesberger, and Altink, pp. 29–32.

²⁴² Wagenaar, Amesberger, and Altink, p. 29.

²⁴³ Kempadoo, Sanghera, and Pattanaik, p. 108.

between (neo)abolitionists and liberals. Thus, radical feminists, who advocate for the (neo)abolitionist model, see prostitution as intrinsically exploitative, a form of human rights abuse, and an attack on the dignity of human beings, considering that all forms of prostitution are forced prostitution and to combat trafficking there is an urgent need to reduce the prostitution itself.²⁴⁴ On the other hand, the liberal feminists – advocates of the sex-work position have a different conceptual approach stating that prostitution refers to consensual sex work, thus, it should be called sex work and that trafficking should be understood as sexual exploitation.²⁴⁵ Therefore, the liberal approach advocates for combatting trafficking and regulating prostitution to protect the human rights of sex workers, an approach that proposes that prostitution and related activities should be legal and regulated. Both approaches aim to eradicate trafficking for the purpose of sexual exploitation while having different perspectives on how to do that. Predominantly, the foreignisation of prostitution is starting to challenge the liberal position. Firstly, because transnational sex migrants are usually women with limited occupational choices and restricted access to social resources,²⁴⁶ thus their choice of entering prostitution is under question. Secondly, as prostitution becomes an issue of the political economy because of migration, victim protection becomes considerably complicated.²⁴⁷

From the perspective of human rights, a fair conclusion would be that the legislation models which provide legal protection for sex workers are much more effective than legislation models which criminalise the selling of sex services. The winner of the previous debate seems to be the neo-abolitionist model, but even this one has its downsides, mainly related to the fact that when finding clients, prostitutes are forced to move to more less accessible places which increases their vulnerability. In consequence, the model of collaborative governance is nowadays proposed as an alternative to the other two models because it means the introduction of the voice of sex workers in the design and implementation of the prostitution policy.²⁴⁸ A prominent role of this model is occupied by sex workers advocacy organisations, which, by collaborating with the State can influence the political agenda and decision-making process and orient the process towards the integration of human rights, labour rights, and working conditions of sex workers,²⁴⁹ in current policies.

Accordingly, in relation to the case study, the dependent variable of this paper is the factors influencing the human rights approach to prostitution. Concerning the *ideological environment* as an independent variable, the research hypothesis upon which we start is the following: the higher the level of stigmatisation of prostitutes is, the higher the level of their social marginalisation and vulnerability. The hypothesis will allow highlighting the backgrounds of the Romanian society that contribute to the perpetuation of the current legislative model and the serious human rights violations of prostitutes. Additionally, in relation to the second independent variable – political approach: control versus cooperation, the research hypothesis states that adopting an approach based on control harms the social position of prostitutes while choosing an approach based on collaborative governance contributes to the creation of effective policies to protect the human rights of prostitutes. These hypotheses allow identifying the advantages and disadvantages of a change of prostitution policies in Romania.

²⁴⁴ Cho, p. 324.

²⁴⁵ Walkowitz, 'The Politics of Prostitution and Sexual Labour', p. 1.

²⁴⁶ Walkowitz, 'The Politics of Prostitution and Sexual Labour', p. 9.

²⁴⁷ Cho, p. 235.

²⁴⁸ Wagenaar, p. 3.

²⁴⁹ Wagenaar, p. 11.

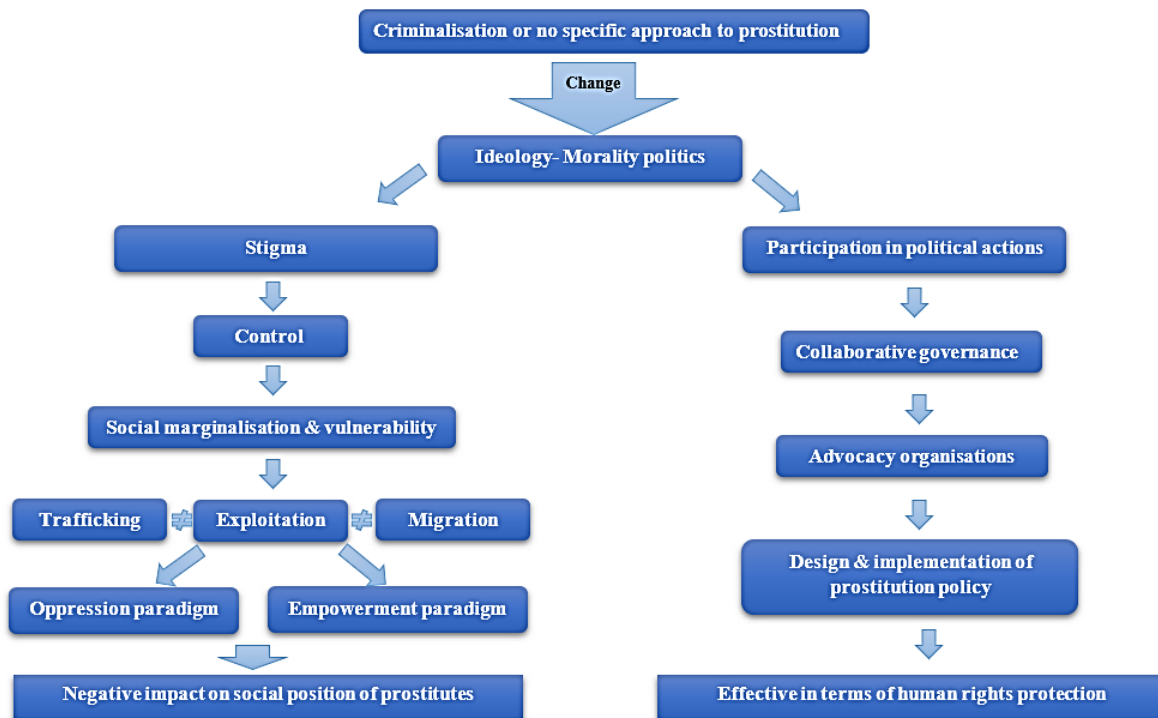


Figure no.1: Valeria Găvoază, Analysis model based on the literature.

Methodology

Following the research problem of this paper – prostitution in Romania from a human rights and gender equality perspective, primary data sources were selected in line with the main concepts that form the analytical framework of the paper, applied at the case study level. To elucidate the impact of prostitution policies in Romania on prostitutes and to see which models should be followed to solve the current problems, the content analysis method is used in the study of binding or consultative laws or reports. Thus, the study is based on qualitative research, and to argue each hypothesis in part, legislative texts, reports of international organisations and various national/transnational/non-governmental organisations, and reports containing testimonies of prostitutes in Romania have been selected. Depending on the nature of the primary data sources, the first set of data is represented by the legislative texts concerning the issue of prostitution at the European Union level and the Romanian level. Thus, the second set of data includes reports from international organisations, such as the European Union, and various NGOs such as Amnesty International, Carusel, and the competent authorities in Romania that refer to the research problem addressed in this article.

Prostitution under the international law

On the one hand, even though from a human rights perspective, there is a consensus among the international organisations against the model that criminalises prostitution and supports prostitute's exploitation, when it comes to the approaches on addressing the exploitation, a consensus is more elusive. For instance, WHO & Amnesty International or The European Sex Worker's Alliance state that prostitution is a matter of free choice, by that farming prostitution

as sex work and calling for States to decriminalise the commercial sexual activities between adults, to protect the human rights of sex workers and to fight against trafficking, which is considered to be sexual exploitation.²⁵⁰ Yet, it is important to mention that these decisions are mainly recommendatory rather than binding States to take concrete decisions in this regard.

On the other hand, from the perspective of international human rights law, prostitution is seen as a violation of human rights and an obstacle to gender equality. Thus, its exploitation is prohibited, thereby States should eliminate the exploitation of prostitution in respect of human rights by implementing abolitionist policies. For example, the Charter of the United Nations and the Universal Declaration of Human Rights refers in their texts to the respect for and protection of the dignity and worth of the human person.²⁵¹ Even at that point there could still have been debates about the signification of the concept of human dignity, in 1949, the United Nations General Assembly mentions explicitly in the preamble to the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (ratified by Romania) that prostitution is “incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family, and the community.”²⁵² This position hitherto was reinforced by a series of similar documents, such as the 1979 Convention on the Elimination of All Forms of Discrimination against Women and the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children adopted in 2000.²⁵³ Nonetheless, the problem is that even if the Convention is legally binding for the States that have signed and ratified it, the Convention still lacks efficient ways to control its application, and precise directions for its implementation. Meaning, that Romania can claim that by its criminalisation/contravention policies does nothing else but applying the Convention, which is not the case.

At the European Union level clearer recommendations were provided, but the lack of binding mechanisms are still present. An illustrative example could be the non-binding resolution, adopted by the European Parliament in February 2014, in favour of the Swedish model of criminalising the buying, but not the selling of sex, stating that EU countries should reduce the demand for prostitution by punishing the clients, not the prostitutes.²⁵⁴ Similarly, to the Conventions adopted by the United Nations, the European Parliament reminded in its resolution that forced or voluntary forms of prostitution violate human dignity and human rights, and calls on Member States to work on exit strategies for women who want to leave prostitution. Referring to this resolution, the S&D member of the European Parliament Mary Honeyball who drafted the resolution mentioned that “rather than blanket legalization – which has been a disaster in Holland and Germany – we need a more nuanced approach to prostitution, which punishes men who treat women’s bodies as a commodity, without criminalising those who are driven into sex work.”²⁵⁵ Consistently, in the same year, the

²⁵⁰ Amnesty International, *Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, 2016, p. 7.

²⁵¹ United Nations, *Universal Declaration of Human Rights* (United Nations, 1948) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> [accessed 2 January 2022].

²⁵² General Assembly of the United Nations, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 1949.

²⁵³ Grégoire Théry, *Prostitution under International Human Rights Law: An Analysis of States’ Obligations and the Best Ways to Implement Them* (CAP international, 2016), pp. 4–5.

²⁵⁴ European Parliament.

²⁵⁵ Colombo Telegraph, ‘Nordic Model Of Prostitution Approved By EU Parliament’, *Colombo Telegraph*, 2014 <<https://www.colombotelegraph.com/index.php/nordic-model-of-prostitution-approved-by-european-parliament/>> [accessed 2 January 2022].

Council of Europe has made a similar recommendation, stating that “while each system presents advantages and disadvantages, policies prohibiting the purchase of sexual services are those that are more likely to have a positive impact on reducing trafficking in human beings.”²⁵⁶

Eventually, European Women's Lobby shares the same position, which bills itself as the largest umbrella organisation of women's associations in the European Union, considering prostitution a form of exploitation in which men dominate women, and as a practice that results from the patriarchal social order.²⁵⁷ Despite this partial agreement existent at the European level, it is impractical due to the lack of legislative harmonization at the level of Member States since each of them has a different idea about the best way of combating trafficking for the purpose of sexual exploitation.

The legal framework at the Romanian level

The phenomenon of prostitution in Romania has been known for a long and complex evolution, with periods when it was widely practiced by an impressive number of women in Romania's big cities, at the beginning of the 20th century, and periods when prostitution was criminalised. In general, these changes were generated by changes in the ideological doctrines that dominated society at the time, as shown by the analysis model developed above. For example, the opening to the West in the interwar period fuelled people's desire for a wealthier lifestyle, but the economic realities of that period made it particularly difficult to obtain the financial means to do so, especially for women, so prostitution was accepted as a necessary evil even it was regulated. On the contrary, the shift in priorities during the communist period towards population growth led to increasing control over women and especially over their sexuality, culminating in extremely drastic measures targeting them, such as the banning of abortions,²⁵⁸ and the introduction of criminal punishment for prostitution.²⁵⁹

Consequently, to understand the current legislative approach towards prostitution and sexual exploitation in comparison with the previous legislation, dating from the communist time is more than necessary. Furthermore, the wider stigma of prostitution that persists in the country, especially because the legislation was changed only in 2014, relatively late comparing with the evolutions at the European level and in other European States, cannot be understood otherwise but through a historical lens.

Hence, when it comes to the legislation regarding prostitution, from 1969 to 2014, in Romania it was considered a criminal offense, and, according to Article 328 of the Criminal Code, “punished by imprisonment from 3 months to 3 years.” Equivalently, regarding sexual exploitation, according to Article 329, “urging or coercing into prostitution or facilitating the practice of prostitution or profiting from the practice of prostitution by a person, as well as

²⁵⁶ José Mendes Bota, *Prostitution, Trafficking and Modern Slavery in Europe* (Council of Europe, 20 March 2014) <<http://www.assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=20559&lang=en>> [accessed 2 January 2022].

²⁵⁷ European Women's Lobby, ‘Together for a Europe Free From Prostitution’ <<https://www.womenlobby.org/Together-for-a-Europe-Free-From-Prostitution?lang=en>> [accessed 3 January 2022].

²⁵⁸ Consiliul de Stat al Republicii Socialiste România, ‘DECRET 770 01/10/1966’, 1966 <<http://legislatie.just.ro/Public/DetaliiDocumentAfis/177>> [accessed 3 January 2022].

²⁵⁹ Parlamentul Republicii Socialiste România, ‘CODUL PENAL 21/06/1968’, 1968 <<http://legislatie.just.ro/Public/DetaliiDocument/38070>> [accessed 3 January 2022].

recruiting a person for prostitution or human trafficking for this purpose, shall be punished by imprisonment of 2 to 7 years and the prohibition of certain rights”, with the specification that in the case that such actions were targeting minors, the “imprisonment period could increase up to 10 years.”²⁶⁰

From this perspective, the legislative modifications were adopted in 2014, in the context of a general change in the attitude towards prostitution both at the global and at the European level, made a huge move towards the decriminalisation and diminishing the stigma of prostitution from the legal perspective. For example, now, according to Law 61/1991 on the violation of certain norms of social coexistence, public order, and peace, “practicing prostitution is sanctioned with a fine between 500 and 1500 lei (100-300 euros).”²⁶¹ On the other part, pimping is still considered a criminal offense, and the punishment for “the determination or facilitation of the practice of prostitution or the obtaining of material benefits from the practice of prostitution by one or more persons remains almost unchanged: imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights and imprisonment that can increase up to 10 years in case the practice of prostitution was made by coercion.” Moreover, the Criminal Code specifies that if “the deeds are committed against a minor, the special limits of the punishment shall be increased by half.”²⁶²

As a consequence, the biggest accomplishment of this legislative change is that it has foreshadowed the direction towards a more humane approach to prostitution, by gradually changing the accent from blaming the prostitutes towards making accountable the perpetrators. However, far from being perfect from the theoretical perspective, there are a lot of practical problems regarding the implementation of the new law that make one seriously question the idea that this legislative change would have a noticeable positive impact on those selling sexual services.

Problems with the current Romanian legal framework

First of all, Romania's legislative choice to consider prostitution a contravention, which is not in any way the standard in Europe, may seem paradoxical if we consider that Romania is one of the main countries in the European Union that is a source for human trafficking for the purpose of sexual exploitation. The number of trafficked victims identified by the Romanian authorities in 2019 was 698, among which 117 were male and 581 female victims, including 327 children, thus children constituted nearly 50% of identified victims, especially on the purpose of sexual exploitation.²⁶³ However, while the phenomenon of trafficking enjoys media attention and a relatively visible place on the agenda of public institutions, the foundation of the problem lies in the way prostitution is dealt with only domestically. The majority of victims are trafficked internally in Romania, which means that although in theory both authorities and civil society have the legal means to address the phenomenon, the stigma associated with prostitution has normalized the phenomenon of sexual exploitation. The victims are often

²⁶⁰ Parlamentul Republicii Socialiste România.

²⁶¹ Parlamentul României, ‘LEGE (R) 61 27/09/1991’, 2020

<<http://legislatie.just.ro/Public/DetaliuDocumentAfis/1535>> [accessed 3 January 2022].

²⁶² Parlamentul României, ‘COD PENAL (A) 01/04/2018’, 2009

<<http://legislatie.just.ro/Public/DetaliuDocumentAfis/223635>> [accessed 3 January 2022].

²⁶³ Group of Experts on Action against Trafficking in Human Beings, *Evaluation Report Romania. Third Evaluation Round. Access to Justice and Effective Remedies for Victims of Trafficking in Human Beings* (Group of Experts on Action against Trafficking in Human Beings, 3 June 2021), p. 8.

being judged for the problems they face without taking into account the possibility that they may be performing sexual services against their will. And all this considering that the majority of minors in Romania are sexually exploited internally, thus raising the issue of the normalization of sexual exploitation of children, which is based on the idea those involved in the sex industry are doing so consensually. Therefore, the situation of sexually exploited minors is not perceived as being abnormal or as representing a serious violation of children's rights²⁶⁴.

Even though prostitution is no longer considered a crime but a contravention, the fact that this legislative change has not led to an improvement in the way prostitution is perceived by the authorities, especially the police, has resulted in the continuation of the social marginalisation of prostitutes. Though sometimes they receive about three or four fines a day, they become impossible to pay and the accumulation of debts exposes prostitutes to the risk of foreclosure if they own any property. Fines are seen as an instrument of social correction by the police, even if their only effect is that their number tends to get unmanageable, making them impossible to pay, thus deepening the social marginalisation of prostitutes²⁶⁵. Although direct abuse by the police or gendarmerie has decreased significantly following the 2014 legislative change, prostitutes still avoid asking the police for help when they are facing abuses, both because of the fines and because of the stigmatisation they are facing while interacting with the police.

The current model of tackling prostitution in Romania reveals the unbalanced power relations between men and women, notably regarding financial and economic resources as well as their social image. Thus, these gender stereotypes contribute to the perpetuation of the idea of men buying sex from women, at the same time blaming women for selling sexual services.²⁶⁶ Such a situation is enforcing their marginalisation, especially when it comes to access to the healthcare system – impossible through the national insurance system. Therefore, most of the time, prostitutes get more consistent medical examinations when they are pregnant or when there is a need to be hospitalized. Some of them also cover their healthcare needs by going to the hospital and pretending they have an emergency medical issue, or by donating blood,²⁶⁷ and yet society seems to be more concerned about the health of clients than that of prostitutes, which is another result of the imbalance in gender relations. In addition, in terms of professional reconversion, most prostitutes face several structural problems in trying to find a job, including low levels of education usually linked to early pregnancy, as well as lack of work experience and lack of social support measures for young mothers, such as childcare services.²⁶⁸ All these elements contribute in one way or another to the marginalisation of prostitutes and their lack of alternatives for survival.

Therefore, even if the analysis model clearly distinguishes between prostitution, migration, and trafficking, the data show that in the case of the Romanian model, prostitutes can frequently become victims of trafficking for the purpose of sexual exploitation both in Romania and in Western European countries. It is especially the case of those who practice street prostitution, being direct victims for perpetrators as well as entire networks of criminals specializing in sexual exploitation.

²⁶⁴ Livia Aninoșanu and others, *Traficul Pentru Exploatare Sexuală a Femeilor de Origine Română. Cercetare Calitativă Realizată În România, Italia Și Spania*, 2016, p. 24.

²⁶⁵ Daniel Sandu and others, *Femei Care Practică Sexul Comercial: Rețele Sociale Și Acces La Servicii Publice Autori: Daniel Sandu, Ana Mohr, Ana Pogânceanu, Mircea Anghelescu* (Carusel, 2017), pp. 3–4.

²⁶⁶ Erika Schulze and others, *Sexual Exploitation and Prostitution and Its Impact on Gender Equality*, PE 493.040 (European Parliament, 2014), p. 19.

²⁶⁷ Sandu and others, p. 31.

²⁶⁸ Sandu and others, pp. 13–14.

Legislative alternatives for prostitution policies in Romania

The main point of debate between the legalization and abolitionist model is the question of consent: whether women could consent to sell their body without any form of coercion or not. In Romania, although studies show that the majority of prostitutes started this practice because of the lack of financial alternatives to support themselves or their children, the arguments for the legalization of prostitution present in the discourse on the political scene in Romania are focused more on the security and confidentiality of clients than on the respect of the basic rights of sex workers.

The model of liberalization

As it was mentioned above, the legalization approach does not intend to put an end to prostitution but to recognize the prostitution market regulated by law. More specific example is Silviu Prigoană's initiative to legalize prostitution that materialized in a legislative proposal in 2010, during the time he was a member of the Chamber of Deputies of Romania from the Democratic Liberal Party. According to him, prostitution could be carried out independently or in brothels, under some specific rules. The project itself aimed at controlling the organisation and activities of sex workers, regular medical check-ups, preventing unauthorized persons from practicing sexual services, and guarantees regarding the respect of clients' rights and confidentiality. Unfortunately, this proposal did not include concrete measures to provide support to sex workers, to guarantee their rights, or special programs for those who want to quit prostitution.²⁶⁹ Due to these circumstances, the legislative proposal was rejected for moral and religious reasons rather than the issue of human rights of prostitutes. This has rather positive connotations considering that a proposal to legalize prostitution, that is mainly aimed at the benefit of the clients, is not likely to produce positive effects in terms of respect for the human rights of prostitutes and even more so in terms of gender equality. Moreover, even in this situation, the industry would remain unregulated and insufficiently policed, which encourages corruption and the use of drugs, at the same time institutionalizing the sexual exploitation of sex workers by pimps. In addition, taking into consideration the economic situation of Romania compared to other European countries and given the high level of the foreignisation of prostitution, the phenomenon could become widespread both internally and at the European level. Thus, legalization of prostitution would complicate the work of agencies responsible for eradicating human trafficking.

The abolitionist model

At the level of Romanian society, the legalization of prostitution does not seem to enjoy much support, especially, considering the high level of stigmatisation and self-stigmatisation characteristic of prostitutes. Additionally, the strong opposition of the Romanian Orthodox Church challenges the initiative on moral and religious grounds. The Association for the Promotion of Women in Romania likewise stands against the abolitionist model, insofar as it

²⁶⁹ Adelina Dragomir, 'Silviu Prigoană a depus la Parlament o propunere legislativă privind legalizarea prostituției', *Mediafax.ro* <<https://www.mediafax.ro/politic/silviu-prigoana-a-depus-la-parlament-o-propunere-legislativa-privind-legalizarea-prostitutiei-7130248>> [accessed 5 January 2022].

sees prostitution as a form of male violence against females. However, as far as the abolitionist model is concerned, it should be noted that the complete decriminalisation of the soliciting, by eliminating the fines for practicing prostitution, could contribute to the reduction of social marginalisation, to their social reintegration, and could improve their access to particular civil rights, which are currently limited and conditioned to the payment of fines. Although, the idea of criminalising the purchase of sexual services may experience significant resistance from both men and women due to the patriarchal gender relations characteristic to the whole society and the high degree of stigmatisation of prostitutes, sometimes even from social workers,²⁷⁰ whose job it is to help them. Moreover, assuming that such a law would be accepted, the general aversion to the phenomenon of prostitution could cause major problems in its implementation. First, lack of trust in the police could lead prostitutes relocating to places which could be difficult for the police to access, exposing themselves to even greater danger. Second, there is a risk that the police will continue dismissing the complaints of prostitutes, as is currently the case, or will avoid sanctioning clients, since Romanian society considers the purchase of sex by men as morally justified.

Collaborative governance

As for the third alternative approach to the issue of prostitution – collaborative governance – seems to be the best way to follow. In practice, especially in the context of Romania, it would be difficult to implement because of several reasons: the legal framework that works against the creation of sex workers advocacy organisations; the stigma that prostitutes face; the low level of education that deprives them of the knowledge; and skills needed to organise themselves within a common structure. Firstly, from a legal perspective, an organisation representing prostitutes within a representative body would implicitly mean the recognition that they practice prostitution and would make them liable to a fine, according to Article 2 of Law 61/199.²⁷¹ Therefore, from a legal perspective, such an organisation would be equivalent to one representing the rights of pickpockets, given that both activities are punishable by a fine, and would thus lack any legitimacy before the authorities. Another problem is that prostitutes are disconnected from each other, feeling that they compete for resources and tend to self-stigmatise and stigmatise commercial sex work in general, and therefore tend to treat their fellow prostitutes with the distrust and rejection with, in the same way they are treated by society.²⁷² Therefore, considering the legal framework, the level of stigmatisation of prostitution in Romania and the level of education of prostitutes complicate the task of creating a solid platform being able to interact with political or administrative decision-makers, and better and more informedly protecting their rights. Thus, although the collaborative governance model is appearing to be the most appropriate to address human rights and gender equality issues in relation to prostitution, the actual change should start by a shift towards a less incriminating perception of prostitutes in society. As well as by eliminating the fine penalty, while allowing a new model to emerge which deals with prostitution and works for prostitutes, not against them.

²⁷⁰ Aninoşanu and others, p. 24.

²⁷¹ Parlamentul României, 'LEGE (R) 61 27/09/1991'.

²⁷² Sandu and others, p. 3.

Conclusions

Considering the relation between prostitution, human rights, and gender equality in Romania, the main contribution of the study relies upon assessing the impact of prostitution policies in Romania on those who sell sexual service. The results show that in Romania, policies related to the criminalisation of prostitution (even when only a fine applies) are not in line with human rights, since they increase the possibility of sexual exploitation by trafficking. Additionally, the high level of social marginalisation perpetuated both by the police and the rest of the society, reinforces unbalanced power relations between men and women and impact negatively their possibilities for a career change. Nevertheless, when it comes to the hypothesis suggesting that adopting the model of collaborative governance would contribute to improving the situation of prostitutes in terms of human rights and gender equality, the research results proved the validity of the argument. At the same time, however, it found weaknesses in this model, connected mainly with the social and political perception of the phenomenon of prostitution in Romania.

As the issue of prostitution is not on the political agenda of the Romanian government, the official data on the issue of prostitution provided by the authorities was insufficient, which limited the parameters of this research. Therefore, the sources of data are limited in nature and do not allow for an in-depth overview of the true extent of the phenomenon. Furthermore, more data obtained through interviews with prostitutes is necessary in order to fully capture the multi-faceted dimensions of the problem.

To conclude, solving the problem of prostitution in Romania is only possible by two methods. First, mapping it out in a broader framework that addresses the patriarchal mentality existing in Romania. Second, raising awareness of women's issues and human rights in general and the negative impact of the stigmatisation of prostitutes, in particular. However, this research has proved that the solution is more complicated than that due to the lack of Romanian political will to change the approach to prostitution, and the absence of a common position at the European and international levels.

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Abridged Analysis of The Domestic Violence and Torture or Ill-treatment Connection Under International Human Rights Law

Cristina Snegur

Abstract

Domestic violence and torture and inhuman or degrading treatment are two concepts of similar nature. The main similarity lies in the physical and mental harm to which the victim is subject by the perpetrator. There are certain factors, such as the purpose and intent of the acts of torture and ill-treatment that challenge the application of the provisions regarding torture and ill-treatment to instances of domestic violence. Nevertheless, the international community seems to aim for a consensus in which the issues in question are very much related. In the present article, provisions of four major human rights instruments are analyzed to establish whether the issue of domestic violence can be regarded as torture or ill-treatment.

Key words: domestic violence, ill-treatment, private actors, public officials, torture.

Introduction

Domestic violence is probably one of the oldest phenomena in the world and numerous attempts to combat it were made throughout time. Starting a few decades ago and more prominently in recent years, domestic violence was compared to torture, inhuman and degrading treatment or punishment (or simply put- ill-treatment). Whilst at first glance torture or ill-treatment have a certain degree of state involvement, domestic violence is a matter customarily believed to pertain to the private sphere, in which the State does not interfere. Therefore, in this article, the author seeks to address the question of similarities between the concepts of domestic violence and torture or ill-treatment, as well as challenges that arise while making such a comparison. Further on, the second section of the article is meant to answer the question of whether domestic violence can be viewed as torture or ill-treatment under major human rights instruments. The author of the present paper acknowledges that domestic violence is a phenomenon that subjects different categories of victims, such as women, men, children and the elderly. For the purpose of manageability, this paper is focused on women, as being by far the most targeted victims of domestic violence.

1. Nature of Domestic Violence and Torture or Ill-Treatment

1.1 Similarities

In its General Recommendation No. 19, the UN Committee on the Elimination of Discrimination Against Women (the CEDAW Committee) has identified that gender-based

violence constitutes 'acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. rights human several impairs violence Such ²⁷³ of women, including the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.²⁷⁴ Subsequently, in General Recommendation No. 35 which amended Recommendation No. 19, the CEDAW Committee specifically declared that circumstances of domestic violence constitute a form of gender-based violence, and can amount to torture or ill-treatment.²⁷⁵

On the other hand, the customary definition of torture as provided in the United Nations Convention Against Torture (UNCAT) identifies torture as:

*'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind ...'*²⁷⁶

It is pertinent to mention that the difference between torture and other forms of ill-treatment lies in the higher level of severity of the acts for the former and a lower level for the latter, albeit having the same nature. Consequently, the author argues that it is enough to establish the conceptual similarities between domestic violence and torture, to correspondingly regard it as other forms of ill-treatment.

By comparing the definitions provided in the UN treaties, it is indeed possible to establish that domestic violence and torture or ill-treatment have similar characteristics, such as infliction of physical or mental harm. In another interpretation, domestic violence, just like torture or ill-treatment, is a behavioural pattern that aims to isolate, humiliate, intimidate or subordinate a person, to various forms and degrees of physical violence, sexual abuse and even murder.²⁷⁷ Perhaps this was the rationale behind the argumentation of several scholars who promoted the idea that domestic violence can constitute torture or ill-treatment. For instance, the prominent scholar Rhonda Copelon noticed that both physical and psychological methods of torture and their analogues can pertain to the context of domestic violence and sustained that it is futile to segregate them in the sense of goals or effects in practice.²⁷⁸

²⁷³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, at para. 6

²⁷⁴ *Ibid.*, p. 7

²⁷⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 35: Violence against women*, 2017, at para. 16

²⁷⁶ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 1

²⁷⁷ UN OHCHR, *Domestic Violence and the Prohibition of Torture and Ill-Treatment. Thematic Consultations of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Available at:

<https://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/DomesticViolenceProhibitionTorture.aspx>

²⁷⁸ Rhonda Copelon, 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' *25 Columbia Human Rights Law Review* 291 (1994), at 310

1.2 Challenges

In point of fact, there have been opponents to the comparison of domestic violence to torture or ill-treatment. In contrast to the arguments of Rhonda Copelon, one would argue that while the element of physical and mental suffering pertaining to torture or ill-treatment might be present in instances of domestic violence, the intent and purpose elements raise controversies, as domestic violence acts can be merely an impulsive and emotional behaviour of the perpetrator.²⁷⁹ However, the empirical evidence shows that domestic violence ‘typically involves (1) a pattern of violence, rather than random individualized acts; (2) [is] done for the purpose of control; and (3) [is] accompanied with the use of other techniques that we associate with torture.’²⁸⁰

From another vantage point, it might be unclear whether all instances of domestic violence should be viewed as torture or ill-treatment or whether such qualification depends on the level of severity of the committed acts. The rationale behind this lies in the high threshold that needs to be met in order for an act or omission to qualify as torture.²⁸¹ In this regard, Bonita C. Meyersfeld has argued that *extreme* forms of domestic violence should constitute ‘private torture.’²⁸² At the same time, torture can be interpreted ‘not [as] an act in itself, or a specific type of acts, but it is the legal qualification of an event or behaviour, based on the comprehensive assessment of this event or behaviour. a that deduced be can it Therefore,’²⁸³ thorough analysis of the context should be made by competent authorities in order to consider domestic violence as torture or ill-treatment, in which several factors can be taken into account, such as: the nature and the context of the treatment and punishment, its duration, the physical and mental effects, as well as the sex, age and state of health of the victim.²⁸⁴

Another dissent to the relationship of domestic violence with torture or ill-treatment is impelled by the commonality of the issue. It is a phenomenon pertaining to all countries in the world and the COVID-19 pandemic had nothing but stressed the enormous number of victims of domestic violence. Research has shown that ‘one in four women say that household conflicts have become more frequent and that they feel more unsafe in their home, [whilst] seven in ten women said they think that verbal or physical abuse by a partner has become more common. would treatment-ill or torture as violence domestic of instances all Recognizing’²⁸⁵ mean convicting uncounted perpetrators and potentially raising the question of State responsibility. However, one can argue that the great number of perpetrators and victims of domestic violence cannot constitute a justification for not addressing it in the context of torture

²⁷⁹ Theo van Boven, Sabina Puig, ‘Domestic violence against women and torture’, in *Violence in the Domestic Sphere* edited by Ingrid Westendorp and Ria Wollewinkel, (Antwerp- Oxford: Intersentia, 2005), at 60

²⁸⁰ Tania Tetlow, ‘Criminalizing “Private” Torture’, 58 *William and Mary Law Review* 183 (2016), at 190

²⁸¹ ECtHR, *Ireland v. United Kingdom*, Application no. 5310/71, Judgment of 18 January 1978, at para. 167; ECtHR, *Selmouni v. France*, Application no. 25803/94, Judgment of 28 July 1999, at paras. 96-97.

²⁸² Bonita C. Meyersfeld, ‘Reconceptualizing Domestic Violence in International Law’, 67 *Albany Law Review* 371 (2003-2004), at 373

²⁸³ The United Nations Voluntary Fund for Victims of Torture, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, at para. 2

²⁸⁴ ECtHR, *Soering v. The United Kingdom*, Application no. 14038/88, Judgment of 07 July 1989, at para. 100

²⁸⁵ UN Women Report, *Measuring the Shadow Pandemic: Violence Against Women During Covid-19* (2021), at 3

or ill-treatment. Rather than that, it points at the compelling necessity to address the issue of domestic violence through all effective means in order to protect the victims.

Furthermore, The Special Rapporteur on torture, inhuman and degrading treatment or punishment recognized domestic violence as a matter of public concern that constitutes a major human rights issue which is necessary to be examined, amongst others, from the perspective of torture and ill-treatment.²⁸⁶ More than that, the Special Rapporteur noted that:

*from a substantive perspective under international law, and regardless of questions of State responsibility and of individual criminal culpability, both of which need to be separately assessed, domestic violence therefore always amounts to cruel, inhuman or degrading treatment or punishment and very often to physical or psychological torture.*²⁸⁷

Hence, based on the above-mentioned argumentation, one can infer that throughout the years, a growing tendency seems to have been established which relates domestic violence to the concept of torture or ill-treatment.

2. Can domestic violence be viewed as torture or ill-treatment under international instruments?

In the previous section, the similarities of both concepts have been established and some of the challenges have been addressed. A further question that arises is whether some of the main International Human Rights treaties allow for the qualification of domestic violence as torture or ill-treatment. For the purposes of this paper, it is relevant to analyze this matter from the perspective of the UNCAT, International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR) and Inter-American Convention on Human Rights (IACtHR), and will be approached as follows.

2.1 United Nations Convention Against Torture

Article 1 of UNCAT as mentioned in the previous section, particularly prescribes that torture is committed 'at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. violence, domestic that argue can one Therefore,²⁸⁸ which is naturally not perpetrated by a public official but a private individual, cannot fall within the ambit of Article 1 and such an interpretation would go beyond the object of the Convention. Nevertheless, the UN Committee Against Torture has clarified in General Comment No. 2 that States have a positive obligation 'to exercise due diligence to prevent, investigate, prosecute and punish alia, inter torture, committed how actors private or officials State-non the²⁸⁹ applying this principle in the context of domestic violence. More than that, States should be

²⁸⁶ UN General Assembly, *Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence: note/ by the Secretary-General*, A/74/148 (2019), at para. 4

²⁸⁷ *Ibid.*, at para. 9

²⁸⁸ UNCAT, Article 1

²⁸⁹ UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, at para. 18

considered as authors, complicit or otherwise responsible for this failed obligation. The Committee has stressed that such failure may constitute a de facto permission and encourages the perpetrators of domestic violence to commit such acts with impunity.²⁹⁰

In practice, the Committee has applied this principle in its respective Concluding Observations. For instance, in the case of the Philippines, the Committee was concerned about the prevalence of violence against women and about the lack of state-wide statistics on domestic violence.²⁹¹ Therefore, the State was encouraged 'to strengthen its efforts to prevent, combat and punish violence against women ... , including domestic violence.'²⁹²

2.2 International Covenant on Civil and Political Rights

Unlike the provisions of UNCAT, there is no requirement in Article 7 of ICCPR for a level of involvement or acquiescence by a State official for an act to be qualified as torture or ill-treatment.²⁹³ Rather than that, the Human Rights Committee stressed that Article 7 obliges the States to take all the necessary measures to protect individuals against the prohibited acts, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.²⁹⁴ Therefore, it is possible to assume that instances of domestic violence which in their nature qualify as torture or ill-treatment are prohibited by Article 7 of ICCPR. To emphasize, in its Concluding Observations regarding Jamaica, the Human Rights Committee (HRC) was concerned that the domestic legislation was providing a narrow understanding of rape and lack of shelters for victims of domestic violence, which constituted a violation of Article 7 of ICCPR.²⁹⁵ In another instance, the HRC noted that impunity for domestic violence 'is exacerbated by significant delays in the processing of cases and barriers to bringing perpetrators of marital rape to justice a others amongst constituted hichw ,'²⁹⁶ violation of the prohibition of torture and other forms of ill-treatment.

2.3 European Convention on Human Rights

The European Court of Human Rights (ECtHR) is one of the institutions which successfully applied the provision regarding torture, inhuman and degrading treatment from Article 3 of ECHR²⁹⁷ to the context of domestic violence. One of the groundbreaking cases of this kind was the case of *Opuz v. Turkey*,²⁹⁸ in which violence against women was for the first time

²⁹⁰ *Ibid.*

²⁹¹ UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture: the Philippines*, 29 May 2009, CAT/C/PHL/CO/2, at para. 25

²⁹² *Ibid.*

²⁹³ Association for the Prevention of Torture. Center for Justice and International Law, *Torture in International Law. A guide to jurisprudence* (2008), at 8

²⁹⁴ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, at para. 2

²⁹⁵ UN Human Rights Committee (HRC), *Concluding observations on the fourth periodic report of Jamaica*, 22 November 2016, CCPR/C/JAM/CO/4, at para. 23

²⁹⁶ UN Human Rights Committee (HRC), *List of issues in relation to the fifth periodic report of Sri Lanka*, 2014, CCPR/C/LKA/Q/5, at para. 6

²⁹⁷ Article 3 ECHR

²⁹⁸ ECtHR, *Opuz v. Turkey*, Application no. 33401/02, Judgment of 09 September 2009

acknowledged as a systemic issue that amounts to a form of discrimination,²⁹⁹ as well as to a violation of Article 3 of the Convention. First of all, the Court established that based on the conjunction of Articles 1 and 3 of the Convention, the States have a duty to take measures to protect individuals within their jurisdiction from being subjected to torture or ill-treatment, including if it is perpetrated by private individuals.³⁰⁰ Secondly, the Court observed that the physical injuries and the psychological pressure suffered by the victim were sufficiently severe to render them unfit for work and endanger their lives, and thus amounted to ill-treatment within the meaning of Article 3 of the Convention.³⁰¹ At the same time, the Court held that the authorities did not manifest the required diligence to prevent the recurrence of violent attacks against the applicant, as well as they tolerated such violence against the applicant which did not come to an end.³⁰²

Additionally, the jurisprudence of the ECtHR encompasses cases of violation of the prohibition of torture, inhuman and degrading treatment in cases in which the authorities failed to provide adequate protection against domestic violence to the victims,³⁰³ did not carry out an effective investigation into the complaints of domestic violence,³⁰⁴ or even admitted the risk of victim's exposure to domestic violence in case of deportation.³⁰⁵ At the same time, the European Court recognised that besides women and men who can be direct victims of domestic violence, children, "too, are often casualties of the phenomenon, whether directly or indirectly."³⁰⁶

2.4 Inter-American Convention on Human Rights

Similarly to ICCPR and ECHR, IACHR does not contain provisions on domestic violence, however, it prescribes in Article 5 that '[no] one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.'³⁰⁷ In *Velásquez-Rodríguez v. Honduras*, the Inter-American Court of Human Rights (IACtHR) stated that an act perpetrated by a private person can be considered to violate human rights outlined in the Convention, 'not because of the act itself, but because of the lack of due diligence to prevent or to respond to it as required by the Convention. IACtHR the *Venezuela, v. Otros y Soto Lopez* of case the in instance, For³⁰⁸ established that Article 5 of IACHR does not contain a requirement of State involvement for

²⁹⁹ Ebru Demir, 'The European Court of Human Rights 'Engagement with International Human Rights Instruments: Looking at the Cases of Domestic Violence', 17 *The Age of Human Rights Journal* 79 (2021), at 80

³⁰⁰ *Opuz v. Turkey*, *Supra* note 26, at para. 159

³⁰¹ *Ibid.*, at para. 161

³⁰² *Ibid.*, at paras. 173-176

³⁰³ ECtHR, *E.S. and Others v. Slovakia*, Application no. 8227/04, Judgment of 15 September 2009; ECtHR, *Eremia and Others v. the Republic of Moldova*, Application no. 3564/11, Judgment of 28 May 2013

³⁰⁴ ECtHR *E.M. v. Romania*, Application no. 43994/05, Judgment of 30 October 2012; ECtHR, *Valiulienė v. Lithuania*, Application no. 33234/07, Judgment of 26 March 2013

³⁰⁵ ECtHR, *N. v. Sweden*, Application no. 23505/09, Judgment of 20 July 2010

³⁰⁶ *Opuz v. Turkey*, *Supra* note 26, at para. 132

³⁰⁷ Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), (1978), Article 5

³⁰⁸ IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment (Merits) of 29 July 1988, at para. 172

qualifying the committed acts as torture.³⁰⁹ Consequently, the Government was found responsible for a violation of Article 5 of IACHR because its omission allowed for the torture of the victim committed by a private actor,³¹⁰ through various acts of physical, verbal, psychological and sexual violence.³¹¹ Therefore, one can infer that the States parties to the Convention can be held accountable for failure to prevent and prosecute acts of torture committed by private actors, including in the context of domestic violence.

In point of fact, the IACtHR does not have ample jurisprudence regarding domestic violence in the context of torture or ill-treatment as the ECtHR has. Nonetheless, it is very much guided by the jurisprudence of other judicial bodies, including ECtHR and has recognized 'the existence of a general pattern of state tolerance and ineffective judiciary towards cases of domestic violence. protection the for system American-Inter the ECtHR, the to Similarly³¹²' of human rights recognizes that a victim's next of kin can as well be subjected to the same ill-treatment or torture as the direct victim.³¹³ For this purpose, the IACtHR has to consider issues such as close family ties and the manner in which the next of kin witnessed the events.³¹⁴

Conclusion

In conclusion, there should be no doubt that acts of domestic violence can amount to instances of ill-treatment or even torture. The international fora have more and more observed the similar nature of those two concepts. One can stick to the original interpretation of torture and ill-treatment provided in legal instruments, as to not allow instances of domestic violence to fall under their ambit. However, this does nothing but undermine the objective of the instruments and the need to pursue human rights set forth in them in the light of continually evolving realities. The author established that even though the referenced human rights treaties did not specifically contain provisions regarding prohibition of domestic violence, the prohibition of torture or ill-treatment provisions were used to address such instances. It is plausible that the competent international bodies are looking for ways to make the provisions in question as comprehensible as possible and are holding accountable the perpetrators regardless of their official or private capacity. The need to address domestic violence as torture or ill-treatment did not emerge once with the academic articles on this matter, nor was it invented by the disputes of scholars or law-making officials. The author believes that victims of domestic violence are the ones who can utterly define the treatment to which they are subjected, and supposes that the vast majority would perceive it from the perspective presented in this article.

³⁰⁹ IACtHR, *Lopez Soto y Otros v. Venezuela*, Judgment (Merits, Reparations and Costs) of 26 September 2018, at para. 189

³¹⁰ *Ibid.*, at para. 199

³¹¹ *Ibid.*, at para. 114

³¹² Katrin Tiroch, 'Violence against Women by Private Actors: The Inter-American Court's Judgment in the Case of Gonzalez et al. ("Cotton Field") v. Mexico', in 14 *Max Planck Yearbook of United Nations Law* 371 edited by A. von Bogdandy and R. Wolfrum (2010), at 400

³¹³ IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, Judgment (Merits, Reparations and Costs) of 25 November 2006, at para. 335

³¹⁴ IACtHR, *Case of Bueno-Alves v. Argentina*, Judgment (Merits, Reparations, and Costs) of 11 May 2007, at para. 102

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4. Ebru Demir, 'The European Court of Human Rights 'Engagement with International Human Rights Instruments: Looking at the Cases of Domestic Violence'', 17 *The Age of Human Rights Journal* 79 (2021)
5. ECtHR *E.M. v. Romania*, Application no. 43994/05, Judgment of 30 October 2012
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19. Katrin Tiroch, 'Violence against Women by Private Actors: The Inter-American Court's Judgment in the Case of Gonzalez et al. ("Cotton Field") v. Mexico', in 14 *Max Planck Yearbook of United Nations Law* 371 edited by A. von Bogdandy and R. Wolfrum (2010)
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COVID-19 impact on victims of violence against women and their access to services in Estonia in 2020-2021

Merle Albrant

Introduction

Estonia has taken upon itself the obligation to assist the victims of the violence against women and as a confirmation, Estonia has also ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as the Istanbul Convention, which entered into force in Estonia on 1 February 2018 (three years ago).³¹⁵

At the beginning of 2020, the whole world was shocked by a crisis – the COVID-19 viral pandemic, which did not leave Estonia untouched either. Prompted by the coronavirus pandemic, on 12 March 2020, the Government of the Republic of Estonia declared a state of emergency which lasted from 12 March 2020 until 17 May 2020.³¹⁶ After the end of the state of emergency, the Government of the Republic of Estonia issued several orders to prevent the spread of COVID-19, many of which are still in force and directly affect the lives of victims of violence against women, their access to services as well as their daily life.³¹⁷

The restrictions and orders imposed due to the COVID-19 pandemic cannot lessen the validity of the Istanbul Convention on the territory of the Republic of Estonia as Estonia has not notified of its withdrawal from the Convention. Estonia is still committed to fulfilling its obligations under the Istanbul Convention during the COVID-19 pandemic making sure victims of violence against women have access to services, including general social services, specialist support services, shelters, helplines, etc., in accordance with Articles 20 to 24 of the Convention.³¹⁸

This paper examines whether the declaration of a state of emergency due to the COVID-19 pandemic in Estonia from 12 March until 17 May and subsequent restrictions up until December 2021 caused any changes in the access to services by victims of violence against women or whether there were no changes compared to the period before the outbreak of COVID-19.

³¹⁵ [Naistevastase vägivalda ja perevägivalda ennetamise ja tõkestamise Euroopa Nõukogu konventsioon](https://www.riigiteataja.ee/akt/226092017002) (26.09.2017). *Rügi Teataja II*. Accessed 23.02.2022, <https://www.riigiteataja.ee/akt/226092017002>

³¹⁶ Eriolukorra väljakuulutamise Eesti Vabariigi haldusterritooriumil. (13.03.2020). *Rügi Teataja II*. Accessed 23.02.2022, <https://www.riigiteataja.ee/akt/313032020001>

³¹⁷ Riigikantselei. (2022). *Õigusaktid ja seletuskirjad*. Accessed 23.02.2022, <https://kriis.ee/covidi-kriisi-juhtimine-kusimused-ja-vastused/kriisi-juhtimine/oigusaktid-ja-seletuskirjad#korraldus-nr-172>

³¹⁸ Convention on Preventing and Combating Violence against Women and Domestic Violence, Articles 20 to 24

For the purposes of writing this paper, in January 2022 interviews were conducted with the managers of 10 women's support centres³¹⁹ (Lääne County Women's Support Centre, Viru County Women's Support Centre, EWSU* Rapla County Women's Support Centre, Viljandi County Women's Support Centre, Lääne County Women's Support Centre, EWSU Tallinn Women's Support Centre, Jõgeva County Women's Support Centre, Valga County Women's Support Centre, Võru County Women's Support Centre, Järva County Women's Support Centre, Ida-Viru County Women's Support Centre-Shelter) operating in 11 counties and with the coordinator of the 24/7 nationwide free hotline 1492. All those organizations are members of the Estonian Women's Shelter Union. The interviews were focused on the provision of services as well as on victims' feedback regarding the access to other services during the COVID-19 pandemic.

1. Services for the victims of violence against women

According to §6(2) of the Victim Support Act,⁵ a victim of violence against women is a woman who has suffered physical, sexual, psychological or economic harm or suffering, whether in public or in private life, as a result of gender-based violence or threats thereof.³²⁰ Hence, the Estonian law treats the victim of violence against women in the same way as the Istanbul Convention, taking into account the four different types of violence (physical, sexual, psychological, and economic), whether occurring in the private or the public life.

Interviews with professionals engaged in women's support centres revealed that during the COVID-19 pandemic they had assisted women victims of physical, sexual, psychological, and economic violence, and additionally, victims of stalking.

Responses given in interviews showed that in 2020-2021, women's support centres were likewise contacted by women considered particularly vulnerable such as underage girls, older women, pregnant, lesbian, disabled, mentally disabled women, religious (including Christian and Moslem) and Roma women and women from different ethnic backgrounds (Russian, Ukrainian, Belarusian, English, Finnish, German, Japanese Kazakh, Czech, etc.) as well as women who had come to Estonia from other countries (South America, USA, Russia, Ukraine, Philippines, Thailand, etc.).

1.1 General services for victims of violence against women

Article 20 of the Istanbul Convention sets forth general services for women which include legal and psychological counselling, financial aid, dwelling, education, training, and assistance with finding employment, access to health and social services, etc.³²¹

³¹⁹ Albrant, M. (2022). *Personal communication*. Tallinn, January 7

*EWSU – Estonian Women's Shelters Union

³²⁰ Ohvriabi seadus.06.05.2020). *Riigi Teataja I*. Accessed 23.02.2022 , <https://www.riigiteataja.ee/akt/106052020022>

³²¹ Convention on Preventing and Combating Violence against Women and Domestic Violence, Article 20

1.1.1 General legal aid services

According to the Estonian State-funded Legal Aid Act (RT I, 22.12.2020, 46)³²² it is possible to apply for state-funded legal aid in Estonia (by submitting an application thereof to the Court) if the person does not have sufficient financial resources to pay for the services of a lawyer. However, this process is not a fast one as the Court has to decide on the application, and only then will it be clear whether and to what extent the woman is eligible to receive assistance. In addition, in cooperation with the Estonian Ministry of Justice, all people domiciled in Estonia are entitled to free legal consultations if their average gross income remains below EUR 1,700 per month.³²³

1.1.2 Financial assistance

It is possible to apply for financial assistance from the municipality where one lives, and the decision to grant or refuse such assistance is taken by the municipality based on the person's income, number of family members, etc. A person can apply for a subsistence benefit if his or her income remains below the subsistence level. In 2021, the subsistence level for a person living alone or for the first member of a family was EUR 150 per month.³²⁴ When applying for a subsistence benefit, expenses such as housing, including rent, utilities, etc. are taken into account. The EUR 150 subsistence benefit fails to guarantee a decent standard of living in the conditions of rapid price increase caused by the crisis.

1.1.3 Dwelling

Local authorities have a general obligation to provide people with a place of temporary overnight stay and temporary shelter services (§30(1) and §33(1) of the Social Welfare Act).³²⁵ Temporary shelter services are mainly used by the homeless, as they provide beds, washing facilities and a safe environment.

Provision of dwelling is also a social service organised by local authorities. Its objective is to ensure the possibility to use a dwelling by a person who due to socio-economic situation is unable to provide a dwelling which would correspond to their own and their family's needs (§ 41(1) of the Social Welfare Act).³²⁶ Therefore, if a victim of violence against women does not have a dwelling, she can apply to the local authority for getting a place to live at. *De facto*, many local authorities lack suitable rental premises or have very long waiting lists. The situation is especially complicated outside the two largest cities, Tallinn and Tartu.

³²² Riigi õigusabi seadus (22.12.2020). *Riigi Teataja I*. Accessed 23.02.2022, <https://www.riigiteataja.ee/akt/RÕS> (hereinafter Riigi õigusabi seadus)

³²³ Riigi õigusabi seadus (22.12.2020). *Riigi Teataja I*. Accessed 23.02.2022, <https://www.riigiteataja.ee/akt/RÕS> (hereinafter Riigi õigusabi seadus)

³²⁴ Sotsiaalministeerium.(2021). *Toimetulekutoetus*. Accessed 23.02.2022, <https://www.sm.ee/et/toimetulekutoetus-0>

³²⁵ Sotsiaalhoolekandeseadus (22.03.2021). *Riigi Teataja I*. Accessed 23.02.2022, <https://www.riigiteataja.ee/en/eli/ee/504042016001/consolide/current>

³²⁶ Sotsiaalhoolekandeseadus. R (22.03.2021). *Riigi Teataja I*. Accessed 23.02.2022, <https://www.riigiteataja.ee/en/eli/ee/504042016001/consolide/current>

Interviews with the support centres' staff revealed that local authorities failed to offer women housing, telling them there was no suitable housing available in the area due to which many women might not get the necessary help. And so, even though laws do exist, their enforcement remains a problem as local authorities lack finances to perform their functions. Over the years, an increasing number of duties have been imposed on local governments, adequate funds enabling them to fulfil these duties are, however lacking. This means that in practice, women survivors have to take care of the funds for renting living space, pay one month's rent in advance deposit and broker's fee, which can amount to nearly EUR 1,000. It is very difficult for women to secure this amount of money, so they have to turn to their relatives for help or borrow the money, as few are able to raise such a large sum on their own. This is particularly the case with women who have been accommodated in women's support centres.

1.1.4 Education and training

In Estonia, people are guaranteed the right to free education (basic, upper secondary and higher education), but this does not always guarantee equal access to education for everyone. Caused by the COVID-19 restrictions, educational opportunities of many students worsened as schools shifted to distance learning and not all families have access to the internet. The problem is particularly widespread in rural areas. Many families did not have and still do not have the means to obtain necessary technical equipment, which makes it impossible to work from home as well as to participate in remote learning. As a result, many abused women and their children suffered because of COVID-19 restrictions. These are particularly girls and women who lack access to education and work owing to economic and domestic reasons.³²⁷

COVID-19 restrictions have also affected overall access to training, including further training. This also concerns women survivors of violence. Due to various restrictions, in the 2020-2021 period, training courses were occasionally either banned altogether, or specific restrictions were imposed on participation. In 2021, Estonia introduced the "COVID-19 vaccination passport" and access to training was linked to the requirement of presenting the passport to prove you were vaccinated. Women without a valid corona vaccination passport or who had recovered from COVID-19 over 6 months ago had no access to training and services, even if they were healthy according to the results of a PCR test.

The responses given by victim support staff suggested that women living in rural areas had faced more hardships accessing refresher courses. Participation in training became also more expensive and took more time as women often had to drive long distances further away from home. When some of the courses were moved online, proper internet connection as well as the right equipment were needed, which not all women had or could afford.

1.1.5 Assistance in finding employment

The State provides assistance to people in finding a job which is the responsibility of the Unemployment Insurance Fund. To access the service provided by the Unemployment Insurance Fund, in most cases access to the internet is a must. During the state of emergency,

³²⁷ Erss, M. (2021). Kuidas lappida koroonaja distantsõppel tekkinud auke õpilaste teadmistes?. *Õpetajate leht*. Accessed 23.02.2022, <https://opleht.ee/2021/02/kuidas-lappida-koroonaja-distantsoppel-tekkinud-auke-opilaste-teadmistes/>

the Unemployment Insurance Fund did not practice face-to-face meetings at their premises and the consultations were conducted exclusively by phone. During the state of emergency, most government agencies switched to remote working and communication with people by phone or online which has remained a common practice after the termination of the state of emergency.

The interviews with professionals revealed that victims complained of difficulties accessing services provided by the Unemployment Insurance Fund, especially during the state of emergency.

1.1.6 Access to health and social services

The victim support staff participating in the interviews also pointed to the fact that it was no longer possible for women to have face-to-face appointments with family physicians as only telephone consultations were provided during the state of emergency. Frequently, it was impossible to reach the family physicians as they were overburdened; no-one answered the phone or the lines were just always busy. The victims were particularly distressed when they had to frequently consult the doctor because of their children's health issues.

The interviewees also pointed to problems with accessing the rehabilitation services as during the state of emergency the services were simply not provided. Moreover, access to services for women with disabilities deteriorated.

Women contacting support centres highlighted problems with accessing social services as the services moved online which, however, depended on the availability and quality of internet connections as well as on digital skills. For example, as many of the child protection professionals started working from home, women missed opportunities to meet them face-to-face. What women further lacked was the option to submit a divorce application digitally as this option is not envisaged in the current law.

The responses given in interviews with professionals working in women's support centres pointed both to positive as well as negative effects of COVID-19 on victims:

- Due to the lockdown, some of the women had fewer opportunities to contact people outside of their home without their abusive partner knowing about it.
- Women were also negatively impacted when general services quickly shifted online which worsened access to services for women living in areas without good quality internet connection or without the means to secure it. Today, there are still lots of rural households that just cannot afford decent internet services. One problem complicating the situation further is lack of digital skills among older women.
- According to a survey published in 2021, Estonia fell in the digital quality of life index due to slow and expensive internet.³²⁸ Thus, the increase in the cost of the internet is directly related to the availability of assistance to victims of violence against women and can significantly limit the

³²⁸ Mägi, K.A. (2021). Eesti langes digitaalse elukvaliteedi tabelis, põhjuseks aeglane ja kallis internet. *Digi.geenius*. Accessed 23.02.2022, <https://digi.geenius.ee/rubriik/uudis/eesti-landes-digitaalse-elukvaliteedi-tabelis-pohjuseks-aeglane-ja-kallis-internet/>

availability of all kinds of e-services, depending on whether the victim lives in an area belonging to good or bad coverage zones.

- As a positive impact it was highlighted that while in the past women spent a lot of travel time to access services, especially in rural areas, the women were now able to contact the service providers online more quickly from home helping them save time. This was the case only if the woman had all the necessary equipment and good quality internet access.

1.2 Specialist support services

Under Article 22 of the Istanbul Convention, all victims must be provided with immediate, short- and long-term specialist support services in an adequate geographical distribution. In Estonia, specialist services for victims are provided by the Social Insurance Board. Victim support services are accessible to all victims of violence regardless of the type of crime committed or the sex of the victim. Victim support staff are present in all counties of Estonia and they provide on-the-spot counselling and support to victims.³²⁹

The interviews conducted with women's support centres' staff helped identify challenges related to access to services during the state of emergency as possibilities to meet victim support staff face to face did not exist.

On 1 January 2019, the Social Security Board launched its own telephone helpline 116 006 which is accessible to all victims.³³⁰ Up until then, there was only one hotline 1492 in operation in Estonia for women victims of violence. Established in 2008 and run for years by the Estonian Women's Shelters Union, the hotline 1492 continues providing the service also today.³³¹ Thus, according to Article 23 of the Istanbul Convention, it is only the hotline 1492 that is specifically catering to the needs of abused women, as the telephone helpline 116 006 is meant for all victims of violence.³³²

1.2.1. Services of women's shelters

Article 23 of the Istanbul Convention stipulates that parties to the Convention shall take the necessary legislative or other measures to provide for the setting-up of appropriate, easily accessible shelters in sufficient numbers to provide safe accommodation, especially for women and their children.³³³

In Estonia, services of women's shelters form part of the compound service offered to victims of violence against women or women's support centre service. The service includes provision

³²⁹ Sotsiaalkindlustusamet. (n.d.). *Ohvriabi ja ennetusteenused*. Accessed 23.02.2022, <https://www.sotsiaalkindlustusamet.ee/et/ohvriabi-huvitis/ohvriabi-ja-lepitusteenus#Ohvriabi>

³³⁰ Sotsiaalkindlustusamet. (n.d.). *116 006- Ohvriabi kriisitelefoni*. Accessed 23.02.2022, <https://www.sotsiaalkindlustusamet.ee/et/ohvriabi-enmetustoo/116-006-ohvriabi-kriisitelefoni>

³³¹ Eesti Naiste Varjupaikade Liit. (n.d.). Tugitelefoni 1492. Accessed 23.02.2022, <https://www.naisteliin.ee/?id=115>

³³² Convention on Preventing and Combating Violence against Women and Domestic Violence, Article 23

³³³ Convention on Preventing and Combating Violence against Women and Domestic Violence, Article 23

to the victim of initial crisis counselling, case-based counselling, psychological counselling as appropriate, legal counselling and safe temporary accommodation.³³⁴

According to Article 23 of the Explanatory Report of the Istanbul Convention, specialised women's shelters are best equipped to address multiple problems faced by women because their functions go beyond providing a safe place to stay.³³⁵ Women's support centre service is regulated by the Victim Support Act,³³⁶ which sets out the content of the service and the requirements for the service provider. Women's support centres operate in 15 regions in Estonia and their services are coordinated by the Social Insurance Board (Sotsiaalkindlustusamet).³³⁷

The interviews conducted with the staff of women's support centres revealed that during the state of emergency declared in response to the COVID-19 pandemic, many women did not feel secure to seek assistance from women's support centres as it was not very clear for them what the state of emergency entailed. At the same time, all women's support centre services were available for the victims *de facto* throughout the period of the state of emergency. Because of the risks associated with COVID-19, women themselves were less willing to meet the staff face-to-face in the counselling room or preferred instead to meet outdoors. Women seeking help were more willing to contact the centres on the phone due to which the number of telephone consultations grew substantially. Overall, however, the levels of asking support declined.

During the emergency, psychological counselling sessions were somewhat limited since the service could not be provided with the same degree of efficiency from a distance. Nevertheless, during the state of emergency, support centres continued to provide legal and, to a certain extent, psychological counselling, doing so in the form of online counselling. The responses given in interviews also suggested that the staff tried to do their best to continue assisting victims during the state of emergency while also respecting all security rules (practising 2 meters physical distancing, disinfecting hands, wearing masks, etc.).

Interviews with women's support centre staff further revealed that women who tested positive for COVID-19 could not have been provided accommodation in each county as this would have jeopardised the health of the women and children already staying at the centre. Fortunately, support centres did not have to deal with such situations as accommodation services were rarely needed. In counties where support centres have several apartments (e.g. Ida-Viru County, Tallinn), a COVID-19 positive woman and her children were accommodated in a separate apartment. In Tallinn, a special COVID-19 taxi service was provided to assist women in getting to the place of accommodation. In other countries, an option to use separate accommodation facilities for COVID-19 positive victims were envisaged together with local and public authorities to mitigate the risks, however, there was no need to use this option.

³³⁴ Sotsiaalkindlustusamet. (n.d.). Naiste tugikeskused. Accessed 23.02.2022,,

<https://www.sotsiaalkindlustusamet.ee/et/ohvriabi-huvitis/naiste-tugikeskused>

³³⁵ Eesti Naisteühenduste Ümarlaud. (2011). Euroopa Nõukogu naistevastase vägivalda ja perevägivalda ennetamise ja tõkestamise konventsiooni juurde. Accessed 23.02.2022, https://www.enu.ee/lisa/611_Istanbuli%20seletuskiri.pdf (hereinafter Istanbuli seletuskiri)

³³⁶ Ohvriabi seadus (06.05.2020). *Riigi Teataja I*. Accessed 23.02.2022, <https://www.riigiteataja.ee/akt/106052020022>

³³⁷ Sotsiaalkindlustusamet. (n.d.). Naiste tugikeskused. Accessed 23.02.2022, <https://www.sotsiaalkindlustusamet.ee/et/ohvriabi-huvitis/naiste-tugikeskused>

Women's support centres paid particular attention to safety issues (disinfection, protective clothing) during and after the state of emergency. However, this involved some extra costs for the support centres. These support centres' extra costs were initially shouldered by the Women's Shelters Union. Assistance was later also provided by the government that allocated protective equipment, rapid tests, etc. free of charge. The government also offered the staff of women's support centres opportunities to vaccinate early in the process. Now all women's support centres carry out rapid tests before a woman and her child(ren) are admitted to the centre. Furthermore, Women's support centres do not require a COVID-19 vaccination certificate from the woman.

The responses given by professionals also showed decreased levels of training on general prevention and violence. For example, due to COVID-19 restrictions, support centres' staff were not able to visit schools to talk to young people about violence as schools had shifted to distance learning. Also, when schools reopened after the COVID-19 closures, many schools restricted outsiders from entering their sites. Therefore, several planned training sessions had either to be cancelled or moved online.

Whereas before the COVID-19 crisis, family health centres were willing to distribute information bulletins on accessing help for abused women, during the COVID-19 pandemic this practice was banned because of the risk of infection. Therefore, services had to be promoted only through the media or online.

For the purpose of writing this paper, the Estonian Women's Shelters Union provided access to statistical data on the use of women's support centre services for 2019, 2020, 2021 in 11 counties in Estonia.³³⁸

Year	Number of women contacting women's support centres	Number of women using accommodation service	Percentage of women using accommodation service	No of overnight stays of women using accommodation service	No of children using accommodation service together with mother	No of overnight stays of children
2019	1098	100	9,11	2113,00	91	1887
2020	1092	79	7,23	2609,00	55	1924
2021	1204	92	7,64	3419,00	85	2698

Table 1: Estonian Women's Shelters Union (EWSU) statistics for 11 counties in Estonia, women + overnight stays (Reitelmann, 2022)

³³⁸ Reitelmann, E. (2022). Estonian Women's Shelters Union (EWSU) statistics for 11 counties in Estonia, women + overnight stays.

The EWSU statistics permit us to conclude that the number of women seeking safe accommodation decreased due to the lockdown, which seems logical given the range of measures introduced by the government during the period under review. However, at the same time, the period of stay at the facility increased 1.5 times. This can be explained by the economic hardships faced by women as well as problems finding affordable housing. Due to property price rises since 2019 women are finding it increasingly difficult to buy their own home. The problem has been present for the past years, and with fewer properties available, more people are forced to opt for rental housing and stay in the rental market for longer than initially expected.³³⁹

The EWSU statistics show an increase of almost 30% in the number of telephone and online counselling sessions and a decrease in the number of face-to-face appointments between 2019 and 2021.

Despite the COVID-19 restrictions, the 11 support centres still offered a significant amount of services to victims of violence against women, including psychological and legal counselling. Whereas the need for legal counselling was growing constantly during the review period, the need for psychological counselling increased in particular in 2020 when the COVID-19 pandemic hit Estonia.

Year	Psychological counselling / hrs	Legal counselling / hrs	Crisis counselling / hrs	Case-based counselling / hrs
2019	1349	1225	778,00	3655,00
2020	1490	1679	845,00	3296,00
2021	1160	1701	119,00	2988,00

Table 2. ENVL statistics for 11 counties in Estonia, volume of services in hours

³³⁹ BNS. (2021). Oma kodu soetamine muutub eestlasele üha kättesaamatumaks. *Kodugeenius*. Accessed 23.02.2022, <https://kodu.geenius.ee/rubriik/kinnisvara/elamispindade-kattesaadavuse-halvenemine-jatkub/>

Year	Number of women contacting women's support centres	Number of women experiencing psychological violence	Percentage of women experiencing psychological violence among the victims	Number of women experiencing physical violence	Percentage of women experiencing psychological violence among victims	Number of women experiencing economic violence	Percentage of women experiencing economic violence among victims	Number of women experiencing sexual violence	Percentage of women experiencing sexual violence among victims
2019	1098	1041	94,81	629	57,29	637,00	58,01	125,00	11,38
2020	1092	1011	92,58	600	54,95	572,00	52,38	96,00	8,79
2021	1204	1079	89,62	634	52,66	594,00	49,34	170,00	14,12

Table 3: EWSU statistics for 11 counties in Estonia, types of violence

The most common type of violence experienced by women in any given year under review was psychological violence (concerns practically all women that contacted the centre). Physical and economic violence remained at an equally high level. The least common type of violence was sexual violence. This harmonises with the statement in the Explanatory Report of the Istanbul Convention, Article 33 saying that psychological violence often precedes or accompanies physical and sexual violence in intimate relationships (domestic violence).³⁴⁰

As explained above, during the COVID-19 restrictions, there were no changes in the forms of violence committed with physical and economic violence both staying at a high level. What increased, however, was the frequency of reporting of cases of sexual violence. Women seem to be better equipped to analyse different aspects of their own lives and better understand the nature of violence. Regarding economic violence, the interviewees highlighted women's growing concern about economic coping. This concerns particularly mothers raising children alone in case the abusive parent pays no or a very small amount of child maintenance. Women further fear increasing economic hardships during the COVID-19 restrictions since the state amended the Family Law Act relative to minimum maintenance. With the amendment, the state reduced the maintenance payments, inter alia, at the expense of the state family allowances, the total basic amount of maintenance for a child was reduced as of 01.01.2022 (Family Law Act § 101)³⁴¹. Unfortunately, the Ministry of Justice did not take the proposals made by the EWSU into consideration when drafting the law, and the adopted amendment

³⁴⁰ Council of Europe (2011). Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210). Explanatory Report. Accessed 23.02.2022, [CETS 210 - Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence \(coe.int\)](https://www.coe.int/t/Convention-Crime-Violence-Against-Women/Convention/Explanatory_Report/2011/09/20110901_Exp_Report_to_Council_of_Europe_Convention_on_preventing_and_combating_violence_against_women_and_domestic_violence_coe.int)

³⁴¹ Council of Europe (2011). Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210). Explanatory Report. Accessed 23.02.2022, [CETS 210 - Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence \(coe.int\)](https://www.coe.int/t/Convention-Crime-Violence-Against-Women/Convention/Explanatory_Report/2011/09/20110901_Exp_Report_to_Council_of_Europe_Convention_on_preventing_and_combating_violence_against_women_and_domestic_violence_coe.int)

fails to consider bigger economic responsibility of single mothers when raising children, leading to increased levels of child and female poverty.

Conclusion

The state of emergency introduced during the COVID-19 pandemic and subsequent government-imposed restrictions in Estonia have affected women's lives, including the opportunities for victims of violence against women to access various services. In 2020 and 2021, the restrictions were changed depending on the spread of the virus in the country.

Cases of violence require urgent intervention. Fortunately, 24/7 assistance to victims of violence against women was available throughout the period of COVID-19 restrictions, which means that following services were maintained:

- In case of physical and sexual assault - police, phone number 112
- In case of bodily injury - emergency medicine departments in every county centre across the country
- Crisis helpline, phone number 116 006
- Violence against women hotline, phone number 1492
- Women's support centre in every county
- Sexual violence crisis centres in 4 regions

When analysing the period 2020-2021, it can be argued that, yes, the COVID-19 pandemic had a direct impact on access to assistance and services for victims of violence against women.

Based on the interviews with professionals working in women's support centres, the following can be concluded:

- a) During the COVID-19 restrictions, the number of women contacting women's support centres did not increase in Estonia, it remained relatively stable.
- b) The need for women's accommodation in shelters decreased.
- c) Women's contacts and communication with the outside world decreased.
- d) Women experienced equally physical and economic violence.
- e) The number of women belonging to various vulnerable target groups contacting women's support centres increased, especially the number of women of other nationalities and speakers of other languages, who live in Estonia and have fallen victims of domestic violence here.
- f) The provision of the women's support centre services became more expensive for the NGOs providing the services due unexpected costs related to the spread of COVID-19 in connection with the need to apply safety measures and ensure security.
- g) Access to medical care was hampered by the increase of workload in the medical sector.
- h) Access to new housing for women wishing to leave a violent relationship has become more difficult due to the rising real estate prices. Women are often not able to rent or buy real estate anymore.

- i) As the general cost of living in Estonia has increased in recent years, and the prices of services and goods have risen steadily, rather than ending up in economic hardships, victims decide to stay more often in the violent relationship.
- j) Local authorities' limited budgets which lead to their inability to provide housing often leave victims of violence against women without the necessary assistance.
- k) General availability of assistance for various services has varied across the country; face-to-face meetings with the service providers have decreased, including services provided by the state. Many services provided by the state and local authorities have not reached the levels present before the COVID-19 lockdown, which makes the availability of the service dependent on everybody's ability to use the internet.
- l) Widespread uncertainty and anxiety in the country, and the need to face multiple simultaneous crises has had a negative effect on women's mental health, i.e. new problems have emerged in addition to violence.
- m) There is no gender-sensitive approach to crisis management in Estonia, although women dominate in ministries and agencies, and the current Prime Minister, Minister of Justice, Minister of Education, Minister of Finance and Foreign Minister are women who could pay attention to women's human rights.

This study confirmed that women are very vulnerable in various crisis situations, including the COVID-19 pandemic. Analysing what happened in Estonia in the period 2020-2021 and the interviews conducted with professionals, the following recommendations can be given to defend women's human rights:

- The provision of services must ensure the availability of all services provided by the state and local authorities outside the online environment in the same way it was done prior to the pandemic in order to ensure equal access to services independent of the victim's economic situation, access to equipment or place of residence.
- Concrete measures must be envisaged to combat economic violence against women. Victims of economic violence must be assisted *de facto*, not only *de jure*.
- There is a need to increase the financial capacity of local governments enabling them to fulfil their legal obligations and provide the necessary services, especially in rural areas.
- In crisis management, the impact of both the crisis as well as the proposed mitigation measures on both women and men, including on victims of violence against women must be constantly analysed to avoid limiting women's rights and to eliminate indirect discrimination.

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