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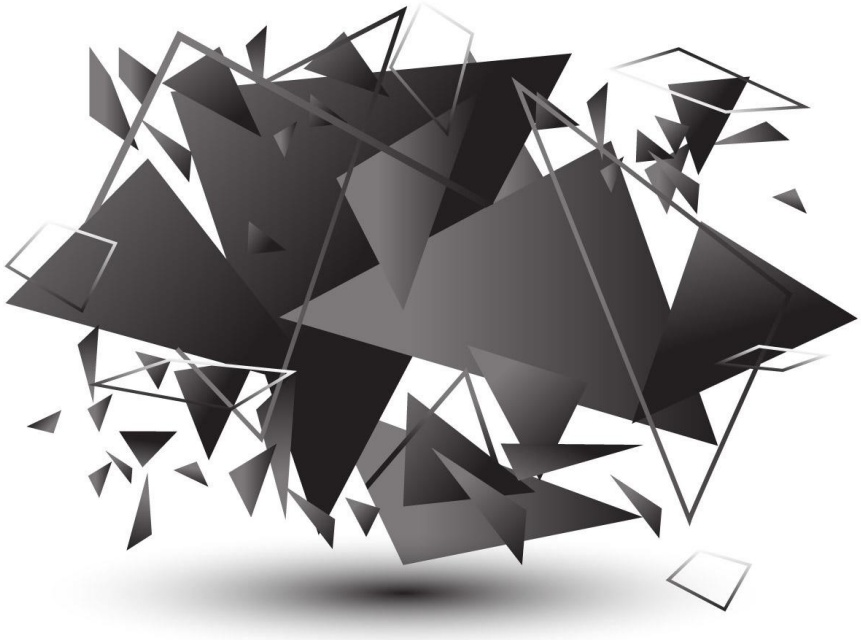

Just Access Research Posts

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Table of Contents

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1

The international responsibilities of "*de facto* authorities" and terrorist organisations in the Yemeni conflict

At the occasion of the 130th Session of the Human Rights Council (12 October 2020 – 6 November 2020), Just Access together with the Maat Foundation for Peace, and Development and Human Rights Association (MAAT), filed a submission in the context of the review of Yemen under the International Covenant on Civil and Political Rights.[1] In our submission, we raise the legal responsibility for multiple crimes and international law violations committed in Yemen by the Houthis and terrorist groups, underscored by the fact that those non-state armed groups exercise control over large portions of this country. International responsibility is indeed traditionally ascribed to the official authorities of a State, because normally only States can legally bind themselves under international legal instruments.

Yet, since the start of the conflict afflicting Yemen and its people, numerous violations of international law have been committed by the Houthis and terrorist groups. They are largely documented among others by UN bodies, fact-finding

[1] UN Treaty Body, CCPR – International Covenant on Civil and Policial Rights, 130 Session (12 October 2020 – 6 November 2020), at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1375&Lang=en.

missions and NGOs. Against this backdrop, an important legal question must be posed: should official authorities plunged into an armed conflict be held responsible for acts committed by non-state actors effectively controlling large portions of its territory? As this post will explain, the Yemeni conflict illustrates how international law has come to depart from the traditional view that chiefly ascribed responsibility to official authorities for international crimes and international law violations committed by non-state armed groups on their territory. This is an especially urgent issue in the case of the Houthis, who wish to appear to be the legitimate authorities of the country, but also of other non-states armed groups imbued with a willingness to break apart the State of Yemen.

1. The Yemeni conflict, the Houthis and terrorist organisations

The UN High Commissioner for Human Rights (hereafter "OHCHR") stated that the situation in Yemen has "deteriorated significantly" during the last years.[2] UNICEF describes the current situation in Yemen as the largest humanitarian crisis in the world. The UN-recognised Government is in exile, while an armed group known as Ansar Allah, often used synonymously with the Houthis, have seized effective control in the north and over the capital, Sana'a. In the last few months, the Southern Transitional Council declared self-rule in parts of south Yemen and the island of Socotra. In addition, Al-Qaida in the Arabian Peninsula (hereafter "AQAP") and the Islamic State (hereafter "IS") are very active in Yemen and control several bases in the country. Thus, Yemen is in a state of disarray, with multiple non-state armed groups controlling important portions of its territory and constant operations and attacks by well-established terrorist organisations. A majority of Yemeni are living under areas controlled by the Houthis.[3]

[2] See, UN Human Rights Council, Situation of human rights in Yemen: Report of the United Nations High Commissioner for Human Rights (A/HRC/33/38), 4 August 2016, paragraph 12.

[3] See, for instance, Bruce Riedel, "Order from Chaos: Amid a brutal stalemate in Yemen, the United Nations must act", 25 June 2018, at https://www.brookings.edu/blog/order-from-chaos/2018/06/25/amid-a-brutal-stalemate-in-yemen-the-united-nations-must-act/. UNSC, Final report of the panel of experts on Yemen,

2. International legal obligations applicable to the National Salvation Government set up by the Houthis

Although the UN does not recognise Ansar Allah (i.e. the Houthis) and the National Salvation Government that it , as the legitimate government of Yemen, UN institutions nonetheless engage Ansar Allah under the label of “de facto authorities”. Ansar Allah itself claims to be the legitimate Government, and has established an institutional structure with ministries and offices that seek to create the impression of a legitimate and functioning government. To support that impression, for instance in its 2019 reply to the Group of Eminent Experts on Yemen (thereafter “GEE”), this “de facto authority” has explicitly claimed to derive legitimacy from the constitutional continuity of Yemen and from its respect for international law, including obligations under international treaties that previous governments of Yemen have acceded to. As we have shown in our joint submission to the OHCHR, the National Salvation Government has specifically claimed to fulfil its obligations under several international instruments, including the International Covenant of Political and Civil Rights.

3. Numerous and egregious international law violations and abuses committed by the Houthis and terrorist organisations

International organisations and bodies, as well as experts, civil society organisations and investigative bodies, have all documented numerous and egregious violations committed in Yemen by the Houthis and terrorist organisations.[4]

S/2018/594, distr. gen. on 26 January 2018, p. 10, para. 21 and Annex 8, p. 69.

4 HRC, Written statement submitted by Partners For Transparency, a non-governmental organization in special consultative status, A/HRC/45/NGO/39, distr. gen. on 16 September 2020, pp. 3-4.

What follows does not constitute an exhaustive list but sheds light on the extent to which those non-state armed groups have repeatedly and tragically afflicted persons living on territories under their effective control and beyond. Among the long list of international crimes and other grave violations of international committed by the Houthis and terrorist organisations are: rapes, torture, mistreatments, arbitrary and extrajudicially killings,[5] including of women and children;[6] recruitment and use of children in armed conflict[7]; killings of journalists[8] and their forced disappearance[9]; persecution of minorities, Baha'is and Yemeni Jews[10]; use of landmines[11]; use of indiscriminate explosive in civilian populated areas[12]; targeting of health infrastructures, medical personal[13] and lack of management of the Covid-19 pandemic in territories under their effective control[14];

5 HRC, Written statement submitted by Partners For Transparency, a non-governmental organization in special consultative status, A/HRC/45/NGO/39, distr. gen. on 16 September 2020, p. 1.

6 HRC, Written statement submitted by Maat for Peace, Development and Human Rights Association, a non-governmental organization in special consultative status, A/HRC/45/NGO/8, distr. gen. on 3 September 2020, p. 3.

7 UNSC, Final report of the panel of experts on Yemen, S/2018/594, distr. gen. on 26 January 2018, p. 20, para. 63 and pp. 52-3, paras. 185-6.

8 HRC, Written statement submitted by Cairo Institute for Human Rights Studies, a non-governmental organization in special consulatitve status, A/HRC/45/NGO/10, Distr. gen. on 4 September 2020, p. 3.

9 HRC, Written Statement submitted by Partners for Transparency, a non-governmental organization in special consultative status, A/HRC/45/NGO/38, distr. gen. on 21 September 2020, p. 3.

10 HRC, Written statement submitted by Organisation internationale pour les pays les moins avancés (OIPMA), a non-governmental organization in special consultative status, A/HRC/45/NGO, distr. gen. on 7 September 2020, pp. 2-3, citing UN News, "Persistent persecution of Bahá'í in Yemen 'unacceptable,' and must stop, says UN expert", 22 May 2017, at https://news.un.org/en/story/2017/05/557852-persistent-persecution-bahai-yemen-unacceptable-and-must-stop-says-un-expert .

11 HRC, Written statement submitted by Maat for Peace, Development and Human Rights Association, a non-governmental organization in special consultative status, A/HRC/45/NGO/8, distr. gen. on 3 September 2020, p. 3; HRC, Written statement submitted by Organisation internationale pour les pays les moins avancés (OIPMA), a non-governmental organization in special consultative status, A/HRC/45/NGO/9, distr. gen. on 7 September 2020, p. 3.

12 UNSC, Final report of the panel of experts on Yemen, S/2018/594, distr. gen. on 26 January 2018, pp. 50-1, paras. 178-9.

13 HRC, Written Statement submitted by Partners for Transparency, a non-governmental organization in special consultative status, A/HRC/45/NGO/38, distr. gen. on 21 September 2020, p. 2.

14 HRC, Written statement submitted by Maat for Peace, Development and Human Rights Association, a non-governmental organization in special consultative status, A/HRC/45/NGO/8, distr. gen. on 3 September 2020, p. 4.

arbitrary detention,[15] including long-term incommunicado detention[16] (among others in the Hanish Prison,[17] in the Ibb's Political Security Building[18], in the Dhammar Community College[19]); enforced disappearance[20] (for ex. in connection to the National Security Forces detention facilities)[21] and other associated violations to the deprivation of liberty[22]; and the 'ordinary' commission of terrorist attacks.[23]

4. Thorny legal issues of international responsibility raised by the Houthis' de facto regime and their effective control of territories

The matter of State responsibility in circumstances such as Yemen's raises thorny legal questions about State capacity, fragility, failure and legitimacy. UN practice with regard to Yemen shows that it is possible to engage "de facto authorities" in matters that conventionally belong to State responsibility without recognising "de

15 HRC, Written statement submitted by Americans for Democracy & Human Rights in Bahrain Inc, a non-governmental organization in special consultative status, A/HRC/45/NGO/18, distr. gen. on 2 September 2020, p. 3 citing; HRC, Written statement submitted by Partners For Transparency, a non-governmental organization in special consultative status, A/HRC/45/NGO/39, distr. gen. on 16 September 2020, p. 1.

16 HRC, Written statement submitted by Americans for Democracy & Human Rights in Bahrain Inc, a non-governmental organization in special consultative status, A/HRC/45/NGO/18, distr. gen. on 2 September 2020, p. 4.

17 HRC, Written statement submitted by Partners For Transparency, a non-governmental organization in special consultative status, A/HRC/45/NGO/38, distr. gen. on 21 September 2020, p. 2.

18 Ibid., p. 3. HRC, Written statement submitted by Partners For Transparency, a non-governmental organization in special consultative status, A/HRC/45/NGO/39, distr. gen. on distr. gen. on 21 September 2020, p. 2.

19 HRC, Situation of human rights in Yemen, including violations and abuses since September 2014, Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen, A/HRC/45/CRP.7, distr. gen. on 29 September 2020, pp. 22-23, para. 69; UNSC, Final report of the panel of experts on Yemen, S/2018/594, distr. gen. on 26 January 2018, p. 49, para. 176; Human Rights Watch, "Yemen: 3 Months Since Houthis 'Disappear' Protesters: Ex-Detainees Describe Mass Arrests, Torture in Ibb", 16 January 2016, at https://www.hrw.org/news/2016/01/17/yemen-3-months-houthis-disappear-protesters

20 HRC, Written Statement submitted by Partners for Transparency, a non-governmental organization in special consultative status, A/HRC/45/NGO/38, distr. gen. on 21 September 2020.

21 HRC, Written Statement submitted by Partners for Transparency, a non-governmental organization in special consultative status, A/HRC/45/NGO/38, distr. gen. on 21 September 2020, p. 3.

22 UNSC, Final report of the panel of experts on Yemen, S/2018/594, distr. gen. on 26 January 2018, pp. 49-50, paras. 173-7.

23 UNSC, Final report of the panel of experts on Yemen, S/2018/594, distr. gen. on 26 January 2018, p. 21-4, paras. 66-76.

facto authorities" as the *de jure* State. The 2018 OHCHR Report notes that "[t]he de facto authorities control large swathes of territory, including Sana'a, and exercise a government-like function in that territory such that they are responsible under international human rights law".[24] In September 2020, the OHCHR also stated that despite the Houthis' refusal to cooperate with its teams, due to the presence of the UN HR Commissioner's field monitors in some areas, it could "document and investigate human rights violations and abuses in those areas to some extent."[25]

Under international law, the notion of effective control traditionally serves, under the rules of States responsibility, to attribute illicit acts to a State that has effective control over non-state actors.[26] A prominent example is the famous ICJ *Nicaragua v. the United States of America* case, where the United States was accused of controlling forces opposed to the Contras in Nicaragua. In case a non-state armed group seized power in a State, the responsibility of that State for wrongful acts can be triggered as a rule of attribution to the victorious non-state armed group then in power.[27] Thus, despite factual realities of the Houthis' *de facto* control over large portions of Yemen's territory and terrorist groups' activities and presence, the situation in Yemen is legally complex. Indeed, in some instances a State engaged in a non-international armed conflict can still be held responsible under some international conventions, even though it has lost control over some areas of its territory against other parties to the conflict. Yet, the official Yemeni Government's loss of control in many areas of its territory has reached such a level that it cannot

[24] See, UN Human Rights Council, Situation of human rights in Yemen, including violations and abuses since September 2014, Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts, 17 August 2018, para. 14.

[25] HRC, Implementation of technical assistance provided to the National Commission of Inquiry to investigate allegations of violations and abuses committed by all parties to the conflict in Yemen, Report of the United Nations High Commissioner for Human Rights, A/HRC/45/57, distr. gen. on 2 September 2020, p. 3, para. 12.

[26] For ex., Christian J. Tams, "Self-Defence against Non-State Actors: Making Sense of the "Armed Attack" Requirement" *in* Mary Ellen O'Connell, Christian J. Tams and Dire Tladi, *Self-Defence against Non-State Actors* (2019; CUP), pp. 90-173.

[27] See, for instance, Jean d'Aspremont, "Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents", *International & Comparative Law Quarterly*, 2009, Vol. 58, No. 2, pp. 427-442, p. 430.

be held responsible for acts committed in those territories. The conventional scheme of State and non-state responsibilities does not fit the current situation in Yemen.

If the Houthis cannot be considered as having seized power, they are nevertheless exerting effective control over large portions of the country's territory and have established a *de facto* regime with structures that claim to parallel those of the recognised Government.[28] Furthermore, the Houthi-dominated National Salvation Government does in fact exercise elements of governmental authority on the State's territory. Therefore, it would be manifestly unreasonable to refuse to hold "de facto authorities" to international norms and standards, especially since such authorities explicitly claim to be bound by them. As shown in our joint submission to the OHCHR, this view is supported by Article 9 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as well as by the fact that the OHCHR and the European Court of Human Rights have accepted that Convention rights can be realised through governmental institutions of a de facto regime.[29] This is further supported by the fact that the Houthi "de facto authorities" have committed violations of ICCPR provisions that the Human Rights Committee considered to be part of customary human rights law, thus enforceable against every authority regardless of its official status or recognition.[30]

The Yemeni situation demonstrates that non-State forces pretending to govern those areas can be held directly liable for their violations of international law. This was clearly affirmed by the Group of Experts on Yemen in their September 2020 report about the *de facto* regime of the Houthis as well as terrorist groups

[28] UNSC, Final report of the panel of experts on Yemen, S/2018/594, distr. gen. on 26 January 2018, p. 10, para. 21 and Annex 8, p. 69.

[29] OHCHR, Report of the United Nations High Commissioner for Human Rights on the question of human rights in Cyprus, A/HRC/25/21, distr. gen. on 22 January 2014, p. 5, para. 11; European Court of Human Rights, Loizidou s. Turkey, App. No. 15318/89, Judgment (Gr. Ch.) of 18 December 1996, paras 45-6.

[30] See, UN Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, para. 8.

controlling their territories.[31] One could even argue that this view draws on an increasingly established trend in international law. The Independent International Inquiry on Syria has already stressed responsibilities of the so-called Islamic State and other terrorist groups for their atrocities and international law violations in that conflict, under international human rights law, international humanitarian law, and for the international obligations that have a *jus cogens* value.[32]

5. A clear trend in international law for holding non-state armed groups and de facto authorities directly responsible for egregious international law violations

The Group of Experts' September 2020 Report states that if "the Houthis/de facto authorities are also obliged to abide by these same international humanitarian law norms", "[t]he precise legal mechanism by which this occurs is debated."[33] In this regard, the Group of Experts cites a legal article that reviews multiple theories concerning the legal basis on which non-state actors and *de facto* authorities can be held responsible for violations of international law: "While some theories take into account ANSAs' consent, other views are based on their relationship with States and the rules accepted beforehand by States' authorities."[34]

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31 HRC, Situation of human rights in Yemen, including violations and abuses since September 2014, Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen, A/HRC/45/CRP.7, distr. gen. on 29 September 2020, p. 11, para. 29 and fn 15 and pp. 20-21, paras. 82-83.

32 UNGA, Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/25/65, distr. gen. on 12 February 2014, distr. gen. on 12 February 2014, Annex IV "Without a trace: enforced disappearances in Syria", p. 37, paras. 5-6; HRC, Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/19/69, distr. gen. on 22 February 2012, p. 20, para. 106.

33 HRC, Situation of human rights in Yemen, including violations and abuses since September 2014, Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen, A/HRC/45/CRP.7, distr. gen. on 29 September 2020, p. 12, para. 32 and fn 19.

34 Annyssa Bellal and Ezequiel Heffes, "'Yes, I do': A Binding Armed Son-State Actors to IHL and Human Rights Norms through their Consent", *Human Rights and International Legal Discourse*, 2018, Vol. 12, No. 1, pp. 120-136, at https://www.hrild.org/en/journal/hrild/12-1/yes-i-do-binding-armed-non-state-actors-to-ihl-and-human-rights-norms-through-their-consent/index.html , p. 121.

In the case of the Houthis, the matter seems to be factually less controversial, since they have clearly expressed their consent to be bound by several international instruments. One of the traditional theories cited in the aforementioned article is that of "effective sovereignty".[35] Other theories emphasize the importance of non-state actors' consent to be bound to international instruments, as is in fact the case with the Houthis.[36] The two authors of the paper cited by the Group of Experts favour an approach based on the principle of equality of belligerent parties for international law's application.[37]

Such theories can contribute to solving some of the practical and theoretical difficulties that arise when non-state actors do not claim to represent a State in every regard. In the case of Yemen, some difficulties remain concerning terrorist groups that operate on Yemeni territory.[38] However, insofar as those groups also exercise forms of territorial effective control,[39] the same logic might apply. In addition, international law unambiguously provides for obligations directly applicable to terrorist organisations, which can also be bound by international human rights law and international humanitarian law.

If serious international law violations and atrocities committed by the Houthis and international terrorist groups in Yemen have clearly been pointed out in several international reports over the last several years, most of the attention has been devoted to the legal responsibility of the recognised Government of Yemen for the conflicts that afflict this country. In this regard, one could plausibly argue that the Group of Experts pays insufficient and ill-framed attention to issues of responsibility and accountability of the Houthis *de facto* government and terrorist groups in Yemen. Just Access' submission to the OHCHR aims to bring attention to victims of

35 Ibid., p. 122.
36 Ibid., pp. 124-127.
37 Ibid., p. 128.
38 UNSC, Final report of the panel of experts on Yemen, S/2018/594, distr. gen. on 26 January 2018, p. 21-4, paras. 66-76.
39 Bellal and Heffes, "Yes, I do", precited, p. 129: "Generally, views on why ANSAs are bound by IHRL have focused on their relationship with the territorial State. This has been justified by Fortin in relation to the principle of effectiveness, which requires 'not only other authority which claims to exercise, or actually exercises, powers which usually belong to the State'."

numerous atrocities by the *de facto* regime established by the Houthis as well as by terrorist groups in Yemen.

23.2.2021

2

Corruption and access to justice in international law, Part 1

Coronavirus may be sweeping the globe, but over the past three decades the contagion of corruption has done much to harm public trust in democracy throughout the world. As western states channel money towards struggling sections of their populations and economies, literal and metaphoric contagions look set to collide. In both Europe and the Americas, the race to buy up equipment and supplies has seen governments award contracts without due oversight or accountability.[40] In December 2020 the European Union sought to ensure that money flowing to member states as part of its pandemic recovery package would not allow Poland and Hungary to reward "improper behaviour by public procurement agencies, prosecutors and the courts."[41] National leaders are being exposed for their attempts to personally profit from pandemic relief funds.[42] Meanwhile wealthy elites are offering large donations in return for receiving vaccinations ahead of public dispensation.[43]

[40] https://www.corporatecomplianceinsights.com/corruption-coronavirus-latin-america-covid/ ; https://globalinitiative.net/analysis/corruption-coronavirus/

[41] https://www.ft.com/content/179c4786-8b16-4b63-ae58-53befb43aca7

[42] https://www.theguardian.com/world/2021/jan/13/estonian-government-collapses-over-corruption-investigation

[43] https://www.latimes.com/california/story/2020-12-18/wealthy-patients-scramble-covid-19-vaccine

Corruption, defined as the abuse of power for private gain, has historically been likened to contagion for its association with moral pollution, degradation, and the spoilage of public institutions. It is no surprise that in his foreword to the text of the United Nations Convention Against Corruption (2004), then Secretary-General Kofi Anan compared the spread of corruption to a plague ravishing the world.[44] Although one hundred and eighty seven states have signed the UNCAC, for the past two decades criminal acts of bribery, money laundering, and misappropriation have not receded but rather metastasized, crossing borders with alarming speed and scope. The focus of international scrutiny on acts of grand corruption, committed by public officials or domestic governments, has shifted towards systemic trans-national abuses, described in the work of investigative journalists and NGOs as the global rise of kleptocracy characterized by illicit flows of money through the global financial system on a massive scale. If corruption is understood to be a systemic issue, legal and judicial corruption continues to present major obstacles to the rule of law in both poor and wealthy parts of the world. Even international institutions engaged in the enforcement of global norms are no strangers to the problem of corrupt practices. The ICC, for example, recently clarified its rules governing participation in arbitration proceedings as part of an attempt to address the so-called revolving door of judges working on international investment cases.[45]

How should we define corruption? This is a central challenge for those seeking to widen legal action against corrupt institutions and individuals. Today the term “corruption” is capacious; it is used to describe so much dysfunction in so many different aspects of human society. Yet it has no straightforward legal definition. Instead, corrupt practices such as bribery, traffic in influence, embezzlement, and fraud, are the more recognizable crimes. In this way, we see how different legal standards, not just across different societies or parts of the world, but through time, have altered the understanding of what constitutes corruption.

Definitional issues notwithstanding, returning to basic principles and concepts helps underscore the existential threat that corruption poses to values of justice

[44] https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html
[45] https://academic.oup.com/jiel/article/20/2/301/3859188

and the rule of law. Access to justice and corruption are an inversion of each other. Corruption is the phenomenon of securing impunity or special advantage to circumvent the rules that govern individual and collective conduct. It presupposes impunity, discretion, and arbitrariness in the nature of law. The rule of law is predicated on the regularity and uniformity of an independent judiciary, uncorrupted by fear or favour. Fairness and equality underwrite the rule of law, ensuring that regardless of their position in society, individuals have a right to legal intelligibility, protection, and representation. However, in practice, as is all too evident throughout both the developed and developing world, the principle of equality before the law is undermined by wide disparities of wealth and education. Corruption at its most basic and arguably ubiquitous level allows those who are in positions of power to charge for public services, in the "transactional conversion of public power" in private gain.[46]

In both a substantive and procedural sense, the capacity of individuals to access legal services and advocate for their rights and interests is fundamental to free constitutions and functioning judiciaries. The term, "access to justice", is usually understood domestically to describe efforts to provide legal aid and education to those groups least likely to be able to afford legal advice or counsel or to understand their rights. Legal aid is not a recent innovation but has a longer history. In the United Kingdom, free legal assistance was given to the poor as early as the fifteenth century, often in more equitable and effective forms than it is today.[47] Later in the nineteenth century, as social reformers sought to secure all citizens protection from poverty and disease through state provision, legal scholars wrote of the need to ensure that the legal infrastructure of the state kept pace with the provision of socio-economic rights. The contrast between the infrastructural conditions supporting the growth of corruption and those affording access to justice provide a very direct illustration of the contemporary malaise, one which is premised on economic inequality. To what extent does international law provide an

[46] https://philarchive.org/archive/GOWICA
[47] Sir John Baker, *English Law Under Two Elizabeths: The Late Tudor Legal World and the Present* (Cambridge, 2021).

infrastructure of justice for individuals and communities harmed by corruption across multiple sectors of society?

In public international law, the protection of human rights and the pursuit of justice are only possible where there exist procedures and judicial remedies. Despite the development of human rights law since the end of the Second World War, no international legal architecture exists to make justice accessible to individuals seeking redress on the basis of customary international law. States are the constitutive basis of legal personality, enforcing laws within their jurisdictions, often limiting as a result the scope of international litigation in practice. Even if individuals can increasingly claim a right to international legal redress, this usually takes place within the domestic legal system where the violation of rights has occurred. The ICC acts on the basis of an overlapping, not singular, jurisdiction. In this sense, some have called for corruption to be considered a crime against humanity and within the remit of the existing ICC, who could act as a judge of last resort for the responsibility of national governments engaging in the kind of corruption which exacerbates, if not directly causes, disasters of famine and disease.[48]

Corruption is increasingly regarded as a direct abuse of human rights. The corruption of government finances and sources of funding denies states and individuals access to essential resources which could be put towards remedying poverty, providing education, and building infrastructure; violation of human rights occurs through preventing access to rights.[49] Corruption of the judiciary is a logical abuse of human rights, in its undermining the basic capacity of individuals to access justice through the courts. Regardless of status, citizens should be able to understand their rights and the obligations imposed on them by the laws, as well as gain access to legal services at the state level. Such rights of access to justice are iterated in legal instruments from the United Nations Universal Declaration on Human Rights (1948), the International Covenant on Civil and Political Rights, the

[48] https://academic.oup.com/jicj/article-abstract/4/3/466/814228?redirectedFrom=PDF
[49] https://www.jstor.org/stable/pdf/10.5305/procannmeetasil.104.0243.pdf?refreqid=excelsior%3A19d7f33786c744557190d1fb8d640927

European Convention on Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, the Inter-American Convention on Human Rights and the African Convention on Human Rights. The existence of UN Special Procedures on the Independence of Judges and Lawyers (1994) has provided a basis for individual complaints and legislation aimed at addressing threats to judicial independence. International lawyers have for decades made reference to the need to provide access to justice as the cornerstone of enforcing human rights as "infrastructures which uphold the rule of law and democracy".[50]

Addressing corruption at the international level has been the focus of concerted effort since the 1990s with the Inter-American Convention Against Corruption (1996) and the OECD Anti-Bribery Convention (1997). There followed a steady march of laws aimed at establishing criminal liability for bribery offenses committed by public officials and private companies. The rise of such treaties helped to challenge the notion that corruption in government circles belonged to a stage of political development and was simply part of the cost of wealthy countries doing business with poor nations. Instead, corruption scandals in western governments exposed the hypocrisy of measuring developing countries legal and political modernity against their success in eliminating corruption. Judicial corruption remains a major cause of injustice throughout the world. Again, defying the notion that corrupt practices are the province of poorer countries, the federal judiciary of the United States has been shown to be riddled with corrupt judges acting without regard to legal standards for their own personal and professional conduct, often handing out sentences with no respect for norms of evidence or sentencing standards.[51]

However it has also been the case that when corruption has been characterized as a human rights abuse perpetrated by corrupt regimes in poor countries, the appeal to international norms has created, as Anne Peters has written, "a negative

[50] World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (1993) para 27.

[51] https://www.reuters.com/investigates/special-report/usa-judges-misconduct/

feedback loop", giving ample scope to accusations of hypocrisy. Western states "deplore that corruption undermines the enjoyment of human rights and, concomitantly, employ human rights as a normative framework to denounce and combat corruption".[52] The double standards of western governments combined with the legacy of colonial history have given governments the ability to cast asset recovery programs as neo-imperial attacks on poor countries' sovereignty.[53]

To what extent does the UNCAC provide a viable legal basis for access to justice? As one high-profile legal commentator has observed, the UNCAC's monitoring mechanism for states' compliance in criminalizing corruption has tended to focus on the enactment of laws as a mark of success or progress at the expense of their enforcement. This is the observation of Mark Wolf, a leading advocate for an International Anti-Corruption Court, modeled on the role played today by the International Criminal Court. Despite acknowledging its limitations, Judge Wolf sees the UNCAC as providing a solid legal basis for establishing such an institution. Given the scale of the problem, Judge Wolf sees the present moment as reminiscent of the early years of this century, when the long held ambition of internal lawyers to prosecute war crimes and human rights abuses led to the founding of the ICC. He makes the important point that an international court acting as a last resort for the prosecution of corruption could only act where a state proves "unwilling or unable to make good-faith efforts to investigate, prosecute, and punish its leaders and their accomplices for corruption".[54]

Such a scenario is all the more likely and necessary in situations where governments and leaders have captured the media, the courts, and the electoral system, all but ensuring impunity. Again, however, the context of the corruption problem points towards multiple forms of capture, which relate and overlap. The United States Congress provides a case study in the problem of institutional corruption, that phenomenon described by Lawrence Lessig as the "systemic and

52 https://academic.oup.com/ejil/article/29/4/1251/5320164?login=true
53 https://www.hrw.org/news/2019/12/17/victims-corruption-deserve-justice
54 https://static1.squarespace.com/static/5728d314b6aa60d865f7840e/t/5b436cd203ce641f981f75eb/1531145426895/Daedalus+Full.pdf

strategic influence which is legal" but "that undermines the institutions effectiveness" or purpose.[55] Lobbying and campaign finance laws are the best examples of the capturing of governing institutions by special interests. However institutional corruption is not the exclusive province of politics. Sectors of the legal profession are equally inured to the risk of capture, a problem recently explored by the European Union in its investigating lawyers' role in facilitating tax evasion and money laundering. Although the illegality of some may not be particularly revelatory, it is worth noting the role that surveys have played in the past in reporting on the widespread nature of the problem.[56]

Finally, with the focus on the systemic causes of corruption providing much of the basis for current legal and political analysis, it is easy to ignore the victims of corruption. The UNCAC makes explicit the connection between access to justice and the prosecution of corruption "to ensure that entities and persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation".[57] However, it is fair to say that one of the challenges involved in combating corruption is the danger posed to individuals who divulge illegal practices. Whistleblowers face the danger of retribution, from low level threats to reputations to the threat of injury or even death.[58] At the same time, the apathy with which many throughout the world increasingly approach the problem of corruption, as an endemic and inoperable disease, underscores the necessity for the individuals and institutions of civil society to continue to expose and highlight corruption as a threat to international norms and governance.

55 https://journals.sagepub.com/doi/abs/10.1111/jlme.12063?journalCode=lmec&
56 https://www.moneylaunderingnews.com/2017/05/tax-evasion/; https://www.oecd.org/investment/anti-bribery/46137847.pdf
57 https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604993e.pdf
58 https://uncaccoalition.org/learn-more/whistleblowing/

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3

Director's comments to the BBC on the day the Koblenz Court delivered its first verdict under universal jurisdiction on Syrian state torture

His full statement to the BBC[59] read,

"Tomorrow's decision will enter the history books. Critics say that the accused, Eyad A., was a low-ranking intelligence officer who acted on superior orders and would have risked his life if he disobeyed; that he willingly cooperated with German authorities as a witness to the Syrian regime's crimes against humanity and against Anwar R., and that his statements are now unfairly used against him. Critics also say that this exercise in universal jurisdiction at the complex intersection between politics and international law is too little, too late, and that it's reputation laundering as Germany risks little by not turning a blind eye to the Syrian regime's crimes against humanity while it fails to take a similar stance against equally horrifying atrocities committed by Iran or Qatar, states that are also active in Syria.

[59] https://www.bbc.co.uk/news/world-europe-56160486

These are important points, but the trial is already a net positive. The victims were given a voice; the Caesar photos and other evidence of horrendous state torture on a mass scale were publicly discussed; and the legal record will continue to serve in a range of future cases, from sanctions to international tribunals. Post-conflict societies cannot stabilise without justice. It is precious even if the practical means of obtaining it are, by design, open to criticism. Tomorrow's decision will be in history books – hopefully as a footnote in a fuller and better record of justice seen and done."

10.3.2021

4

Access to the EU and justice denied: how Bulgaria's actions against North Macedonia amount to abuse of the EU's accession procedural rules

After several years of efforts to satisfy the requirements of the European Union for possibly becoming a candidate country, including a notable attempt towards resolution of the historical dispute regarding its very identity on the international front on account of Greece's constant opposition these last decades until conclusion of the Prespa Agreement in 2018, North Macedonia finds its political destiny being held hostage by Bulgaria in an unprecedented move. Bulgaria's arm-twisting tactics began in 2019 when it resorted to exerting crude pressure within the EU institutions on the basis of dubious and instrumentalised cultural and historical claims against North Macedonia.[60] As things stand, not only is this

[60] politico.eu, "Tongue-tied: Bulgaria's language gripe blocks North Macedonia's EU path", 8 December 2020, at https://www.politico.eu/article/bulgaria-north-macedonia-eu-accession-talks-language-dispute/ ; lemonde.fr, "Pourquoi la Bulgarie ne veut pas que la Macédoine du Nord rejoigne l'Union européenne", 18 November 2020, at https://www.lemonde.fr/international/article/2020/11/18/querelle-linguistique-heros-dispute-pourquoi-la-bulgarie-entrave-la-marche-de-la-macedoine-du-nord-vers-l-europe_6060213_3210.html; Süddeutsche.de, "Bulgarien verlangt neue Geschichtsschreibung von Nordmazedonien", 25 October 2020, at https://www.sueddeutsche.de/politik/eu-beitritt-bulgarien-verlangt-neue-geschichtsschreibung-von-nordmazedonien-1.5093307. See, for an overall critical account of Bulgarian's claims against North Macedonia in the EU enlargement procedure context, Rosa Luxemburg Stiftung, "Europe Does Not Understand Us: Why is Bulgaria trying to veto North Macedonia"s EU membership", 12 February 2020, at https://www.rosalux.de/en/news/id/43443/europe-does-not-understand-us?

threatening to destabilise the whole region but is also complicating the relationship between the Western Balkans and the Union.[61] The present study will shed light on the main steps that have characterised the positive relationship of North Macedonia with the Union, in the context of the latter's special relationship with the Western Balkans, and demonstrate how Bulgaria's hostile stance against its neighbour is abusive under international law in the context of the EU enlargement. If the notorious political nature of EU enlargement procedures and applicable EU laws make it difficult for North Macedonia to legally oppose Bulgaria's blackmailing, in particular due to the asymmetry existing in its relationship with Bulgaria who enjoys the privilege of its EU membership, this paper will explore some possible paths which could strengthen its access to means for re-establishing elementary considerations of justice in this process. Current negotiations between both countries should not allow the aggressive and unfair stance of Bulgaria against its smaller neighbour to go unnoticed, as its instrumentalisation of EU law and cultural-identarian offensive arguments are negatively impacting the rule of law in Europe.

As the following facts will clearly show, North Macedonia's willingness to abide to the EU requirements for its candidacy to the EU membership have indeed been constantly well-received by key EU institutions and most EU member States. Greece's historical opposition to North Macedonia's very existence in the international political sphere came to an end with conclusion of the Prespa Agreement in 2018 between both the countries, thereby further augmenting North Macedonia's chances of joining the European Union. Most of the recent obstacles on the path of North Macedonia's candidacy to the EU accession have resulted since 2019 from few member States' political moves, including in a first time by France (with the backing of Denmark and the Netherlands) and since 2020 by Bulgaria's obsession on reviving menacing historical and cultural nationalist and identity tensions. In particular, Bulgaria's 'vetoing' in key EU meetings has not only

cHash=c4187ece4743addf394d7376286c703b

61 Euronews.com, "Bulgaria's block on North Macedonia 'endangers Europe's security", 8 December 2020, at https://www.euronews.com/2020/12/08/bulgaria-s-block-on-north-macedonia-s-bid-to-join-eu-massively-endangers-europe-s-security

resulted in a situation seriously prejudicing North Macedonia's chances to finally enter in official negotiation talks with the EU regarding its candidacy to become a member State, but is also jeopardizing EU's important relationship with the West Balkans. The unfairness with which North Macedonia's recognised efforts and reforms have been received recently by few EU member States poses a credible risk to the stability of EU's relationship with the West Balkans. The following facts will retrace some of the main events that took place in the recent years concerning North Macedonia's candidacy for becoming a member State of the Union.

1. Factual background of North Macedonia's political relationship with the EU, Greece and Bulgaria

North Macedonia signed the Stabilisation and Association Agreement ("SAA") with the EU in 2001, which sets the framework for relations with the EU, including political, economic and technical dialogue.[62] On 16 December 2005, the European Council decided to grant North Macedonia the status of candidate for EU membership.[63] A political agreement was reached in Skopje in July 2015, whereby North Macedonia's four main political parties agreed to the development and implementation of an Euro-Atlantic integration agenda.[64]

On 4 December 2018, following the June 2018 EU Council's meeting, the Stabilisation and Association Council adopted the decision on the passage of North Macedonia to stage II of the "SAA" which is the legal framework applicable to

62 European Commission, Commission Staff Working Document North Macedonia 2019 Report, 29 May 2019, SWD(2019) 218 final, at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf , p. 99.

63 Council of the European Union, Presidency Conclusions on Brussels European Council 15/16 December 2005, 15914/1/05 REV 1, CONCL 3, at https://data.consilium.europa.eu/doc/document/ST-15914-2005-REV-1/en/pdf , p. 7, paras. 23-25.

64 European Commission, Statement by Commissioner Hahn and MEPs Vajgl, Howitt and Kukan: Agreement in Skopje to overcome political crisis, 15 July 2015, at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_15_5372 .

Western Balkan states willing to join the Union,[65] based on the Commission's 2009 proposal.[66]

After several decades of opposition from Greece against Macedonia's very name and existence, the two countries made the historical step to conclude the Prespa Agreement on 12 June 2018 for settling this dispute, which among others, agreed that Macedonia could use the name of North Macedonia.[67] On 28 June 2018, the European Council stated in its Conclusions, after noting that "[c]o-operation with, and support for, partners in the Western Balkans region remain key to exchange information on migratory flows, prevent illegal migration, increase the capacities for border protection and improve return and readmission procedures,"[68] and that it: "strongly welcomes and supports the agreement reached between the former Yugoslav Republic of Macedonia and Greece on the name issue. This, together with the agreement between Bulgaria and the former Yugoslav Republic of Macedonia on the Treaty of Friendship, Good Neighbourliness, and Cooperation, sets a strong example for others in the region to strengthen good neighbourly relations."[69]

The Prespa Agreement concluded between Greece and North Macedonia entered into force in February 2019.[70] On 29 May 2019, the Commission transmitted to the

65 European Commission, Stabilisation and Association Agreement – European Neighbourhood Policy and Enlargement Negotiations, last updated on 6 December 2016, at https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/saa_en .

66 European Commission, Commission Staff Working Document North Macedonia 2019 Report, 29 May 2019, SWD(2019) 218 final, at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf , p. 99.

67 Ioannis Prezas, "A bilateral treaty developing legal effects erga omnes? Reflections on the Prespa Agreement between Greece and North Macedonia settling the name dispute", *Questions of International Law*, 17 January 2020, at http://www.qil-qdi.org/a-bilateral-treaty-developing-legal-effects-erga-omnes-reflections-on-the-prespa-agreement-between-greece-and-north-macedonia-settling-the-name-dispute/, pp. 21-61.

68 European Council, European Council meeting's Conclusions, EUCO 9/18, CO EUR 9, CONCL 3, 28 June 2018, at https://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/, p. 2, para. 4.

69 Ibid., p. 10, para. 23.

70 European Commission, Commission Staff Working Document North Macedonia 2019 Report, 29 May 2019, SWD(2019) 218 final, at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-

relevant competent EU institutions, the North Macedonia 20F19 Report.[71] In this 2019 North Macedonia report, the EU Commission observed that regarding regional cooperation, North Macedonia maintained good relations with other enlargement countries and participated actively in regional initiatives. Historical steps were reported to have taken place for improving good neighbourly relations, including the entry into force of the Prespa agreement and its implementation, thereby putting an end to one of the oldest disputes in the region. The Commission looks forward to the continued implementation of the bilateral treaty with Bulgaria."[72] Furthermore, the Commission's Staff working document stated in its section focusing on good neighbourly relations and regional cooperation that North Macedonia's government "has taken a very positive approach to regional cooperation and good neighbourly relations" but also that the "country remained constructively committed to bilateral relations with other enlargement countries and neighbouring EU Member States."[73] With respect to North Macedonia's bilateral relation with Bulgaria, the Commission's Staff further noted that:

"The implementation of the Treaty of Friendship, Good Neighbourliness and Cooperation with Bulgaria is ongoing, with several meetings of the Joint Commission on Historical and Educational Matters taking place in a constructive atmosphere. The Law ratifying the agreement with the government of Bulgaria on cooperation in case of catastrophes was adopted in May 2018. Prime Minister Zaev visited Sofia in February 2019. The joint intergovernmental commission on trade and economic cooperation held its first meeting in Skopje in March 2019, 10 years after it was set up. Bulgaria ratified the NATO accession protocol."[74]

On 25 July 2019, the EU European Neighbourhood Policy and Enlargement Negotiations Commissioner Johannes Hahn declared that North Macedonia's

report.pdf, p. 53.

71 European Commission, Commission Staff Working Document North Macedonia 2019 Report, 29 May 2019, SWD(2019) 218 final, at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf.

72 Ibid., p. 5.

73 Ibid., p. 54.

74 Ibid., p. 55.

Government must implement reforms before that EU accession's negotiations can start.[75] On 3 October 2019, Presidents Tusk, Sassoli, Juncker and President-elect Von der Leyen affirmed in a Joint letter their clear and strong support for advancing the negotiations for North Macedonia's accession to the EU:

"Our world is undergoing rapid changes. If the EU is to uphold its international role and protect its interests, taking a step towards integrating those European countries that have expressed an interest and have fulfilled the requirements for starting the accession process will help achieve this." In this Joint letter, while nothing that "[t]here is no guarantee of success," they observed that North Macedonia "did what we asked them to do" and that "[a]chieving that required a significant effort from their citizens, for whom the European perspective has been a great source of motivation and determination."[76]

On 9 October 2019 the Bulgarian Government adopted a Framework position,[77] confirmed by a declaration of its Assembly which proposed a long list of conditions to be implemented in the framework in order for Bulgaria to support the start of the European Union's pre-accession negotiations with North Macedonia and Albania.[78] These conditions referred to the accession generally and separately for the first and second intergovernmental conferences, as well as for the negotiating chapters 35 and 10 .Both documents comprised of claims which denied existence of the

75 Reuters.com, "North Macedonia must reform judiciary before accession talks can start: EU's Hahn", 25 July 2019, at https://www.reuters.com/article/us-north-macedonia-eu/north-macedonia-must-reform-judiciary-before-accession-talks-can-start-eus-hahn-idUSKCN1UK266/.

76 European Council, Joint letter by Presidents Tusk, Sassoli, Juncker and President-elect Von der Leyen on the opening of accession talks with North Macedonia and Albania, 3 October 2019, at https://www.consilium.europa.eu/en/press/press-releases/2019/10/03/joint-letter-by-presidents-tusk-juncker-sassoli-and-president-elect-von-der-leyen-to-the-eu-heads-of-state-or-government-on-the-accession-talks-with-north-macedonia-and-albania/.

77 Bulgarian Government, "РАМКОВА ПОЗИЦИЯ ОТНОСНО РАЗШИРЯВАНЕ НА ЕС И ПРОЦЕСА НА СТАБИЛИЗИРАНЕ И АСОЦИИРАНЕ: РЕПУБЛИКА СЕВЕРНА МАКЕДОНИЯ И АЛБАНИЯ" ("Framework position on EU enlargement and the stabilization and association process: the Republic of Northern Macedonia and Albania"), 9 October 2019, at https://www.gov.bg/bg/prestsentar/novini/ramkova-pozitsia.

78 Bulgarian Parliament, "Народното събрание прие Декларация във връзка с разширяването на Европейския съюз и Процеса на стабилизиране и асоцииране на Република Северна Македония и Република Албания" ("The National Assembly adopted a Declaration on the Enlargement of the European Union and the Stabilization and Association Process of the Republic of Northern Macedonia and the Republic of Albania"), 10 October 2019, at https://www.parliament.bg/bg/news/ID/4920.

Macedonian language and are accompanied by other demands with an aim to perpetrate the Bulgarian narrative unilaterally.[79] These documents were followed by a Statement of the Bulgarian Government annexed to the Council of Europe conclusions of March 2020, a unilateral statement from this member state of the EU, which was eventually not upheld and adopted by the Council of the European Union[80].

Subsequently, on 18 October 2019, France vetoed the opening of the negotiations talk for North Macedonia and Albania's accession to the EU, joined politically by the Netherlands and Denmark. Those three countries led by France called for reforming first the Union from the inside and among others to reform rules of procedure within the Union[81], before contemplating further steps regarding pending negotiation talks between the EU, Albania and North Maceconia. France's 'veto' received a lot of criticisms from other European Member States,[82] given that, the "huge majority of member states supported "opening the access negotiations for both countries" according to Finland's EU affairs minister Tytti Tuppurainen.[83] While some EU leaders talked about an 'historical mistake" committed by France, the latter on the other hand insisted on the necessity to reform the procedure applicable to EU enlargement before opening EU accession negotiations.[84] France's blocking resulted in the organisation of snap elections in North

79 Balkan Insight, "Bulgaria Sets Though Terms for North Macedonia's EU Progress", 10 October 2019, at https://balkaninsight.com/2019/10/10/bulgaria-sets-tough-terms-for-north-macedonias-eu-progress/.

80 Council of the European Union, End of Written Procedure, Council conclusions on Enlargement and Stabilisation and Association Process, The Republic of North Macedonia and the Republic of Albania, CM 1946/20, 25 March 2020, at https://data.consilium.europa.eu/doc/document/CM-1946-2020-INIT/en/pdf , pp. 3-4.

81 Reuters.com, France opposes EU Membership talks with North Macedonia, Albania: diplomats", 10 October 2019, at https://www.reuters.com/article/us-eu-balkans-idUSKBN1WP1Z0; politico.eu, "EU ministers once again fail to reach deal on North Macedonia and Albania", 15 October 2019, at https://www.politico.eu/article/eu-ministers-once-again-fail-to-reach-deal-on-north-macedonia-and-albania/; reuters.com, "France under fire for 'historic error' of blocking Balkan EU hopefuls", 18 October 2019, at https://www.reuters.com/article/us-eu-summit-balkans-idUSKBN1WX1CT .

82 Ibid.

83 politico.eu, "EU ministers once again fail to reach deal on North Macedonia and Albania", 15 October 2019, at https://www.politico.eu/article/eu-ministers-once-again-fail-to-reach-deal-on-north-macedonia-and-albania/ .

84 Nedim Hogic, "The rule of law and the EU enlargement to the Western Balkans", 11 December 2019, at https://europeanlawblog.eu/2019/12/11/the-rule-of-law-and-the-eu-enlargement-to-the-western-balkans/ .

Macedonia. On 24 October 2019, the European Parliament adopted a resolution with 412 votes in favour, 136 against and 30 abstentions.[85] This Resolution expressed the European Parliament's disappointment over the failure to agree on opening EU accession talks with Albania and North Macedonia at the EU summit on 17-18 October 2019.[86]

Following the debate on the necessity to reform EU rules applicable to EU accession brought by France when it had blocked the opening of negotiation talks in November 2019, the European Commission published on 5 February 2020 a Communication titled "Enhancing the access process – A credible EU perspective for the Western Balkans."[87] According to the Commission, this Communication "sets out the Commission's concrete proposals for strengthening the whole accession process", in particular to prepare Western Balkans to meet the requirements of membership relating to fundamental democratic, rule of law and economic reforms, as well as economic growth and social convergence.[88] The Communication also clearly states that "When partner countries meet the objective criteria and the established objective conditions, the Member States shall agree to move forward to the next stage of the process. All parties must abstain from misusing outstanding issues in the EU accession process.[89]" On 25 March 2020, the Council of the European Union decided to "open accession negotiations with the Republic of Macedonia" in light of the "progress achieved on reforms and the fulfilment of the conditions set unanimously," but this decision was subjected to

85 European Parliament, "Failure to open accession talks with Albania and North Macedonia is a mistake", 24 October 2019, at https://www.europarl.europa.eu/news/en/press-room/20191021IPR64717/failure-to-open-accession-talks-with-albania-and-north-macedonia-is-a-mistake .

86 Ibid. European Parliament, Opening accession negotiations with North Macedonia and Albania, P9_TA(2019)0050, 2019/2883(RSP), 24 October 2019, at https://www.europarl.europa.eu/doceo/document/TA-9-2019-0050_EN.html.

87 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process – A credible EU perspective for the Western Balkans, COM(2020) 57 final, 5 February 2020, at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_181 .

88 Ibid., pp. 1-2.

89 Ibid.

endorsement by the European Council.[90] The decision of the Council of the European Union was subsequently endorsed by members of the European Council.[91]

On 1 July 2020, the European Commission published drafts for negotiating frameworks for Albania and North Macedonia, which would have only been made public once Member States would have adopted them.[92] After the failure to reach a consensus at the occasion of the European Council meeting on 17 November 2020, the German Minister for European Affairs Michael Roth stated, "all delegations expressed their support for a swift and successful conclusion with regard to the negotiating frameworks, with the exception of Bulgaria."[93] On 18 November 2020, Bulgaria blocked the opening of North Macedonia's accession talks on the basis of its historical and cultural claims against the latter.[94] On 8 December 2020, German State Secretary for European Affairs confirmed that there has been no agreement between the EU Member States on negotiating boxes for North Macedonia and Albania, nor on EU Council conclusions on the enlargement countries.[95] Before the EU Summit on EU's enlargement, despite several discussions at the level of Member States' ambassadors and an attempt at German mediation, Bulgaria was still blocking an agreement on the negotiating box with not only North Macedonia but also Albania, since some Member States

90 Council of the European Union, Enlargement and stabilisation and association process – the Republic of North Macedonia and the Republic of Albania, Council conclusions, 7002/20, ELARG 20, COWEB 35, 25 March 2020, p. 3, para. 6.

91 European Commission, European Neighbourhood Policy and Enlargement Negotiations, North Macedonia, at https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/north-macedonia_en. _Internet Archive_ https://web.archive.org/web/20210629131851/https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/north-macedonia_en.

92 European Commission, Commission drafts negotiating frameworks for Albania and North Macedonia, 1 July 2020, at https://ec.europa.eu/commission/commissioners/2019-2024/varhelyi/announcements/commission-drafts-negotiating-frameworks-albania-and-north-macedonia_en.

93 Bulletin Quotidien Europe, "No agreement in EU Council on frameworks for accession negotiations with Albania and North Macedonia", 17 November 2020.

94 EU Observer, "Bulgaria vetoes North Macedonia's EU talks", 18 November 2020, at https://euobserver.com/tickers/150109.

95 Bulletin Quotidien Europe, "EU-27 unable to agree on negotiating boxes and EU Council conclusions", 8 December 2020.

believed that the two frameworks should go hand in hand.[96] On the same day, 24 MEPs from several political groups within the European Parliament signed a letter requesting the EU Council to approve the negotiating box for North Macedonia and asked to stop further delaying EU accession negotiations.[97] This statement stressed the importance of a resolution of the dispute opposing Bulgaria to North Macedonia, and called in particular on the former to approve the opening of the intergovernmental conference preferably in December 2020.[98] This statement also highlighted the patience and confidence of people from North Macedonia while insisting that "The Prespa Agreement with Greece and the Treaty on Friendship, Good Neighbourliness and Cooperation with Bulgaria were historic and their implementation remains crucial."[99]

The first Intergovernmental Conference was originally scheduled to take place before the end of the year 2020,[100] but Bulgaria's blocking attitude has resulted in the postponement of this key conference to 2021. The Portuguese Presidency of the Union has recently indicated its determination to "continue accession negotiations with the countries of the Western Balkans, notably with the approval of the negotiating box and the organisation of the first intergovernmental conferences with Albania and North Macedonia by the end of June."[101] Most recently, Bulgaria's tone against North Macedonia has slightly softened, while both countries are engaged in negotiations which seem to be driven by Bulgaria's revival of cultural and historical identical disputes with its neighbour.[102] Also, crucially, threats generated in the context of Bulgaria's exaltation in 2020 are promised to remain

96 Bulletin Quotidien Europe, "*Brexit*, EU Summit and enlargement on EU Ministers' agenda", 8 December 2020.

97 European Parliament, Statement on accession negotiations of North Macedonia and Albania, 8 December 2020, at https://www.david-mcallister.de/statement-on-accession-negotiations-of-north-macedonia-and-albania/.

98 Ibid.

99 Ibid.

100 Ibid.

101 Bulletin Quotidien Europe, "Portuguese Presidency of Council of the EU calls for a sense of geopolitical balance", 27 January 2021, No. 12644.

102 dw.com, "Нов пристап кон Бугарија - помалку емоции, повеќе разум" ("New approach to Bulgaria, less emotion, more reason"), 16 February 2021, at https://www.dw.com/mk/нов-пристап-кон-бугарија-помалку-емоции-повеќе-разум/a-56589987.

real, given that it still cultivates a hard line with North Macedonia[103] and that deadlock lasting decades, as was previously the case with Greece, was recently mentioned by the Bulgarian side as a possibility[104]. Besides the Portuguese Presidency of the Union, Germany is committed to remain active with this important dispute and is engaged in a process of mediation between the two countries together with Portugal. This is a clear sign of the importance of the situation both for the Western Balkans and the EU.

As we will see in the next part of this paper, several legal arguments on the basis of international law can be made to criticise the hostile strategy opted for by Bulgaria to blackmail North Macedonia at a crucial time of its history, by instrumentalising EU enlargement procedures and its membership to the Union for (mainly internal) political gains.

2. How Bulgaria's blackmailing against North Macedonia is abusive under international law

Admittedly, each sovereign State's vote cannot be limited in international law, especially within a unanimous procedural framework such as the one for officially opening negotiations to the EU accession for candidate countries like North Macedonia and Albania. From this viewpoint, it seems difficult to contest Bulgaria's right to determine and pursue its own interests within the context of the European Union.

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103 News.bg, "Захариева: Лъжа е, че оспорваме македонската идентичност, нека да спре насаждането на омраза" ("Zaharieva: It is a lie that we are challenging the Macedonian identity, let it stop instilling hatred"), 17 February 2021, at https://news.bg/int-politics/zaharieva-lazha-e-che-osporvame-makedonskata-identichnost-neka-da-spre-nasazhdaneto-na-omraza.html.

104 This was actually said by Bulgaria's Deputy Prime Minister and its Defence Minister. See, Mediapool.bg, "https://www.mediapool.bg/otnosheniyata-sas-severna-makedoniya-vlizat-v-oshte-po-ostra-kriza-obnovena-news317483.html" ("Relations with Northern Macedonia enter even more acute crisis (Updated)"), 29 January 2021, at https://www.mediapool.bg/otnosheniyata-sas-severna-makedoniya-vlizat-v-oshte-po-ostra-kriza-obnovena-news317483.html.

However, this post will show that Bulgaria's stance cannot only be concerned with itself, especially not with mere views and feelings that parts of its current governmental team want to instrumentalise for internal political aims. Bulgaria's constant and instrumentalized opposition to eventually allowing North Macedonian to reach its next step in the EU accession process takes place in an institutional and legal context which concerns the whole Union and its direct neighbourhood; not only Bulgaria.

Yet, so far it appears as if Bulgaria was given free rein to harm its neighbour's political goal by abusing its rights and the complex procedures applicable to EU enlargement. Meanwhile, North Macedonia is unable to enjoy the regular course of its candidacy to the EU despite its constant efforts, which have been welcomed by most EU institutions and EU member States.

Bulgaria's tactic damages not only European politics by opening the door to a further sliding of the Western Balkans into the orbit of other great powers,[105] but it also harms the very idea of rule of law at the European level. Bulgaria's conduct seems to be based on a questionable cocktail of political, cultural and legal instrumentalization.[106] There is a likelihood of this situation leaving a lasting adverse impact on the peoples of North Macedonia and the region, if nothing is done to re-establish basic considerations of justice in the highly political process of the EU enlargement.

Bulgaria's blackmailing is targeting the fate of North Macedonia in a critical moment by leveraging identarian and nationalist-cultural debates. By doing so without any real legal arguments in support, and without even articulating arguments vaguely

[105] nytimes.com, "He Changed His Country's Name. Will North Macedonia Punish Him?", 14 July 2020, at https://www.nytimes.com/2020/07/14/world/europe/north-macedonia-election-zoran-zaev.html.

[106] See, for an analysis by a Macedonian think tank of the claims that Bulgaria has distributed among member states to back up it´s de facto vetoing of a framework for the candidacy of both North Macedonia and Bulgaria, European Policy Institute – Skopkje, "EU – North Macedonia Accession Negotiations: The Implications of the Bulgarian Conditions", 3 June 2020, at https://epi.org.mk/post/15046?lang=en. See also, bellingcat.com, "Russian interference in North Macedonia: A View Before the Elections", 4 July 2020, at https://www.bellingcat.com/news/uk-and-europe/2020/07/04/russian-interference-in-north-macedonia-a-view-before-the-elections/.

relating to the EU accession process itself, Bulgaria is unmistakably acting in bad faith by misusing EU and international legal rules. Yet without judicial means of dispute resolution, these violations are unlikely to generate legal consequences at this stage.

Bulgaria's strategy of intimidation and improper pressure takes full advantage of a structural inequality in its relationship with North Macedonia. North Macedonia could or should contemplate raising aspects of this "dispute" before an international court or body, especially because it has a treaty of amity in force with Bulgaria, which is blatantly violated by the latter's offensive attitude against its neighbour. Yet, such a move is seemingly politically delicate at the moment, since this will most probably accentuate fears that the EU accession process in the case of North Macedonia would get stalled even longer. This is a clear manifestation of the successful blackmailing campaign that Bulgaria is running against its Macedonian neighbour, by taking full advantage of its relative privileged position as an EU member State to crudely exert pressure in view of purportedly internal political gains.[107]

The current situation created by Bulgaria, is not operating in a vacuum: other states are also rallying along to hinder the way of North Macedonia's possible accession to the Union. Before Bulgaria's bid against its neighbour in the European institutions, France together with the Netherlands and Denmark disrupted this process for EU and internal political reasons. Also, letting another deadlock perdure after 30 years of constant opposition from Greece opposing North Macedonia's very identity on the international level and right on the heels of the conclusion the Prespa Agreement, is a clear denial of justice. This post will touch upon four dimensions in which Bulgaria's behaviour towards North Macedonia can nonetheless be seen as violating international law.

[107] See, for instance, Euronews.com, "Bulgaria's block on North Macedonia's bid to join EU 'massively endangers Europe's security'", 8 December 2020, at https://www.euronews.com/2020/12/08/bulgaria-s-block-on-north-macedonia-s-bid-to-join-eu-massively-endangers-europe-s-security/, Financial Times, "Bulgaria moves to bar North Macedonia from joining EU", 17 November 2020.

2.1. By de facto and arbitrarily vetoing North Macedonia's bid to access the EU, Bulgaria is violating the bilateral "Treaty of Friendship" in force with its neighbour

On the 1st August 2017, official representatives of Bulgaria and the Republic of North Macedonia had signed a Treaty of Friendship, Good neighbourliness, and Cooperation. This Treaty of Friendship had officially entered into force on 14 February 2018, with the exchange of the instruments of ratifications, according to its Article 13.[108] The European Parliament has denounced in its resolution 2019/2883(RSP) the repeated failure of the European Council to reach an agreement on the opening of negotiations for the accession of North Macedonia to the EU, especially when this country has achieved important progress in line with EU expectations.[109] In this regard, the European Parliament has referred in particular to the Prespa Agreement concluded with Greece and the aforementioned Treaty of Friendship.[110] Also, despite hopes that this bilateral treaty concluded between Bulgaria and North Macedonia would demonstrate the determination of both sides to overcome bilateral issues and serve as an inspiration for the whole

[108] UN Depository Library System, No. 55013, Bulgaria and The former Yugoslav Republic of Macedonia, Treaty of friendship, good-neighbourliness and cooperation between the Republic of Bulgaria and the Republic of Macedonia. Skopje, 1 August 2017, Registered with the UN Secretary on 8 March 2018, at https://treaties.un.org/doc/Publication/UNTS/No%20Volume/55013/Part/I-55013-08000002804f5d3c.pdf. See also, Bulgarian National Television, Macedonia Ratifies Good Neighbourly Relations Agreement with Bulgaria, January 2018, at https://bnt.bg/news/macedonia-ratifies-good-neighbourly-relations-agreement-with-bulgaria-173709news.html.

[109] European Commission, Commission Staff Working Document North Macedonia 2019 Report, 29 May 2019, SWD(2019) 218 final, at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf, p. 5, pp. 53-5, p. 99; European Council, Joint letter by Presidents Tusk, Sassoli, Juncker and President-elect Von der Leyen on the opening of accession talks with North Macedonia and Albania, 3 October 2019, at https://www.consilium.europa.eu/en/press/press-releases/2019/10/03/joint-letter-by-presidents-tusk-juncker-sassoli-and-president-elect-von-der-leyen-to-the-eu-heads-of-state-or-government-on-the-accession-talks-with-north-macedonia-and-albania/; reuters.com, "France under fire for 'historic error' of blocking Balkan EU hopefuls", 18 October 2019, at https://www.reuters.com/article/us-eu-summit-balkans-idUSKBN1WX1CT ; Council of the European Union, Enlargement and stabilisation and association process – the Republic of North Macedonia and the Republic of Albania, Council conclusions, 7002/20, ELARG 20, COWEB 35, 25 March 2020, p. 3, para. 6.

[110] European Parliament, Opening accession negotiations with North Macedonia and Albania, P9_TA(2019)0050, 2019/2883(RSP), 24 October 2019, at https://www.europarl.europa.eu/doceo/document/TA-9-2019-0050_EN.html, paras. I and 2.

region,[111] Bulgaria's blackmailing campaign against its neighbour constitutes a blatant violation of the very core of this Treaty of Friendship as well as international obligations applicable to their bilateral relationship.

The bilateral treaty unambiguously obliges both states to develop comprehensive relations in pursuance with fundamental principles of international law and good neighbourliness (Art. 1);[112] to cooperate with the UN, the OSCE, the CoE and other international organisations and fora (Art. 2);[113] as well as to facilitate the development of the cooperation among Southeast European countries and strengthening understanding, peace and stability in the region (Art. 3).[114] To this effect, Art. 4 provides for an obligation to maintain contacts between the two countries.[115] Arts. 10 and 11 set for an obligation to advance cooperation among others in the legal consular areas, and to prevent themselves to "undertake, encourage or support activities aimed against the other Contracting Party, which are of hostile nature."[116] Admittedly, Bulgaria has not called for any violent action against its neighbour. Yet, the diffusion of its claims at the international level for justifying its coercion campaign against North Macedonia can clearly be considered as part of a hostile propaganda aimed at harming the latter. Indeed, Art. 11(6) requires that States "undertake efficient measures to prevent ill-intentioned propaganda by institutions and agencies and shall discourage activities of private entities […] that may be detrimental to their relations."[117]

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111 European Union External Action, Statement by High Representative/Vice-President Frederica Mogherini and Commissioner Johannes Hahn on the signature of a bilateral treaty between Bulgaria and the former Yugoslav Republic of Macedonia, 170801_23, 1 August 2017, at https://eeas.europa.eu/headquarters/headquarters-homepage_en/30591/StatementbyHighRepresentative/Vice-PresidentFedericaMogheriniandCommissionerJohannesHahnonthesignatureofabilateraltreatybetweenBulgariaandtheformerYugoslavRepublicofMacedonia.

112 UN Depository Library System, No. 55013, Bulgaria and The former Yugoslav Republic of Macedonia, Treaty of friendship, good-neighbourliness and cooperation between the Republic of Bulgaria and the Republic of Macedonia. Skopje, 1 August 2017, Registered with the UN Secretary on 8 March 2018, at https://treaties.un.org/doc/Publication/UNTS/No%20Volume/55013/Part/I-55013-08000002804f5d3c.pdf, pp. 14-5.

113 Ibid., p. 15.

114 Ibid.

115 Ibid.

116 Ibid., p. 16.

117 Ibid., pp. 16-7.

Furthermore, Art. 12 of that treaty established a Joint Intergovernmental Commission composed of the Minister of Foreign Affairs and senior officials from both countries, which meets at least once a year for "reviewing the effective implementation of this Treaty, to adopt measures to improve bilateral co-operation as well as to resolve issues arising during the implementation of the treaty."[118] Instead of raising its concerns purportedly about North Macedonia's identity and status, Bulgarian officials have preferred to directly pressure North Macedonia on the European scene with political and cultural claims. This could be interpreted as a sign of Bulgaria's bad faith in its attempts to disrupt the admission of North Macedonia as an official EU candidate. Furthermore, Bulgaria's bid to derail the accession process of its neighbour in the Union, does not only hinder cooperation but clearly harms North Macedonia's core interests by disputing its very existence as a 'proper' State.

2.2. How Bulgaria's attitude towards North Macedonia constitutes unreasonable and harmful bad faith violating international law

As emphasised above, Bulgaria's claims are politically motivated and they have weaponised history and culture in order to exert pressure over its neighbour at a key moment of its history. Bulgaria's attitude and actions towards North Macedonia amount to a form of blackmail in order to force the latter to modify key elements of its identity and culture, which in themselves can constitute violations of key international legal principles, especially the principles of self-determination and non-intervention principle into the internal affairs of other states. Here we focus on one general but fundamental principle of international law applicable to the current situation: the principle of good faith.

Good faith constitutes a core principle of international law, as enshrined in Art. 2(2) of the UN Charter,[119] and it is deeply connected to the principle of equality between

[118] Ibid., p. 17, Art. 12(1)-(2).
[119] Charter of the United Nations and Statute of the International Court of Justice, San Francisco, 1945, p. 3, Art. 2.

States. One of the most prominent sources for the principle of good faith is the UNGA Declaration on Friendly Relations and Co-operation among States (2626(XXV)).[120] Also, this principle applies to all international treaties validly concluded and entered into by contracting states, since Art. 26 of the VCLT clearly declares that every treaty in force must be performed in good faith.[121] Thus, this principle applies to the bilateral treaty concluded between Bulgaria and North Macedonia. The ICJ in its *Nuclear Tests* Judgment (*Australia v. France*) clearly placed the principle of good faith at the core of international principles applicable to international obligations: "One of the basic principles governing the creation and performance of legal obligations, *whatever their source*, is the principle of good faith."[122] Various other international legal authorities confirm the importance of this principle of international law, especially with respect to good neighbourliness.[123]

Moreover, the good faith principle is "chiefly concerned with the way in which States conduct themselves in their relations with one another, encompassing general elements of 'honesty, fairness and reasonableness'."[124] The connection between good faith and reasonableness was clearly established in several ICJ judgements,[125] including in its *Gabčíkovo-Nagymaros Project Case*[126] *and earlier*

[120] Markus Kotzur, "Good Faith (Bona Fide), *Max Planck Encyclopedia of Public International Law*, January 2009, para. 9.

[121] United Nations, Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969, Entered into force on 27 January 1980, United Nations Treaty Series, vol. 1155, p. 331.

[122] ICJ, *Nuclear Tests Case* (*Australia v. France*), Judgment, *I.C.J. Reports 1974*, p. 253, p. 268, para. 46.

[123] See, for instance, Michael Byers, "Abuse of Rights: An Old Principle, A New Age" (2002), *McGill Law Journal*, 2002, Vol. 47, No. 2, pp. 389-434, p. 401, citing "(*Canada v. France*) (1986), 82 I.L.R. 590 at para. 28 (Arbitral Tribunal, Arbitrators: De Visscher, Pharand, Quéneudec)." See, more generally, on the continuous importance of this principle in international law, Guillaume Futhazar and Anne Peters, "Good faith" *in* Jorge E. Viñuales, *The UN Friendly Relations Declaration at 50: An Assessment of the* Fundamental *Principles of International Law* (CUP; September 2020), pp. 189-228.

[124] Andrew D. Mitchell and Trina Malone, "Abuse of Process in Inter-State Dispute Resolution", *Max Plank Encyclopedia of International Procedural Law*, December 2018, para. 7.

[125] Asier Garrido-Muñoz, "Managing Uncertainty: The International Court of Justice, 'Objective Reasonableness' and the Judicial Function", *Leiden Journal of International Law*, 2017, Vol. 30, No. 2, pp. 457-474, p. 464 and p. 466.

[126] ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7, pp. 78-79, para. 142.

on in its Military and Paramilitary Activities Case (Nicaragua v. The United States)[127]*.*

The latter case is of particular importance since one of the subject-matters covered by the dispute concerned a bilateral treaty of friendship concluded between Nicaragua and the United States. In the latter case, the ICJ has stressed that under customary international law "[t]here must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty."[128] On that basis, the Court eventually determined that "there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two parties to it",[129] by retaining violent actions which took place against Nicaragua but also economic pressure.[130] This shows that under international law, a violation of a treaty validly concluded by acting in bad faith not only with its terms but also its very object and purpose, can be qualified as such, without necessarily consisting of military or violent actions.

This point is important to consider in light of the multiform pressures that Bulgaria is exerting against North Macedonia. By impeding North Macedonia's way to the opening of official negotiations about its possible accession to the EU which also account for the latter's serious political and economic interests, on the mere basis of political and cultural claims instead of legal claims, Bulgaria clearly violates the terms as well as the object and purpose of the treaty of friendship between them.

Bulgaria has not only behaved in bad faith towards North Macedonia in the EU context, but it has also acted in an unreasonable manner by leveraging unfair advantages by virtue of its status as an EU member state. As noted, the principle of good faith is deeply connected to the principle of reasonableness at the

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127 ICJ, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, pp. 136-7, paras. 272-6.

128 Ibid., p. 137, para. 273.

129 Ibid., p. 138, para. 275.

130 Ibid., para. 276.

international level.[131] This is certainly relevant, because Bulgaria's claims consist simply in the negation of the key features of the North Macedonian statehood by ultimately requiring North Macedonia to negate its own existence as a sovereign state.

One cannot ignore that Bulgaria's blackmailing of North Macedonia in the context of the latter's desire to join the Union is even more criticisable, since Bulgaria has notably benefited from the Union's "leniency" for its own accession, considering that Bulgaria was not in compliance with the EU's rule of law criteria.[132] It seems ironic that Bulgaria feels free to misuse EU accession procedures and rules, without even articulating legal and EU-related claims for backing up its political blackmailing.

This leads us to two other types of general norms of international law which are applicable to Bulgaria's conduct and actions in this context, which will be dealt with in the next section.

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131 Asier Garrido-Muñoz, "Managing Uncertainty: The International Court of Justice, 'Objective Reasonableness' and the Judicial Function", *Leiden Journal of International Law*, 2017, Vol. 30, No. 2, pp. 457-474, p. 467; Michael Byers, "Abuse of Rights: An Old Principle, A New Age" (2002), *McGill Law Journal*, 2002, Vol. 47, No. 2, pp. 389-434, p. 411 citing B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), p. 121.

132 See, for instance, FAZ.net, "Was tun mit dem Balkan?", 1 January 2021, at https://www.faz.net/aktuell/politik/ausland/was-der-stopp-der-eu-erweiterung-fuer-den-balkan-bedeutet-17123311.html. Indeed, Bulgaria has been subjected to a post-accession review of its compliance with EU requirements, together with Romania. See, in that respect, Euopean Commission, European Commission reports on progress in Bulgaria under the Cooperation and Verification Mechanism, 13 November 2018, at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6364.

2.3. Bulgaria's instrumentalization of EU accession rules for its mere internal political gains is abusive under international law

With the Framework position adopted by the Bulgarian Government[133] and the Declaration confirmed by the Assembly in October 2019[134], Bulgaria presented set of conditions that would

need to become part of the EU accession framework for North Macedonia to gain Bulgaria´s consent in order to initiate the negotiation process. Some examples of these conditions are acknowledgment that the Macedonian language is codified Bulgarian dialect and that there should be no mention of Macedonian language as part of EU documents or that North Macedonia and the EU should use only the full name of the country and not the shortened form. These conditions are not only unrelated to the EU accession rules and clearly unacceptable by the Macedonian side, but also contradict the Prespa agreement which refers to the distinct nature of the Macedonian language, history and culture. Further, the European Charter of Fundamental Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international charters and conventions from which the Macedonian people derive their inalienable and sovereign rights to self-determination are in turn closely related to their state-building status and national, historical, cultural, linguistic and nominal identities. However, at the same time, it cannot be entirely disregarded that the actions of Bulgaria against the North Macedonian accession have been happening in a turbulent political climate where the nationalist ruling party has been dealing with continued mass demonstrations against its rule for months and have therefore resorted to stoking nationalistic

133 Bulgarian Government, "РАМКОВА ПОЗИЦИЯ ОТНОСНО РАЗШИРЯВАНЕ НА ЕС И ПРОЦЕСА НА СТАБИЛИЗИРАНЕ И АСОЦИИРАНЕ: РЕПУБЛИКА СЕВЕРНА МАКЕДОНИЯ И АЛБАНИЯ" ("Framework position on EU enlargement and the stabilization and association process: the Republic of Northern Macedonia and Albania"), 9 October 2019, at https://www.gov.bg/bg/prestsentar/novini/ramkova-pozitsia.

134 Bulgarian Parliament, "Народното събрание прие Декларация във връзка с разширяването на Европейския съюз и Процеса на стабилизиране и асоцииране на Република Северна Македония и Република Албания" ("The National Assembly adopted a Declaration on the Enlargement of the European Union and the Stabilization and Association Process of the Republic of Northern Macedonia and the Republic of Albania"), 10 October 2019, at https://www.parliament.bg/bg/news/ID/4920.

sentiments by drawing on historical fault-lines in order to divert from existing domestic issues of scandals and corruption. To summarize, Bulgaria's sustained attempts at politically hoodwinking its own peoples at the cost of North Macedonia's legitimate political progress is an instance of instrumentalization of EU accession rules for internal political gains and thereby a violation of international law.

The doctrine of abuse of rights in international law is mostly seen as having a customa international legal value or to constitute a general principle of law according to Art. 38 of the ICJ Statute.[135] It is deeply connected to the principle of good faith, regarding which Michael Byers argued that abuse of rights "provides the threshold at which a lack of good faith gives rise to a violation of international law, with all the attendant consequences."[136] Similarly, abuse of process is mostly qualified under international law as a general principle of law.[137] Also, since abuse of process derives from the principle of good faith, it is also based on international treaty law according to Art. 26 of the VCLT which "requires that every treaty in force must be performed by the parties in good faith, thereby requiring state parties not to abuse the processes of the treaty and its relevant dispute mechanisms."[138]

The doctrine of abuse of process is "directed against certain misuses of procedural rights and instruments by a party to a dispute."[139] Robert Kolb has defined it more precisely as consisting of "the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights are established, especially for fraudulent, procrastinatory or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process or for

135 Michael Byers, "Abuse of Rights: An Old Principle, A New Age" (2002), *McGill Law Journal*, 2002, Vol. 47, No. 2, pp. 389-434, p. 397.
136 Ibid., p. 411.
137 See, for instance, Luke Tattersall and Azfer A. Khan, "Taking Stock: Abuse of Process within the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, 2020, Vol. 19, No. 2, pp. 229-268, p. 258.
138 United Nations, Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969, Entered into force on 27 January 1980, United Nations Treaty Series, vol. 1155, p. 331.
139 Andrew D. Mitchell and Trina Malone, "Abuse of Process in Inter-State Dispute Resolution", *Max Planck Encyclopedia of International Procedural Law*, December 2018, para. 1

purposes of pure propaganda."[140] Hervé Ascencio after recalling that this doctrine can be "deduced from the good faith", indicates that it is "aimed at limiting the exercise of procedural subjective rights in some circumstances deemed to be abusive" and stresses its function which is the "correction [of] a too formalistic approach of the procedure, taking into account elements of social finality and fairness."[141] According to him, two main ideas are covered by this doctrine: "an abuse of right occurs when its beneficiary uses it in contradiction with the goal pursued by the rule instituting that right; or when its exercise affects the balance of interests at stake and favours in a disproportionate manner the beneficiary of the right."[142] Also, Alexandre Kiss has distinguished three forms of abuses of rights, including one applicable to Bulgaria's blackmailing operation, in situations when a state exercises a right "intentionally for an end which is different from that of which the right has been created, with the result that injury is caused."[143]

Even if the ICJ has clearly distinguished the two international legal concepts,[144] we are here applying both to the situation between Bulgaria and North Macedonia, since they are oftentimes considered as having partly overlapping scope of application.[145] Also, if some authors consider primarily their application in the context of international dispute settlement procedures, which is not currently the case for the aforementioned dispute, we submit that as principles of international law, they are relevant in the European Union context. This is especially the case in

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140 Ibid. (our emphasis), citing Robert Kolb, "General Principles of Procedural Law" *in* Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (OUP; 2019), pp. 998-9, at para. 49.

141 Hervé Ascencio, "Abuse of Process in International Investment Arbitration", *Chinese Journal of International Law*, 2014, Vol. 13, No. 4, pp. 763-785, p. 764.

142 Ibid., pp. 764-5.

143 Alexandre Kiss, Abuse of Rights, *Max Planck Encyclopedia of Public International Law*, December 2006, para. 5.

144 See, for instance, Andrew D. Mitchell and Trina Malone, "Abuse of Process in Inter-State Dispute Resolution", *Max Planck Encyclopedia of International Procedural Law*, December 2018, para. 2.

145 ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment of 6 June 2018, *I.C.J. Reports 2018*, p. 292, pp. 336-7, paras. 150-1. On that, see Luke Tattersall and Azfer A. Khan, "Taking Stock: Abuse of Process within the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, 2020, Vol. 19, No. 2, pp. 229-268, pp. 238-9.

the inter-governmental setting, and reinforced by the Union's willingness to respect international law at the core of its functioning.[146]

2.4. Abuse of rights and process in international law as applicable to the EU accession framework

The procedure applying to votes by the European Council concerning the opening of negotiations for Albania and North Macedonia's accession to the EU are regulated by Art. 12(1) of the Rules of Procedure of the European Council, which provides for the use of unanimity.[147] In the case of North Macedonia, it must as a Western Balkan State respect the requirements and procedures detailed in the Stabilisation and Association Process applicable to them.[148] The rule of unanimity therefore applies to the EU Council's decision and is required for adopting a framework or a mandate for negotiations with the candidate country, which is exactly the context of Bulgaria's blackmailing efforts.[149]

However, according to the European Parliament resolution 2019/2883(RSP), "pursuant to Article 49 TEU, any state in Europe may apply to become a member of the European Union provided that it adheres to the Copenhagen criteria and the principles of democracy, respects fundamental freedoms and human and minority rights, and upholds the rule of law."[150] Accession to the EU is therefore regulated by the so-called Copenhagen criteria, which are themselves based on Arts. 49 and 6(1) TUE.[151] According to those criteria, deciding upon the adoption of a framework for the sake of a candidacy of a third country to join the Union, remarkably does not

146 See, Treaty of the European Union, Arts. 2 and 49.
147 EU, Rules of Procedure of the European Council, Rules of Procedure of the Council, December 2009, at https://europa.eu/european-union/sites/europaeu/files/docs/body/rules_of_procedure_of_the_council_en.pdf, p. 10, Art. 12.
148 Ibid., under "Special process for Western Balkans."
149 European Commission, European Neighbourhood Policy and Enlargement Negotiations, Steps towards joining, at https://ec.europa.eu/neighbourhood-enlargement/policy/steps-towards-joining_en, under "Membership negotiations – in detail".
150 European Parliament, Opening accession negotiations with North Macedonia and Albania, P9_TA(2019)0050, 2019/2883(RSP), 24 October 2019, at https://www.europarl.europa.eu/doceo/document/TA-9-2019-0050_EN.html, para. 14.
151 EUR-lex, Glossary of summaries, Accession Criteria (Copenhagen Criteria), at https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhague.html.

rely on the pure individual will of EU member states, but rather on a list of material criteria. In any case, the attempt of an EU member state to revive and instrumentalise history in a complex region should presumably not trump the core elements of the rule of law according to the Union's own understanding of it.[152] Those objective criteria are very comprehensive, and North Macedonia has notably achieved significant progress in striving to satisfy them. This has been officially recognised multiple times and explains why North Macedonia was originally expected to become an official candidate in 2020.

As Michael Byers has argued, the doctrine of abuse of rights is perhaps the most useful in international law in areas or situations wherein State sovereignty is less limited.[153] In this regard, the EU procedural framework for deciding upon a possible EU enlargement in the case of North Macedonia (and Albania) is a good example, since this framework is based on unanimity and is thus maximalising space for sovereign choices that individual EU member states can make in this context.[154] Should the fact that Bulgaria's blackmailing taking place within the EU be perceived as problematic, another central feature of the Union should be recalled here. The EU constitutes at the very least a *legal community*. This means that Bulgaria's abuse of rights and procedures applicable in the EU by unreasonably pressuring its neighbour, directly contravenes the (ideal) possibility of a *common understanding* that EU accession procedures and rules concerning primarily the fate of the Union cannot be hijacked for internal political purposes of one member state without any claims.[155] This is even more so the case whenever political and legal requirements

[152] See, in this sense, CEPS, "The EU's enlargement agenda is no longer fit for purpose", 12 January 2021, at https://www.ceps.eu/the-eus-enlargement-agenda-is-no-longer-fit-for-purpose/: "By trying to insert history into the accession process, the Bulgarian government is not only undermining the criteria for accession, it also seems to be ignoring the vast experience of the EU in over 70 years of overcoming the legacy of the past and promoting a process based on reconciliation and the rule of law."

[153] Michael Byers, "Abuse of Rights: An Old Principle, A New Age" (2002), *McGill Law Journal*, 2002, Vol. 47, No. 2, pp. 389-434, p. 391: "Yet abuse of rights continues to play an important role in those few areas where the rights of states are still conceived as a general or primordial, by mediating between otherwise limiting the exercise of rights." See also, ibid., p. 423.

[154] For further information, see next section below.

[155] Comp. with Michael Byers, "Abuse of Rights: An Old Principle, A New Age" (2002), *McGill Law Journal*, 2002, Vol. 47, No. 2, pp. 389-434, p. 417: "Although in recent decades a significant degree of commonality has developed in some areas, a limited degree of commonality remains characteristic in others. And, in addition to making it difficult to apply a concept of

as set out in EU law are fulfilled, since it strengthens the intensity of states' obligations not to act in bad faith in a way that instrumentalises otherwise legitimate rights for harming another state.[156]

Bulgaria is instrumentalising its vote for the adoption of the EU Commission's proposed negotiation framework for North Macedonia for other purposes, i.e., to advance a political agenda based on historical and cultural claims which are irrelevant to EU requirements for granting the official status of candidate country to EU accession. Therefore, it can be regarded as violating the aforementioned international fundamental principles by abusing the rights it enjoys in the Union as well as the EU legal processes applicable to possible enlargement. This is even more problematic in light of France's blocking of negotiation talks for North Macedonia and Albania for want of reinforcement of EU enlargement procedures, especially when these procedures have already been strengthened.[157]

If there is formally no right of veto explicitly conferred upon EU member states, the fact that unanimity is required under EU law for enlargement-related matters should invite us to consider the possibility of revisiting a proposal made previously regarding the UN Security Council and defended by several EU member states, on restraining the possibility to indefinitely use a veto power without any justifications whatsoever.[158] While the situation at stake with the ongoing Bulgarian strong-

reasonableness, a lack of commonality makes it unlikely that specific rules will have evolved in the latter areas to limit rights that have traditionally been cast in general and primoradial terms."

156 Michael Byers, "Abuse of Rights: An Old Principle, A New Age" (2002), *McGill Law Journal*, 2002, Vol. 47, No. 2, pp. 389-434, pp. 404-5, citing "N.-S. Politis, "Le problème des limitations de la souveraineté et de l'abus des droits dans les rapports internationaux" (1925) 1 Rec. des Cours 1 at 81" and p. 406, citing "L. Oppenheim, *International Law: A Treatise,* 8th ed., ed. by H. Lauterpacht (London: Longmans, Green & Co., 1955) at 345."

157 Council of the EU, Enlargement and stabilisation and association process – the Republic of North Macedonia and the Republic of Albania, Council Conclusion, COM(2020) 57 final, SWD(2020) 46 final and SWD(2020) 47 final, 7002/20, 25 March 2020.

158 Comp. with the French-Mexican Proposal for restraining the use of veto within the UNSC. Globalr2p.org, "Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities", 1 August 2015, at https://www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/; Globalr2p.org, "List of Supporters of the Political Declaration on Suspension of Veto," Updated in March, at https://www.globalr2p.org/resources/list-of-supporters-of-the-political-declaration-on-suspension-of-veto/. See also individual positions of EU member states (Italy, Slovenia, France, Spain, Latvia, Estonia, in United Nations, Member States Call for Removing Veto Power, Expanding Security Council to Include New Permanent Seats, as General Assembly Debates

arming within the EU obviously does not pertain to mass crimes, the abusive use of EU procedures and rules in bad faith contributes nonetheless to seriously injuring the rule of law as well as the Union's core interests and its standing in the region. Serious concerns about the unimpeded instrumentalisation of a de facto veto power by Bulgaria are even more aggravated given various issues that exist in Bulgaria concerning the rights of the Macedonian minority.

2.5. Bulgaria's abusive behaviour is also harming the rights of the Macedonian minority living in Bulgaria as well as the authority of the Strasbourg Court

Reportedly, Bulgaria is expressing fears that a possible North Macedonian accession to the EU could revive tensions relating to the Macedonian minority living on its territory.[159] These Bulgarian concerns have been expressed to justify the vetoing of North Macedonia's official candidacy to accede to the EU, in spite of North Macedonia actively taking steps to calm those fears, and the Treaty of Friendship in force between the two countries actually covering this subject-matter comprehensively under its Art. 11.[160] To this effect, Art. 11(5) provides for the following unilateral engagement of North Macedonia towards its neighbour: "The Republic of Macedonia confirms that nothing in its Constitution can and should be

Reform Plans for 15-Member Organ", 20 November 2018, at https://www.un.org/press/en/2018/ga12091.doc.htm. See also the common position of the EU, permenentrepresentations.nl, "Statement on behalf of the Group of Friends of the Responsibility to Protect", 7 September 2017, at https://www.permanentrepresentations.nl/documents/speeches/2017/09/06/statement-on-behalf-of-the-group-of-friends-of-the-responsibility-to-protect.

159 See, for instance, Ioannis Prezas, "A bilateral treaty developing legal effects erga omnes? Reflections on the Prespa Agreement between Greece and North Macedonia settling the name dispute", *Questions of International Law*, 17 January 2020, at http://www.qil-qdi.org/a-bilateral-treaty-developing-legal-effects-erga-omnes-reflections-on-the-prespa-agreement-between-greece-and-north-macedonia-settling-the-name-dispute/, pp. 21-61, p. 54 citing "The declaration by the Bulgarian Minister of Foreign Affairs Ekaterina Zaharieva on 11 June 2019: 'Bulgaria Will Be Watching Closely Implementation of Treaty with North Macedonia during Its EU Accession Negotiations' < www.mfa.bg/en/news/22329>."

160 See, UN Depository Library System, No. 55013, Bulgaria and The former Yugoslav Republic of Macedonia, Treaty of friendship, good-neighbourliness and cooperation between the Republic of Bulgaria and the Republic of Macedonia. Skopje, 1 August 2017, Registered with the UN Secretary on 8 March 2018, at https://treaties.un.org/doc/Publication/UNTS/No%20Volume/55013/Part/I-55013-08000002804f5d3c.pdf, pp. 16-7, Art. 11.

interpreted as constituting or will ever constitute a basis for interfering in the internal affairs of the Republic of Bulgaria with the purpose of protecting the status and rights of persons who are not citizens of the Republic of Macedonia."

However, if this interpretation could have been upheld politically, legally the fact that the European Court of Human Rights have rendered several judgments condemning Bulgaria for the treatment of its Macedonian minority rights cannot be ignored.[161] So quite on the contrary, the situation between North Macedonia and Bulgaria endangers the rights and lives of minorities in both states, including those of Macedonians in Bulgaria.[162] This risk is particularly real due to the possibilities that Bulgaria's weaponization of the regional history with an offensive stance can lead to worsening of relationship between the peoples of both countries. Most recently, some Bulgarian political leaders started raising arguments with respect to the treatment of the Bulgarian minority in North Macedonia, offering another instance of Bulgaria's boldness to instrumentalise issues regardless of its own treatment towards its own minority.[163] This boldness has recently extended to the domestic affairs of North Macedonia whereby in anticipation of the Macedonian census and in context of alleged assaults on ethnic Bulgarian Macedonians, Bulgarian institutions are being urged by the state´s president to simplify the procedures for requiring Bulgarian citizenship for those publicly declaring themselves to be Bulgarians in North Macedonia[164]. This can be construed as a tactic to offer EU passports to citizens abroad in the garb of protecting their right of national self-awareness. This is not just an open offer of gain for change of ethnicity but also an instance of direct interference in the internal affairs of North Macedonia.[165]

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161 See recently for instance, ECtHR, *Macedonian Club for Ethnic Tolerance in Bulgaria and Radonov v. Bulgaria*, Application No. 6197/13, Judgment (5th Sect.) of the 28th May 2020.

162 Minority Rights Group International, Bulgaria, Macedonians, Updates in July 2018, at https://minorityrights.org/minorities/macedonians-2/.

163 dw.com, "Ноев: Сакаме Бугарите во Македонија да бидат пребројани" ("Noah: We want the Bulgarians in Macedonia to be counted"), 18 February, at here.

164 dw.com, "Писмото од Битола ја крена Бугарија на нозе" ("The letter from Bitola raised Bulgaria to it´s feet"),1 March 2021, at here.

165 mia.mk, "Pendarovski: Radev's reaction violates principle of non-interference in domestic affairs of other countries", 2 March, at . https://mia.mk/pendarovski-radev-s-reaction-violates-principle-of-non-interference-in-domestic-affairs-of-other-countries/?lang=en

Although several judgments have condemned Bulgaria for its treatment of the rights of the minority of ethnical Macedonians, who compose up to 10% of its population, this state has for the moment not modified its laws and policies to respect the judgments of the ECtHR.[166] The strategy deployed by Bulgaria against North Macedonia's bill to join the EU is another reminder that the Balkans do not need further tensions, both in light of the existing challenges in the region as well as those concerning the European political landscape.

[166] See, for instance, European Parliament, Parliamentary questions, Question for written answer E-003308-18 to the Commission, Subject: The rights of the Macedonian minority in Bulgaria, 18 June 2018, at https://www.europarl.europa.eu/doceo/document/E-8-2018-003308_EN.html.

5.4.2021

5

Corruption and access to justice in international law, Part 2

Our previous blogpost[167] made a pointed enquiry into the extent to which international law provides an infrastructure of access to justice for individuals and communities harmed by corruption across multiple sectors of society. It took into account how it has proven difficult to have an exhaustive and universal definition of corruption given its intrinsic link to the socio-political and economic circumstances, among other things, across societies. The post also identified the challenges entailed in seeking to widen the definition of corruption in order to widen the scope of applicable legal action against corrupt individuals and institutions. As a follow up exercise, the current post seeks to examine whether the discourse on corruption has witnessed any evolution in spite of its definitional constraints. The following discussion will focus on a narrow yet contested aspect of judicial function through both case law as well as by making reference to both substantive treaty obligations and best practices.

[167] Corruption and access to justice in international law, Part 1, available at https://just-access.de/corruption-and-access-to-justice-in-international-law-part-1/#sdfootnote6anc

It is important to recognize how international law has been continuously striving to combat corruption through various international treaties and instruments in the exigent battle against the growing menace of corruption. The Organization for Economic Co-Operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Anti-Bribery Convention'), the African Union Convention on Preventing and Combating Corruption ('AUCPCC'), the Inter-American Convention Against Corruption ('IACAC'), the United Nations Convention Against Transnational Organized Crime ('UNCTOC'), the Council of Europe Criminal Law Convention on Corruption ('CCLC') and the United Nations Convention Against Corruption ('UNCAC') are some of the primary anti-corruption treaties and instruments that have been negotiated and are currently in force with a view to expand upon and settle on an all-encompassing scope of corruption and the legal remedies available to those suffering from it. The UNCAC, as emphasized upon in our previous blogpost, has emerged as a formidable ally in this campaign against corruption. Albeit an exercise in reiteration, the UNCAC is the first global and legally binding anti-corruption instrument.[168] It calls for the inclusion of private actors to expand upon the definition of corruption into 'an abuse of public or private power for personal benefit or improper benefit or the exercise of improper influence over those entrusted with public or private power[169], without necessarily defining corruption.[170] In doing so, it mandates greater obligations of transparency and disclosure through public reporting obligations[171] and incentivizing self-reporting.[172] The UNCAC relies on accomplishing several of these measures by relying on the integrity and transparency of judicial systems that is further envisioned in Art. 11.

However, it must be noted that the institutions that are entrusted with providing justice against the grievances caused by corruption are unfortunately not immune

[168] https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html
[169] Eds. Rose et al, UNCAC Commentary, 3, 4.
[170] Eds. Cecily Rose, Michael Kubiciel and Oliver Landwehr, The United Nations Convention Against Corruption: A Commentary (Oxford, 2019), 23 on debates during drafting that led to this feature.
[171] Art. 10; Eds. Rose et al, UNCAC Commentary, 107-8.
[172] UNCAC Arts. 37 and 39.

from the scourge itself. Within the spectrum of activities that amount to corruption and have a systemic adverse impact, judicial corruption is by far one of the most injurious towards an entity/individual's access to justice. It is capable of percolating through several social and economic layers and thereby casting the darkest shadow.

Corruption in the court and tribunal systems has created an insurmountable crisis not only in the administration of justice but also in the functioning of other democratic institutions across the geo-political spectrum. And since corruption is directly linked to violation of human rights including access to justice, judicial corruption takes away the most fundamental redressal tool available to both individuals/entities.

Although there exist several elements to the anathema of judicial corruption, this post specifically wishes to explore the practice of double hatting through revolving doors as an extension of corruption being applicable to international legal practitioners, especially judges. The phenomenon of a revolving door is mostly seen in the field of international investment arbitration, wherein an individual may play multiple roles as that of the arbitrator, expert witness and counsel.[173] It is this simultaneous or sequential movement between roles that has generated considerable debate on grounds of conflict of interest and is oftentimes referred to as 'double hatting'.[174] This practice although is synonymous with the international investment community, however, has drawn the attention of international institutions such as the ICJ which clarified its rules on the participation of its judges in international investment arbitration proceedings.[175] One might also consider Art. 16(1) of the ICJ Statute alluding to a similar provision prohibiting any member of the Court from exercising any political or administrative function or engage in any

[173] See Malcolm Langford, Daniel Behn, Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' Journal of International Economic Law, 2017 at p. 1.

[174] *Ibid* while quoting Phillipe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel', in Arthur Rovine (ed.), Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (New York: Brill, 2012), at 28–49; Phillipe Sands, 'Developments in Geopolitics – The End(s) of Judicialization?' 2015 ESIL Conference Closing Speech, 12 September 2015.

[175] *Ibid*; see also https://www.icj-cij.org/en/other-texts/compilation-decisions

other occupation of a professional nature. However, this never stopped both serving as well as former ICJ judges from accepting arbitration appointments. This not only brought their duties as an ICJ judge under scrutiny, but also raised concerns regarding the independence and impartiality of the judges with respect to being compensated by their respective parties to an arbitration.[176] The Court of Arbitration for Sport ('CAS') became one of the first institutions to take a stand against the practice of double hatting way back in 2009.[177] The CAS amended its regulations to prevent the likelihood of an arbitrator favoring a recurrent counsel appointment across multiple cases, thus prompting other institutions to weigh in.[178]

Similarly, in ISDS cases, it is the 'public law' nature of arbitrations which fuels concerns regarding transparency and conflicts of interests raised by the revolving door phenomenon.[179] Recently, ICSID and UNCITRAL released a Draft Code of Conduct for Adjudicators applicable to ISDS cases.[180] The Draft Code although does not impose a blanket prohibition on double hatting[181], however, it does impose an obligation on the arbitrators to either refrain from acting, or disclosing their involvement in a significant capacity on matters involving the same parties (with the possibility of expanding this to include matters involving the same facts and/or treaty).[182]

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176 Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, "Is 'Moonlighting' a Problem? The Role of ICJ Judges in ISDS", Nov. 2017, IISD. https://www.iisd.org/articles/moonlighting-problem-role-icj-judges-isds

177 Clarissa Coleman, 'Two Heads Are Better Than One: Double Hatting and Its Impact on Diversity in International Arbitration', The National Law Review, Vol. XI, No. 88 (2020), available at https://www.natlawreview.com/article/two-heads-are-better-one-double-hatting-and-its-impact-diversity-international

178 I*bid*.

179 Stephan Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach', 52 Virginia Journal of International Law 57 (2012).

180 Vanina Sucharitkul, 'ICSID and UNCITRAL Draft Code of Conduct: Potential Ban on Multiple Roles Could Negatively Impact Gender and Regional Diversity, as well as Generational Renewal', Kluwer Arbitration Blog (2020), available at http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-potential-ban-on-multiple-roles-could-negatively-impact-gender-and-regional-diversity-as-well-as-generational-renewal/; also see https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf

181 *Supra* note 11.

182 Art. 6 of the Draft Code, available at https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_IS

A case that recently ignited the debate around an arbitrator's duty of disclosure, among other things is the UK Supreme Court's decision in *Halliburton Company v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)*.[183] This case relates to an arbitration arising out of the Deepwater Horizon drilling rig oil spill accident in 2010, pursuant to which there was not just significant loss of life and massive environmental damages but thousands of civil claims were filed against BP Exploration and Production Inc ('BP') , Halliburton Company ('Halliburton') and Transocean Holdings LLC ('Transocean').[184] Transocean, as the manager and operator of the rig had leased it to BP. Halliburton was in charge of providing cementing and well monitoring services on the rig.[185] BP in turn claimed against Halliburton and Transocean, both of which held insurance policies with Chubb Bermuda Insurance Ltd ('Chubb'). This led to 3 concurrent arbitrations. However, the current discussion pivots on the resulting arbitration between Halliburton and Chubb arising out of Chubb's rejection of Halliburton's insurance claims under a Bermuda Form liability policy. Mr Kenneth Rokison QC was subsequently appointed by the English High Court as the third arbitrator in the Halliburton Arbitration as the parties could not agree on a presiding arbitrator.[186] What merits attention here is that Mr. Rokison went ahead and accepted arbitration appointments in the other 2 arbitrations as well (between Transocean and Chubb and between Transocean and a third-party insurer). These were subsequent appointments and were not disclosed by Mr. Rokison to Halliburton. Halliburton requested Mr. Rokison's resignation from the tribunal on becoming aware of these later appointments, which Mr. Rokison did not abide by. Eventually, Halliburton applied to the High Court seeking removal of Mr. Rokison under Sec. 24(1)(a) of

DS.pdf

183 2020] UKSC 48.

184 Ahmed Durrani, 'Halliburton v Chubb: Arbitrator's duty of disclosure and appearance of bias', ICAR (Jan 2021), available at https://www.investmentandcommercialarbitrationreview.com/post/halliburton-v-chubb-arbitrators-duty-of-disclosure-and-appearance-of-bias

185 James Dingley, Anokan Ghosh, 'Halliburton v. Chubb - An International Perspective: New-found Clarity Or Continued Uncertainty?, Jan 2021, available at https://www.mondaq.com/russianfederation/trials-appeals-compensation/1022228/halliburton-v-chubb--an-international-perspective-new-found-clarity-or-continued-uncertainty

186 *Ibid*.

the Arbitration Act, 1996 alleging perceived bias. Upon the High Court's refusal of Halliburton's application, the Court of Appeals also dismissed Halliburton's appeal and subsequently and in light of the issues at stake, the Supreme Court decided to hear the appeal.[187]

The Supreme Court relied on both established case laws[188] and best practices and codes of conduct of several international bodies[189] while determining the threshold for apparent bias and examining situations to determine if disclosure was necessary in the face of apparent bias. The Supreme Court finally found that although disclosure should have been made in alignment with the extant best practices, however, the lack of it alone would not necessarily lead a fair-minded and informed observer to infer a real possibility of bias.[190] The Supreme Court's final ruling in this case has given way to considerable discussions around an arbitrator's impartiality and unconscious bias. The crux of the ruling, while seeks to respond to the questions before it and thereby laying the jurisprudence, it also reinforces the obligations contained in the codes of conduct of other international bodies in the process. A recent ruling[191] by the Court of Appeal, much on the lines of the reasoning adopted in the afore-discussed Halliburton case, laid down guidelines for courts on matters of conflict of interest. While ruling on the specific aspect of 'expert witnesses', the Court of Appeal observed that a conflict of interest is a matter of degree[192], thus leaving room for the application of such principle to develop through best practices. Aspects of confidentiality and disclosure may not find their mention in legislations and are therefore often difficult to enforce, however, best practices and jurisprudence can often close legislative gaps.

Upon a preliminary perusal, a link between this case and our aforesaid discussion on judicial corruption may not be evident. However, a considered discussion on matters of impartiality, transparency, disclosure and confidentiality of judges and

187 Ruth Keating, Samar Abbas Kazmi, 'The axiom of impartiality: Halliburton v Chubb', IBA (2021).
188 Porter v Mgill [2000] UKHL 67.
189 The IBA, GAFTA, ICC, as well as LMAA, ICA, LCIA, CIArb to state a few.
190 *Supra* note 19.
191 *Secretariat Consulting PTE Ltd & Ors v A Company* [2021] EWCA Civ 6.
192 *Supra* note 21.

arbitrators, among other things, by the Supreme Court and the consequently developing literature around these, can lead to an incisive understanding of the dynamics of this particular facet of judicial corruption and the potential impact it can have on the concerned parties if left unchecked. It also remains to be seen if the aftermath of decisions like this can facilitate in the reevaluation of existing institutional anti-corruption measures and in the identification of blind spots in the present instruments.

In addition to the likelihood of running afoul of obligations of transparency and disclosure, revolving doors and double-hatting may also have certain ancillary pitfalls. The number of female arbitrators comprise of a very measly percentage of a homogenous group of white, male arbitrators and judges.[193] An already dismal statistic becomes even more egregious when maximum appointments are sought from the very same homogenous pool and all movement across matters and fora is monopolized by the members of said pool. The argument for this glaring issue of gender diversity can also be extended to a complete lack of regional diversity. Arbitrators and judges appointed by parties in investment or commercial arbitrations are primarily from the Global North (comprising of Western Europe and North Americas).[194] It can be further argued that the lack of competent professionals from all other regions is not just another signpost of western hegemony but also an instance of institutional failure towards facilitating diverse representation. The larger question of inadequate gender and regional representation itself is intimately tied to the idea of justice. A homogenous group of people will have the tendency to advocate for and safeguard only very specific set of interests and perspectives and therefore impact any consequent decision making accordingly. Such decision making can act as a barrier to securing justice for those who are already marginalized and underrepresented, thereby making access to justice partial and restricted._

193 *Supra* note 14.
194 *Ibid*.

Finally, corruption cannot be understood to exist in a vacuum outside of any system. It has to be identified and addressed within a given system of norms and processes. Corruption as a menace has evolved with time and thus it is imperative to equip existing infrastructures in place to keep up. Institutional practices with an inclination to accommodate power imbalances and overlook concentration of power, if left unchecked, may foster newer forms of corruption. The Halliburton case although dealt with issues of disclosure and transparency with caution, it did not lay down any strict guidelines thereby leaving room for future interpretation of these principles. Therefore, enforcement of these principles and obligations can be better accomplished in the backdrop of strong and independent judicial systems. An impartial system is a *sine qua non* in not only holding perpetrators of corruption accountable but also in securing justice for those who are affected by it. Therefore, it is imperative that any individual or body discharging either judicial or quasi-judicial functions remains free of any influences and biases that may render it incompetent and short-sighted in ensuring access to justice.

8.4.2021

6

2021 EU Justice Scoreboard roadmap - the feedback of Just Access e.V.

Using the opportunity to influence the shaping of laws and policies of the European Commission, today we submitted our feedback on the roadmap for 2021 EU Justice Scoreboard[195].

We are conveying our feedback integrally:

Just Access, a registered German NGO focused on access to justice, applauds the EU Justice Scoreboard, including its section 3.2.1 specifically dedicated to Accessibility.

While the quantitative element of this comparative exercise is unavoidable and in many ways useful, we recommend the regular and thorough revision of the Scoreboard's metrics. In addition to being a formal and immediate obligation, the provision of justice is also an aspirational exercise, a tool to continue pushing the

[195] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12903-2021-EU-Justice-Scoreboard/F2223984_en

boundaries of human rights and social justice. Neither EU norms nor the law itself remain static; but the Scorecard's quantified criteria themselves, as well as their underlying methodologies, risk undermining this vital aspiration.

For instance, the Scoreboard's metrics on caseload ignore and arguably misrepresent the number of EU citizens involved in litigious cases. The number of cases per 100 inhabitants is in many ways less relevant than the number of people involved in the cases, and their experience within the EU judicial systems. Preference for, or transition from litigation into, alternative resolutions, such as mediation, reconciliation, and community justice, is another meaningful but missing metric. Similarly, legal experts increasingly acknowledge the importance of insights from adjacent disciplines, such as cognitive and decision sciences, which have demonstrated that judicial independence can be compromised through double-hatting, revolving doors (e.g. between the judiciary and the legislative, as well as the executive branches), small gifts, and other phenomena that 'classic corruption' metrics applied in the Scoreboard fail to take into account.

In sum, Just Access regards the EU Justice Scoreboard as a tremendously useful and powerful tool, which must be systematically updated in accordance with evolving standards and practices in domestic, EU, and international law.

20.4.2021

7

Just Access e.V. feedback on "The Extension of the list of EU crimes to hate speech and hate crime"

This initiative of the European Commission "Hate speech & hate crime – inclusion on list of EU crimes" aims to expand the list of EU crimes to include hate speech and hate crime.

Here is our feedback to the roadmap[196]:

Just Access e.V., a German NGO focused on access to justice, welcomes the initiative to include an improved definition and scope of hate speech and hate crime on the list of EU crimes, with particular attention to sex, sexual orientation, age and disability as the criteria for hate speech and crime. Our recommendation is to improve pertaining EU regulation by balancing the human rights of extremist civil society organisations engaged in hate speech and crimes against EU States' international and municipal legal obligations to protect their own citizens; and to deprive extremist NGOs that promote hate speech from their sources of funding.

[196] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12872-Hate-speech-&-hate-crime-inclusion-on-list-of-EU-crimes/F2231413_en

The long-running World Values Survey and its European variants, including the Eurobarometer, have demonstrated that attitudes to sex, sexual orientation, age and disability are heavily influenced by cultural and ideological background, and that notions of heteronormativity, bias against women in the workplace and the voting booth, and associated unacceptable norms and practices strongly correlate with some traditional cultures. Developing mutual understanding and toleration, and overcoming hate speech and crime, require pro-active commitment and engagement; they are not the inevitable result of co-existence in European societies that, by design, also offer the option of isolated enclaves and self-radicalisation as an alternative to shaping and endorsing society-wide shared norms and practices. This is why hate speech and crime concerning sex, sexual orientation, age and disability cannot be viewed outside the context of empirically verified determinants, including culture.

Two chief cultural challenges relevant to improving legislation concerning hate speech and crime are immigration and state-sponsored hate speech. The integration of immigrants and refugees provide economic and cultural benefits to Europe, and adequate legal provisions must ensure that immigrants and refugees do not become victims of hate speech and crime; and conversely, that they are not isolated and self-radicalised due to unrealistic images of their host society as hate-filled and worthy of hate in turn.

Foreign states' sponsorship of hate speech and crime is a well-known and empirically verified fact. The French, Dutch, UK, Swedish, German, Swiss and other legislatures are debating at this moment how to counter Muslim Brotherhood-dominated NGOs that are deliberately and effectively inciting hatred and fear across Europe. The foreign funding from Turkey, Qatar, and other non-EU States that enables such NGOs to incite hatred through TV channels, school textbooks and courses on combat is an explicit part of the current parliamentary discussion in France, the UK, and the Netherlands. Improved EU regulation of hate speech and crime must address the responsibility of state sponsors of hate speech and crime

under public international law; otherwise the structure of incentives and available means of such organisations will continue to remain a core part of the problem.

The call for contributions notes that, "the initiative thus complements the Counter-Terrorism Agenda for the EU". Numerous legal mechanisms for the suppression of terrorism indeed apply to this issue, but the present contribution focuses on direct improvements of EU regulation on hate speech and crime. In that context, we note that Art. 20(2) of the International Covenant on Civil and Political Rights ("ICCPR") is a mandatory limitation on the freedom of expression to curtail hate speech. So is Art. 4 of the International Convention on the Elimination of Racial Discrimination, which was specifically applied in *Jewish Community of Oslo v. Norway* (CERD 30/03). In *Faurissan v. France*, the UN Human Rights Committee upheld the same principle to combat anti-Semitism.

Another relevant document at the UN level is Human Rights Council Resolution 7/19, which urged States to prohibit "the dissemination (…) of racist and xenophobic ideas and material aimed at any religion or its followers that constitute incitement to racial and religious hatred, hostility and violence".[197] According to the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the following elements are essential in determining whether an expression constitutes incitement to hatred: "real and imminent danger of violence resulting from the expression; intent of the speaker to incite discrimination, hostility or violence; and careful consideration by the judiciary of the context in which hatred was expressed".[198]

The *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* ("Rabat Plan") declares that "under international human rights standards, which are intended to guide legislation at the national level, expression labelled as 'hate

[197] UN Human Rights Council, Resolution 7/19, 27 April 2008, para. 8.
[198] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted in accordance with Human Rights Council resolution 16/4, A/67/357, of 7 September 2012, para. 46.

speech' can be restricted under articles 18 and 19 of the ICCPR on different grounds, including respect for the rights of others, public order or sometimes national security".[199] In addition, the Rabat Plan refers to the obligation of States to prohibit expressions that amount to incitements to discrimination, hostility or violence.

At the European level, the *General Recommendation No. 15* of the European Commission against Racism and Intolerance, which is part of the Council of Europe, is particularly relevant, as it deals with State obligations to combat hate speech. This document defines hate speech as "the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression".

Moreover, it recognises that "the use of hate speech appears to be increasing, especially through electronic forms of communication which magnify its impact, but that its exact extent remains unclear because of the lack of systematic reporting and collection of data on its occurrence and that this needs to be remedied, particularly through the provision of appropriate support for those targeted or affected by it". The Commission also states that an especially serious form of hate speech is the one that intends to "incite, or reasonably expected to have the effect of inciting others to commit, acts of violence, intimidation, hostility or discrimination against those who are targeted by it"[200]. In its *General Policy Recommendation No. 15 on Combating Hate Speech*, the European Commission against Racism and Intolerance (ECRI) called on parties to "withdraw all financial and other forms of support by public bodies from political parties and other organisations that use hate speech or fail to sanction its use by their members and provide, while respecting

[199] Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, para. 14.

[200] European Commission against Racism and Intolerance (ECRI), ECRI General Policy Recommendation No. 15 on Combating Hate Speech, Adopted on 8 December 2015, at https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.15, para. 9.

the right to freedom of association, for the possibility of prohibiting or dissolving such organisations regardless of whether they receive any form of support from public bodies where their use of hate speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it".[201] In its explanatory memorandum, ECRI specifies that such a withdrawal of support should cover "not only grants, loans and other forms of financing for the activities of the organisations concerned but also the making available to them of facilities or premises, the possibility to use staff and any other kind of practical assistance".[202]

According to the ECtHR, in the case of non-political associations the threshold for the necessity of interference is lower. In view of the difference between the importance of a political party and of a non-political association for a functioning democracy, only political parties are protected by the highest standard of scrutiny concerning the necessity of a restriction on the right to association.[203] Moreover, the national authorities enjoy a broader margin of appreciation in their assessment of the necessity of interference in cases of incitement to violence against an individual, a representative of the State, or a section of the population.[204] The Court has also recognised that an association whose leaders put forward a policy which does not respect the rules of democracy or which is aimed at its destruction and the flouting of the rights and freedoms recognised in a democracy can be subject to penalties.[205]

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201 European Commission against Racism and Intolerance (ECRI), ECRI General Policy Recommendation No. 15 on Combating Hate Speech, Adopted on 8 December 2015, at https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.15, para. 9.

202 European Commission against Racism and Intolerance (ECRI), ECRI General Policy Recommendation No. 15 on Combating Hate Speech, Explanatory Memorandum, para. 157.

203 ECtHR, *Vona v. Hungary*, Application No. 35943/10, Judgment rendered on 9 July 2013, para. 58; ECtHR, *Les Authentiks and Supras Auteuil 91 v. France*, Application Nos. 4696/11 and 4703/11, Judgment (2nd sect.) rendered on 27 October 2016, paras. 74 and 84.

204 ECtHR, *Les Authentiks and Supras Auteuil 91 v. France*, Applications Nos. 4696/11 and 4703/11, Judgment (2nd sect.) rendered on 27 October 2016, para. 84

205 ECtHR, *Zehra Foundation and Others v. Turkey*, Application No. 51595/07, Judgment (2nd sect.) rendered on 10 July 2018, para. 54

The ECtHR has argued that in the event of incitement to violence and/or hatred, State authorities enjoy a wider margin of appreciation when examining the need for interference. The Court found that the conviction and sentence of an applicant, convicted for remarks that incited violence and/or hatred, were proportionate to the aims pursued and necessary in a democratic society.[206] The Court also declared an interference with the freedom of expression to be lawful in a case in which the applicants were convicted after distributing leaflets and brochures advocating and glorifying warfare in the form of jihad.[207]

In sum, as this representative though partial overview shows, both international and European law already exists to enable the EU to improve legislation concerning hate speech and hate crime, specifically by honouring EU States' obligations to dissolve extremist NGOs and prosecute individuals who abuse NGOs to promote hate speech and incite hate crimes.

[206] ECtHR, *Zana v. Turkey,* 19 September 2000.
[207] ECtHR, *Kasymakhunov and Saybatalov v. Russia*, Applications No. 26261/05 and 26377/06, Judgment (1st sect.) rendered on 14 March 2013, para. 107.

13.4.2021

8

Responsible or complicit: a look at Myanmar's crisis through its business actors, people's resistance and the international community

1. Myanmar since February 2021

Myanmar's political landscape since February of this year has witnessed some extremely distressing transformation. Right before the start of the new parliament[208], the Myanmar military, or popularly known as the 'Tatmadaw', deposed the democratically elected government by staging a coup d'etat on February 01, 2021 and detaining the de facto leader and State Counsellor, Daw Aung San Suu Kyi, President Win Myint, members of the Union Election Commission ('UEC')[209] and several other political allies from the National League of Democracy ('NLD') party. The Tatmadaw, in addition to declaring a year-long state of emergency, precipitated a slew of subversive changes to the country's legal system by criminalizing peaceful protests, suspending basic protections under the

[208] https://www.dw.com/en/opinion-myanmar-sanctions-will-not-stop-the-bloodshed/a-56736649
[209] https://thewire.in/south-asia/civil-society-members-letter-india-myanmar-military-democracy-rights

Law Protecting the Privacy and Security of Citizens (2017)[210], authorizing arbitrary detentions and amending the Electronic Transactions Law to criminalize the online dissemination of information critical of the coup[211], to state a few.

As of April 11, 2021, according to the Assistance Association for Political Prisoners ('AAPP'), the publicized toll of the number of people killed by the Tatmadaw stands at 706[212] with the likelihood of the actual number of fatalities being far worse. The number of people under detention and having been tortured is much higher and is a continuously mounting toll with each day of the coup becoming ghastlier than the one before. The legitimacy drawn by the Tatmadaw for its actions does not find a source either in Myanmar's already skewed Constitution in favour of the military[213] or under any international legal standards. The attempt to justify the coup and the resulting violence on the civilians on account of election irregularities[214] is both unconstitutional and grossly disproportionate to the national interest it claims to protect. The present situation in Myanmar as projected by the military does not qualify for derogation from any of the human rights that it has been so prompt to suspend. Especially disquieting is the impunity with which rights of bodily integrity such as that of *habeus corpus* have been pilfered without any recourse to judicial review.[215] Since the Myanmar Constitution does not necessitate any review of 'legitimate measures' pursuant to the declaration of state emergency and consequently emboldens the military forces to steamroll any and all forms of dissent in the process, the ICJ considers this safeguard for the military forces as both unconstitutional and antithetical to the rule of law.[216]

Although Myanmar has witnessed severe political unrest in the past, the ongoing atrocities being committed by the Tatmadaw is drawing ire not just from the international community at large but is also seeing unyielding and almost universal

[210] https://www.hrw.org/news/2021/03/02/myanmar-post-coup-legal-changes-erode-human-rights
[211] *Ibid*.
[212] https://aappb.org/?p=14255
[213] https://www.icj.org/myanmar-military-coup-detat-violates-principles-of-rule-of-law-international-law-and-myanmars-constitution/
[214] https://news.un.org/en/story/2021/02/1084512
[215] *Supra* note 6.
[216] Art. 432 of the Myanmar Constitution; Supra note 6.

resistance from its own people.[217] The coup has not only resulted in a democratic reversal of sorts by clamping down and jeopardizing the rights and liberties of its peoples, but has also caused a major setback to a decade of peacebuilding efforts[218] and political and economic liberalization.[219] The response of the international community can be observed on a spectrum ranging from outright condemnation[220] to mild concern with a focus on instability.[221] This post will discuss some of these reactions with an emphasis on the human rights responsibilities of corporations presently operating in Myanmar. This post will also highlight the overall measures that have been or are likely to be considered by the international community in response to the ongoing turmoil as a means of securing relief for the people of Myanmar.

2. Business actors during the coup

The Tatmadaw has always found enablers and supporters in large global and multinational corporations. Since Myanmar's efforts of transitioning from a military rule into a civilian democratic government in 2011, multinational business entities operating in Myanmar and their links to the military have become more pronounced. For years preceding the present crisis in Myanmar, the Tatmadaw has been continuously linked to instances of grave human rights violations such as forced appearances, arbitrary detentions, torture and genocidal crimes against ethnic minorities such as the Rohingya Muslims. It is a well-known fact that the corporations doing business in Myanmar have always had reliable intel on the internal machinations of the military including corruption and other human rights violations.[222] As part of the Independent International Fact-finding Mission ('IIFFM

217 https://www.crisisgroup.org/asia/south-east-asia/myanmar/b166-responding-myanmar-coup
218 https://theconversation.com/myanmars-coup-might-discourage-international-aid-but-donors-should-adapt-not-leave-154742
219 *Supra* note 10.
220 Western states such as the U.S., NZ, the EU have almost unanimously condemned the coup and some have already issued sanctions.
221 China has emphasized on the need for 'stability' in Myanmar although it vetoed a UN Security Council resolution condemning the coup; Crisis Group interviews, diplomats and officials, New York, February 2021.
222 https://www.hrw.org/news/2021/02/03/your-business-funding-myanmar-military-abuses

Mission') in Myanmar under the 42nd session of the Human Rights Council, a report was published on the economic interests of the Myanmar military.[223] This report was in furtherance of the previous reports submitted to the Human Rights Council in the year 2018 which in addition to detailing the grave atrocities committed by the Tatmadaw against the ethnic Rohingya Muslims, also identified and investigated five areas of economic interests enabling the Tatmadaw.[224] Amongst them feature the military's principal conglomerates, Myanmar Economic Holdings Limited ('MEHL') and Myanmar Economic Corporation ('MEC') and the subsidiaries either owned or controlled by them. These are owned and controlled by senior personnel in the Tatmadaw and have more than 100 businesses across various sectors of the economy.[225] The Tatmadaw therefore is able to both fill its coffers and sustain and shield its autonomy from any democratic oversight. This untethered degree of financial independence and might effectively releases the Tatmadaw from any sense of accountability towards its actions and renders it practically immune from any civilian censure. The report by the IIFFM Mission essentially confirmed and underscored the existing commercial relationship between the aforesaid companies and its primary patrons. Although the IIFFM Mission report made several recommendations in line with its adverse findings, the primary proposition was to call on the commercial enterprises to cease all business activities with the Tatmadaw or any entities owned and controlled by them, including subsidiaries. The report since has been a testament to the economic facilitation of the Tatmadaw's unending cycle of violations and impunity. However, despite the recommendations and all the evidence establishing the military's culpability, it has still led to the present-day turmoil and rampant lawlessness while the military continues to remain as unscathed as before.

Some Western states have attempted to impact the status quo and mount international pressure by imposing economic sanctions on several personnel of the Tatmadaw, both in response to the current coup and at several points in the past

223 https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMMyanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf
224 *Ibid*, at p. 4.
225 *Supra* note 16.

before. The U.S. imposed sanctions by specifically targeting the MEHL, MEC and one of Tatmadaw's economic backbone enterprises involved in the mining and marketing of jade and gemstones, Myanma Gems Enterprise ('MGE')[226] and freezing their assets in the U.S. The European Union imposed sanctions on senior officials of the Tatmadaw by issuing a visa ban and by freezing of assets.[227] Germany and the UK have also cautioned and indicated towards imposing further sanctions. A number of Japanese companies, including Suzuki and beverage maker Kirin, have suspended business activities,[228] but are apprehensive of completely withdrawing from their trade partnership.[229] The Swedish giant H&M and Italy's Benetton have currently suspended all new orders from Myanmar in spite of Myanmar being a crucial manufacturer in the garment production industry.[230] The French energy giant, EDF has suspended an ongoing hydro-power dam project in Myanmar in response to the coup,[231] whereas another French company Voltalia plans to close all its activities entirely despite being active in Myanmar since 2018.[232] However, it must be noted that not all companies have been inclined towards making a strong statement in response to the situation. Prominent French corporations Total and Accor, which have significant investments in Myanmar, have professed little to no intention of suspending their respective operations in Myanmar.[233] Although both corporate giants insist that their local subsidiaries and business affiliates are in compliance with and respectful of universal human rights obligations, Accor's business partner Max Myanmar Group was named as one of the cronies of the military and one of the companies involved

226 https://mrwatchlist.com/2021/04/08/ofac-adds-myanma-gems-enterprise-to-myanmar-sanctions/ ; https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210408

227 https://www.voanews.com/east-asia-pacific/us-eu-impose-sanctions-myanmar-coup-leaders

228 https://mondediplo.com/2021/03/02myanmar

229 'Japan defence official warns Myanmar coup could increase China's influence in region', Reuters, 2 February 2021.

230 https://www.business-humanrights.org/es/últimas-noticias/myanmar-foreign-firms-in-myanmar-face-tough-choices-over-how-to-respond-to-the-military-coup-the-subsequent-violent-crackdown-on-pro-democracy-protesters/; https://www.thedailystar.net/business/news/foreign-firms-face-tough-choices-over-myanmar-unrest-2071665

231 https://www.france24.com/en/asia-pacific/20210322-eu-sanctions-myanmar-junta-chief-over-coup-and-protest-crackdown

232 https://www.business-humanrights.org/es/últimas-noticias/myanmar-foreign-firms-in-myanmar-face-tough-choices-over-how-to-respond-to-the-military-coup-the-subsequent-violent-crackdown-on-pro-democracy-protesters/

233 *Ibid*.

in crimes against humanity in the IIFFM report of 2019.[234] Danish brewer Carlsberg on the other hand has assured of 'no contact' with the new regime and plans to reduce its production of beer without intending to wind up its operations entirely as it employs about 500 people locally.[235]

Historically, sanctions have not always been the most effective as many of them do not act as deterrents on those imposed but end up affecting the already oppressed and affected civilian population.[236] However, these set of sanctions have been specifically targeted towards the military and officials of the military. Although the imposition of these economic embargos has not elicited any response from the Tatmadaw nor has it visibly mitigated the escalating crisis situation on the ground, but these certainly count as part of growing voices of international intervention intent on sustaining pressure through economic isolation.[237]

Since sanctions are primarily post facto international punitive measures in response to specific situations, what merits a closer examination is if businesses can operate within a framework that does not directly contribute to widespread human rights abuses. All kinds of businesses do not have the option to suspend their operations in situations of conflict. Essential businesses such as transport, telecommunications, logistics, infrastructure, banking services etc. should continue to function in these kinds of situations in order to prevent a complete economic breakdown. The UN Guiding Principle on Business and Human Rights ('UNGPs') read together with the UN guidance for businesses in conflict affected regions[238] emphasize on the significance of conducting heightened human rights due diligence in order to minimize any further potential harms as a result of their activities and affiliations.[239] Although it is an extremely challenging proposition[240],

234 https://iufap.org/2021/02/03/the-military-coup-in-myanmar-is-business-as-usual-for-accorhotels/
235 https://www.thedailystar.net/business/news/foreign-firms-face-tough-choices-over-myanmar-unrest-2071665
236 https://www.dw.com/en/opinion-myanmar-sanctions-will-not-stop-the-bloodshed/a-56736649
237 https://scroll.in/article/983646/is-it-ethical-for-indian-companies-and-others-to-do-business-with-myanmars-military
238 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/190/21/PDF/N2019021.pdf?OpenElement
239 *Ibid*.
240 https://www.bsr.org/en/our-insights/blog-view/business-response-to-the-coup-in-myanmar

but economic investment can be accomplished without being in concert with the military and its operations. It must be reiterated that business actors are never neutral in situations of conflict.[241] The primary responsibility of larger corporations lies towards prioritizing the safety of their civilian staff on ground and support their civil and political liberties.[242] All businesses must reorganize their internal policies and adapt to volatile situations by collaborating with other similarly situated businesses, engaging in collective actions, critical information sharing, maintaining an open yet discreet channel of communication with trade associations, local and international civil society organizations, embassies and consulates etc.[243] In situations where employees and staff are subject to abuses, businesses must try and intervene within the existing legal infrastructure to the best of their ability and in cases when such intervention has the likelihood of causing more potential harm, document the abuses and maintain records if necessary for future evidentiary purposes.[244]

While the primary focus of businesses and their affiliates must be a complete cessation of any and all commercial ties to the military, it must be done in a phased manner so as to not attract hostile repercussions. In addition to impeding the flow of revenue and any other economic incentive, this must be done to avoid conferring any legitimacy on the personnel and leaders of the military responsible for the egregious human rights violations. In the midst of a human rights emergency, even acts of simple practical facilitation[245] for military operations can amount to aiding and abetting of the crimes against humanity. In any event, all efforts must always be directed towards protection and support of human rights and any derogation and violation must be strictly condemned and communicated if possible, either singularly or as part of a collective action. A noteworthy instance of one such collective action is the joint statement released by concerned businesses

241 *Ibid*.
242 *Ibid*.
243 *Ibid*.
244 *Ibid*.
245 Instances of logistical support, hospitality services etc. are acts of everyday practical facilitation that are not necessarily of an economic nature but are still essential for the functioning of an institution.

operating in Myanmar in cooperation with the Myanmar Center for Responsible Business ('MCRB').[246] The statement has also been further endorsed by EuroCham Myanmar and several other international chambers of commerce in Myanmar as well. The statement although does not explicitly condemn the coup but does express a deep sense of concern over the state of emergency and commits to undertake a wider human rights and business integrity due diligence and comply with the principles enshrined in the UNGP, ILO Conventions and international anti-corruption instruments.[247] Lastly, should a business entity choose to exit Myanmar, it must do so keeping in mind the safety and interests of all its employees and stakeholders with respect to paying salaries, benefits, offering assistance with any immigration formalities if applicable, to state a few.

3. The international community's opprobrium of the crisis: what it means for the people's movement and access to justice

The present persecution of its people by the Tatmadaw is an echo of the unspeakable atrocities and ethnic cleansing inflicted by them against the Rohingya Muslims. As a result, Myanmar has been at the center of 2 significant international proceedings[248] over the last 2 years. Despite being at the receiving end of almost unanimous condemnation by both states as well as transnational humanitarian organizations, the Tatmadaw has shouldered absolutely no accountability for its actions. The present situation is playing out to be no different as the number of victims far exceed any justice avenues in sight. As much as it is important to bring the perpetrators to justice, it has become more exigent to level focus on the civilians and avow all support necessary. The civilian protesters continue to resist by staging peaceful demonstrations and acts of civil disobedience despite being treated with utmost impunity. With the absolute disruption of all the democratic

246 https://www.myanmar-responsiblebusiness.org/news/statement-concerned-businesses.html
247 *Ibid*.
248 *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* ICC-01/19 and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*) before the ICJ.

institutions and processes including access to judicial remedies, the civilians are looking towards the international institutions and processes in place for not just to condemn but to act.[249] The protesters have been relying on the principle of 'responsibility to protect' or the 'R2P' with slogans, placards and messages on clothing. The R2P principle, despite its imperialist implications,[250] is crucial in so far as it obligates the international community to fulfill its collective commitment towards protecting people from ethnic cleansing, crimes against humanity, genocide and war crimes.[251] The R2P, although a call for immediate intervention, goes beyond mere military measures and relies more on processes dependent on political will for effective implementation.[252]

The UNHRC has also taken serious cognizance of the situation through resolution A/HRC/46/L.21/Rev.1, wherein the UNHRC has decided to extend the mandate of the Special Rapporteur, Mr. Thomas Andrews on the situation of human rights in Myanmar for a further period of one year, with a request to present an oral progress report to the Human Rights Council at its 47th and 48th sessions and to monitor the situation of human rights in light of the recommendations and communicate any urgency if the situation were to further deteriorate.[253] Mr. Andrews has thus far emphasized on the need for coordinated action and has documented several cases of grave human rights violations including but not limited to extrajudicial killings, arbitrary mass detentions, torture, use of force etc.[254] Mr. Andrews has also called on the UNHRC to urge the UN Security Council to consider all options it has previously considered to address grave human rights violations.[255] The options, some of which have already been considered by states as discussed hereinabove, range from imposing sanctions, arms embargos, travel

[249] https://www.globalr2p.org/publications/myanmars-deadly-coup-and-the-responsibility-to-protect/
[250] Sasha Bhatnagar, 'Responsibility to Protect and its Neo-Imperialist Implications', April 2016, available at https://www.e-ir.info/2016/04/14/responsibility-to-protect-and-its-neo-imperialist-implications/
[251] *Supra* note 42.
[252] *Ibid*.
[253] https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26943&LangID=E; https://www.globalr2p.org/publications/atrocity-prevention-and-outcomes-of-the-human-rights-councils-46th-session/
[254] http://www.ishr.ch/news/hrc46-international-community-must-act-together-people-myanmar
[255] https://news.un.org/en/story/2021/02/1084512

restrictions, action before the ICC or ad hoc tribunals.[256] Myanmar however has rejected the Special Rapporteur's mandate claiming contravention of principles of universality and neutrality.[257]

The UN High Commission for Refugees ('UNHCR') has also urged states to honor the principle of non-refoulement and offer sanctuary to anyone crossing borders and seeking asylum.[258] Some additional measures that neighboring states in the region must equip themselves with are temporary suspension of deportations of both documented and undocumented migrants from Myanmar, facilitate safe and non-custodial alternatives to detention of undocumented migrants especially in light of a public health crisis such as Covid-19.[259]

The UN country team ('UNCT') in Myanmar which consists of 21 UN agencies and offices is also committed to staying in Myanmar and providing humanitarian assistance.[260] The international NGOs currently working in Myanmar have issued a joint statement with a commitment to collaborate and continue liaising with other civil society partner organizations, local community groups to national civil society networks.[261] There is a legitimate fear of donors pulling out of civil society initiatives and reviewing their long-term role in a transitional state. However, the primary beneficiaries of the funds must be borne in mind before any efforts to scale back are initiated. The decision to continue channelizing funds through partner organizations and grass root local organizations to those affected is critical to ongoing humanitarian efforts.[262]

Civil society groups have historically faced immense opposition in Myanmar but they have managed to persist and make incremental progress in working on rights of ethnic minorities, gender equality, peacekeeping efforts and civil liberties. The

256 *Ibid*.
257 *Supra* note 47.
258 https://news.un.org/en/story/2021/04/1088842
259 *Ibid*.
260 *Ibid*.
261 https://www.clovekvtisni.cz/en/ingo-joint-statement-on-the-unfolding-crisis-in-myanmar-7400gp
262 https://www.crisisgroup.org/asia/south-east-asia/myanmar/b166-responding-myanmar-coup

coup has compelled international actors to recognize the need for aid programs and development assistance to be both politically sensitive and flexible enough to accommodate unpredictable democratic transitions. Access to humanitarian aid should never be solely contingent on expectations of linear transitions and must be prepared to adapt and evolve, just like the people of Myanmar.[263]

The people of Myanmar were afforded a very small window to experience a democratic civilian political environment and this sudden revert to the past has stirred the national consciousness like never before. The cost of defending that experience has however been a colossal loss of community and lives. No resistance or movement is stranger to dissenters being wrongfully and forcefully silenced, but as witnesses to such appalling acts of injustice, justice for them can only be imagined with the systemic dismantling of the powerful and brutal machinery in force and by holding them accountable.

[263] https://theconversation.com/myanmars-coup-might-discourage-international-aid-but-donors-should-adapt-not-leave-154742

10.5.2021

9

Corruption and access to justice in international law, Part 3

Later this year, in the second session of the Global Alliance of National Human Rights Institutions ('GANHRI'), the Qatar National Human Rights Committee ('QNHRC') will be assessed for re-accreditation.[264] This is an opportunity to reflect on Qatar's influence on GANHRI and the UN at large, and on the loopholes, poor institutional design, and misaligned incentives that made it possible. It would be particularly problematic if Qatar's influence on GANHRI were found to be undue and improper, because the international human rights regime is uniquely vulnerable to multiple corruptive influences within the UN system. The troubling influence of other States within the UN system has already been extensively and instructively discussed by others.[265]

[264] GANHRI, 2021 Sessions, 2021, at https://ganhri.org/upcoming-sessions/: "Session 2: 18-29 October 2021 (if held virtually) / 18-22 October 2021 (if held in-person)" […] Re-accreditation: Korea, Mongolia, Northern Ireland, Palestine, Qatar, Samoa, Sierra Leone, Uruguay, Zimbabwe."

[265] E.g. Human Rights Watch, "The Costs of International Advocacy: China's Interference in United Nations Human Rights Mechanisms", 5 September 2017, at https://www.hrw.org/report/2017/09/05/costs-international-advocacy/chinas-interference-united-nations-human-rights; Human Rights Watch, "China's Influence on the Global Human Rights System: Assessing China's Growing Role in the World", 14 September 2020, at https://www.hrw.org/news/2020/09/14/chinas-influence-global-human-rights-system/.

In addition, in our series on corruption and public international law, previous blog posts have explored the difficulties of providing an adequate and useable legal definition of corruption, even though corruption "is the phenomenon of securing impunity or special advantage to circumvent the rules that govern individual and collective conduct." We have also stressed that "[a]cess to justice and corruption are inversion of each other"[266], which is particularly important to consider in light of the role and responsibility that QNHRC and GAHNRI are supposed to assume at the national and international levels for the protection of individuals and groups from human rights violations. In a follow-up exploration of corruption and international law, we noted that:

> "the institutions that are entrusted with providing justice against grievances caused by corruption are unfortunately not immune from the scourge itself. Within the spectrum of activities that amount to corruption and have a systemic adverse impact, judicial corruption is by far one of the most injurious towards an entity/individual's access to justice."[267]

The influence that Qatar is exerting within GAHNRI by using and instrumentalizing its NHRC for the sake of political gains is a source of concern in this sense.

This post will proceed in three steps to show how Qatar has made use of its national human rights institute, and to review the evidence to date that suggests that QNHRI is characterized by a lack of independence and failure to reliably defend the cause of human rights, but serves instead as a tool to exert corruptive influence within the international society under the thin guise of human rights.

After intense campaigning and lobbying, in 2015 Qatar secured an "A" rating from GANHRI for its National Human Rights Committee. Yet in discussing the QNHRC's

[266] Just Access, "Corruption and access to justice in international law, Part 1", 23 February 2021, at https://just-access.de/corruption-and-access-to-justice-in-international-law-part-1/.
[267] Just Access, "Corruption and access to justice in international law, Part 2", 5 April 2021, at https://just-access.de/corruption-and-access-to-justice-in-international-law-part-2/.

future re-accreditation, the 2015 *Final Report of the International Committee of National Institutions for the Promotion and Protection of Human Rights* noted major flaws in the functioning and independence of the QNHRC:

> "In accordance with the 2015 Law, the NHRC is comprised of no less than seven (7) civil society representatives and four (4) representatives from government ministries. All members are appointed by Emiri decree. The 2015 Law also indicates that the civil society representatives should have experience and interest in human rights. The law is otherwise silent on the process and criteria used to determine the suitability of applicants. In March 2009, the SCA requested the NCHR advocate for changes to its legislation to provide for a transparent, participatory, merit based selection process.
>
> While the NCHR has formed its own a selection committee to nominate candidates for appointment, the SCA notes that its 2009 recommendation has not been addressed. It reiterates its original recommendation that a transparent, participatory, merit-based selection process should be entrenched in the law. […]
>
> It is critically important to ensure the formalization of a clear, transparent and participatory selection and appointment process for an NHRI's decision-making body in relevant legislation, regulations or binding administrative guidelines, as appropriate. [...]
>
> The decree law is silent on a situation where members have an actual or perceived conflict of interest. The avoidance of conflicts of interest protects the reputation, and the real and perceived independence of, an NHRI. Members should be required to disclose conflicts of interest and to avoid participation on decisions where these arise.
>
> The SCA encourages the NHRC to advocate for the inclusion of provisions in its enabling legislation, regulations or binding administrative guidelines that protect against real or perceived conflicts of interest."[268]

[268] International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 16-20 November 2015, at https://ganhri.org/wp-content/uploads/2019/11/SCA-FINAL-REPORT-NOVEMBER-2015-

According to GANHRI, senior figures within the leadership QNHRC are selected in a non-transparent manner, whereas a National Human Rights Institute is meant *at the very least* to serve the interests and protect the rights of citizens, peoples and other fundamental goods (nature, animals, etc.) against its own State. The Qatari law that established, and regulates the existence and functioning of, the QNHRC also fails to prevent systemic conflicts of interest.

Unsurprisingly, criticisms against the QNHRC have continued unabated since GANHRI's first accreditation. Civil society organizations asked that the QNHRC is stripped of its "A" Grade.[269] During Qatar's next Universal Periodic Review process, several NGOs jointly pointed out that

> "despite having been granted an "A" status by the global Alliance of National Human Rights Institutions' Sub-Committee on Accreditation in 2015, Qatar's National Human Rights Institution – the National Human Rights Committee (NHRC) – was not in full compliance with the Paris Principles and that it was insufficiently independent of the executive. The NHRC was established and reorganized in 2010 Emiri decrees, and the nomination, appointment and dismissal of its members has been subject to approval by the Emir. The NHRC is entirely financed by the state and the executive retains the power to both allocate funds to the institution and decide on its expenses."[270]

UPR Recommendations suggested that Qatar "[a]mend Decree-Law 17 of 2010 regarding the establishment of the National Human Rights Committee to ensure that it is in compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles)",

English.pdf, pp. 37-38.

269 "Qatar: National Human Rights Committee's subordination to the executive undermines its capacity to publicly and freely address human rights violations", Alkarama, available at: https://www.alkarama.org/en/articles/qatar-national-human-rights-committees-subordination-executive-undermines-its-capacity.

270 Human Rights Council, Summary of Stakeholders' submissions on Qatar, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/WG.6/33/QAT/3, distr. gen. on 21 February 2019, p. 4, para. 25.

and to "[c]ease to instrumentalize the National Human Rights Committee in carrying out activities for political ends".[271]

Shortly thereafter, in the context of the International Court of Justice case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*), it was reported during oral arguments that the accredited status of the QNHRC has been used for propagandizing the false allegation that the UAE had violated an order of the International Court of Justice, even before the ICJ actually rendered a decision.[272] The Court was also presented with uncontroverted evidence that the QNHRC had submitted multiple fraudulent pieces of evidence to the Court, including statements the QNHRC collected from individuals it has systematically coached and misled, and the QNHRC's fabrication of the UK Parliament's endorsement of Qatar's complaints against the many States that in 2017 chose to sever diplomatic relations with Qatar.[273]

At this time, GANHRI websites already notified the public that QNHRC would be re-accredited in 2019, and set a deadline for NGOs to comment on its merits in advance. Shortly after the UPR and ICJ criticisms of QNHRC, the re-accreditation dates disappeared, without explanation, from all United Nations websites. Instead of proceeding with the due and already promised re-accreditation of QNHRC,

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[271] Human Rights Council, Report of the Working Group on the Universal Periodic Review, Qatar, A/HRC/42/15, distr. gen. on 11 July 2019, A/HRC/42/15, p. 14, paras. 134.62 and 134.63.

[272] International Court of Justice, *Public sitting held on Thursday 9 May 2019, at 10 a.m., at the Peace Palace, in the case concerning* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Corrected Verbatim Record, CR 2019/7, p. 34.

[273] International Court of Justice, *Public sitting held on Thursday 7 May 2019, at 10 a.m., at the Peace Palace, in the case concerning* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Corrected Verbatim Record, CR 2019/7, pp. 22-25, 46-48, 51.
International Court of Justice, *Public sitting held on Thursday 9 May 2019, at 10 a.m., at the Peace Palace, in the case concerning* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Corrected Verbatim Record, CR 2019/7, pp. 31-34.

GANHRI elected the Chairman of QNHRC, Dr. Ali bin Shmaikh Al-Marri, as GANHRI's own Vice-President and Secretary General.[274]

Despite long-running criticisms of its lack of political independence and recommendations not to instrumentalize its National Human Rights Institute for political propaganda, the QNHRC announced the election of its Chairman to these powerful UN roles this way:

> "The National Human Rights Committee won the leadership positions in the Global Alliance of National Human Rights Institutions, as a culmination of its achievements and contributions to the defense of human rights issues in Qatar and the region and its international efforts to counter the blockade imposed on Qatar. The National Human Rights Committee won four leadership positions in recognition of its efforts and contributions in defending human rights issues nationally, regionally and internationally. The National Human Rights Committee has become a model for human rights institutions in the region and the world.
>
> It is worth mentioning that The National Human Rights Committee of the State of Qatar is the only country in the GCC to be accredited status A by the Global Alliance of National Human Rights Institutions following a rigorous accreditation process under the supervision of the Office of the United Nations High Commissioner for Human Rights. Status (A) is granted only to national institutions that fully complies with the Principles relating to the Status of National Institutions. (The Paris Principles).
>
> The National Human Rights Committee has again received the confidence of the Global Alliance of National Human Rights Institutions (NHRIs), which has previously rejected complaints submitted by the blockading countries, to

[274] QNHRC, "The General Assembly of the Global Alliance of National Human rights Institutions selected Dr. Al Marri as the Vice President and Secretary General of the GANHRI: The NHRC officially took up office in the GANHRI, 5 March 2019, at https://nhrc-qa.org/en/the-general-assembly-of-the-global-alliance-of-national-human-rights-institutions-selected-dr-al-marri-as-the-vice-president-and-secretary-general-of-the-ganhri-the-nhrc-officially-took-up-office-in/.

> try to withdraw the status A from the NHRC, while questioning its credibility and integrity. The efforts of the National Human Rights Committee to counter the blockade also earned the appreciation of the international community, led by the United Nations, which in its official report valued the efforts of the National Human Rights Committee and confirmed the credibility of its reports on violations by the blockading countries."[275]

Qatar then proceeded to launch funded programmes for other GANHRI members and held high-profile, well-funded events in Qatar for them.[276]

Numerous organizations and individuals have noted and analyzed the worrying trend of States instrumentalizing international human rights solely to advance their foreign policy interests. QNHRC is now up for re-accreditation, two years after GANHRI procedures would normally mandate. QNHRC continues to hold the most influential positions in GANHRI, while the serious criticisms of QNHRC's independence, present since its first accreditation, continue to multiply. The QNHRC's re-accreditation is a rare opportunity to ask the vital questions concerning the acceptability of such practices within the UN institutional design, and commonsensical ways to improve the quality of access to justice that the UN must provide to human rights victims and vulnerable groups and individuals.[277]

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[275] Qatar's National Human Rights Committee, The General Assembly of the Global Alliance of National Human rights Institutions selected Dr. Al Marri as the Vice President and Secretary General of the GANHRI: The NHRC officially took up office in the GANHRI", 5 March 2019, at https://nhrc-qa.org/en/the-general-assembly-of-the-global-alliance-of-national-human-rights-institutions-selected-dr-al-marri-as-the-vice-president-and-secretary-general-of-the-ganhri-the-nhrc-officially-took-up-office-in/.

[276] See, for instance, Gulf Times, "GANHRI strives to strenghen rights institutions globally: al-Marri", 18 June 2019, at https://www2.gulf-times.com/story/634450/GANHRI-strives-to-strengthen-rights-institutions-g.

[277] Anne Peters, "Corruption as a Violation of International Human Rights", *European Journal of International Law*, 2019, Vol. 29, No. 4, at (open access) https://academic.oup.com/ejil/article/29/4/1251/5320164, pp. 1251-1287, p. 1280. On institutional corruption, see Lawrence Lessig, "Institutional Corruptions", *Edmond J. Safra Lab Working paper No. 1*, March 2013, at http://ssrn.com/abstract=2233582.

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The urgent task of improving the online complaint procedure before Human Rights Council Special Procedures Mandate Holders: towards victim-friendly design and effective collective complaints

At the end of 2020, the Office of the United Nations Office of the High Commissioner for Human Rights ("OHCHR") launched a new dedicated website enabling victims of human rights violations to submit their submissions to the Human Rights Council ("HRC") Special Procedures Mandate Holders directly online, via a new uniform complaint procedure.[278] If this new online complaint procedure constitutes a real and welcome improvement, many other serious impediments to effective access to justice before the Special Procedures ("SP") mandate holders remain in the current functioning of the SP mechanism. In what follows, Just Access takes account of this new development, assesses its merits and flaws, and proposes some solutions to improve access to justice for victims of

[278] OHCHR, Submission of information to the Special Procedures, at https://spsubmission.ohchr.org/.

human rights abuses, violations and international crimes worldwide. This blog post suggests possible venues to make it easier for victims of human rights violations to directly address Special Procedures mandate holders in order to improve the chances to make their cause known at the international level, assuming they otherwise fulfil the requirements applicable to submissions before SP mandate holders. Just Access in particular suggests enabling collective claims before the SP mandate holders. This is currently only legally possible, but needs substantial technical improvement to provide an effective option for large-scale victims of mass or systematic human rights and/or international law violations to make their voice heard at the international level.

The HRC SP mandate holders have for several decades now fulfilled an important mission at the international level by bringing to the attention of the global public opinion the perpetration of international human rights abuses or violations in a preventive fashion, or through information on their actual perpetration by States and non-State actors alike. This important contribution has materialised throughout the years, despite the fact that SP are based on various and *sui generis* mandates without a uniform procedural framework applicable directly to their mandates and activities. Moreover, they do not have competences to render binding decisions and they lack the means to compel the cooperation of State and non-State actors. That said, one particularly strong symbol of their impact globally are the press statements and other public declarations that SP mandate holders issue regularly to bring to the foreground important violations of international human rights law, under the famous blue stamp of the United Nations. In 2020, mandate holders have issued 320 press releases “raising awareness and voicing concerns regarding a range of human rights issues, including individual cases.”[279] The aims of the dedicated website of the OHCHR for communicating submissions to the SP mandate holders are threefold: (i) “draw the attention of Governments and others on alleged human rights violations;” (ii) “ask that violations are prevented, stopped,

[279] HRC, Report of the activities of special rapporteurs, independent experts and working groups of the special procedures of the Human Rights Council in 2020, including updated information on special procedures, A/HRC/46/61, distr. gen. on 15 March 2021, p. 4, para. 13.

investigated, or that remedial action is taken;" and (iii) "Report to the Human Rights Council on communications sent and replies received, therefore raising public awareness on individual, and group cases as well as legislative and policies developments they have addressed in a given period".[280]

In general, SP mandate holders focus on specific themes or specific countries. According to the Report on the activities of special rapporteurs, independent experts and working groups of the special procedures in 2020, there are 44 thematic and 11 country-specific mandate holders active.[281] Thematic Special Procedures deal with grave or/and urgent global issues, such as torture, forced disappearance, the right to freedom and assembly, prevention and peacebuilding, migration, climate change, new technologies, and the corona disease.[282] In parallel, there were several country-specific SPs, as in the case of Syria, Yemen, Myanmar or Sudan, whose mandate was terminated in 2020. The very term, "special procedure", refers to a specific feature of this institution: their mandate is often the product of a particular set of political and legal circumstances that require or support the monitoring of a human rights-related situation or issue, which can sometimes be renewed for decades, or last only for a relatively short-lived mandate. This makes the existence and the understanding of the SP functioning particularly apt for victims of human rights abuses and violations, which are in theory able and invited to submit complaints directly to SP mandate holders but who are in practice always represented by some NGOs, lawyers or other (mostly benevolent) representatives.

The history of the United Nations institutional landscape in the fields of international human rights law is filled with many ups and downs, since States are mostly reluctant to see their HR-record monitored by international actors, especially when issues are raised by victims. The SPs of the HRC have in

280 https://spsubmission.ohchr.org/

281 HRC, Report of the activities of special rapporteurs, independent experts and working groups of the special procedures of the Human Rights Council in 2020, including updated information on special procedures, A/HRC/46/61, distr. gen. on 15 March 2021, p. 3, para. 3.

282 OHCHR, Thematic Mandates, at https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM&lang=en.

particular been the object of intense campaigns to reduce or prevent them from accomplishing what is nonetheless still their main role in the United Nations system: promoting and raising the alarm with respect to the implementation of international human rights law ("IHRL"). On the other hand, States have also pushed for the creation of new SP mandate holders, including multiple times by African and Asian States.[283] The lack of procedural clarity about the missions, prerogatives and activities of SP mandate holders might have contributed to the relative distrust with which SPs have been received by some States and other organisations; but there have been some major steps to reform their functioning since the first SP have been set up.

In particular, there have been many attempts and projects to reform how SPs procedurally work, which is crucial for the effective functioning of a special type of international HR institution that is meant to facilitate access to justice for victims of HR violations and to raise awareness about their situation worldwide. However, most of those efforts and projects of reform have led to mixed results, regardless of the reasons that motivated them. Indeed, they have not prevented SP mandate holders from expanding their range of operations, even when they struggled with tight budgets; they have not solved the dire lack of personal support for SP mandate holders and their staffs; and they have not significantly improved the lack of means to receive effective cooperation by States and non State-actors accused of the perpetrations of serious violations of IHRL, or even international crimes. These realities partially explain why some international lawyers have qualified the historical institutional evolution of SP as a "process of learning by doing,"[284] since special procedures are almost the product of a series of accidental and incremental evolutions, which have taken place without constant or clear institutional or State support.

[283] Elvira Dominguez-Redondo, *In defense of politicization of human rights* (OUP, 2020), p. 19.
[284] Elvira Domínguez-Redondo, "The History of the Special Procedures: A 'Learning-by-Doing' Approach to Human Rights Implementation" *in* Aoife Nolan, Rosa Freedman and Thérèse Murphy (eds.), *The United Nations Special Procedures System* (BRILL/Nijhoff; 2017), pp. 9-51.

Therefore, the HRC Special Procedures are not treaty-based and they do not constitute a harmonised body. This explains the particular importance of individualities behind the various SP mandate holders, which have sometimes attracted criticisms for taking advantage of their non-paid mandates for their own benefit. Indeed, there are issues regarding either some excesses committed by individual SP mandate holders, such as the over-personalisation of their mandate, but they should not hide the objectively difficult conditions that affect how they can fulfil their mandates: scarcity of resources, political pressures,[285] lack of cooperation of State- and non-State actors,[286] and so forth.

Positive trends are nevertheless identifiable, notwithstanding repeated attempts by some States to reduce SPs' effectiveness, the repeated denial of favourable conditions to improve their working conditions, and the lack of institutional and procedural stability of the various SP mandates that are often quickly terminated when UN Member States withdraw their support. For instance, while SP mandate holders operate formally without strictly defined working methodologies and methods, over the last years a process of reiteration and collective institutional learning and consolidation has helped SP mandate holders to strengthen the procedural approach of their mandates by following up on the experiences of some of their predecessors or other mandate holders. Another particularly important trend is the increasing cooperation among SP mandate holders and the development of diverse strategies to bring about cross-cutting issues on the international plane. In this regard, the Coordination Committee of Special Procedures assumes a significant role,[287] which includes "enhancing the

[285] The Guardian, Top Saudi official issued death threat against UN's Khashoggi investigator", 23 March 2021, at https://www.theguardian.com/world/2021/mar/23/top-saudi-official-issued-death-threat-against-uns-khashoggi-investigator.

[286] See for instance, UN HRC Special Procedures, Forty-third session of the Human Rights Council, General debate under item 5, Statement by Javaid Rehman, Member of the Coordination Committee of Special Procedures, 11 March 2020, at https://www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/CCSpecialProceduresIndex.aspx, p. 4: "Lack of cooperation or selective cooperation from some States continues to affect the ability of my colleagues to discharge their mandates fully. Our direct communications, our proposals for visits, our offers of technical assistance, and our specific recommendations following country missions are sometimes left unanswered."

[287] OHCHR, Coordination Committee of Special Procedures, at https://www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/CCSpecialProceduresIn

effectiveness and independence of mandate-holders and facilitating their work"; and also "proactively identifying issues of concern to groups of mandates and facilitating joint action on cross-cutting issues or issues of shared concern".[288] Moreover, the Coordination Committee acts as catalyst for SPs' collective actions, including by increasing their visibility and facilitating them through open letters, press releases and statements.[289]

One example for which Special Procedures' collective actions can make a difference concerns the dire situation in Myanmar, wherein a military junta committed a coup after the democratic election of a civilian government. In that context, multiple violations of international law and serious human rights abuses have been committed by the military, including extra-judicial killings, acts of torture, mass arbitrary detentions and systematic repression or civil and political rights.[290] On 26 February 2021, several SP mandate holders issued a common statement on Myanmar calling the military junta to restore democracy and to allow people to protest and express themselves. Signatories include the SP on the right to peaceful assembly and association; the SP on the situation of human rights in Myanmar; the SP on the rights of indigenous peoples; the SP on extrajudicial, summary or arbitrary executions; the SP on the promotion and protection of freedom of opinion and expression; the SP on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the UN Working Group on Arbitrary Detention, the UN Working Group on Enforced or Involuntary Disappearances; and the UN Working Group on human rights and transnational corporations and other business enterprises.[291]

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dex.aspx.

288 HRC, Manual of Operations of the Special Procedures of the Human Rights Council, August 2008, at https://www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/Manualofspecialprocedures.aspx, p. 27, para. 111(a) and (d).

289 Elvira Dominguez-Redondo, *In defense of politicization of human rights* (OUP, 2020), p. 91.

290 HRC, Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews, A/HRC/46/56, distr. gen. on 4 March 2021, p. 5, para; 28.

291 OHCHR, "Myanmar: Military must restore democracy, allow people to protest and express themselves, say UN experts", 26 February 2021, at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26808&LangID=E.

Another example concerns the current situation in Columbia, where hundreds of demonstrators and persons have been killed by the national security forces in the context of peaceful protests against a planned fiscal reform in the country.[292] Several SP mandate holders have issued a common statement to condemn the governmental crackdown on peaceful protests and called for a thorough and impartial investigation.[293] Yet, despite the current growing practice of collective actions by SP mandate holders, and if submissions to SP mandate holders can in legal principle be done on the behalf of a group, the current system to file submission is operated on the basis of criteria that unduly favours individually drafted complaints. As we will argue in the second part of this post, further steps need to be taken to effectively ensure real possibilities to raise collective complaints. This development of the submission system before SP mandate holders could then reinforce the current trend among them to pool their resources and act collectively for denouncing concerning or grave situations in the world.

The launch of a new online platform for submitting complaints could then be seen as a major step in the institutional history of the HRC Special Procedures in that direction, if this complaint procedure was really uniform, user-friendly and effective at bringing victims complaints. This is not currently the case given, for instance, that complaints even get lost. The recent launch of the online platform is an important step in the right direction, which however leaves major problems unsolved. This post sheds light on some improvements by this new online complaint procedure and on its major remaining flaws from a practical, victim-centered perspective (I). In a second step, the proposal will be made that a bold but necessary change to the existing complaint system before SP mechanisms should be planned and enacted by providing the possibility to enable collective complaints for groups of individuals which are producing information and evidence of collective harm suffered in violation of international law (II).

[292] Santiago Vargas Niño, “The Dreadful Night Goes On: State Repression, International Criminal Law, and the Call for Justice in Columbia”, *Völkerrechtsblog*, 12 May 2021, at https://voelkerrechtsblog.org/the-dreadful-night-goes-on/.

[293] OHCHR, “Colombia: UN and OAS experts condemn crackdown on peaceful protests, urge a thorough and impartial investigation”, 14 May 2021, at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27093&LangID=E.

1. Improvements and flaws of the new online form to submit complaint before the HRC Special Procedures Mandate-Holders

In 2020, HRC SP "mandate-holders transmitted 681 communications, 600 of which were sent jointly, to 132 States and 76 non-State actors. The communications covered 1,296 individuals, 307 of whom were identified as female. A total of 433 replies, of which 330 were substantive replies, were received in 2020 (this includes replies to communications sent before 2020). A total of 384 replies to communications sent in 2020 were received, of which 338 (48.46 per cent reply rate) were substantive replies. Some communications received more than one reply (A/HRC/46/61/Add.1 chaps. IX and X)."[294]

The procedure applicable to submitting complaints to SP mandate holders is based on several requirements. These were formalised through the adoption in 2007 of a HRC Code of Conduct for SP mandate holders.[295] In 2008, another UN document summarised some of the main requirements applicable to communications sent by persons and groups alleging to be victims of HR violations:

> "38. Information may be sent by a person or a group of persons claiming to have suffered a human rights violation. NGOs and other groups or individuals claiming to have direct or reliable knowledge of human rights violations, substantiated by clear information, may also submit information so long as they are acting in good faith in accordance with the principles of human rights and the provisions of the UN Charter, free from politically motivated stands. Anonymous communications are not considered.

[294] HRC, Report on the activities of special rapporteurs, independent experts and working groups of the special procedures of the Human Rights Council in 2020, including updated information on special procedures, Report of the Secretariat, A/HRC/46/61, distr. gen. on 15 March 2021, p. 4, para. 9; HRC, Facts and figures with regard to the special procedures in 2020, A/HRC/46/61/Add.1, distr. gen. on 15 March 2021, pp. 20-6.

[295] HRC, 5/2. Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council, 18 June 2007.

> Communications may not be exclusively based on reports disseminated by mass media.
>
> 39. Allegations should ideally contain clear and concise details regarding the name of individual victim(s) or other identifying information, such as date of birth, sex, passport number and place of residence; ethnic or religious group when appropriate; the name of any community or organization subject to alleged violations; information as to the circumstances, including available information as to the date and place of any incident(s); alleged perpetrators; suspected motives; contextual information; and any steps already taken at the national, regional or international level in relation to the case."[296]

An interesting feature of the new online portal to submit complaints to SP mandate holders is that individual complaints can be submitted with regard to a specific human rights violation, but also to a "bill, legislation or policy". The new portal also makes it possible to add information to a previous submission. Concerning human rights violations, it can refer to an individual, a group or community, or to civil society organisations who allege to be suffering of violations of IHRL. There is also the option of using the individual complaint for multiple victims, and an Excel sheet can be uploaded for large numbers of victims. Just Access underlines that these are all positive developments.

Nevertheless, there are important practical limitations of space in this new complaint form, which restrict the possibility to effectively raise collective submissions for persons who are victims of multiple, mass or systematic violations of human rights and international law. There are only 2,000 characters available to describe the facts relating to a violation, and there are also further limitations in each of the boxes where one can include the text, sometimes actually not even clearly indicating what this limit is. In addition, one can only include a maximum of three attachments to one submission, and there is a size limit to these attachments

[296] HRC, Manual of Operations of the Special Procedures of the Human Rights Council, August 2008, at https://www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/Manualofspecialprocedures.aspx, p. 13, paras. 38-9.

(ca. 2 MB or so). This is not very practical for explaining and conveying even the most basic facts regarding allegations of serious HR abuses and violations, especially for victims of mass or systematic violations of human rights and international law who are willing to raise a collective complaint (see Part II of this post). If these practical flaws appear trivial, they in fact significantly limit possibilities to raise collective complaint in the current online system. For a clear and simple example, one can roughly compare the procedural requirements for information relating to the online platform for submitting complaints to the SP mandate holders with the very limited space available to attach evidence and information in a digital format. The following requirements need to be fulfilled by a complaint to be acted upon by one or several SP holders:

1. "the communication should not be manifestly unfounded or politically motivated;
2. the communication should contain a factual description of the alleged violations of human rights;
3. the language in the communication should not be abusive;
4. the communication should be submitted on the basis of credible and detailed information;
5. the communication should not be exclusively based on reports disseminated by mass media."[297]

The online complaint form for UN SP procedures constitutes an important improvement on the previous situation, in which specific UN SP mandate holders failed to provide the public with most basic information about their activities and, even worst, on how to actually reach them.

If the general availability of relevant information on the general functioning and activities of individual UN Special Procedures mandate holders remains an important issue, especially concerning country-specific Special Procedures which

[297] OHCHR, Submission of information to the Special Procedures, at https://spsubmission.ohchr.org/, under "What are the criteria applied to act on a submission?."

barely provide on their websites the most basic information about their activities,[298] the introduction of an online complaint form is an important improvement in this regard. Previously, dedicated websites for country-specific Special Procedures, for instance, seldom provided any guidelines on submitting complaints.

The introduction of the online complaint form does not solve other fundamental issues afflicting the very accessibility of information for persons and groups that need to submit a letter of allegations to one of the dozens UN SP mandate-holders in activity. For instance, Elvira Dominguez-Redondo has highlighted these multiple barriers negatively affecting access to justice for victims willing to raise complaints before SP mandate-holders':

> "This is an outcome noticeable to those already familiar with Special Procedures rather than a feature that will likely prove useful to those engaging with them for the first time. Potential users of Special Procedures, including first and foremost victims of human rights violations that can benefit from their intervention, must navigate a metaphorical and literal web of reports, online links, and forms to familiarize themselves with basic information concerning their modus operandi. The quantity and quality of information provided and the format used to present information vary significantly between mandate holders with no correlation to divergences in the practical implementation of methods of work. […] [A] more significant problem that arises in this context is the creation of unnecessary barriers to access Special Procedures that add multiple sources of information about the same mandate, depending on fragmented understandings of the mandates and resources as interpreted by individual mandate holders. It is worth remembering that this occurs in the context of an already complex web of mechanisms in which unity has largely depended on mandate holders' willingness to coordinate activities among themselves." [299]

[298] Elvira Dominguez-Redondo, *In defense of politicization of human rights* (OUP; 2020), p. 84.
[299] Elvira Dominguez-Redondo, *In defense of politicization of human rights* (OUP; 2020), pp. 86-7. See also, ibid., p. 96: "Special Procedures mandate holders have insisted that the need of greater consistency in methods of work should not undermine the necesssity of maintaining

While the vagueness of the mandate of HRC Special Procedures is notable for several reasons, for instance for allowing mandate holders to expand their remit,[300] a more uniform and inclusive complaint procedure would enhance and strengthen the functioning of their office. As it stands, the dedicated website to submit complaint to SP mandate holders is a major obstacle to creating a uniform procedure. Some SP mandate holders are not even included in the existing system.

2. The way towards a submission procedure before the HRC SP effectively allowing for collective complaints

In face of the practical and procedural flaws that still affect the submission system to SP mandate holders, Just Access lays out in the following section how despite the already existing possibility to raise complaints for multiple persons, the online application form remains still based on individual complaints (A). Next, this post will shed light on the fundamental stakes behind those procedural and practical difficulties which could be alleviated by a more effective collective complaint mechanism (B.), before we address some further challenges which can be generated with a new system better designed to properly address collective claims (C.).

their autonomy and the specificities of each mandate. […] However, the need for flexibility and respect for the independence and autonomy of mandate holders, or particular political sensitivities associated to thematic or country mandates, does not justify the unnecessary difficulties in accessing basic information about their methods of work."

300 See, for instance, Elvira Dominguez-Redondo, *In defense of politicization of human rights* (OUP; 2020), Chapter 2 "The Politics of Reforming Special Procedures", pp. 35-68 and Chap. 3, pp. 90-1.

2.1. The application form is individually based, although one specific case can actually represent multiple (and more or less similar) HR violations

The UN website for submitting submissions to the SPs is explicitly mentioning the possibility that communications in this context address "allegations of violation of the human rights of a group or a community" as well as "allegations that a bill, a law, a decree, a policy and/or a practice is not in compliance with international human rights law and standards."[301] This possibility is not new, but it marks a departure from previous anxieties voiced by States, which have long been opposed to an abstract system which would not be connected to the situations of concrete and actual victims. However, let us recall that the current possibilities to raise collective actions via the submission system before SP mandate-holders does not mean going back to a more abstract system decoupled with the consent of the victims thereby represented, which is still required at the moment of submitting a complaint to them. This requirement applicable to all UN Special Procedures mandate holders is identifiable among others in Article 9(d) of the 2007 HR Code of Conduct for Special Procedures Mandate Holders:

> "The communication should be submitted by a person or a group of persons claiming to be victim of violations or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with principles of human rights, and free from politically motivated stands or contrary to, the provisions of the Charter of the United Nations, and claiming to have direct or reliable knowledge of those violations substantiated by clear information;"[302]

The only case where the consent of victims is not required is in cases specifically dealing with deceased victims and persons who are victims of enforced

[301] OHCHR, Submission of information to the Special Procedures, at https://spsubmission.ohchr.org/.
[302] HRC, 5/2. Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council, 18 June 2007, Art. 9.

disappearance, which make it impossible to obtain their consent in the first place. For that reason, existing possibilities to bring collective action will still be based on evidence/information received by SP mandate holders, and the consent of the victims represented in the complaint is in any case required, except for the afore-mentioned exception.

Despite the fact that the new UN online platform already provides for possibilities to raise complaints in the name of several victims or on the behalf of groups and communities, the current system suffers from several major flaws.

The fact that UN SP mandate holders have to deal not only with purely individual allegations of human rights violations but also with allegations emanating from groups does not constitute a new reality: it constitutes in fact an established practice reflecting positive international law, which has long considered collective actions. This strong trend is reflected in the aforementioned practice, on the side of SP mandate holders, who increasingly take positions collectively whenever a situation involves multiple violations falling within their (broad) mandates.

For instance, the 2008 Manual of the Operations of Special Procedures of the Human Rights Council contains many instances when SP mandate holders dealt with human rights violations suffered by groups of persons. This Manual provides for the requirement that SP mandate-holders "take the measures necessary to monitor and respond quickly to allegations of human rights violations against individuals or groups, either globally or in a specific country or territory, and to report on their activities"[303] It also set the general requirement that SP mandate-holders effectively deal with collective submissions whenever it falls within their mandate and satisfy to applicable procedural and substantial requirements in that context:

[303] HRC, Manual of Operations of the Special Procedures of the Human Rights Council, August 2008, at https://www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/Manualofspecialprocedures.aspx, p. 5, para. 4.

> "Communications may deal with cases concerning individuals, groups or communities, with general trends and patterns of human rights violations in a particular country or more generally, or with the content of existing or draft legislation considered to be a matter of concern. Communications related to adopted or draft legislation may be formulated in various ways, as required by the specificities of each mandate."[304]

Just Access's proposal to reinforce existing possibilities to raise collective actions before SP mandate holders must be understood against the backdrop of the high stakes relating to access to international justice for victims of international law violations as well as serious and grave human rights violations.

2.2. What is at stake behind the goal to ensure a more effective submission mechanism for collective complaints?

Just Access supports revamping the submissions system such that it will effectively ensure the possibility for collective submissions to be filed before the SP mandate holders. Such a move would positively affect the possibility of peoples across the world to make their voice heard, including the currently urgent cases of Myanmar and Columbia. Conversely, possible fears that deepening this already existing trend might lead to overwhelming SP-holders can be mitigated on the basis of actual instances of legal systems where the admissibility of a request can also be treated collectively – such as in the pilot judgments system in the system of the European Convention on Human Rights,[305] or the class action system in the US legal system.[306] Going in that direction will not only in practice improve the new submission system to SP mandate-holders, but also legally fill a gap since the

[304] Ibid., p. 12, para. 29.
[305] Registry of the ECtHR, Rules of the Court, 1 January 2020, at https://www.echr.coe.int/documents/rules_court_eng.pdf, pp. 32-4, Art. 61 ("Pilot-judgment procedure").
[306] See, for instance, FindLaw, Class Action Cases, Last Updated on 2 July 2019, at https://www.findlaw.com/litigation/legal-system/class-action-cases.html.

afore-mentioned systems do not exist at the UN level even if they are directly relating to the mandate of the UN.

Such a development, which would involve overhauling the existing UN online portal to submit complaints to SP mandate holders, would reinforce and make more effective access to justice for victims of HR violations and abuses in the UN HR system. Note that this is particularly the case given that SPs are useful insofar as they have no direct equivalent with a universal mandate in the UN human rights system.

Firstly, this will reinforce the mission of SP mandate holders to prevent the commission of systematic HR violations.[307] The preventative function of UN SP mandate holders was envisioned from their inception, as one of their core contributions relating to the role of the UN Special Rapporteurs within the UN overall institutional landscape, according to what the Chair of the Coordination Committee of Special Procedures has communicated in its June 2020 letter to the President of the UNSC:

> "Their contribution occurs throughout the conflict/crisis continuum, before, during and after conflict, inter alia by identifying early signs of crisis, addressing human rights violations as conflicts unfold or fostering the integration of human rights in post-conflict situations, as well as supporting inclusive development."[308]

Secondly, making more effective existing possibilities to raise collective actions will improve the functioning of the various UN special procedures mandate holders, by supporting ongoing trends towards pooling resources among them.

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[307] Elvira Dominguez-Redondo, *In defense of politicization of human rights* (OUP; 2020), pp. 135-6 and 142-3.

[308] UNSC, Note verbale dated 1 July 2020 from the Permanent Missions of Belgium, Estonia, France and Germany to the United Nations addressed to the President of the Security Council, Annex, 12 June 2020, S/2020/631, distr. gen. on 1 July 2020, p. 2.

Thirdly, such a possibility does not mean that individual complaints ought to be relatively disregarded or put aside. On the contrary, the logic of collective action could ensure victims of human rights to raise their claims without having to suffer unnecessary complications.

In any case, the possibility to enable groups of persons suffering from harm and gross HR violations is directly falling under one of the most important functions assumed by HRC Special Procedures.

2.3. Further challenges ahead on the way to an effective collective complaint mechanism before Special Procedures mandate holders

Even if an effective reinforcement of possibilities to raise collective complaints in the collective system of the SP mandate holders will be a fruitful project for significantly improving the access to justice in face of international violations, such a development will not be without further challenges.

One clear challenge has to do with the very limited resources available to SP mandate holders, who mainly act voluntarily. In that regard, we suggest that there are several ways to avoid overwhelming them, mainly by filtering collective claims in a creative and efficient manner.

Given existing possibilities to raise complaints about the situations of multiple individuals or on the behalf of groups or communities, one of the fundamental questions that must be dealt with in the current context is how to better operationalise differentiation for some forms of collective harms suffered in violation of IHRL.

Other challenges relating to collective action for HR victims can be exemplified with some of the difficulties and flaws identified with the functioning of the ICC Trust

Fund for Victims. Indeed, this Trust Fund for Victims is oftentimes criticised for causing the ICC to divert its resources and energy in a way detrimental to its main function, without even properly answering to the needs and concerns of victims,[309] which is to render justice in complex international cases (and contributing to fight against immunity).[310] By contrast, UN SPs are not a judicial or quasi-judicial body, and their work does not depend upon the main mission of any other institution, as is the case for the ICC Trust Fund for Victims with the ICC, from which it is institutionally separated.[311] Thus, the situation of SP mandate holders is radically distinct because, in spite of the variety of the existing mandates, they are never operating on the basis of binding decisions and have generally no prerogatives or competencies to compel a State to cooperate with them if it does not consent to so doing.

Another fundamental challenge is how to ensure protection of data privacy & security for larger groups, since victims are directly exposed to real life or death dangers. The possibilities available to persons and peoples who suffer from HR violations absolutely must ensure their security. This translates into obligations to effectively organise legal and institutional frameworks, but also practical steps to protect their privacy and anonymity. This constitutes for SP mandate holders an utmost duty towards victims of HR violations, and in turn requires specific design and functionality features of the online platform launched by the UN to receive submissions to SP mandate holders. This is clearly spelled out in the 2008 Manual of the Operations of Special Procedures of the Human Rights Council: "Any person or group who cooperates with a Special Procedure is entitled to protection by the State from harassment, threats or any other form of intimidation or retaliation."[312];

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309 See for instance, Sara Kendall and Sarah Nouwen, "Representational practices at the international criminal court: The gap between jurified and abstract victimhood", *Law and Contemporary Problems*, 2013, Vol. 76, Nos. 3 & 4, pp. 235-62.

310 Douglas Guilfoyle, "Part I- This is not fine: The International Criminal Court in Trouble", 21 March 2019, at https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/; Liesbeth Zegveld, "Victims' Reparations Claims and International Criminal Courts: Incompatible Values?", *Journal of International Criminal Justice*, Vol. 8, No. 1, pp. 79-111.

311 ICC, Trust Fund for Victims, at https://www.icc-cpi.int/tfv.

312 HRC, Manual of Operations of the Special Procedures of the Human Rights Council, August 2008, at https://www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/Manualofspecialproced

"Mandate-holders shall invite individuals and groups which have provided information and have suffered any form of reprisals or retaliation as a result to report all such incidents to the mandate-holder so that appropriate follow-up action can be taken."[313]

Indeed, in the case of Myanmar, and other situations where serious human rights and international law violations are systematically committed against individuals and peoples, exposing the identity of complainants will put their life and security directly at risk, as well as their relatives'. This is a clear manifestation of the civil and political dimension of the internationally protected private sphere,[314] which receives in international law reinforced protection in the case of human rights defenders and other persons aiming at the respect of core international obligations.[315] The military junta in Myanmar is reported to use foreign surveillance technologies to monitor peoples' online communications,[316] thus confirming the utmost importance of ensuring privacy design in the context of online submissions to SP mandate holders.

3. Conclusion

In light of our observations, Just Access proposes the following near-term, mid-term and long-term recommendations for contributing to more effective submission

ures.aspx, p. 18, para. 66.

313 Ibid., p. 11, para. 27.

314 OHCHR, "UN experts stress links between digital space and human rights at RightsCon, Tunis", 13 June 2019, disponible en ligne à https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24696; OHCHR, The right to privacy in the digital age, Report of the United Nations High Commissioner for Human Rights, A/HRC/39/29, distr. gen. on 3 August 2018, pp. 2-3, paras. 5-6; Human Rights Council, General Comment No. 37, Article 21: right of peaceful assembly, Advance unedited version, CCPR/C/GC/37, distr. gen. on 27 July 2020, p. 6, para. 34.

315 HRC, Surveillance and human rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/41/35, Distr. gen. on 28 May 2019; HRC, Summary of Experts consultation on A/HRC/41/35, A/HRC/41/35/Add.4, distr. gen. on 27 May 2019, p. 2, para. 1; Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, distr. gen. on 12 September 2011.

316 The New York Times, "Myanmar's Military Deploys Digital Arsenal of Repression in Crackdown", 1 March 2021, at https://www.nytimes.com/2021/03/01/world/asia/myanmar- coup-military-surveillance.html;

mechanism before SP mandate-holders. Just Access recommends urgently ensuring a more privacy- and user-friendly design for the application form available for UN SP submissions. This in turn requires a better allocation of resources among SPs and a system for improved grouping and scaling of the requests.

On the mid- and long-term, Just Access recommends the adoption of a more effective system to allow groups of individuals to submit collective allegations in order to both secure further the right to access to justice at the international level and to streamline the scarce resource of the various SP mandate holders, especially in our current times of multiple global crises. Indeed, UN Special Procedures mandate holders do not only indirectly contribute to raising the alarm over human rights violations committed all over the world, but they more directly contribute to directing public attention to important issues, which can lead to a change of attitude among a State or a group of States whose reputation can suffer from reported international law violations and crimes by the UN.

7.6.2021

11

Justice for ISIL victims, Part 1: a constitutional perspective

Efforts to hold ISIL accountable for the heinous crimes committed that may amount to genocide, crimes against humanity, and war crimes, and to attain justice for its victims are stalling due to Iraq's inadequate constitutional framework and overwhelmed judicial system. Confirming long-held fears, the United Nations established, on 10 May 2021, that there is "clear and compelling evidence" that the unimaginable atrocities suffered by the Yazidis at the hands of ISIL amount to genocide[317]. A young Yazidi survivor of sexual enslavement describes the horrific events, recounting[318] that "when I woke up there were scars on my body and blood all over my clothes, [but] they raped me again and again." And another 2,868[319] Yazidi women and girls enduring a similar fate remain missing.

However, years after ISIL fighters were killed, driven into hiding, or captured amidst a military offensive in northern Iraq and north-eastern Syria, their victims' demands for justice remain for the most part elusive. Despite the fact, that there has been a

317 https://www.unitad.un.org/news/unitad-launches-multimedia-video-demonstrating-evidence-crimes-against-yazidi-community
318 https://twitter.com/aliya_yaqthan/status/1399449973310296069
319 https://twitter.com/aliya_yaqthan/status/1398701052950679553

surge in arbitrary arrests and detention after the territorial defeat of ISIL, pre-trial detention centers are overcrowded as the judicial system is unable to absorb the vast number of suspects. Thousands of ISIL suspects, including thousands of children, have been detained, many sentenced to death in trials that lasted mere minutes[320], but most are still waiting to learn of their charges and to get a court hearing.

To support domestic prosecution efforts, the UN Security Council established the UN Investigative Team for Accountability of Da'esh/ISIL (UNITAD)[321] in 2017 to collect, store and preserve evidence and assist in the preparation of criminal case files for crimes that may amount to genocide, crimes against humanity, and war crimes. However, after almost three years of painstaking work to prepare cases that meet the highest standards of international criminal law, a key challenge for the Investigative Team in the present context remains its inability to actually share evidence with Iraqi authorities, or any other state for that matter. Although the death penalty has been abolished by the Coalition Provisional Authority in 2003, it was later re-instated by Iraqi authorities and there is political pressure to hand down capital punishment for ISIL members responsible for the most serious crimes. However, as a UN body the Investigative Team is rightly not at prevue to share evidence that might assist in proceedings resulting in the death sentence.

Another challenge is that the domestic legal framework appears entirely unprepared to deal with the consequences of ISIL's emergence. Although the Iraqi Constitution (2005)[322] clearly stipulates in its Article 7 that entities that promote terrorism, accusations of others being infidels (takfir) or ethnic cleansing, are prohibited and this shall be regulated by law, in the contemporary legal framework international crimes are not criminalized. Thus, Iraqi courts could not prosecute ISIL suspects for crimes that may amount to genocide, crimes against humanity, or war crimes. It is not clear what type of support or collaboration between UNITAD

320 https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq
321 https://undocs.org/S/RES/2379(2017)
322 https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en

and the Iraqi authorities were envisaged by the Security Council when establishing the investigative body given the existing obstacles. For the Investigative Team to be able to fulfill its mandate, Iraq has to reform its judicial system. In fact, having ratified a number of pertinent treaties, including the Genocide Convention and the Convention against Torture, Iraq is under an obligation[323] to establish jurisdiction and to lead criminal law proceedings for crimes committed on its territory.

One avenue that is being explored is the adjudication of cases against ISIL members in a re-activated Iraqi High Tribunal. Following the U.S. invasion in 2003, the Tribunal was established as a hybrid mechanism to try members of the deposed Baathist regime for genocide, crimes against humanity, war crimes, or other serious breaches of international human rights and humanitarian law and of Iraqi law. To exercise jurisdiction over international crimes committed by ISIL, the statue of the Tribunal would require a number of amendments and approval from the legislature. The statute would require amendments in terms of (a) subject matter, to try ISIL members, (b) temporal jurisdiction, to adjudicate crimes committed since the rise of ISIL, and (c) personal and territorial jurisdiction to potentially establish extraterritorial jurisdiction over crimes committed by foreign nationals and/or outside Iraqi territory. In additional to criminalizing international crimes under domestic law, the re-activation of the Tribunal would allow Iraqi authorities to circumvent challenges regarding the death penalty as Article 24 of the statute clarifies that sentencing concerning international crimes may refer to judicial precedents and relevant decisions taken in international criminal tribunals.

However, there are a number of significant hurdles in pursuing this avenue. Chief among them is parliamentarians' reluctance to adopt an amended statute as it is highly unpopular to refrain from adopting the death sentence for the most heinous crimes committed by ISIL, while thousands of ISIL suspects have been convicted and sentenced to death under the terrorism law for mere allegiance to the jihadist group. Moreover, the Tribunal itself is surrounded with controversy as it served to

[323] https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/

prosecute Baathist members, which mainly belonged to the Sunni community, and may now be seen as a tool for the persecution of Sunnis. The fact that the U.S. played a major role in the establishment of the Tribunal does also not bode well.
Meanwhile, the government of the autonomous Kurdistan Region has introduced a draft legislation[324] for a special criminal court to adjudicate international crimes committed by ISIL within the region and the 'disputed territories.' The legal basis for the tribunal was devised with assistance from UNITAD and is expected[325] to embody the highest standards of international criminal law. After the draft legislation successfully passed a first reading in the Kurdistan Parliament, it is expected to be approved in a second reading. With the Kurdistan Regional Government's Prime Minister, Masrour Barzani, vowing[326] to continue collaborating closely with the Investigative Team in preparation for the first public trial, Baghdad would be under pressure to follow suit.

In the absence of applicable regulations in the Iraqi criminal law, ISIL suspects are being charged with terrorism related crimes. Tried under Iraq's Anti-Terrorism Law (No. 13/2005)[327], many suspects have been sentenced to death for mere membership in a terrorist organization, without any distinction being made for the severity of the crimes committed. Failing to adhere to international standards, or even the Iraqi criminal procedure code, suspects are held in overcrowded and inhumane conditions and convictions are based on forced confessions with rampant allegations of torture being a key feature of interrogations. Draconian sentencing is often unleashed on those convicted, including children. In one case[328], a 14 year-old boy was sentenced to 15 years in prison for admitting that he and his family were forced to serve as human shields for ISIL.

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[324] https://www.kurdistan24.net/en/story/24448-Bill-establishing-court-for-ISIS-crimes-passes-first-reading-in-Kurdistan-Parliament
[325] https://www.thenationalnews.com/opinion/comment/iraq-is-in-a-legal-mess-over-isis-and-the-west-has-made-it-worse-1.1230464
[326] https://www.kurdistan24.net/en/story/24387-Kurdistan-PM-describes-bill-establishing-new-court-to-prosecute-crimes-of-ISIS
[327] http://wiki.dorar-aliraq.net/iraqilaws/law/19499.html
[328] https://news.un.org/en/story/2020/01/1056142

The UN Assistance Mission for Iraq (UNAMI) found that terrorism-related trials fail to live up to basic fair trial standards and are putting "defendants at a serious disadvantage[329]." This is in direct contravention to Iraq's Constitution, which guarantees that defendants are entitled to counsel provided by the state. In fact, court-appointed defense lawyers[330] are quite open about their misgivings over having to represent "terrorists" and their preconceived notion of "guilt." From a victims' perspective, a failure to recognize the heinous crimes committed by ISIL that amount to genocide, crimes against humanity, and war crimes as such, diminishes the gravity and gruesomeness of the inconceivable agony inflicted on Iraq's communities. From an investigative stand point, convictions for mere membership of individuals that could serve as witnesses and offer critical testimony often result in the loss of essential evidence that could lead to the identification of ISIL members responsible for the most serious crimes. Especially in light of the severe sentencing, with association and membership often resulting in the death-sentence and non-combatant participation in 25 years in prison, the criminal law proceedings involve extremely high stakes[331].

Efforts to promote justice and to achieve accountability have to be undertaken in a politically sensitive manner and seek to foster social cohesion rather than being perceived as a campaign to persecute and marginalize the Sunni community. While most ISIL members ascribed to the Sunni branch of Islam, Sunnis also suffered at the hands of ISIL and were subject to serious crimes committed by militias and armed services—representing various religious and ethnic groups but mostly dominated by the Shia community—in their military offensive to combat ISIL. While ISIL as a non-state actor active in a non-international armed conflict, but also as a terrorist group, does evidently not enjoy combatant immunity, the Shia militias that are nominally linked to the Iraqi Armed Forces do benefit from such immunity. To promote some sense of fairness and accountability, forces fighting for or affiliated with the armed services that have committed the most serious crimes should also

329 https://news.un.org/en/story/2020/01/1056142
330 https://www.lawfareblog.com/iraqs-broken-justice-system-islamic-state-fighters
331 https://www.lawfareblog.com/iraqs-broken-justice-system-islamic-state-fighters

face legal consequences. At the communal level, as well, individuals have often become victims of deep-seated sectarian divides or communal tensions, with suspects being arrested simply at the behest of rival families who report individuals for their alleged association to ISIL. Thus, transitional justice in post-conflict Iraq has to be fair and holistic to avoid sowing the seeds for the emergence of ISIL 2.0.

The Iraqi judicial system is utterly inadequate for dealing with such a sheer insurmountable number of cases—to be sure, as would the judicial system of any other country. Between January 2018 and October 2019 alone, the Iraqi judiciary processed over 20,000 cases[332] of terrorism-related crimes, and still, thousands remain in backlog. Just in relation to international crimes committed in the Sinjar district, UNITAD has identified 1,444 suspects[333] responsible for genocide, crimes against humanity, and war crimes. Mechanisms applying extraterritorial jurisdiction at the international, regional, or national level may offer alternative avenues to attain justice for the heinous crimes suffered by victims of ISIL. The international community has to shoulder part of the responsibility, especially states whose nationals have joined ISIL. States should repatriate and prosecute foreign nationals, particularly as the application of the death penalty and the absence of due process guarantees is in direct violation of treaty law to which many of these states are parties.

[332] https://news.un.org/en/story/2020/01/1056142
[333] https://undocs.org/en/S/2021/419

14.6.2021

12

Justice for ISIL victims, Part 2: a jurisdictional perspective

As the national judicial systems in Iraq and Syria are unable to respond to demands for justice from victims of ISIL, the international community has to fulfill its responsibility in promoting accountability for crimes committed by the jihadist group. This is particularly the case for states whose nationals have been implicated in some of the most heinous crimes committed by ISIL members. It is estimated that over 41,000 foreign nationals[334] from 80 countries have traveled to Iraq or Syria to join ISIL. Overwhelmed with the burden of carrying for and guarding thousands of ISIL members in detention, Kurdish authorities in northeastern Syria have proceeded to release[335] thousands of women and children that were detained during the battle against ISIL and lived in inadequate and overcrowded detention camps. There are a number of avenues that may be pursued to attain justice and advance accountability, including referral to the International Criminal Court (ICC), establishment of a regional or 'hybrid' tribunal, and exercise of universal jurisdiction by states.

[334] https://icsr.info/wp-content/uploads/2018/07/Women-in-ISIS-report_20180719_web.pdf
[335] https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/

While referral to the ICC appears to represent a viable option for the prosecution of ISIL members, there are a number of obstacles that would have to be overcome. Most notably, neither Syria nor Iraq are party to the Rome Statute and the court does, therefore, not have territorial jurisdiction over the situation in these states. The ICC may, however, exercise jurisdiction if (a) the UN Security Council acting under UN Charter Chapter VII powers refers the situation, (b) the ICC prosecutor (soon to be former UNITAD head Karim Khan) initiates an investigation *proprio motu*, or (c) if a state party whose nationality the suspect holds accepted the jurisdiction of the ICC. While ISIL constitutes a 'threat to international peace and security' as affirmed by UN Security Council resolution 2253 (2015), the first scenario is unlikely due to the unwillingness[336] of some Security Council members, namely Russia and China, to refer the situation to the ICC. This would also open the door for investigations into actors other than ISIL active in the conflict, including anti-ISIL coalition members. With respect to the second scenario, ICC Prosecutor Fatou Bensouda, in 2015, issued a statement[337] expressing reluctance to initiate investigations as the court's purpose is to prosecute the most serious crimes, which have been committed by Syrian and Iraqi nationals. She also emphasized that ultimately the decision of non-party states to accept jurisdiction is independent of the court. The third scenario, which would infer personal jurisdiction over crimes committed by citizens of states that are party to the Statute, is also unlikely due to the complementarity principle. Lastly, referral to the ICC also poses serious operational and financial challenges to prosecuting a high number of suspects given the enormous resources that would be required.

In light of the political and operational challenges in pursuing justice through the ICC, the establishment of an *ad hoc* regional criminal tribunal may offer another avenue to hold ISIL members accountable for their crimes. For instance, the Swedish government hosted a high-level meeting[338] to explore the possibility of such a regional tribunal and introduced legislation that would allow its government

[336] https://blog.oup.com/2016/04/international-criminal-law-and-daesh/
[337] https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1
[338] https://www.government.se/press-releases/2019/06/sweden-to-host-expert-meeting-on-isis-tribunal/

to assist other actors, such as UNITAD, seemingly seeking to avoid repatriation and to achieve prosecution of its nationals outside of the country.

Mindful of ISIL's ideological dimension, the possibility of the establishment of a 'hybrid' tribunal[339] has been explored. The tribunal would draw on a combination of secular international criminal law and procedural rules and on relevant norms of Islamic international criminal law as its legal basis. Complementing the hybrid legal framework, it is proposed that the tribunal be situated in the Middle East and be composed of an equal share of practitioners of the Islamic legal tradition. Doing so would award the tribunal with greater legitimacy among Islamic communities and counter the narrative and misleading interpretation of *Sharia law* promoted by ISIL. ISIL claims that secular laws, including treaty law enshrined in the Geneva Conventions and Hague Conventions are the law of infidels (takfir). Islamic legal scholars have an important role in dispelling these claims and in emphasizing that the actions purportedly carried out in the name of Islam are in violations of the very principles of Islamic law they profess to adhere to.

Another proposal, which would focus on terrorism-related crimes, is the establishment of a treaty-based court[340], whereby states whose nationals are implicated in such crimes "pool their jurisdiction" to form a tribunal. Jurisdiction in this case would be based on the active personality principle, allowing most states to prosecute their nationals for terrorism-related crimes under domestic law.

Pursuant to the principle of 'universal jurisdiction,' whereby national prosecutors can lead prosecutions against individuals responsible for serious crimes, including genocide, crimes against humanity, and war crimes, irrespective of territorial or personal linkages to the crime, other states can promote justice for ISIL atrocities. Germany, in particular, is well positioned to try international crimes under its laws

339 https://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/
340 https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/

incorporating universal jurisdiction[341] and has taken significant steps in repatriating and prosecuting its nationals that have joined ISIL. Having garnered a lot of publicity due to the fact that the suspect is a female ISIL member, Germany has taken on the case of Omaima A.[342], who is accused, among other things, of holding a 13-year old Yazidi girl as a slave. Enslavement constitutes a crime against humanity under the German Code of Crimes Against International Law[343], which provides the domestic legal framework for exercising universal jurisdiction. Germany commenced the first Yazidi genocide trial[344] in April 2020, and it also sentenced[345] a German woman to five year in prison for her membership of ISIL. Despite these efforts, the Yazidi Women's Council has filed a lawsuit against the German justice and interior ministers, accusing them of failing to repatriate and prosecute[346] German ISIL members held in Kurdish custody in Syria.

The case of the four British ISIL members dubbed "The Beatles" is illustrative of some of the jurisdictional challenges emerging when attempting to prosecute ISIL members at the national level. While one of the four men was killed in combat in 2015 and another one convicted in a trial in Turkey in 2017, the two remaining members, El Shafee Elsheikh and Alexanda Kotey, were transferred for prosecution to the U.S. A request by the U.S. to the UK for information- and evidence-sharing has been deemed a violation of the European Convention on Human Rights and its Sixth Protocol[347] concerning the abolition of the death penalty due to the risk of a conviction resulting in the death penalty.

Similar concerns also arise with regards to retaining foreign nationals, particularly of EU member states, to face prosecution in Iraq. Most states have expressed reluctance to repatriate and prosecute their nationals and in some cases returned

341 https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/
342 https://www.justsecurity.org/70280/a-lost-phone-brings-a-female-isis-returnee-to-trial-for-crimes-against-humanity/
343 https://www.gesetze-im-internet.de/vstgb/__7.html
344 https://www.justsecurity.org/69833/first-yazidi-genocide-trial-commences-in-germany/
345 https://www.dw.com/en/german-islamic-state-bride-jailed-for-5-years/a-49482891
346 https://www.dw.com/en/germany-is-failing-to-prosecute-is-foreign-fighters-yazidis-accuse/a-48944533
347 https://www.echr.coe.int/Documents/Library_Collection_P6_ETS114E_ENG.pdf

ISIL members reported that they were able to avoid legal consequences. The UK and France, in particular, have shied away from meeting their obligations in returning their nationals and in ensuring accountability for their crimes. In February 2019, France, for instance, reached an agreement[348] with the Iraqi government that the latter would try French nationals in accordance with Iraqi domestic law. There have been reports[349] that Iraq would commute the death sentence for French nationals were the French government to pay millions, though they were denied by authorities from both countries.

States claim that they have insufficient evidence to charge returnees for terrorism crimes, and much less so, for international crimes. Thus, a key challenge in pursuing justice through extraterritorial jurisdiction is the accessibility of crime scenes—Syria's conflict is ongoing and Iraq continues to experience significant insecurity—and the availability of evidence that would uphold the scrutiny of judicial proceedings. While the UN Security Council established in 2017 the UN Investigative Team for Accountability of Da'esh/ISIL (UNITAD)[350] to collect and preserve evidence of genocide, crimes against humanity and war crimes, its mandate clearly states that these are to be used for criminal proceedings in Iraq and sharing of evidence for proceedings in other national courts would have to be determined by the Iraqi government "on a case by case basis." Interestingly, France of all actors has been particularly vocal about its opposition[351] to UNITAD sharing evidence with Iraq due to concerns over the death penalty.

348 https://www.kurdistan24.net/en/news/127bf51f-11ea-4117-8408-a8c9765ffabf
349 https://www.kurdistan24.net/en/news/bd2de7eb-c3ff-4feb-8e54-297a4384bc95
350 https://undocs.org/S/RES/2379(2017)
351 https://www.thenationalnews.com/opinion/comment/iraq-is-in-a-legal-mess-over-isis-and-the-west-has-made-it-worse-1.1230464

14.7.2021

13

Just Access speech at “Protecting Human Rights on the Internet: The Role of Government, Business and Civil Society” on the sidelines of the Human Rights Council 47th session

Thank you very much for this opportunity! My remarks will focus on HRC Resolution 38/7, the previous resolution adopted in July 2018 concerning the promotion, protection and enjoyment of human rights on the internet, in order to identify flaws that can now be corrected. The adoption of this Resolution has a long pre-history, and we must credit Brazil and other Geneva missions that took a leading role in drafting and negotiations. It is a vital and laudable achievement. It integrates multiple key concerns, including the protection of rights to privacy and freedom of opinion and expression, the rights of particularly vulnerable groups such as children, women, and journalists, and the role of Internet-related business enterprises in protecting and promoting human rights. Three areas of possible improvement concern the particular vulnerability of human rights victims and defenders, quasi- and parastatal business enterprises, and State responsibility.

In November 2018, a few months after Resolution 38/7 was adopted, the High Commissioner for Human Rights observed that "the Internet is increasingly a space of threat for human rights defenders."[352] HRC's session 47, now drawing to a close, has considered the report of the Human Rights Council Advisory Committee on the possible impacts, opportunities and challenges of new and emerging digital technologies on human rights, which also explicitly addressed legal principles and technical specifics that impact human rights defenders.[353] In addition, the Advisory Committee's report noted that while victims of human rights violations perpetrated by States can be empowered by digital technologies, they are especially vulnerable to the offending State's surveillance and digital interference (para 54). By contrast, HRC Resolution 38/7 does not address the unique threats to these groups.

Let me give two examples, of a victim and of a human rights defender, why it should.

Qatar has been holding Sheikh Talal, a grandson of Qatar's founder, in arbitrary detention for over 8 years, without access to a lawyer of his choosing, to an independent physician, or his family. His wife and four children escaped to Germany in 2018. Their lawyers submitted urgent appeals to the Working Group on Arbitrary Detention and the Special Rapporteur on torture which, joined by the special rapporteur on the right to health, issued a Joint Letter of Allegations on 19 October 2020 (QAT 2/2020). Qatar refused to answer these Special Mandate Holders' question about Sheikh Talal's whereabouts and condition – but the same day Qatar received the Joint Letter of Allegations, Mrs. Arian's computer was hacked, and the hackers found the confidential address where she lived with her children under German police and State protection. This has led to tremendous anxiety and need for psychological help for both her and the children; and the case is now with the German Public Prosecutor.

352 Michelle Bachelet, "Human Rights in a New Era", 14 November 2018. Available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23874

353 Human Rights Council Advisory Committee, "Possible impacts, opportunities and challenges of new and emerging digital technologies with regard to the promotion and protection of human rights" (A/HRC/47/52). Available at https://undocs.org/A/HRC/47/52.

Mr. Malcolm Bidali is a Kenyan citizen who worked in Qatar. He reported anonymously on migrant workers' treatment until a phishing attack in April 2021 uncovered his identity and location, as well. He was arrested in early May. Amnesty International attributed the phishing attack with high probability to the Qatari security forces.[354] Mr. Bidali was arrested arbitrarily, again denied access to a lawyer of his choosing, and held in incommunicado and solitary confinement. Global outcry followed. Mr. Bidali was allegedly released, but cannot leave the country.

Resolution 38/7 is to be applauded for recognising and discussing the particular vulnerabilities of children, women and journalists with regard to the Internet. Yet the High Commissioner's speech and the Advisory Committee's report add victims and human rights defenders to the list.

As these two cases show, the Internet is an asymmetrically resourced sphere where not technology, but only human rights law can create equality of arms. As, for instance, several Regular Opinions adopted by the Working Group on Arbitrary Detention show, States routinely hack messaging apps with end-to-end encryption. It is not possible to organise a demonstration or file a UN complaint securely. Journalists, children, women and, let me suggest, victims and human rights defenders will always be at a disadvantage in the digital age until their specific vulnerabilities are recognised and pertaining legal doctrines, norms and practices evolve concerning State responsibility and, may I add, international criminal law including the immunity of state officials.

I started by acknowledging the long pre-history and complex negotiations and drafting process that led to the HRC Resolution. While adding the two vulnerable groups I mentioned should have been obvious, we can't ask an HRC Resolution to reform international criminal law. Yet the Resolution is sensibly clear in affirming human rights in terms that emphasise State obligations, for instance to prevent and

[354] *See*, https://www.migrant-rights.org/2021/05/migrant-rights-activist-detained-incommunicado-by-qatar/.

suppress terrorist uses of information and communication technology. The Resolution also singles out encrypted and anonymous digital communications as essential to the rights of privacy, freedom of expression, peaceful assembly and association. State hacking of encrypted communications, as we find in the case of Mrs. Arian and Mr. Bidali, could be specifically addressed by minor changes in language with considerable legal consequences.

Another inoffensive way to give Internet-dependent human rights more teeth is to not only emphasise the positive roles businesses can play, but also note that States use quasi- and parastatal businesses with terrific scale and regularity to perpetrate some of the worst human rights abuses, from crippling rivals' basic infrastructure, including hospital IT systems and water supplies, to complicity in oppressing protests.[355] Myanmar's Tatmadaw regime has shut down the internet and systematically interfered with protesters' communications. Telenor, one of the biggest carriers in Myanmar, sold its operations, while as far as I know, Ooredoo continues to operate in Myanmar and thereby enable the regime to violate the protesters' fundamental rights. More emphasis on business-related human rights violations would be a useful addition to the toolkit embodied in the HRC Resolution, and at least it would set human rights perimeters to examinations of State responsibility via transnational and parastatal corporations.The recommendations in section IV.B of "Ending Internet Shutdowns", the new report by the Special Rapporteur on the rights to freedom of assembly, show considerable progress in this regard.[356]

Thank you very much for enduring my long comment, which boils down to this: victims and human rights defenders have particular digital vulnerabilities; and given States' conduct, business-focused remedies must be a relatively uncontroversial, necessary, and very far from sufficient addition to the tools outlined in the HRC Resolution concerning this vital topic.

[355] Nicole Perlroth, *This is How They Tell Me the World Ends* (London: Bloomsbury, 2021).
[356] "Ending Internet shutdowns: a path forward – Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association" (A/HRC/47/24/Add.2). Available at https://undocs.org/A/HRC/47/24/Add.2.

16.7.2021

14

20 years in pursuit of 'access to justice' under the Aarhus Convention

1. Brief journey of the Aarhus Convention

Environmental rights and climate justice under the international law regime cannot be discussed without referring to the 1998 Convention on Access to Information, Public Participation in Decision–Making and Access to Justice in Environmental Matters, more popularly known as the Aarhus Convention (the 'Convention'). Negotiated and adopted under the auspices of the United Nations Economic Commission for Europe (UNECE) in the year 1998 and entered into force in the year 2001, it recently completed 20 years of being a seminal instrument in global environmental governance.[357]

One of the distinguishing tenets of the Convention has been its recognition of the limitations of environmental decision making by public authorities. Climate jurisprudence stands witness to often irreversible and long-term impacts of such decision making. Therefore, the Convention provides for accountability by imposing obligations on such public authorities towards recognizing and upholding the right

[357] Michael Mason, So far but no further? Transparency and disclosure in the Aarhus convention. In: Gupta, Aarti and Mason, Michael, (eds.) Transparency in Global Environmental Governance: Critical Perspectives (2014).

to health and well-being of persons in the present and in posterity through access to environmental information, public participation in environmental decision making, and access to justice in environmental matters. Since the primary subject matter of this Convention consists of the enforcement of the three aforesaid procedural human rights[358] of right to information, right to participation and the right to access of justice, the Convention's impact and relevance has attracted both academic examination as well as public scrutiny. The Convention draws its legitimacy as a human rights-based instrument from its efforts in integrating environmental concerns with human rights.[359] The Convention is equipped to protect said rights and address trans-national environmental concerns through mechanisms of both compliance and implementation without prejudice to the availability of dispute settlement procedures.[360] Art. 15 of the Convention provides for the establishment of a compliance committee for the purposes of a non-confrontational, non-judicial, advisory and consultative review of state compliance with the obligations under the Convention. The composition of the compliance committee is both noteworthy and unprecedented as it comprises of independent experts from state parties or signatories instead of representatives from respective state governments and that non-governmental organizations (NGOs) have the same right as other signatories and state parties in nominating members to the Committee.[361] At this juncture, it is important to note that contrary to the historical treatment of non-state parties such as NGOs under most international treaties, the Convention has made a very pronounced exception since its very inception. Not only were NGOs involved extensively in the negotiation and drafting of the Convention, but they have since been considered as 'principal clients' of this Convention instrumental in realization

358 Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice', Transnational Environmental Law, 9:2 (2020), pp. 211–238.

359 Elisa Morgera, 'An Update on the Aarhus Convention and its Continued Global Relevance', Review of European Comparative International Environmental Law 14 (2) 2005.

360 *Supra* note 1; See, e.g., the implementation committee of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), Montreal, QC (Canada), 16 Sept. 1987, in force 1 Jan. 1989, available at: http://ozone.unep.org/new_site/en/montreal_protocol.php, and the implementation committee of the Convention on Long-range Transboundary Air Pollution, Geneva (Switzerland), 13 Nov. 1979, in force 16 Mar. 1983, available at: http://www.unece.org/env/lrtap

361 *Supra* note 3.

of the rights guaranteed under the Convention.[362] The Committee has been mostly perceived as merely authoritative and non-binding in its interpretations, rulings and recommendations over time, however, such perception has undergone a re-evaluation in the recent years.[363] It has been observed that the compliance committee's enforcement mechanism has transcended from issuing 'soft remedy'[364] to judicialization of rulings with binding and legal effect. This has further contributed to the increasing relevance and impact of the Committee's rulings on domestic state practices.[365]

2. The dynamics between the AARHUS Convention and the EU through the 'access to justice' provisions

This post intends to view the Convention through its 20 years of environmental democracy, with a specific emphasis on its developing jurisprudence on access to justice within the EU member states. Although the Convention has 47 signatories including the EU, its implementation vis-à-vis the EU primary law has been the subject matter of several practical and academic discussions and this post wishes to capture and analyse the quintessence of that dynamic and what it means for the environmental rights discourse. Under the EU legal order, the Convention must be incorporated into the domestic legal systems of state parties for it to be binding. And in instances where such integration has not taken place, the provisions of the Convention may be relied upon at the discretion of the court in matters of legislative ambiguity.[366] The same principle extends to the decisions and rulings issued by the Committee.[367] On one hand, whereas Arts. 4 (access to environmental information) and 5 (collection and dissemination of environmental

362 *Ibid*.
363 *Supra* note 2.
364 E. Fasoli & A. McGlone, 'The Non-Compliance Mechanism under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65(1) Netherlands International Law Review.
365 *Supra* note 2.
366 Walton v Scottish Ministers [2012] UKSC 44 [2013] PTSR 51 at [100]; Andrew Lidbetter & Nehal Depani, The Aarhus Convention and Judicial Review, 19 JUD. REV. 30 (2014).
367 Andrew Lidbetter & Nehal Depani, The Aarhus Convention and Judicial Review, 19 JUD. REV. 30 (2014).

information) have become part of domestic EU law through their incorporation into the EU Directives, the critical provisions on public participation (Arts. 6, 7 and 8) have however been incorporated only partially. For disputes arising in and out of compliance obligations within the Public Participation Directive, the CJEU and domestic courts can exercise discretion to determine and rule on public participation requirements or their violation thereof.[368] The aforesaid rights of access to environmental information and public participation in decision making along with enforcement of domestic legislations on the environment[369] are guaranteed by the access to justice clause enshrined in Arts. 9(1), 9(2) and 9(3) of the Convention. Art. 9(4) mandates the procedural framework for the enforcement of said rights to be 'fair, equitable, timely, not prohibitively expensive and able to provide effective and adequate remedies, including appropriate injunctive relief.'[370] Art. 9(5) obliges each party, *inter alia*, to establish appropriate assistance mechanisms towards reduction or removal of financial or other barriers to access to justice.[371]

Through a combined reading of the aforementioned provisions and of the preamble to the Convention, it can be reasonably inferred that one of the fundamental objectives of the Convention is to ensure adequate representation and protection of the legitimate environmental interests of the public through effective judicial mechanisms. Consequently, the Convention is perceived to be an empowering instrument in the hands of the common public in its treatment and facilitation of environmental justice concerns. The Convention has managed to significantly bridge the distance between an aggrieved party and the redressal of their grievances by conjoining of its procedural and substantive environmental rights. Both members of the public as well as NGOs can invoke their rights under the Convention against any instances of alleged non-compliance by simply sending a

368 *Ibid*.
369 The Role of The Aarhus Convention in Promoting Good Governance and Human Rights, Submission by the UNECE Aarhus Convention Secretariat, available at https://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/ECONOMIC_COMMISSION_FOR_EUROPE.pdf
370 *Supra* note 11; *Supra* note 13.
371 Text of the Aarhus Convention, available at https://unece.org/DAM/env/pp/documents/cep43e.pdf

'communication/s' to the Compliance Committee. This is often also identified as a public trigger. Although communications can be raised by either an individual member of the public or by a group, it is the NGOs which have brought forward the most notable instances of non-compliance against their respective State parties.[372] The Committee is obligated to take each communication under consideration unless it makes an adverse inference as to the merits of said communication or if it determines such communication to be incompatible with the provisions of the Convention.[373] It is pertinent to note that in addition to providing interpretations of the Convention, the Committee also discharges a crucial function of assisting and clarifying to the Parties their access to justice obligations.[374]

Since its inception, the Committee has received more than 165 communications from members of the public on issues of compliance while engaging with the provisions in the Convention.[375] The *modus operandi* of the Committee can therefore be seen as an evolutionary exercise complementary to the scope of the Convention. The compliance procedure is structured not merely towards the determination of non-compliance but also to ultimately ensure compliance by the erring parties.[376] As mentioned in this post previously, the discussions around the judicialization of the Committee's rulings and interpretations have become more pronounced, especially in response to the idea that a traditional compliance mechanism in an international treaty is unlikely to guarantee compliant conduct. While that might be a part of an ever-evolving narrative, it has not constrained the Committee from issuing findings of non-compliance with respect to access to justice obligations under the Convention to several EU member states.[377] The

372 Jiahui Qiu, What is the Aarhus Convention?, available at https://earth.org/what-is-the-aarhus-convention/

373 *Supra* note 3.

374 Áine Ryall, Access to Justice in Environmental Matters in the Member States of the EU: the Impact of the Aarhus Convention, Jean Monnet Working Paper No. 5/16, available at https://www.jeanmonnetprogram.org/wp-content/uploads/JMWP-05-Ryall.pdf

375 *Supra* note 2; United Nations Economic Commission for Europe (UNECE), 'Communications from the Public', available at; https://www.unece.org/env/pp/pubcom.html

376 *Supra* note 2.

377 Ebbesson, J, The EU and the Aarhus Convention: Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Briefing to the European Parliament Petitions Committee, June 2016, PE 571.357, pp7-8; Áine Ryall, Access to Justice in Environmental Matters in the Member States of the EU: the Impact of the Aarhus Convention,

likelihood and appearance of discord in the implementation of the Convention within the EU arises and has been observed on account of the three distinct jurisdictional ambits of the Committee, the CJEU and the domestic courts.[378] Despite the CJEU's proclamation of the Convention's provisions being an integral part of the EU legal order[379], it is still interesting to examine the CJEU's overall treatment of the Committee's findings and/or rulings and its consequent impact on ensuring access to justice as provided for under the Convention.

As referenced previously in this post, Art. 9 of the Convention contains, *inter alia*, procedural provisions such as legal standing, timely and effective review mechanisms including injunction, and a ceiling on expenses etc. for the purposes of guaranteeing access to justice for rights enshrined in other provisions of the Convention. In several instances, due to lack of textual clarity, these procedural standards have often been interpreted in a manner that facilitate the widest and most effective access to justice while upholding their legislative intent. The frequent references made by the domestic courts to the CJEU have contributed to the growing body of jurisprudence within the realm of environmental justice litigation. This is also indicative of the reliance of the domestic courts on the CJEU for optimal interpretations of the access to justice obligations.[380] The CJEU has found the EU Commission in contravention of the obligations under the Convention on several occasions. The CJEU has consequently implored the EU Commission to act with utmost diligence in its disclosure and transparency obligations which can impact access to justice.[381] Although it is an expectation that the rulings of the CJEU in interpreting the provisions of the Convention will offer a uniform jurisprudence to all member states, it is not always practical considering the existence of diverse systemic factors and approaches such as culture, politics,

Jean Monnet Working Paper No. 5/16, available at https://www.jeanmonnetprogram.org/wp-content/uploads/JMWP-05-Ryall.pdf

378 *Supra* note 18.

379 Case C-240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky EU:C:2011:125 para 30.

380 *Supra* note 18.

381 Marjan Peeters, Judicial Enforcement of Environmental Democracy: a Critical Analysis of Case Law on Access to Environmental Information in the European Union, Chinese Journal of Environmental Law 4 (2020).

investment obligations, socio-economic status vis-à-vis other member states etc. Therefore, implementation of access to justice under the CJEU may not always have a linear progression, but it does offer a roadmap for emphasizing the significance of access to environmental justice and protection.

3. The way forward: recent amendments and public interest litigations

Despite the attempts by the CJEU to provide the widest possible interpretation to access to justice obligations under the Convention, the EU's Aarhus Regulation[382] has often been criticised by experts, environmental law scholars and civil society organizations as being inadequate in fulfilling the access to justice obligations under the Convention.[383] In a communication brought forth by the NGO ClientEarth, the main grievance focused on the inconsistent jurisprudence of the CJEU on access to justice in environmental matters generally. The communicant NGO submitted that the internal review procedure in Art. 10 of the Aarhus Regulation was neither adequate, effective or fair.[384] While agreeing in part with the communicant's allegations, the Committee did acknowledge the non-compliance by EU with respect to access to justice obligations and recommended that all relevant EU institutions must take appropriate measures to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the concerned public with access to justice in environmental matters.[385] Since then, the EU Commission has undertaken few steps towards exploring options and ways to improve access

382 Regulation 1367/2006/EC on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] Official Journal of the European Union, L 264/13.

383 Pallemaerts, M, "Access to Environmental Justice at the EU Level: Has the 'Aarhus Regulation' improved the situation?" in Pallemaerts, M, The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law (Groningen: Europa Law Publishing, 2011)

384 Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union; available at https://unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7_for_web.pdf

385 *Ibid* at Para 42.

to justice with respect to environmental concerns.[386] With a view to address some of these concerns, the EU Commission published a proposal[387] to amend the administrative review procedure under the Aarhus Regulation. The EU Commission also published a communication on improving access to justice in environmental matters in the EU and the member states.[388] Following considerable political and social backlash both internally[389] and outside of the EU[390], the EU Commission published a detailed external study[391] on the present situation on access to justice in environmental matters at the EU level and commissioned a report[392] on the status of the implementation of the access to justice obligations under the Convention. On the heels of these reports in 2019, the EU Commission undertook few concrete steps in the year 2020 to expand the scope of administrative review under the Aarhus Regulation which was previously deemed as being restrictive[393] in determining not only the beneficiary and subject matter of the review but also the

386 Ioanna Hadjiyianni, Access to Justice in Environmental Matters in the EU Legal Order – Too little too late?; available at https://europeanlawblog.eu/2020/11/04/access-to-justice-in-environmental-matters-in-the-eu-legal-order-too-little-too-late/

387 Proposal for a regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies; available at https://ec.europa.eu/environment/aarhus/pdf/legislative_proposal_amending_aarhus_regulation.pdf

388 Improving access to justice in environmental matters in the EU and its Member States, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions; available at https://ec.europa.eu/environment/aarhus/pdf/communication_improving_access_to_justice_environmental_matters.pdf

389 European Parliament resolution of 15 November 2017 on an Action Plan for nature, people and the economy (2017/2819(RSP)); available at https://op.europa.eu/en/publication-detail/-/publication/fdc66ea5-c793-11e8-9424-01aa75ed71a1

390 Budva Declaration on Environmental Democracy for Our Sustainable Future, [As adopted by the Meetings of the Parties to the Convention and its Protocol]; available at https://unece.org/fileadmin/DAM/env/pp/mop6/in-session_docs/ECE.MP.PP.2017.CRP.3-ECE.MP.PRTR.2017.CRP.1_EN.pdf

391 Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, Final Report (September 2019); available at https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implemention_environmental_matters_2019.pdf

392 Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters (2019); available at https://ec.europa.eu/environment/aarhus/pdf/Commission_report_2019.pdf

393 Sanja Bogojević, Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity, *Yearbook of European Law*, Volume 34, Issue 1, 2015, Pages 5–25, available at https://academic.oup.com/yel/article-abstract/34/1/5/2362965

overall impact of such review. However, the proposed amendment merely addresses the subject matter that can be considered for the purposes of the administrative review, while the entitled beneficiary and the impact remain unchanged.[394]

Although not a complete overhaul, however this can still be considered as both a necessary as well as a positive change as the prior definition of 'administrative acts' under the Aarhus Regulation could not be broadened through judicial interpretation.[395] What the amendment does not address is extension of the scope of administrative acts to acts with no legally binding or external effects.[396] Finally, although the entire gamut of proposed amendments are a step towards course correction, it remains to be seen if a point of convergence can be imagined between access to justice under the Convention and the extent to which EU law guarantees the same.

A separate but analogous element in any discussion on access to justice under the Convention is the practice of public interest litigation ('PIL'). Public interest can arise from both public and private law matters and PILs are largely understood in the context of a domestic entity pursuing a specific policy change with the aid of an international law instrument before the domestic court as their forum.[397] In a recent landmark ruling before the Netherlands Supreme Court, a civil society organization named Urgenda proceeded to bring a case against the Dutch Government for failing to reduce its greenhouse gas emission levels, while claiming to represent the interests of almost everybody concerned or everyone likely to be affected.[398] The Dutch Supreme Court accepted Urgenda's representation of all residents of the Netherlands who are entitled to be protected by the state from any

394 *Supra* note 30.
395 *Ibid*.
396 *Ibid*.
397 Otto Spijkers, Chapter 14: The Urgenda case: a successful example of public interest litigation for the protection of the environment?, Courts and the Environment, available at https://www.elgaronline.com/view/edcoll/9781788114660/9781788114660.00024.xml
398 Otto Spijkers, Pursuing climate justice through public interest litigation: the Urgenda case; available at https://voelkerrechtsblog.org/pursuing-climate-justice-through-public-interest-litigation-the-urgenda-case/

environmental hazard or dangerous impacts of climate change. The Dutch Supreme Court ruled in favour of Urgenda while relying on both human rights as well as environmental rights instruments including the Aarhus Convention. The Supreme Court relied on both access to justice provisions of the Convention under Art. 9(3) and on Art. 2(5) by holding Urgenda as an NGO promoting environmental protection and having an interest in environmental decision making.

In the Slovak Brown Bear[399] ruling of the CJEU concerning an NGO's right to challenge an alleged infringement of environmental law, the Court acknowledged species protection provisions to be in the general interest of the public and the right of an environmental NGO to challenge any decision in that regard.[400] The CJEU further clarified that although Article 9(3) of the Convention was not sufficiently precise and unconditional to have direct effect with respect to legal standing of individuals and associations, it certainly was 'intended to ensure effective environmental protection' in pursuance of access to justice.[401]

4. Conclusion

The former Secretary-General of the United Nations, Mr. Ban Ki Moon once observed, "This treaty's powerful twin protections for the environment and human rights can help us respond to many challenges facing our world, from climate change and the loss of biodiversity to air and water pollution. The Convention's critical focus on involving the public is helping to keep governments accountable."[402] A further affirmation to this overarching commitment towards the Convention and goodwill of the parties to the Convention is the recent legally

399 Slovak Brown Bear case (C-240/09).

400 nne Altmayer, Implementing the Aarhus Convention Access to justice in environmental matters; available at European Parliamentary Research Service (October 2017); available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608753/EPRS_BRI(2017)608753_EN.pdf

401 *bid*.

402 *Supra* note 16; UNECE Quick Guide to the Aarhus Convention; available at https://unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_brochure_Protecting_your_environment_eng.pdf

binding treaty on environmental rights covering the Latin Americas and the Caribbean known as the Escazú Agreement.[403] While this Agreement draws heavily on the experiences of the Convention, it also strives towards learning from the shortcomings of the Convention and exploring its own boundaries. As the Convention crosses its two-decade milestone into increasingly unchartered and challenging territories such as the global pandemic and raging climate change repercussions, it is crucial to center and expand the contours of the Convention for safeguarding the rights of all conceivable stakeholders. The transformative potential of the Convention should be further explored by acknowledging the congruence of civil and political rights with environmental rights. A concerted effort should be made towards advocating for universal ratification and implementation of this Convention or towards importing the underlying principles of this Convention to other relevant discourses. With every radical step on the roadmap of access to justice, it is remarkable how this Convention has made it possible to reimagine environmental justice as social justice.

[403] Text of the Escazú Convention, available at https://unece.org/fileadmin/DAM/env/pp/wgp/WGP-22/Other_material/Updated_LAC_P10_Two-Pager_Final_6.12.2018.pdf

16.7.2021

15

International Justice Day Statement

Eighteen days ago Judge Chile Eboe-Osuji, outgoing President of the ICC, stated that neither impermanent sophistries nor the glacially evolving fundamentals of international criminal law institutions matter. “Let me be clear here, as clear as I can possibly be: the law is for the people”, he told his interviewer.[404] Legal technicalities are vital embodiments of this purpose, but they are secondary to it. Judge Eboe-Osuji added that he sees the Rome Statute as the culmination of eight decades of unceasing efforts to ease the chokeholds of state sovereignty, immunity and impunity on what should be non-negotiable accountability for international crimes. We hold that had it not been for the people’s attempt to wrest the law away from states, those eight decades of effort would have failed.

The Coalition for the International Criminal Court has, in particular, played a decisive role in drafting and creating State consent for the Prosecutor’s power to initiate investigations and the prohibition of sexual and gender-based crimes.[405]

[404] JIB/JAB: The Laws of War, 27 June 2021, available at https://jibjabpodcast.com/episode-24-judge-chile-eboe-osuji-on-the-icc-the-concept-of-attack-and-more/.

[405] Gabriela Augustínyová and Aiste Dumbryte, “The Indispensable Role of Non-Governmental Organizations in the Creation and Functioning of the International Criminal Court”, *Czech Yearbook of International Law* V (2014), 39-60.

Article 44(4) of the Rome Statute is just one institutionalised form of the Court's ongoing reliance on NGOs, and the CICC's intense engagement with the Court and with international criminal law writ large is an eloquent testament to the core importance and sheer vitality of civil society participation.

Just Access will celebrate the first anniversary of its establishment on 17 July 2021, which is also the 23rd anniversary of the Rome Statute's signing. On the eve of the International Criminal Justice Day and the birthday we share with the Rome Statute, we are honoured and proud to recognise and thank the CICC for their historic role, for accepting us among its Members, and for helping us to take our first steps. We greatly look forward to the next 25 years at the least, and to working with CICC and all its Members. We cannot imagine more important work than giving voice to the voiceless and protecting those who need it most, and we are certain that international criminal law advocacy and the framework created by the CICC is the most effective way that we can do our best. Tireless in love and justice, we must help our better angels prevail.