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Table of Contents

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8.10.2021

1

Depriving the Myanmar junta of narcotics income: the international community's, States' and NGOs' obligations and opportunities

Myanmar is the largest provider of narcotics in Asia, and probably the whole world. Since the military junta's coup d'état in February 2021, the country has also been suffering from ferocious oppression and civil war. Given the persistence of broad-based civilian protests and multiple well-organised ethnic armed groups, the situation in Myanmar may escalate to an all-out civil conflict.[1]

The two facts are not unrelated: the military junta is heavily involved in the production and trade of narcotics. While sanctions imposed on Tatmadaw-affiliated businesses by the UN, US, EU and other entities has affected the junta's revenues, drug production and trade, already illegal, is inherently resistant to the creation of new sanctions regimes. It is therefore vital to identify and effectively use all possible legal mechanisms to combat drug production and trafficking in Myanmar, not only as a global health issue, but also as a human rights priority.

A recent United Nations Office on Drugs and Crime ("UNODC") report underlined that Myanmar, on the verge of civil war, must deal with the illicit drug economy.

[1] https://www.theguardian.com/world/2021/jun/01/rise-of-armed-civilian-groups-in-myanmar-fuels-fears-of-civil-war.

> "There is a longstanding connection between drugs and conflict in Myanmar, and any meaningful action to address the conflict will require breaking this cycle," noted Jeremy Douglas, UNODC Regional Representative for Southeast Asia and the Pacific. He added, "The money generated has fueled a corrosive political economy and continued militarization, and it is clear that poor opium farming areas require better security and sustainable economic alternatives. The fact is that opium and heroin still remain an important source of income for organized crime even as the production of methamphetamine and other synthetic drugs has again increased. It is important to develop strategies to address the overall drug economy."[2]

According to the International Crisis Group and Nikkei, a Japanese newspaper, the Tatmadaw negotiates ceasefires with ethnic militias in exchange for giving them free rein to produce and trade drugs in the territories they control.[3] The rapprochement between the Tatmadaw and the Karen Border Guards Force is a case in point.[4]

Opium and opioids have long been a major economic activity in Myanmar, especially in the Shan region that borders Laos and Thailand as part of the so-called Golden Triangle. What is new, however, is Myanmar becoming the largest methamphetamine provider for Thailand, Laos, China, and Japan, and quite probably the whole world.[5] Methamphetamine production is the highest-value element of Myanmar's informal economy, and practically the only economic engine in regions such as Shan State.[6] According to a 2019 estimate,

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2 https://www.unodc.org/southeastasiaandpacific/en/2021/02/myanmar-opium-survey-report-launch/story.html.

3 International Crisis Group, "The Cost of the Coup: Myanmar Edges Toward State Collapse", 1 April 2021, at https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse, under III., C. "A Post-coup Economy: Natural Resource Rent Seeking and Illicit Economy".

4 https://www.theguardian.com/world/2021/jun/01/rise-of-armed-civilian-groups-in-myanmar-fuels-fears-of-civil-war; Asia.nikkei.com, "Myanmar coup provides drug traffickers with ideal conditions", 28 May 2021, at https://asia.nikkei.com/Spotlight/Myanmar-Coup/Myanmar-coup-provides-drug-traffickers-with-ideal-conditions.

5 Ibid.; TheGuardian.com, "South-east Asia's biggest synthetic drug raid: 200m meth tablets found in Myanmar", 19 May 2020, at https://www.theguardian.com/world/2020/may/19/south-east-asias-biggest-drugs-raid-200m-meth-tablets-found-in-myanmar.

6 International Crisis Group, "Fire and Ice: Conflict and Drugs in Myanmar's Shan State", 8 January 2019, at https://www.crisisgroup.org/asia/south-east-asia/myanmar/299-fire-and-ice-conflict-and-drugs-myanmars-shan-state.

methamphetamine accounted for $61 billion out of a total $71 billion generated by narcotics production and trafficking in the region.[7]

The junta should be rendered unable to continue instrumentalising methamphetamine to solidify its power, partly by securing sources of income and partly through bargaining with ethnic groups. Yet this should be done in line with international standards. Economic and human rights considerations are vital for uniting the country against the junta. UNODC and, separately or jointly, the National Unity Government ("NUG") might be in position to take the lead in reducing narcotic production and trade in Myanmar and thereby secure both domestic and international support. The following sections outline legal options against the Tatmadaw; against China; and elements and features of a potential positive plan for replacing the methamphetamine economy without alienating currently dependent minorities.

I. Practical steps to restrict the Tatmadaw's income from narcotics production and trade

Myanmar's international obligations related to drug production and distribution are based mostly on the 1961 Single Convention on Drugs, amended in 1972 and ratified by Myanmar in 2003. Particularly relevant are Art.s 4 (general obligations), 14 (enforcement), 29 (manufacturing), 31 (export and distribution), and 35 (prevention of illicit trafficking). Another key instrument is the 1988 United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which Myanmar acceded on 11 June 1991 with the following reservation: ""The Government [of Myanmar] further wishes to make a reservation on article 32, paragraphs 2 and 3 and does not consider itself bound by obligations to refer the disputes relating to the interpretation or application of this Convention to the International Court of Justice."[8]

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7 https://news.un.org/en/story/2020/09/1071192.

8 United Nations Treaty Collection, Narcotics Drugs and Psychotropic Substances, Vienna, 20 December 1988, Status as at 2 June 2021, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en#EndDec.

More recent salient recommendations are in the 2016 UNGASS outcome document,[9] the 2016 Outcome document of the thirtieth special session of UNGA, entitled "Our joint commitment to effectively addressing and countering the world drug problem (Resolution S-30-1), and the 2019 Ministerial Declaration by the Commission on Narcotic Drugs.[10] Myanmar incurs international responsibility for failing to comply with the aforementioned provisions inter alia through state organs' participation in the manufacturing or distribution of drugs, and the State's lack of due diligence in preventing the manufacture and distribution of drugs by private persons.

An effective way to raise these issues is through the **International Narcotics Control Board** (INCB), an independent and quasi-judicial monitoring body for the implementation of UN drug control conventions. The INCB examines information provided by governments, UN organs, specialised agencies, other intergovernmental organisations and international NGO's with direct competence in the subject matter and ECOSOC consultative status.

The INCB should (a) ask for explanations in the event of apparent violations of the treaties, (b) propose appropriate remedial measures to Governments that are not fully applying the provisions of the treaties or are encountering difficulties in applying them and, where necessary, (c) assist Governments in overcoming such difficulties.

If the INCB notes that the measures necessary to remedy a serious situation have not been taken, it may call the matter to the attention of the Parties concerned, and the Commission on Narcotic Drugs and the Economic and Social Council. As a last resort, the treaties empower INCB to recommend to Parties that they stop importing drugs from a defaulting country, exporting drugs to it, or both. Moreover, the Board undertakes a number of country missions every year to discuss with competent national authorities measures taken and progress made in various areas of drug control.

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9 https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf.

10 https://www.unodc.org/documents/commissions/CND/2019_Ministerial_Declaration/19-V1905795_E_ebook.pdf.

With regard to methamphetamine, another relevant factor is **precursor control**, the control of chemical precursors used to manufacture methamphetamine. This is particularly relevant to Myanmar, since cartels there have "started to produce their own drug precursors, which previously had to be sourced from India or China. By using unregulated ingredients to make restricted precursors, they can bypass the international regulatory regime."[11]

Under Art. 3 the 1988 UN Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances, State parties "shall […] establish as criminal offences under its domestic law, when committed intentionally" for the manufacture, transport or distribution of chemical substances used for producing drugs knowing that they are to be used for illicit purposes.[12]

Regarding precursors, INCB calls on Governments to partner with industry to effectively and quickly identify suspicious shipments.[13] Successful operations have been conducted under the aegis of Projects Prism and Cohesion.[14] Resources have been developed, such as PEN Online, PICS and practical, precursor-related recommendations from the Board's annual reports on precursors, which actively and effectively support Governments in working towards the objectives of the Convention.[15] Some of these resources are only available to responsible Competent National Authorities.

With respect to pre-precursors or non-scheduled precursors, the INCB highlights the importance of international cooperation among law enforcement authorities, the timely sharing of information and intelligence, and affirms that there "is a shared responsibility to

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11 Asia.nikkei.com, "Myanmar coup provides drug traffickers with ideal conditions", 28 May 2021, at https://asia.nikkei.com/Spotlight/Myanmar-Coup/Myanmar-coup-provides-drug-traffickers-with-ideal-conditions; France24.com, "Meth precursors fuelling Myanmar's unstoppable drug trade", 7 November 2018, at https://www.france24.com/en/20181107-meth-precursors-fuelling-myanmars-unstoppable-drug-trade.

12 https://www.incb.org/documents/PRECURSORS/1988_CONVENTION/1988Convention_E.pdf; https://www.incb.org/documents/PRECURSORS/TECHNICAL_REPORTS/2016/PARTITION/ENGLISH/2016PreARr_E-Prevention_of_chemical_diversion_beyond_regulatory_controls_the_role_of_law_enforcement.pdf.

13 https://www.incb.org/incb/en/precursors/precursors/tools_and_kits.html.

14 https://www.incb.org/incb/en/precursors/special_projects.html.

15 https://pen.incb.org/; https://pics.incb.org/; https://www.incb.org/documents/PRECURSORS/RECOMMENDATIONS/CompilationRecommendations.pdf .

ensure that each and every national precursor control system is fit for its purpose and does not present a target for traffickers."[16]

II. Third States' international responsibility: e.g. China and Thailand

As briefly noted above, methamphetamine production and trade involves both foreign non-State actors (armed groups, transnational criminal organisations, private corporations) and State actors in the South-East Asian region and beyond. The question of international responsibility is not limited to Myanmar alone. The proximity of Myanmar's methamphetamine-producing regions to China and India is a factor in the massive scale of narcotic production in the country.

China has considerable economic interests in Myanmar, including control over criminal transnational groups that sponsor and operate the drug route between Myanmar and the rest of the region. For instance, CNN recently reported a major seizure of methamphetamine pre-precursors en route to Myanmar via Thailand.[17] Note that a substantial share of chemical components that triggered the opioid crisis in the United States came from territories under Chinese jurisdiction.[18] In 2018, the Chinese Government launched stringent measures to reduce the scope of drug traffic within its borders due to US pressure.[19] The relatively successful Chinese crack-down is one reason why methamphetamine production has skyrocketed in Myanmar. In legal terms, the PRC by and large fulfilled its obligations to control drug trafficking within its territorial jurisdiction, but that it has not met standards of putative responsibility for the extraterritorial effects of illicit operations in which Chinese criminal organisations and entities are involved abroad.

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16 https://www.incb.org/documents/PRECURSORS/TECHNICAL_REPORTS/2016/PARTITION/ENGLISH/2016PreARr_E-Prevention_of_chemical_diversion_beyond_regulatory_controls_the_role_of_law_enforcement.pdf, paras. 187-92.

17 CNN.com, Asia's multibillion dollar methamphetamine cartels are using creative chemistry to outfox police, experts say", 4 May 2021, at https://edition.cnn.com/2021/05/03/asia/golden-triangle-precursors-intl-hnk-dst/index.html.

18 Asia.nikkei.com, "Myanmar coup provides drug traffickers with ideal conditions", 28 May 2021, at https://asia.nikkei.com/Spotlight/Myanmar-Coup/Myanmar-coup-provides-drug-traffickers-with-ideal-conditions.

19 Ibid.

That said, Chinese operations have not been entirely successful in eliminating domestic methamphetamine production, which even in Myanmar still relies partly on precursors and pre-precursors that originate in China. The International Crisis Group recommends that:

> "Myanmar's neighbours should stop illicit flows of precursors, the chemicals used to manufacture drugs, into Shan State. As the main source of such chemicals, China has a particular responsibility to end this trade taking place illegally across its south-western border. It should also use its influence over the Wa and Mongla armed groups controlling enclaves on the Chinese border to end their involvement in the drug trade and other criminal activities."[20]

China has invested immense sums in the development of critical infrastructures in Myanmar, including deep-sea port projects along an economic corridor meant to link China's South-Western interior to the Ocean, in the context of China's global Belt and Road Initiative (BRI). A Memorandum of Understanding was signed between the President of China and Aung San Suu Kyi in January 2020 to this effect.[21] One of the BRI projects is the deep-sea port of Kaukpyu on the Western coast of Myanmar, which serves strategic Chinese interests.

It is reasonable to posit that Chinese-sponsored and -controled critical infrastructure under development would considerably augment long-running Chinese involvement in the Myanmar drug production and trade. There is sufficient evidence and nexus to raise significant questions of international responsibilities and liabilities for China.[22]

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[20] International Crisis Group, "The Cost of the Coup: Myanmar Edges Toward State Collapse", 1st April 2021, at https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse, under III., C. "A Post-coup Economy: Natural Resource Rent Seeking and Illicit Economy".

[21] Financial Times, "China and Myanmar sign off on Belt and Road projects", 18 January 2020, at https://www.ft.com/content/a5265114-39d1-11ea-a01a-bae547046735.

[22] Maria Adele Carrai, "China's Malleable Sovereignty Along the Belt and Road Initiative: The Case of the 99-Year Chinese Lease of Hambantota Port", *New York University Journal of International Law and Politics*, 2019, pp. 1061-99.

III. Elements and features of a solution

From an international law perspective, the junta as the ostensible Government currently holds international responsibility for the drug economy. UNODC is an ideal position to support and coordinate, and NUG is in a strong position to initiate, legal proceedings to hold the junta accountable.

Any realistic plan must take into account that significant regions, ethnic minorities, and segments of the population depend on the production and trade of narcotics; and must be provided with viable alternative sources of income.

Concerning possible alternatives, in the context of replacing cocaine and opium production the UN has promoted the plantation of **alternative crops** through subsidies. One example is the $300 million agreement signed in 2017 with Colombia. A similar approach has been put in place in Afghanistan.

The downside of this approach in the case of Myanmar is that methamphetamine is not produced through extensive plantations but through chemical processes. One solution might be to adapt the UN approach by encouraging the production of other chemical substances that can be legally used in medicine or industry. A detailed plan would have to take into account applicable international legal regimes, including Art. 4 of the 1961 Single Convention on Drugs[23] read together with Art. 5 of the 1971 UN Convention on Psychotropic Substances[24].[25] Such a strategy, despite great initial challenges, would also permit the legitimate civilian authorities of Myanmar to advance drug prevention and

[23] https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Commentaries-OfficialRecords/1961Convention/1961_OFFICIAL_RECORDS_Volumne_II_en.pdf, p. 302, Art. 4 "General obligations".

[24] https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Commentaries-OfficialRecords/1971Convention/1971_OFFICIAL_RECORDS_Volumne_I_en.pdf, p. 120, Art. 5 "Limitation of use to medical and scientific purposes."

[25] Richard Lines, *Drug Control and Human Rights in International Law* (CUP, 2017), p. 83: "In large part, the 1971 Convention simply expands the control measures established for plant-based narcotics under the 1961 Convention to also include synthetic psychotropic substances. Therefore, for example, Article 5 of the 1971 Convention, which calls upon States to limit to medical and scientific purposes of the psychotropic substances listed in that treaty, complements the General Obligation in Article 4(c) of the 1961 Convention 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs'."

control as well as the right to health of the population, as protected by a series of international instruments (e.g. UHRD, Art. 25; Constitution of the WHO; Convention on the Rights of the Child, Art. 24; ICESCR, Art. 12). In addition, an alternative strategy could take a leaf from Art. 14(2) of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[26] and Art. 33 of the UN Convention on the Rights of the Child.[27]

Some experts have criticised the alternative crops approach and suggested instead focusing on **alternative livelihoods**, whereby the State, in combination with UN agencies, invests in human capital, job creation and security in rural communities. This approach is inspired by Thailand's experience, where the Government began reconstruction by developing education and healthcare access in rural communities, as well as investments in infrastructure, land titles and microcredit. These measures were on the whole successful in reducing illicit crop production. UNODC has recently stated that poor opium farming regions in Myanmar require better security and sustainable economic alternatives, as well as strategies to address the overall drug economy.[28] UNODC has been supporting alternative development projects in Myanmar and Laos over the past 10 years. UNODC and, separately but ideally jointly, NUG and NGOs could integrate these systems into a detailed plan of action for the methamphetamine producing areas of Myanmar.

UNODC, NUG, and/or NGOs should also strategically develop an alternative approaches to transitioning away from methamphetamine production to other forms of chemical or industrial production. This would increase pressure on the Tatmadaw and on China by actualising their legal responsibilites and reducing their income from narcotic production and trade. If this strategy is well-framed (e.g. neither unrealistic nor authoritarian, but reliant on providing alternative income to the population), it could gain international and

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26 https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Commentaries-OfficialRecords/1988Convention/1988_OFFICIAL_RECORDS_Volume_I_en.pdf, pp. 190-1, Art. 14 "Measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances", (2): "Each Party shall take appropriate measures to prevent illicit cultivation and to eradicate plants containing narcotic or psychotropic substances […]. The measures adopted shall respect fundamental rights[…]."

27 https://www.unicef.org/child-rights-convention/convention-text-childrens-version, Art. 33 "Protection from harmful drugs": "Governments must protect children from taking, making, carrying or selling harmful drugs."

28 https://www.unodc.org/southeastasiaandpacific/en/2021/02/myanmar-opium-survey-report-launch/story.html.

domestic support. In addition, alternative approaches can garner universal support by avoiding adverse effects of drug criminalisation policies, long criticised for neglecting core human rights principles.[29] A conventional approach based on criminalisation and forceful methods would not only alienate key regions and ethnic minorities domestically, but also abandon the hundreds of thousands who currently depend on the drug economy.

[29] E.g. Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge, 2017).

14.10.2021

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On Qatar's Reservations to the ICESCR

On 18-22 October 2021 in Geneva the UN Committee on Economic, Social and Cultural Rights will hold its 69th Pre-Sessional Working Group to start the process of reviewing States' compliance with the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), one of the most important core human rights treaties.[30] The forthcoming ICESCR compliance review session will be closely observed, as the States reviewed are Armenia, Chad, Mauritania, Qatar, Romania, and Palestine. Among the interesting questions this session will raise, this blog post focuses on Qatar's reservations. It will be the first review of this treaty's implementation by Qatar, which ratified ICESCR on 21 May 2018; but Qatar's reservations to the ICESCR, primarily affecting women's and workers' rights, follow a problematic pattern of reservations to other treaties that a range of UN organs, other States, NGOs, and scholars have drawn attention to.[31]

This post will first discuss the impermissibility of Qatar's reservations to the ICESCR as well as other reservations under universal human rights treaties with a similar subject-matter. Secondly, it will show that Qatar's reservations defeat the object and purpose of

30 See, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2443&Lang=en

31 On Qatar's problematic reservations see e.g. https://www.amnesty.org/en/documents/mde22/9892/2019/en/ ; https://www.ejiltalk.org/qatars-reservations-to-the-iccpr-anything-new-under-the-vclt-sun/

the ICESCR, making them clearly impermissible under international law. Thirdly, it will detail why Qatar's reservations are incompatible with custom and *jus cogens* norms. Fourthly, it will turn to Qatar's intention to maintain its reservations under the ICESCR despite their impermissibility under international law. Finally, this post will formulate recommendations to resolve this concerning situation for the respect of international human rights law.

I. Qatar's impermissible reservations on gender equality and trade union rights under the ICESCR

This section provides the context of Qatar's reservations under ICESCR (A.), then turns to the international norms governing the permissibility of reservations (B.).

I.A. Qatar's reservations under the ICESCR and other reservations under universal human rights treaties with a similar subject-matter

Qatar became a State party to the ICESCR by ratifying it on 21 May 2018. When it ratified this universal human rights treaty, the State of Qatar made an explicit reservation to Art. 3 ICESCR on gender equality: "The State of Qatar does not consider itself bound by the provisions of Article 3 of the International Covenant on Economic, Social and Cultural Rights, for they contravene the Islamic Sharia with regard to questions of inheritance and birth."[32] This reservation falls under the following definition by the International Law Commission:

> "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to

[32] United Nations Treaty Collection, Chapter IV Human Rights, 3. International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, Status as at: 03-08-2021, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec.

exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization."[33]

Qatar also submitted a statement on Art. 8 ICESCR, which is a reservation since it restricts the scope of rights protected under that ICESCR provision. This statement reads as follow: "The State of Qatar shall interpret that what is meant by "trade unions" and their related issues stated in Article 8 of the International Covenant on Economic, Social and Cultural Right[s], is in line with the provisions of the Labor Law and national legislation. The State of Qatar reserves the right to implement that article in accordance with such understanding."[34] This statement is in fact a reservation since Qatar's labour law, after its latest reform on 8 September 2020, still prohibits workers to strike and join trade unions.[35] Qatar's statement on Art. 8 ICESCR upon accession is therefore a statement purporting to limit its obligations. According to the 2011 Guidelines on Reservations to treaties, that constitutes a reservation.[36]

Qatar's reservations to the ICESCR shall not be read in isolation from other reservations it has submitted under other universal human rights treaties. Since this post focuses on Qatar's ICESCR periodic review, it will only refer to Qatar's other reservations that have a similar scope of application to those under the ICESCR.

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33 ILC, Reservations to treaties, Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties, as finalized by the Working Group on Reservations to Treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011, A/CN.4/L.779, distr. gen. on 19 May 2011, at https://legal.un.org/ilc/documentation/, p. 1, para. 1.1.

34 Ibid. Comp. with Sweden's objection to Qatar's reservations under ICESCR, United Nations Treaty Collection, Chapter IV Human Rights, 3. International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, Status as at: 03-08-2021, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec, endnote 30.

35 Human Rights Watch, "Qatar: Significant Labor and Kafala Reforms", 24 September 2020, at https://www.hrw.org/news/2020/09/24/qatar-significant-labor-and-kafala-reforms; Amnesty International, "Migrant Workers Rights with Two Years to the Qatar 2022 World Cup: Reality Check", February 2019, at https://www.amnesty.org/en/latest/campaigns/2019/02/reality-check-migrant-workers-rights-with-two-years-to-qatar-2022-world-cup/.

36 ILC, Reservations to treaties, Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties, as finalized by the Working Group on Reservations to Treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011, A/CN.4/L..779, distr. gen. on 19 May 2011, at https://legal.un.org/ilc/documentation/, p. 1, para. 1.1.1.

Under the ICCPR, the State of Qatar has also made reservations regarding both gender equality and trade unions.[37] Qatar has also made reservations to Arts. 2 and 14 of the Convention on the Rights of the Child ("CRC"), justifying them with reference to Sharia law.[38] Qatar's reservation under Art. 2(1) CRC partly overlap with Qatar's reservation to Art. 3 ICESCR. Finally, Qatar has also made several reservations upon accession to the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), whose subject-matter overlap with the reservation it has authored under Art. 3 ICECSR, regarding specifically gender equality with respect to inheritance and birth.[39]

Qatar's reservations under the ICECSR are impermissible under international law, since they are incompatible with the object and purpose of this universal human rights treaty, according to the Vienna Convention on the Law of Treaties (VCLT) and the International Law Commission's Guidelines on Reservations.

I.B. Applicable rules under the VCLT and the 2011 ILC Guidelines on Reservations

Under Art. 19(3) VCLT on formulations of reservations, a State "may, when signing, accepting, approving or acceding to a treaty, formulate a reservation unless the reservation is incompatible with the object and purpose of the treaty." Art. 21 VLCT on legal effects of reservations sets forth that a reservation can only produce legal effects if it has been *inter alia* made in accordance with Art. 19 VLCT. This is not the case with Qatar's reservations, which are incompatible with the object and purpose of the ICESCR. The two reservations that Qatar submitted to the ICESCR are clearly incompatible with the object and purpose of this Convention, since they fundamentally violate the principle of gender

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37 United Nations Treaty Collection, Chapter IV Human Rights, 4. International Covenant on Civil and Political Rights, New York, 16 December 1966, Status as at: 03-08-2021, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

38 United Nations Treaty Collection, Chapter IV Human Rights, 11. Convention on the Rights of the Child, New York, 20 November 1989, Status as at: 03-08-2021, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec.

39 United Nations Treaty Collection, Chapter IV Human Rights, 8. Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, Status as at: 03-08-2021, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec.

equality and basic rights of workers to strike and form unions, that are protected under international human rights law as fundamental rights.

The 2011 ILC Guidelines on Reservations are authoritative standards in international law that can supplement the general rules applicable to reservations to international treaties under the VCLT. The ILC Guidelines confirm that Qatar's reservations under the ICESCR are impermissible under international law, and therefore without legal effect. The Guidelines explain that a "reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty."[40]

First, Qatar's reservations under the ICESCR are incompatible with the *raison d'être* of the ICESCR, since they fundamentally curtail women's rights as well as workers' rights, that are both at the core of the protection guaranteed by this universal human rights treaty. Furthermore, Qatar's reservations overly restrict other interdependent rights protected under that Covenant, and other universal human rights treaties whose subject-matter partly overlap with the ICESCR.[41]

Secondly, reservations made by Qatar upon accession to the ICESCR are impermissible because they are vague and constitute general reservations of the type that the ILC Guidelines on reservations prohibit: "A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty."[42]

Thirdly, Qatar justifies its reservations in an over-generalised fashion with reference to its understanding of Sharia law anchored in its domestic laws concerning inheritance and birth.[43] Yet, the ILC Guidelines on Reservations only accept that a State authors a reservation to "preserve the integrity of specific rules" of its internal law "insofar as it does

40 ILC, Reservations to treaties, Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties, as finalized by the Working Group on Reservations to Treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011, A/CN.4/L..779, distr. gen. on 19 May 2011, at https://legal.un.org/ilc/documentation/, p. 17, para. 3.1.5.

41 Ibid., 3.1.5.6.

42 Ibid., para. 3.1.5.2.

43 See, supra, fn 1.

not affect an essential element of the treaty nor its general tenour."[44] Qatar's reliance on its own understanding of Islamic Sharia law as it applies to its domestic law in order to justify broad reservations in a manner incompatible with the *raison d'être* of the ICESCR affects both an essential element of this treaty and its general tenour, as the purported reservations have the effect of depriving women, children and workers from the protection of their fundamental rights. These interventions are therefore a negation of the commitments that Qatar made while accessing these universal human rights treaties.

The fact that Qatar's reservations under the ICESCR and other human rights treaties are impermissible under international law has actually motivated other States parties to those treaties, UN treaty monitoring bodies as well as other stakeholders to call upon Qatar to withdraw its reservations.

II. A broad recognition of the impermissibility of Qatar's reservations under the ICESCR

This section will detail the following. Qatar's reservations to the ICESCR have been directly and repeatedly objected to by other States parties to that Convention and other universal human rights treaties whose subject-matter partly overlap the former (A). Those reservations have also been criticised by multiple States during Qatar's UPR Third Cycle (B), as well as by other stakeholders (C). Finally, Qatar's reservations to universal human rights treaties have also been systematically and consistently criticised by UN treaty bodies (D.).

II.A. Direct objections by third States to Qatar's reservations to ICESCR and other universal human rights treaties

[44] ILC, Guidelines on Reservations to treaties, ibid., p. 17, 3.1.5.5.

Multiple reservations made by Qatar under the ICESCR, and other universal human rights treaties, have attracted objections from other States parties to those international treaties. Those objections have all regarded Qatar's reservations made under universal human rights treaties as impermissible under international law and therefore without effects.

The Government of Sweden objected on 22 May 2019 to the reservations made by Qatar upon accession to the ICESCR, by sending the following communication to the UN Secretary General, grounding its objection in international law:

> "The Government of Sweden notes that the interpretation and application of Article 3 and Article 8 are made subject to in general terms to Islamic sharia and/or national legislation. The Government of Sweden is of the view that such reservations, which does not clearly specify the extent of the derogations, raises doubt as to the commitment of the State of Qatar to the object and purpose of the [Covenant].
>
> According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of the [Covenant] shall not be permitted. It is in the common interest of states that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all parties and that states are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.
>
> For this reason, the Government of Sweden objects to the aforementioned reservations made by the Government of Qatar. The [Covenant] shall enter into force in its entirety between the two States, without Qatar benefitting from its reservations."[45]

On 1 July 1996, the Government of Belgium sent a communication to the UN Secretary General to object to the reservations made by Qatar, by contending that they are "incompatible with the object and purpose of the Convention" and that they are

[45] United Nations Treaty Collection, Chapter IV Human Rights, 3. International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, Status as at: 03-08-2021, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec, endnote 30.

consequently in accordance with article 51(2) CRC not permitted. Belgium added moreover in its objection that "as the 12 months period specified in article 20.5 of the Vienna Convention on the Law of Treaties is not applicable to reservations which are null and void, Belgium's objection to such reservations is not subject to any particular time-limit."[46]

The Government of Denmark sent on 3 July 1995 a communication to the UN Secretary General to object to the reservation made by Qatar under the CRC, by arguing that "[b]ecause of their unlimited scope and undefined character these reservations are incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law."[47] Similarly, the Government of Sweden sent a communication to the UN Secretary General to object to the reservations made *inter alia* by Qatar under the CRC.[48] On 18 June 1996, the Government of Austria has similarly objected to the reservation made by Qatar upon ratification to the CRC.[49]

The United Mexican States and the Government of Portugal have both sent a communication to the UN Secretary General to object to Qatar's reservations under CEDAW.[50] Mexico has concluded after examining these reservations that "they should be considered invalid in the light of article 28, paragraph 2, of the Convention because they are incompatible with its object and purpose. The said reservations, if implemented, would inevitably result in the discrimination against women on the basis of sex, which is contrary to all the articles of the Convention."[51] For its part, Portugal justified its objection to Qatar's reservations under the ICESCR with the contention that these reservations "are incompatible with the object and purpose of the Convention, insofar as they disregard fundamental principles that shape the core of the Convention", while adding that

46 United Nations Treaty Collection, Chapter IV Human Rights, 11. Convention on the Rights of the Child, New York, 20 November 1989, Status as at: 03-08-2021, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec, endnote 52.

47 Ibid, endnote 25.

48 Ibid, endnote 23.

49 Ibid., endnote 53.

50 United Nations Treaty Collection, Chapter IV Human Rights, 8. Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 19979, Status as at: 03-08-2021, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec, endnote 84.

51 Ibid.

"[a]ccording to international law, a reservation which is incompatible with the object and purpose of a treaty shall not be permitted."[52]

Besides direct objections by third States to Qatar's reservations to the ICESCR and other universal human rights treaties, several States have also recommended Qatar to review and withdraw its reservations because they are impermissible under international law, at the occasion of Qatar Universal Periodic Review ('UPR') Third Cycle before the Human Rights Council.

II.B. Third States' recommendations asking Qatar to review and withdraw its reservations under the ICESCR and universal human rights treaties

During Qatar's UPR Third Cycle,[53] Albania,[54] Austria,[55] Czechia,[56] France,[57] Germany,[58] Ireland,[59] Slovenia,[60] and Uruguay[61] expressed general concerns about Qatar's reservations under the ICESCR and recommended that State to withdraw them or at least to minimise them. In addition, several States have also recommended that Qatar withdraw its reservations under other universal human rights treaties, whose subject-matter overlap entirely or partly with its reservations under the ICESCR, including: Albania (ICCPR)[62], Austria (ICCPR, CEDAW)[63]; Canada (CEDAW)[64]; Czechia (ICCPR)[65]; France (ICCPR,

52 Ibid.
53 HRC, Universal Periodic Review Third Cycle – Qatar, at https://www.ohchr.org/EN/HRBodies/UPR/Pages/QAindex.aspx.
54 HRC, Report of the Working Group on the Universal Periodic Review, Qatar, A/HRC/42/15, distr. gen. on 11 July 2019, p. 8, para. 94.
55 Ibid., p. 11, para. 134.25.
56 Ibid., para. 134.26.
57 Ibid., para. 134.23.
58 Ibid., p. 4, para. 19 and p. 11, para. 134.22.
59 Ibid., p. 4, para. 28.
60 Ibid., p. 6, para. 63.
61 Ibid., p. 8, para. 90.
62 Ibid., para. 94.
63 Ibid., p. 11, para. 134.25.
64 Ibid., pp. 21-2, para. 134.212.
65 Ibid., p. 11, para. 134.26.

CEDAW)[66]; Germany (ICCPR, CEDAW)[67]; Ireland (ICCPR)[68]; Lichtenstein (CEDAW)[69]; Netherlands (CEDAW)[70]; Norway (CEDAW)[71]; Romania (CEDAW)[72]; Slovenia (ICCPR)[73] and Uruguay (ICCPR, CEDAW, CRC).[74]

II.C. Other stakeholders' reactions against Qatar's impermissible reservations to the ICESR under international law

During Qatar's UPR Third Cycle, the group of NGOs JS4 firstly urged reviewing States to recommend that Qatar amend the Citizenship Law to enable Qatari women to transfer nationality to their children and spouses without restriction, on an equal basis to men, in accordance with international standards and the Constitution of Qatar; and to remove Qatar's reservation to and ensure full compliance with the entirety of CEDAW's Article 9."[75] JS4 also "stated that **the sweeping reservations made** to ICCPR and ICESCRs in respect to gender equality and declarations that appear **to undermine the object and purpose of the Covenants**, were regrettable, and that the gaps in domestic law and policy and the challenges that many individuals and groups faced in relation to their right to a nationality, detailed below, were all in clear violation of the international obligations of Qatar."[76]

Secondly, JS4, JS5, Maat Foundation and Amnesty International have "recommended Qatar to withdraw all reservations and declarations to the ICCPR and ICESCR; ratify the Optional Protocols to the ICCPR, ICESCR and CAT; and the Rome Statute of the ICC and

66 Ibid., p. 11, para. 134.23.
67 Ibid., p. 11, para. 134.22 and p. 20, para. 134.180.
68 Ibid., p. 4, para. 28.
69 Ibid., p. 12, para. 134.29.
70 Ibid., p. 11, para. 123.24.
71 Ibid., p. 19, para. 134.173.
72 Ibid., p. 12, para. 134.28.
73 Ibid., p. 6, para. 63.
74 Ibid., p. 8, para. 90.
75 HRC, 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, pp. 2-3, para. 15.
76 Ibid., para. 21.

the ICPPED."[77] Furthermore, Amnesty International has "expressed concern over the government's sweeping reservations. Through lodging these reservations, Qatar has refused to fully recognize equal rights for women, including in matters of personal status laws, and has also stated that it will interpret the term "punishment" in line with the Islamic Shari'a."[78] It has also suggested that the government may not intend, as a state party to the Covenants, to address the fact that women do not have equal rights to inheritance, or to remove the death penalty and corporal punishment from the Penal Code currently applicable for crimes such as murder, banditry and adultery. Qatar also stated that it will interpret the scope of the right to form and join trade unions in line with the Labour Law, which prevents migrant workers - about 90% of the country's population - from forming or joining unions, thereby violating their right to freedom of association."[79] All of these NGOs observations are congruent with similar assessment by UN treaty monitoring bodies.

II.D. UN treaty monitoring bodies

In 2018, the Committee on the Elimination of Racial Discrimination ("CERD") commented on Qatar's accession to the ICCPR and ICESCR while criticising its reservations under both treaties by noting "with regret [that] the State party's reservations to both Covenants, which might hinder the application of those instruments by the State party."[80] A year later, the CEDAW reiterated an older assessment regarding the impermissible reservations that Qatar has made under the CEDAW,[81] in a similar fashion to the impermissible reservations authored by Qatar while acceding to the ICESCR.[82]

After all those consistent criticisms directed towards its impermissible reservations under the ICESCR and other universal human rights treaties, the State of Qatar has articulated a

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77 Ibid., para. 17.
78 Ibid., para. 18.
79 Ibid., para. 19.
80 CERD, Concluding observations on the combined seventeenth to twenty-first periodic reports of Qatar, CERD/C/QAT/CO/17-21, dsitr. gen. on 2 January 2019, p. 2, para. 4.
81 CEDAW, Concluding observations on the initial report of Qatar, CEDAW/C/QAT/CO/1, distr. on 10 March 2014, p. 2, paras. 7-8.
82 CEDAW, Concluding observations on the second periodic report of Qatar, CEDAW/C/QAT/CO/2, distr. gen. on 30 July 2019, p. 3, paras. 9-10.

defense that fails to justify its insistence in not reviewing its impermissible reservations under those treaties and withdrawing them.

III. Qatar's reservations to the ICESCR are incompatible with Qatar's other treaty obligations, customary international law, and *jus cogens* norms

Qatar's reservation to Art. 3 is without any effect because the equal right of men and women to the enjoyment of all economic, social and cultural rights provided for in Art. 3 ICESCR is also protected by numerous treaties that Qatar has ratified, including Art. 11 of CEDAW (which, as noted above, has declared Qatar's reservation impermissible).[83] In addition, this right is also guaranteed under both customary international law, and *jus cogens* norms.[84]

Qatar's reservation to Art. 8 ICESCR is equally without effect because the right to form and join trade unions and the right to strike are protected by International Labour Organisation conventions, Art. 26 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, Art. 35 of the Arab Charter on Human Rights, and other treaties that the State of Qatar has ratified. In addition, the right to form and join trade unions and the right to strike have also become customary international law.[85]

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83 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, A/71/385, para. 56.

84 For relevant state practice and *opinio juris* pertaining to treaty reservations that concern gender discrimination and were made with reference to Shariah, see William A. Schabas, *The Customary International Law of Human Rights* Oxford 2021, pp. 87-88, 157. The prohibition of gender discrimination is characterised as a *jus cogens* norm in the relevant context in CESCR, General Comment No. 18, Art. 6 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/18, para. 1.

85 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, A/71/385, para. 56.

IV. Qatar must review its impermissible reservations and withdraw them, even if they are without effect under international law

In its Initial report submitted in December 2020 under Arts. 16 and 17 ICESCR to the CESCR, the State of Qatar declared not to be bound by Art. 3 of the Convention according to the reservation it has made while acceding this treaty.[86] Qatar also reiterates that it shall interpret the term "trade unions" under Art. 8 ICESCR "in a manner consistent with the provisions of the Labour Code and national legislation."[87] Thus, despite the fact that its reservations under the ICESCR are clearly impermissible under international law, the State of Qatar continues to date to argue that they are compatible with that Convention.

Qatar states that it submits this Initial Report in accordance with Economic and Social Council resolution 1988/4 of 24 May 1987 and "affirms its commitment to the principles and purposes articulated in the Covenant", before to add that "the measures taken to implement the Covenant will be described in detail in the present report."[88] This statement can be read together with the later paragraph wherein "Qatar affirms its full readiness to cooperate in responding to any queries or requests for clarification concerning the implementation of the Covenant."[89] In the section of this Initial Report on Art. 2, concerning the respect for the rights envisaged in the Covenant, it is explained under the heading "Exercising rights without discrimination" that "Qatar subscribes to all international legal principles and norms that protect individuals within its territory, whose rights it ensures on the basis of the social justice enshrined in the country's Permanent Constitution."[90] Qatar declares that its constitutional framework is "founded on the core values of justice, benevolence, freedom, equality and moral rectitude."[91]

The next section on Art. 3 ICESCR is directly relevant to the reservation made by Qatar to the ICESCR. There, Qatar explains that under its Constitution, "all citizens have equality of

86 CESCR, Initial report submitted by Qatar under articles 16 and 17 of the Covenant, due in 2020, E/C.12/QAT/1, distr. gen. on 1 December 2020, p. 3, para. 3.
87 Ibid., para. 4.
88 Ibid., para. 5.
89 Ibid., p. 4, para. 10.
90 Ibid., pp. 4-5, para. 15.
91 Ibid., pp. 4-5, para. 15.

rights and duties before the law, irrespective of gender",[92] and contends that "the equality of women and men before the law, administrative bodies and the courts, all domestic laws in Qatar cleave to the principle of equality of treatment of persons of equivalent legal status and of men and women."[93] All these arguments are contradicted by the reservations that Qatar maintains under the ICESCR regarding women, children and workers' human rights.

Another important justification recently used by Qatar is that it reviews periodically its reservations to all international human rights treaties, but without a specific time frame, since it argues that the ICCPR does not impose such a time frame.[94] This is therefore a clear delay strategy that should immediately stop, so that Qatar can comply with its commitments under the human rights treaties it has ratified. Qatar, in its voluntary commitments and replies presented at the conclusion of its Third Universal Periodic Review, has merely taken note of all recommendations made by third States that were criticising its reservations to the ICESCR and other human rights treaties.[95]

V. Recommendations

The 2011 International Law Commission ("ILC") Guidelines on Reservations spell out that the assessment of the permissibility of a reservation to a treaty under international law can be carried out by "contracting States or contracting organizations" and also by "treaty monitoring bodies."[96] In addition, a panel of UN human rights practitioners as well as distinguished international legal experts have urged "[a]ll stakeholders – treaty bodies, States, NHRIs, NGOs, OHCHR and other UN bodies, civil society - [to] actively promote the ratification without reservations that are incompatible with the object and purpose of

92 Ibid., p. 10, para. 41-43.
93 Ibid., pp. 10-11, para. 44.
94 HRC, Replies of Qatar to the list of issues in relation to its initial report, CCPR/C/QAT/RQ/1, distr. gen. on 8 April 2021, p. 3, para. 9.
95 HRC, Report of the Working Group on the Universal Periodic Review, State of Qatar, A/HRC/42/15/Add.1, distr. gen. on 30 August 2019.
96 Ibid., p. 18, para. 3.2.

the treaties, and the acceptance of communications and inquiry procedures. They should also promote the withdrawal of all impermissible reservations."[97]

Taking this mandate of human rights NGOs to heart, and given Qatar's willingness to sustain the view that it can make reservations in violation of both international treaty law and international human rights law, the following measures are recommended.

1. UN treaty monitoring bodies, especially the CESCR, should follow the recommendations made by the panel of experts that met in 2011 for renewing international human rights law, by addressing "the issue of impermissible reservations to their treaty of competence", calling upon Qatar to "accept the communications and inquiry procedures laid down in their respective treaties" and to ensure "that impermissible reservations to human rights treaties are consistently addressed in all dialogues with States", including the State of Qatar.[98]

2. All like-minded stakeholders should address the issue of Qatar's reservations under the ICESCR and other human rights treaties, in order to convince Qatar to review and withdraw them given their clear impermissibility under international law.

3. The State of Qatar should establish a clear timeline to review its reservations to Arts. 3 and 8 ICESCR, given their centrality to the purpose and objective of the Covenant, with a view to withdrawing them[99], as soon as feasible in accordance with Arts. 22 and 23(4) VCLT.

4. In the meantime, the international community should deem Qatar's reservations under the ICESCR as severable and therefore without effects, given their clear incompatibility

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97 Strengthening the United Nations Human Rights Treaty Body System, Dublin II Meeting, Outcome Document, 10 – 11 November 2011, at https://www2.ohchr.org/english/bodies/HRTD/docs/DublinII_Outcome_Document.pdf, p. 5, paras. 13-6.

98 Strengthening the United Nations Human Rights Treaty Body System, Dublin II Meeting, Outcome Document, 10 – 11 November 2011, at https://www2.ohchr.org/english/bodies/HRTD/docs/DublinII_Outcome_Document.pdf, p. 5, paras. 15-6.

99 Ibid., para. 16. Comp. with CEDAW, Concluding observations on the second periodic report of Qatar, CEDAW/C/QAT/CO/2, distr. gen. on 30 July 2019, p. 3, paras. 9-10.

with the treaty in question,[100] as this does not depend on States or International Organisations' reactions or objections.[101]

[100] ILC, Guidelines on Reservations to treaties, ibid., pp. 23-4, para. 4.5.1.
[101] Ibid., paras. 4.5.2.

9.11.2021

3

Stakeholders *v.* Shareholders: reimagining environmental justice

I. An introduction to ESG through investor/shareholder activism

For giant corporations and businesses around the globe, climate justice goals have often reflected less of a conscious accountability towards the larger issue of environmental rights and more of a strategic matter of regulatory compliance at best. Although concerns on sustainable investment practices and carbon output by business giants have been parts of several environmental and social justice conversations preceding the current consciousness of climate crisis, however, institutional responses in the form of introducing and including environmental, social and corporate governance (ESG) as part of the framework of fiduciary responsibilities has been one of the more concrete steps towards integration of ESG with decision-making and investment practices.[102] Previously considered as a barrier to long-term financial performance, a failure to incorporate and comply with drivers of ESG is now being increasingly considered as a failure of fiduciary duty.[103] While the afore-said institutional measures can be perceived as markers of progress, there have been few recent instances of organized corporate actions that have led to a greater impact in terms of holding investors and business giants accountable and

[102] Fiduciary Duty in the 21st Century Programme: Final Activity Report 2015-2019, available at https://www.unepfi.org/wordpress/wp-content/uploads/2020/05/FD21-Final-Activity-Report_FINAL.pdf
[103] *Ibid*.

has reignited critical conversations within both the praxis and the discourse.[104] In addition to taking a closer look at some of these well publicized instances of shareholder/investor activism, this post further intends to analyze whether such actions can act as precedents for creating obligations beyond the framework of fiduciary duties.

The case of impact investment firm, Engine No. 1's successful infiltration of oil, gas and energy giant ExxonMobil's Board of Directors by placing three highly-qualified independent directors with experience in clean energy earlier this year has been widely recognized and hailed as a 'watershed moment' in corporate history.[105] The background to this success story was long in the making and contains crucial insights on how to strategize and prepare for combating resistance and hesitation to energy transition changes. Inspite of holding a negligible stake of 0.02% and facing outright opposition from the top management at ExxonMobil, Engine No. 1 was able to consistently strategize and gather support from several significant stakeholders such as BlackRock, State Street, Vanguard in their favour.[106] The consolidation and consensus of some of the largest investment groups towards realizing the commercial repercussions of inadequate climate-oriented long-term policies has created a space for more effective engagement. There is a renewed interest and direction to the ongoing discourse of impact of climate change on investments, making way for a slow but sure paradigm shift. Historically, investors have often been averse to lending their support to any policies or decisions without a tangible prospect of profit diversification. However, Engine No. 1's success has precipitated a change in not viewing profit maximization as adversarial to the support and legitimization of ESG goals. It would be a travesty to talk about the success and effectiveness of investor activism without affording due credit and recognition to the institutions and supporters outside of the corporate genealogies. In the case of Engine No. 1, their organized campaign could not have received the required momentum without the support of the California State Teachers' Retirement System (CalSTRS), the California Public Employees'

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104 Sam Forsdick, 'Activist shareholders reach a 'watershed moment' in their ESG fight' (2021) available at https://www.raconteur.net/corporate-social-responsibility/activist-shareholders-corporate-governance/

105 Jaclyn Jaeger, 'Activist investor win at ExxonMobil should be wake-up call for companies' (2021), available at https://www.complianceweek.com/boards-and-shareholders/activist-investor-win-at-exxonmobil-should-be-wake-up-call-for-companies/30475.article.

106 The CEO of ExxonMobil, Mr. Darren Woods, while rejecting the proposed changes by Engine No. 1 stated, "We respectfully disagree with Engine No. 1's conclusion and proposed approach. Our current board of directors is among the strongest in the corporate world." Also *supra* note 3.

Retirement System (CalPERS), the New York State Common Retirement Fund and major proxy advisers such as Institutional Shareholder Services (ISS) and Glass Lewis.[107]

II. Relevance of institutional frameworks in the context of ESG-led initiatives

Once it is apparent that one need not make concessions on profit maximization for navigating the path to a sustainable ESG future and not all interventions require external mobilization of resources, a larger discussion that begets attention is whether activism can be potentially extended to developing a framework of institutional obligations within the spectrum of access to environmental justice. The rise of voluntary institutional disclosure frameworks in the U.S., such as Sustainability Accounting Standards Board (SASB), Task Force on Climate-Related Financial Disclosures (TCFD) and Global Reporting Initiative (GRI), are facilitating investors in their decision-making process by providing companies with reporting standards.[108] Further, the EU's Non-Financing Reporting Directive (NFRD) has mandatory disclosure requirements with respect to ESG policies, outcomes and risks.[109] Under the EU's Corporate Sustainability Reporting Directive (CSRD), companies have increased reporting obligations under the double materiality perspective that would ensure a heightened oversight of ESG related outcomes, risks, policies and opportunities.[110] While all of these measures are designed with the intention of ensuring accountability, transparency and mitigating the risks of non-compliance with respect to ESG obligations, their efficacy benefits significantly from the complementarity between said institutional measures and the actions of activist shareholders.

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[107] Ele Klein and Danny Goldstein, 'Engine No. 1 Lessons for Environmental Proxy Campaigns' (2021), available at https://news.bloomberglaw.com/esg/engine-no-1-lessons-for-environmental-proxy-campaigns

[108] Catherine Clarkin, Melissa Sawyer and Joshua Levin, 'The Rise of Standardized ESG Disclosure Frameworks in the United States', Harvard Law School Forum on Corporate Governance (2020); Julius Redd, Stacey Sublett Halliday, Jesse Glickstein, 'Addressing Environmental Justice As Part Of ESG Initiatives' (2021), available at https://www.bdlaw.com/publications/addressing-environmental-justice-as-part-of-esg-initiatives/#Law360_05/24/2021_5

[109] Directive 2014/95/EU. *See*, Julius Redd, Stacey Sublett Halliday, Jesse Glickstein, 'Addressing Environmental Justice As Part Of ESG Initiatives' (2021), available at https://www.bdlaw.com/publications/addressing-environmental-justice-as-part-of-esg-initiatives/#Law360_05/24/2021_5

[110] Can be accessed at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189

III. Transformative potential of investor/shareholder activism beyond ESG goals

Engine No. 1's success is already witnessing some ripple effects. There have been few other notable instances of positive investor intervention, especially with respect to setting ESG goals. Companies like Chevron, ConocoPhillips and Phillips 66 have all witnessed majority shareholder voting in favour of emission-cutting proposals and initiatives in their respective board meetings.[111] The focus and target of activist investors and shareholders is not merely limited to large corporate giants in the oil-gas-energy sector but also extends to public companies. A 'say on climate' campaign spearheaded by the British hedge fund, the Children's Investment Fund Foundation, intends to compel every public company to adopt a net-zero transition plan within the next 3 years.[112] The outreach and impact of this campaign has empowered shareholders to further disrupt the *status quo* of complacency and reluctance of several companies across Europe, Asia, Australia, the U.S. and Canada.[113] In order to make transitions to net-zero economy compatible with business and investment infrastructures, decision makers and stakeholders across companies will need to work towards developing collaborative long-term strategies that would facilitate their transformation internally.[114] Some other areas of investor activism are responsible for the internal reorganization of the company structure in terms of both appointment as well as removal of key managerial personnel such as CEOs and founders.[115] Additionally, issues of social justice are also bringing together alliances of investors who see economic instability as a corollary to social unrest.[116] On the one hand, where shareholder advocacy groups are increasingly compelling board members to acknowledge the impact of social

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111 *Supra* note 4.
112 *Ibid*.
113 *Ibid*.
114 *Ibid*.
115 At P&G, investor activism resulted in nomination of a prominent activist shareholder to the position of directorship, as reported here: https://www.cnbctv18.com/finance/5-times-activist-investors-forced-a-change-in-the-board-11107202.htm. Some instances of CEO resignation as a result of investor activism happened at Westpac Banking Corporation, Hugo Boss, as reported here: https://www.cnbctv18.com/finance/5-times-activist-investors-forced-a-change-in-the-board-11107202.htm
116 *Supra* note 3.

movements, on the other hand, they are lobbying for adopting institutional policies such as the publication of diversity and inclusion reports.[117]

While it is crucial to understand and recognize the role of activist shareholders and investors in bringing about changes, it is equally important to realize that not all changes need facilitation through activism. According to a recent survey conducted on institutional investors, lack of responsiveness towards ESG oriented resolutions within the board was one of the primary reasons because of which activist shareholders have been successful in gathering support.[118] One of the widely recognized fiduciary duties of a board across companies and jurisdictions is to ensure the smooth running of a company and to always act in the best interest of the company and its shareholders. Therefore, when a board is faced with instances of proxy campaigns and call for action by activist investors and shareholders on various matters of importance, it is imperative that such vigilance and engagement is perceived as adjunctive to the best interests of the company instead of being seen as a challenge. The board must always be open and mindful to the larger concerns of its shareholders and should always be in a position to effectively communicate its concrete plans and their execution. It is rarely the case that the board in a company is completely oblivious of the ESG concerns before they are taken up as actionable demands by activist campaigns.[119]

While it appears reasonable to characterize this rise in instances of investor activism as innovative in response to the urgent concern around climate crisis, it would be premature to interpret Engine No. 1's success entirely as an outcome of collective climate consciousness. The different agendas that have been taken up by several activist investors/shareholders are ultimately a reflection of the lack of evolution of directors and board members in companies. The resistance to transitioning is often determinative of a company's future economic position and it is in this context that an activist shareholder/investor intervention is initiated. The activist investor acts as an ombudsman

[117] The shareholder advocacy group 'As You Sow' has successfully lobbied for American Express, Campbell's and Monster Beverage to publish diversity and inclusion reports, as reported in *Supra* note 3.
[118] Morrow Sodali's 2021 'Institutional Investor Survey', available at https://morrowsodali.com/insights/institutional-investor-survey-2021. 66% of respondents cited lack of response to an ESG shareholder resolution.
[119] *Supra* note 4.

with a view to ensure that a company is willing to adapt to incremental long-term changes. One of the objectives has been to emphasize on the fact that recalcitrant business behaviour is non-rewarding and detrimental in the long run, especially when it comes to behemoth corporations and businesses with established policies and practices.

Therefore, what Engine No.1 and other activist shareholders/investors have essentially accomplished is an expansion of the ambit of fiduciary duties to accommodate coexistence of profit along with climate/social justice goals. In this particular instance of Engine No. 1, the inclusion of sustainable climate-based policies can be effectively read into the broader framework of existing fiduciary duties such as the duty to care and the duty to disclose, among others. As far as supporting causes and agendas is concerned, any issue that has the potential to impact rights and thereby access to justice, can be afforded a wide enough interpretation within the existing framework of fiduciary duties and become a tipping point. It is important to let the conversation remain open and inclusive around the framing of issues eligible for activism. The stakeholders in each case are affected differently depending on how certain issues are considered to be more pressing than the others. So, while there currently exists an unyielding impetus for integrating climate justice objectives into corporate governance structures, the option of shareholder/investor activism must be exercised for always bringing other critical concerns to the forefront.

IV. On the road to access to environmental justice

Since the instances of investor/shareholder activism including that of Engine No. 1 cannot be entirely distinguished from the fulfillment of their fiduciary duties, it is therefore rational to consider every decision-making member of the board of a company as a climate fiduciary working towards facilitating access to environmental justice while balancing economic interests. Engine No. 1’s actions successfully managed to rouse ExxonMobil out of its complacency inspite of the grave power imbalance between both the parties. ExxonMobil was compelled into recognizing its neglect and disregard towards both climate-oriented goals and the consequential impact on its shareholders. While Engine No.

1's objectives were hardly altruistic, the outcome of its actions is one small step closer towards access to environmental justice. Access to environmental justice, like any other access to justice concern, requires that the rights of all relevant stakeholders be safeguarded and that there are remedies in the event said rights are violated. Historically, it has been almost inconceivable to imagine certain corporate actions stemming from fiduciary obligations being responsible for agitating and organizing against the core capitalist priority of profit maximization. However, in the face of raging climate crisis and the grave repercussions that are being documented and lived everyday, quotidian corporate obligations are being reimagined to include an enduring commitment towards the environment. Issues of sustainability and equity have graduated from being mere token image-building tools for companies to being inherent to the access of environmental justice. While corporate apathy and a resistance to adapt continue to inhabit these liminal spaces, the narrative is expanding to accommodate ideas such as that of 'conscious capitalism'.[120] Conscious capitalism can be understood to loosely indicate the precedence of stakeholder capitalism over shareholder capitalism.[121] The underlying idea herein is to make the decision makers responsible fiduciaries while centering the rights of all its stakeholders. Any and all acts performed in this direction can be considered to be a radical act towards subversion of dominant narratives. Lastly, while it appears that the challenges to the realization of environmental rights are likely to become increasingly complex and harder to overcome, it remains to be seen if this unlikely alliance of environmental concerns with corporate interests can gradually dismantle the conventional barriers to access to environmental justice.

[120] Lila MacLellan, 'The Purpose of Companies' (2019), available at https://qz.com/work/1690439/new-business-roundtable-statement-on-the-purpose-of-companies/

[121] Lila MacLellan, 'The activist fund that shook Exxon is now investing in GM' (2021), available at https://qz.com/work/2069153/engine-no-1-the-fund-that-shook-exxon-is-now-investing-in-gm/

17.11.2021

4

Just Access co-organiser of a side event on the Third session of the Forum on Human Rights, Democracy and the Rule of Law

The United Nations Forum on Human Rights, Democracy and the Rule of Law held its third session on "Equal Access to Justice for All: a Necessary Element of Democracy, Rule of Law and Human Rights Protection" on the 16-17 November in Geneva. Just Access co-organised a side event to the session, together with Maat for Peace, Development and Human Rights (Cairo, Egypt), the International Organization for the Least Developed Countries (IOLDCs) (Geneva, Switzerland), the International Alliance of Women (IAW) (Geneva, Switzerland) and the Word for Peace (New Delhi, India). Our Head of International Litigation Dr. Lucas Sánchez moderated the session and our Director Dr. Mark Somos delivered a speech on the occasion which you can read in full bellow.

Thank you very much! The theme of the third session of the UN Forum on Human Rights, Democracy and the Rule of Law is “Equal access to justice for all: a necessary element of democracy, rule of law and human rights protection”.[122] It would be easy and wrong to imagine a set of clear, limited, specific links between these four things, namely access to justice, democracy, rule of law and human rights, and to imagine that we can identify these links, and develop their technical legal meaning and substance. A bit like when we meet half-forgotten second cousins at a big family wedding, and we’re trying to figure out exactly how we’re related, and if we’ve met before, or should meet again.

But the link between these four legal principles is not like that. In terms of law’s evolution, and current and hopefully future state, access to justice, democracy, rule of law and human rights protection are not distant cousins with clearly defined, narrow connections, but more like identical twins or quadruplets. They are almost the same thing. “Democracy” means rule of law by and for the people, predicated on procedural and substantive rights, among which equal access to justice is paramount. It is not the case that the four principles need to be forcibly connected via legal practice – they are facets of the same unified foundational norm. Legal practice that involves any of them must take the others into account. None of them stands without the others. Recent attempts by legal academics and practitioners, such as William Schabas, to recapture this unity between the four principles at the heart of this UN Forum often describe the norm that unites them as “dignity”, which means the value of an individual, and a term that was used through most of history as an expansive synonym for human rights in a legal order.[123]

I also think that the Forum, and vital side events like this, can use the four principles to move away from the West-centrism that is coded into public international law and the UN. Democracy, access to justice, the rule of law and human rights are not specific to the West historically: city-states in ancient Mesopotomia or the Indus Valley were no less democratic than Sparta or Athens by any plausible definition. In fact, “democracy” was a swear word and a synonym for anarchy in the West until the mid-nineteenth century. As Bernard Manin, John Dunn and other historians have shown, the rule of law, human rights and

[122] https://www.ohchr.org/EN/HRBodies/HRC/Democracy/Pages/Session3.aspx
[123] William A. Schabas, *The Customary International Law of Human Rights* (Oxford University Press, 2021), chapter 4. Ginevra Le Moli, *Human Dignity in International Law* (Cambridge University Press, 2021).

access to justice were unambiguously and consistently called *republican*, not democratic principles, and it was not until republicans tried to outbid one another for political gain that "democracy" was revived as a strange, anachronistic label, a catch-all term that proved successful exactly because it has no clear meaning and even allowed for technically anti-democratic arguments, such that monarchs or small governments can represent the public interest as well as direct participation did in Antiquity.[124] Therefore realising that there's no access to justice, democracy, rule of law or human rights protection without each of these four principles present can become a way to critically and constructively overcome the historical accident of 19th-century abuses and instrumentalisations of both constitutional and international legal orders.

The growing case law and theory focused on dignity is a useable starting point. Next time you see a grand rhetorical appeal to democracy, ask how the proposition in question supports individuals' right to dignity, which is a higher-order value from which democracy can flow. The insight concerning the inseparability of the four principles is another option. Next time you hear a State claiming it's protecting human rights, ask whether its protection is systemic and structural, through democratic institutions that provide fair and universal access to justice under the rule of law. Noting that the four principles are genetically identical, or facets of the same prism, can help to check empty State rhetoric, sleights of hand or vagary.

[124] Bernard Manin, *The Principles of Representative Government* (Cambridge University Press, 1997). John Dunn, *Setting the People Free: The Story of Democracy* (Atlantic Books, 2005).

29.11.2021

5

Access to justice and amnesty laws: two irreconcilable concepts?

After a violent internal conflict, or in the context of transitioning from an authoritarian regime to democracy, one of the main hurdles that victims of violence face in order to have access to justice is the existence of amnesty laws. These can be either 'self-amnesty laws', adopted by an incumbent regime in order to avoid facing legal consequences for its acts, or else amnesty laws adopted in the context of an agreement among the parties to an internal conflict. In both cases, these laws generally prevent the prosecution of perpetrators of human rights violations and the redress of victims. This goes in principle against the four main pillars of transitional justice, i.e. criminal prosecutions, reparations for victims, truth-seeking and guarantees of non-repetition.

There is however no clear regulation of amnesty laws in international law. What comes closer are probably the UN Principles to Combat Impunity, adopted in 2005. According to these Principles, "states shall (…) take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished". Principle 24 refers expressly to amnesty laws, mentioning that they are only lawful if perpetrators can be judged before benefitting from them and if they do not affect the victims' right to reparation.

But before the adoption of these principles, international human rights bodies and courts had already dealt with the issue of amnesty laws. The first of them was the UN Human Rights Committee (HRCee), which mentioned already in 1992 with respect to torture that "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future".[125] Thereafter, the most active court with respect to amnesty laws has been the Inter-American Court of Human Rights (IACtHR), issuing its first judgment concerning this issue in 2001, in the case of *Barrios Altos vs. Peru*. This case concerned two 'self-amnesty' laws, adopted in 1995 by the regime of Fujimori, which impeded to hold responsible anyone who had participated in human rights violations between 1980 and 1995. The facts of that case were related to the extrajudicial execution of fifteen people by members of the Peruvian army in 1991. When the amnesty laws entered into force, the investigation of these facts was closed by the Peruvian High Court of Justice. The IACtHR held in this context that "[s]elf-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention".[126] This judgment allowed to reopen an important number of investigations which led to the prosecution and imprisonment of Fujimori himself, among others.

The aforementioned arguments were subsequently applied in further cases against Chile,[127] Brasil,[128] Uruguay[129] and El Salvador.[130] The IACtHR stated in this respect that the prohibition of amnesty laws not only applies to 'self-amnesties' but also to amnesty laws included in political agreements reached during a transition to democracy.[131] However, in its last judgment concerning amnesty laws, the IACtHR left the door open for partial

[125] UN HRC, General Comment No. 20, Adopted at the Forty-fourth Session of the Human Rights Committee, 10 March 1992, para. 15.

[126] IACtHR, *Case of Barrios Altos vs. Peru*, Merits, Judgment of March 14, 2001, Series C No. 75, para. 43.

[127] IACtHR, *Case of Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 26, 2006, Series C No. 154.

[128] IACtHR, *Case of Gomes Lund et al. ("Guerrilha do Araguaia") vs. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2010, Series C No. 219.

[129] IACtHR, *Case of Gelman v. Uruguay*, Merits and Reparations, Judgment of February 24, 2011, Series C No. 221.

[130] IACtHR, *Case of the Massacres of El Mozote and surrounding areas vs. El Salvador*, Merits, Reparations and Costs. Judgment of October 25, 2012, Series C No. 252.

[131] IACtHR, *Case of Gomes Lund et al. ("Guerrilha do Araguaia") vs. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2010, Series C No. 219, para. 175.

amnesties adopted in the context of negotiations aimed at ending a non-international armed conflict, highlighting on the other hand that such amnesties cannot be applied to war crimes or crimes against humanity.[132] Access to justice for victims of human rights violations has played a very important role in these decisions of the IACtHR, as according to its case-law the prosecution and punishment of perpetrators forms part of the victims' right to a remedy and reparation.

On the other hand, the European Court of Human Rights (ECtHR) has been less strict towards amnesty laws than its American counterpart. It has adopted a flexible approach, mentioning in this respect that "[t]he state is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the provision, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law".[133] It has also specified certain circumstances under which an amnesty law might be lawfully adopted, such as "a reconciliation process and/or a form of compensation to the victims".[134] Nevertheless, in a number of cases against Turkey, the ECtHR found that the existence of amnesty provisions constituted a violation of the State's obligation to investigate acts of torture, arguing that "when an agent of the State is accused of crimes that violate Article 3 of the Convention, (…) the granting of an amnesty or pardon should not be permissible".[135] However, in none of these cases did the ECtHR order a State to repeal an amnesty law.

This is different in the case of the African Court of Human and Peoples' Rights (ACtHPR), which ordered for the first time the repeal of an amnesty law in 2020. Thereby the ACtHPR argued, similarly to the ECtHR, that an amnesty can be compatible with human rights law "if it is accompanied by restorative measures for the benefit of the victims", but these

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132 IACtHR, *Case of the Massacres of El Mozote and surrounding areas vs. El Salvador*, Merits, Reparations and Costs. Judgment of October 25, 2012, Series C No. 252, paras. 285-286.

133 ECtHR, Tarbuk vs. Croatia, para. 50

134 ECtHR, *Case of Marguš v. Croatia* (Grand Chamber), App. No. 4455/10, 27 May 2014, para. 139.

135 ECtHR, *Case of Yerli vs. Turkey*, App. No. 59177/10, 08 July 2014, para. 61. See also ECtHR, *Case of Okkali vs. Turkey*, App. No. 52067/99, 17 October 2006, para. 78; ECtHR, *Case of Terzi and Erkmen vs. Turkey*, App. No. 31300/05, 28 July 2007, para. 34.

measures were not present in the case at hand.[136] However, contrary to the ECtHR, the ACtHPR did not consider that the existence of an amnesty law amounted to a violation of the obligation to prosecute acts of torture. Instead, the ACtHPR argued that this law constituted an infringement of the right to an effective remedy, thus giving more weight to the impediment for victims to have access to justice.

In sum, through the jurisprudence of the three regional human rights courts and the UN Human Rights Committee, one can observe the emergence of a customary international law norm prohibiting 'blanket amnesty laws', i.e. those that apply for every type of crime committed during a specific period. This has also been argued by international criminal courts, such as the Extraordinary Chambers in the Courts of Cambodia, which stated that "am emerging consensus prohibits amnesties in relation to serious international crimes".[137] This prohibition of 'blanket amnesty laws' is also implicit in a number of UN human rights treaties, which oblige states to prosecute acts of torture, genocide or enforced disappearance, among others.

On the other hand, human rights bodies have also become more lenient towards accepting partial or context-specific amnesty laws. This means that amnesty laws can be compatible with human rights law when they leave out of their scope human rights violations that include an obligation to prosecute, such as torture or enforced disappearance, as well as international crimes such as genocide or crimes against humanity. With respect to other 'less serious' human rights violations, it depends on the concrete circumstances of the case. Moreover, a very important aspect for the legitimacy of amnesty norms is whether they allow for the victims' access to justice. This means that in addition to the prosecution of perpetrators, other forms of reparation should be afforded to victims, including measures of restitution, compensation, rehabilitation and satisfaction.[138] If an amnesty law

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[136] ACtHPR, *Case of Sébastien Germain Marie Aikoué Ajavon vs. Republic of Benin*, Merits and Reparations, Application 062/2019, 04 December 2020, paras. 234-238.

[137] ECCC, *Case of Prosecutor vs. Noun Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan*, Preliminary Objections, 03 November 2011, para. 53.

[138] See in this respect UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para. 18.

adopted in the context of a process of reconciliation after an internal conflict complies with these two aspects, it can be compatible with the right of access to justice and the international obligations of the state.

An example of such an amnesty law can be found in the peace process that has been going on in Colombia for the last years. This state adopted an amnesty law in the context of solving its long-lasting internal armed conflict, but this law clearly excludes amnesty or pardon for crimes against humanity and gross human rights violations. Besides it, in order to benefit from this amnesty, the perpetrators are required to confess their crimes and collaborate in the clarification of the facts, thereby contributing to the victims' right to truth. During this peace process, Colombia did also adopt a "Victims' Law", creating a unit for the compensation and reparation of victims' rights, as well as the restitution of their lands.
Thus, the Colombian example shows that amnesty laws and access to justice are not always two irreconcilable concepts. In order for them to be compatible, the law cannot be a 'self-amnesty', it needs to exclude certain crimes, and allow for the reparation of victims in accordance with the UN Basic Principles on the Right to a Remedy and Reparation.[139] It is probably not an easy task to reconcile amnesties and access to justice, but in order to put an end to internal armed conflicts that cause profound divisions in a society it might be the best possible solution.

[139] These principles mention in paragraph 12 that "[o]bligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws".

7.12.2021

6

Diminishing access to justice during police stops and custody within the EU during the COVID-19 pandemic

This post focuses on the issue of regular encounters with law enforcement authorities that lead to police stops, arrests and police custody, during which the fundamental human rights of the detainees are increasingly being violated. It highlights that specific categories of population are especially more frequently exposed to coercive treatment. Although there is a global trend of human rights being increasingly disrespected or outright violated by law-enforcement authorities when they impose coercive measures upon individuals they stop, arrest or place in custody, this post focuses on the legal context within which this is happening in the EU.

I. Immigrants and perceived ethnic minorities are disproportionally greater targets for police stops or custody and infringement of fundamental human rights

A recent study published by the European Union Agency for Fundamental Rights has collected data enabling for the first time to compare, across all EU Member States,

experiences of the general population when stopped by the police to experiences of selected immigrant and ethnic minority groups.[140] Within 12 months (from 2020 and 2021), 14% of the people in the European Union had been stopped by the police.[141] It was established that police stops more frequently affect men, young people, as well as people who self-identify as belonging to an ethnic minority, Muslims, and those who are not heterosexual.[142] In the same period, for instance, 49% of immigrants and descendants of immigrants from Sub-Saharan Africa were stopped by the police in Austria and 33% of Roma in both Croatia and Greece.[143] Foreigners, individuals who are perceived as foreigners or having an immigrant background, are not only more frequently stopped by the police, but they are also subjected to more stringent actions by law-enforcement authorities when they are stopped. The findings include the following:

- People with an ethnic minority or immigrant background experience more frequent stops that involve the police searching them or their vehicle, compared with the general population;
- The police searched 34% of people with an ethnic minority or immigrant background who were stopped while walking, compared with 14% of people in the general population from other backgrounds;
- People with an ethnic minority or an immigrant background were more often asked for identity papers than were people from the general population who were stopped, either when walking or while in a vehicle.[144]

II. Illustrating current trends of police violations: pre-existing issues magnified by the pandemic

There is a growing trend of the police violating basic international human rights when they stop people, when they decide to arrest them, or when they take them into custody. This trend appears in both Global South and Global North countries, even if instances of

[140] European Union Agency for Fundamental Rights, Your Rights Matter: Police Stops, 25 May 2021, at https://fra.europa.eu/en/publication/2021/fundamental-rights-survey-police-stops.
[141] European Union Agency for Fundamental Rights, Your Rights Matter: Police Stops, 25 May 2021, at https://fra.europa.eu/en/publication/2021/fundamental-rights-survey-police-stops, p. 7.
[142] Ibid.
[143] Ibid.
[144] Ibid., p. 14.

violations of the right to life and the prohibition of torture tend to be more frequent in numerical terms outside of the Global North. What gives this trend a very problematic dimension is that it translates into overall shrinking of the access to justice worldwide when the police decides to arrest persons or take them into police custody, especially during the pandemic.[145]

The UN Special Rapporteur on the rights to freedom of peaceful assembly and association observed that governments have restricted fundamental rights relating to access to justice far beyond what is necessary for public health reasons during a pandemic:

> "The Special Rapporteur has received information that in many contexts, restrictions allegedly went beyond the legitimate protection of public health, often circumventing access to justice. For example, courts closed or reduced their operations, which negatively affected the provision of timely and fair hearings, sometimes leading to prolonged pretrial detention. In some contexts, the sanitary measures put in place also impeded access to legal assistance, while in others, the measures were *de facto* breaching the confidentiality of communications between lawyers and clients. In his key principles on State responses to COVID-19, the Special Rapporteur stressed that it was vital that new measures adopted respect human rights; that any limitations on rights be in accordance with the principles of legality, necessity and proportionality; and that independent oversight and review of measures taken during the crisis be guaranteed."[146]

Another growing trend in Europe is the frequent occurrence of pre-emptive arrests of people willing to participate in demonstrations. As the UN Special Rapporteur on the rights to freedom of peaceful assembly and association rightly stressed, fundamental issues regarding access to justice for contesting police arrestation and detentions require major structural changes in many countries:

> "In many states, major structural changes need to be undertaken in order to bring law and practice into compliance with states' human rights obligations. In this

[145] HRC, Access to justice as an integral element of the protection of rights to freedom of peaceful assembly and association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, A/HRC/47/24, distr. gen. on 12 May 2021, pp. 6-7, para. 23.
[146] Ibid., p. 7, para. 24.

> context, the Special Rapporteur emphasizes that states have the primary responsibility to ensure that the rights to freedom of peaceful assembly and access to justice are respected, protected and fulfilled, and underscores the recommendations containing in his report, which are addressed to States and relevant stakeholders, and which form primary matters in need of states' attention and action."[147]

One may infer that the above trends are pre-existing issues regarding access to justice concerning basic powers that police can exercise against individuals, which are merely augmented and exacerbated by the COVID-19 pandemic. There are, indeed, many practical and legal obstacles that impede the effective exercising of the rights and enabling effective access to justice. One general issue is the *de jure* or *de facto* discretion granted to law enforcement authorities to decide who to stop, arrest or take into police custody. There are, however, some basic fundamental rights that are guaranteed in the EU context when police forces or law-enforcement authorities exercise coercive measures against individuals. The protection of the fundamental rights of individuals living in the EU in situations where they face police and law enforcement authorities' coercive measures are all the more important, given that these rights are in practice increasingly being violated or ignored.

Recent laws and reforms adopted by Member States have even broadened the powers that law enforcement authorities can employ while arresting and detaining individuals. These reforms have consolidated important legal powers for law enforcement authorities, without concomitantly making sure that they don't adversely reflect on the overall access to justice. While some new adopted laws pertaining to enforcement authorities' use of powers have been criticised recently for having the effect of reducing access to justice, such as the new security law in Hong Kong[148] or in Brazil, this trend is also observable across Europe due to the normalisation of emergency powers exercisable by law-

[147] HRC, Guidelines for lawyers in support of peaceful assemblies, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/47/24/Add.3, distr. gen. on 29 June 2021, p. 3, par. 2.

[148] International Bar Association, "Honk Kong: IBA and IBAHRI condemn new wave of arrests under National Security Law", 15 January 2021, at https://www.ibanet.org/article/3807B9DE-44AB-4B69-A396-59E9322137CF.

enforcement authorities in Europe and increasing derogations imposed upon fundamental rights protected under international and European human rights legal regimes.

The adoption of state of emergency legislations for health or security reasons has also had a significant limitative effect on the enjoyment of rights before law-enforcement authorities. Arrests, placement in police custody and subsequently in detention, can often materialise for persons deprived of their liberty by law-enforcement authorities, in serious human rights violations. This has also been the case in "non-authoritarian" countries. For instance, the Committee for the Prevention of Torture of the Council of Europe (CPT) has observed, regarding police establishments in France, that "while the majority of those interviewed did not report any physical ill-treatment, several people indicated that they had been deliberately beaten during their arrest or on police premises. Allegations of insults, including of a racist or homophobic nature, were also reported, as well as threats made with a weapon."[149] The CPT has also stressed in the French case the need "to improve the quality of notification of rights and to allow effective access to a lawyer in all circumstances" and it has also more generally declared to be "extremely concerned about the material conditions of detention in some of the police stations" that this European committee has visited.[150]

These trends are extremely worrisome because of the fact that access to justice is increasingly being effectively disrespected, which has a direct bearing on the enjoyment of other fundamental human rights. As the UN Special Rapporteur for the rights to freedom of assembly and association has observed, access to justice constitutes in fact a set of different rights which lies at the very core of the rule of law:

> "When access to justice is not guaranteed or obstructed, individuals will not only refrain from seeking remedy through formal or information institutions of justice, but

[149] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)," "France: anti-torture Committee deplores conditions of detention, prison overcrowding and lack of psychiatric beds", 24 June 2021, at https://www.coe.int/en/web/cpt/news-2021/-/asset_publisher/F4MCR6Bvx1tS/content/france-anti-torture-committee-deplores-conditions-of-detention-prison-overcrowding-and-lack-of-psychiatric-beds?_101_INSTANCE_F4MCR6Bvx1tS_viewMode=view/.

[150] Ibid.

> will often also refrain from exercising their rights to freedom of peaceful assembly and of association in the first place."[151]

One serious issue regarding the protection of fundamental freedoms in face of the broad prerogatives of police forces worldwide and in Europe too, concerns violations of the right to access to justice for participation in assemblies and other gatherings, and various existing ordeals preventing those affected individuals to contest coercive measures such as arrestation and detention. This observation is equally valid in other situations, where persons who are most exposed to illegal use of coercive measures by law-enforcement authorities are suffering from various ills, ranging from serious chilling effects in their everyday life to mistreatment or even torture. It is therefore necessary to briefly expose some of the most relevant fundamental rights that are protected under international and European legal regimes when individuals face police and law-enforcement coercive powers.

III. International human rights law standards applicable in the "criminal" context

Arrestation and placement in police custody trigger several core international human rights provisions. This includes Art. 9 of the International Covenant on Civil and Political Rights (ICCPR) that sets forth the following:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

[151] HRC, Access to justice as an integral element of the protection of rights to freedom of peaceful assembly and association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, A/HRC/47/24, distr. gen. on 12 May 2021, p. 6, par. 21.

> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

Furthermore, ICCPR Art. 14(1) recognizes the general right to a fair trial, while ICCPR Art. 14(3) specifies the minimum procedural rights guaranteed for anyone charged with a criminal offence, including: the right to information, the right to legal assistance, the right to legal aid and the right to interpretation.[152] Similarly, the Universal Declaration on Human Rights (UDHR), Art. 9, ensures that: "No one shall be subjected to arbitrary arrest, detention or exile."

When international human rights obligations are opposable to EU Member States' policies, the European legal landscape is further complicated by the sophisticated legal structure existing within the EU. Most of the competencies to regulate the use of coercive measures by law-enforcement authorities, as well as for protecting of the rights of suspected or accused persons, are under EU law exercised by EU Member States, directly via their internal legal orders. In the European legal architecture, both EU law and the European Convention on Human Rights (ECHR) play nonetheless a crucial role for the exercising of fundamental rights by individuals exposed to coercive measures imposed by law-enforcement authorities. We will focus here on the protection of fundamental rights due to

[152] European Union Agency for Fundamental Rights, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 13 September 2019, at https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest, p. 19.

individuals in the criminal context, given that most of coercive measures imposed by police forces in practice relate to alleged criminal activities.

Individuals living in the EU may rely for the protection of their fundamental rights on two distinct, but interrelated and complementary, sources of law. They can ground their demands on EU law, especially the EU Charter of Fundamental Rights (the Charter) for every action that fall under the scope of application of EU law, or the ECHR. Under the ECHR, minimal criminal procedural rights are laid down in Art. 6 of the Convention. Article 6 (1) of the ECHR provides for the right to a fair trial, guaranteeing equality of arms and the right to adversarial proceedings, as well as the right to a prompt and public hearing by an impartial and independent court. Article 6 (2) and (3) imposes several additional requirements applicable to criminal proceedings. Article 6 (2) introduces the presumption of innocence. Article 6 (3) includes specific aspects of fair trial rights and sets out the five minimum rights that an accused person has in criminal proceedings:

1. the right to be informed promptly, in a language understandable to the suspect, of the detail of “the nature and cause of the accusation against them”;
2. to have adequate time and facilities to prepare a defence;
3. to defend oneself in person or through legal assistance of one’s choosing or, if one cannot afford it, “to be given it free where the interests of justice so require”;
4. to examine, or have examined, witnesses and to ensure their attendance and examination;
5. and, to have the free assistance of an interpreter if one cannot understand or speak the language used in court.”[153]

At the EU level, the Charter is the primary instrument setting out the procedural rights of individuals in criminal proceedings. The Charter applies in respect to the Member States only when they are implementing Union law (Article 51). Article 52 (3) of the Charter ensures consistency between the Charter and the ECHR. It establishes that the rights in the Charter, which correspond to the rights in the ECHR, have the same meaning and

[153] European Union Agency for Fundamental Rights, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 13 September 2019, at https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest, pp. 19-20.

scope as those in the latter, adding that EU law can extend the rights and provide a higher level of protection. Articles 47 and 48 spell out the right to an effective remedy and the right to a fair trial, which correspond to Articles 6 and 13 of the ECHR.[154]

Regarding the EU Charter of Fundamental Rights' general scope of application, there is a strong limit in the context of fundamental rights' violations by law-enforcement authorities since most of those competencies pertain to the internal legal orders of EU Member States, and not EU law per se:

> "Under Article 51, the EU Charter of Fundamental Rights applies to EU institutions and bodies without restriction, and to Member States "when they are implementing Union law". The Explanations relating to the EU Charter of Fundamental Rights state that its obligations apply only when Member States are acting "within the scope of EU law". The CJEU has confirmed that "implementing" and "in the scope of" carry the same meaning.) This covers situations where Member States are, for instance, implementing EU directives and regulations."[155]

There are however still some fundamental rights the exercising of which can be claimed on the basis of EU law in specific situations. For the rest, individuals living in the EU can refer to the ECHR, given that all EU member States are also High Contracting Parties to the system of the ECHR, and because EU law while being independent from the ECHR, does refer to protective rights and principles that are organised under the ECHR:

> "all 28 EU Member States are also States Parties to the ECHR. This means that, even if the EU Charter of Fundamental Rights does not apply, the ECHR may. Additionally, ongoing negotiations about the European Union's planned accession to the ECHR could affect the access to justice landscape."[156]

The EU Charter of Fundamental Rights confer some fundamental rights that are directly applicable to EU citizens and residents, even if most of its provisions are in general

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154 Ibid., p. 20.
155 European Union Agency for Fundamental Rights, Handbook on European law relating to access to justice, 16 April 2016, at https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice, p. 20.
156 Ibid.

applicable whenever EU member States are applying EU law. For instance, Art. 47 of the Charter protects the right to an effective remedy and to a fair trial, but only when Union law is violated. This limitation is inscribed in Art. 6(1) of the Treaty of the European Union (TEU) which provides that: “The provisions of the Charter shall not extend in any way the competencies of the Union as defined in the treaties.”[157] Art. 51(1) of the Charter sets forth that its provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.”

It is furthermore opposable by EU citizens or legal residents to Union courts and tribunals, not directly to EU member States’ national courts. This does not mean that this right to an effective remedy is useless for persons finding themselves in the Union. The Union has in recent years gained some direct competencies for some law-enforcement authorities, especially for controlling the entrees of aliens on EU territory, for instance via the activities of the European agency Frontex.

Given the above limitations, it is important to stress that formal procedural fundamental rights are in practice unable to help those individuals who are facing coercive measures by police forces or law-enforcement authorities in the phase before they have officially been charged of a criminal act. This is why it is imperative to put the emphasis on the crucial role of a broader notion of access to justice in that context, as international and European human rights law protects individuals in theory against irregular use of coercive measures by police forces and law-enforcement authorities.

In this regard, Art. 43 of the EU Charter of Fundamental Rights provides for instance that: “Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.”[158] This includes situations wherein individuals are subjected to unlawful police stops,

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[157] TEU, Art. 6.

[158] European Union, Charter of Fundamental Rights of the European Union, C 326/391, 2012/C 326/02, *OJ C* 326, 26 October 2012, p. 391-407, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT, Art. 43.

arrest, placement in police custody or in detention, or whenever EU member States' law-enforcement authorities are disrespecting applicable fundamental rights. In addition, there is a right to petition for any person legally living in the Union to the European Parliament according to Art. 44 EU Charter of Fundamental Rights, which can serve the interests of bringing to public attention a mistreatment suffered in the hands of European law-enforcement authorities.[159]

One central core fundamental right protected both under international and European human rights law, which is violated by the irregular use of coercion by law enforcement authorities, is the right to access to justice. Access to justice obliges States to guarantee each individual's right to go to court to obtain a remedy if it is found that the individual's rights have been violated.[160] It is thus also an enabling right that helps individuals enforce other rights.[161] Technically, access to justice encompasses several core human rights protected at the international and European levels, including the right to a fair trial under ECHR Art. 6 and EU Charter on Fundamental Rights Art. 47, and the right to an effective remedy under ECHR Art. 13 and EU Charter on Fundamental Rights Art. 47.[162] At the international level, access to justice is protected via Arts. 2(3) and 14 of the ICCPR as well as Arts. 8 and 10 of the UDHR.[163]

Similarly, the Special Rapporteur on the rights to freedom of peaceful assembly and association has stressed the importance of access to justice for individuals because it acts as a cluster protecting core fundamental rights in that context:

> "Access to justice is recognized as a basic principle of the rule of law and in its absence, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision makers accountable. It guarantees that people can go before the courts to demand that their rights be protected, without discrimination. It allows individuals to protect themselves from violations of their rights, offering a remedy to the consequences of tort and holding authorities

159 Ibid., Art. 44.
160 European Union Agency for Fundamental Rights, Handbook on European law relating to access to justice, 16 April 2016, at https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice, p. 16.
161 Ibid.
162 Ibid.
163 Ibid., p. 17.

> accountable. Access to justice refers to the individual empowerment and enforcement component of the rule of law, and it largely depends upon an individual's knowledge of their rights and access to tools to enforce those rights effectively and affordably. In a way, the right to access to justice, through the principle of accountability, is aimed at balancing the relationship between individuals as right holders and duty bearers, including those duty bearers who maintain State-like powers, thereby affecting the ability of rights holders to enjoy their rights."[164]

All Member States of the European Union are also High Contracting Parties to the ECHR. This means that independently of Union law, individuals who are suffering violations of their rights while living in the EU, can also seek redress on the basis of the law of the ECHR.

More generally, individuals whose fundamental rights are violated by law-enforcement authorities can rely on general principles of EU law. The European Court of Justice (ECJ) in its Opinion 2/13 from 18 December 2014 has established that according to its well-established case law, "fundamental rights form an integral part of the general principles of EU law. For that purpose, the ECJ draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories".[165] Art. 6(3) of the TEU sets forth that: "3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Art. 52(3) of EU Charter on Fundamental Rights set forth that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Fundamental of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." Art. 53(4) indicates that

[164] HRC, Access to justice as an integral element of the protection of rights to freedom of peaceful assembly and association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, A/HRC/47/24, distr. gen. on 12 May 2021, p. 5, par. 16.

[165] ECJ, Opinion 2/13 of the Court, Opinion (full court) issued on 18 December 2014, ECLI:EU:2014:2454, at https://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=en, para. 37.

when general principles of EU law result from EU member States' national traditions provided that: "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

This means in plain language, that under the EU law, EU fundamental rights can be also complemented by international human rights standards and rules that are provided for by non-EU international treaties, especially when they reflect fundamental rights protected under the law of every or most EU member States. Fundamental rights against the unlawful deprivation of liberty, forms of torture and mistreatment in the hands of law-enforcement authorities integrate those general principles of EU law.

IV. Factors limiting access to justice before law-enforcement authorities

One major factor limiting access to justice is that even when applicable national laws provide guarantees for individuals arrested or taken into police custody by law-enforcement authorities, they are oftentimes not effective in providing the level of protection they are due under IHRL. One important limit is often the vagueness and lack of precision in the wording of national procedures applicable to arrestation and police custody.

> "The Special Rapporteur notes that many States still have legislation that is too intrusive, that imposes undue restrictions and that, in some instances, through lack of precision and vague wording, enables violations and abuses. For instance, both the lack of clarity regarding the meaning of "national security" in the legislation of numerous States and the impact of broad counter-terrorism legislation have been used by authorities to impose disproportionate restrictions on peaceful assemblies and on the establishment of associations. National legislation criminalizing acts of terrorism must be accessible, formulated with precision, non-discriminatory and non-retroactive."[166]

[166] HRC, Access to justice as an integral element of the protection of rights to freedom of peaceful assembly and association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, A/HRC/47/24, distr. gen. on 12 May 2021, p. 8, par. 30.

Another important factor which causes access to justice to be dramatically restricted is the prerogative of Member States ' national legislations to impose exceptional limitations to the rights of persons arrested or taken into police custody in the name of the protection of national security. If Union law provides protective measures for EU citizens and residents' fundamental rights through the EU Charter on fundamental rights, EU Member States' authorities are only bound to comply with the Charter of fundamental rights when implementing EU law, letting the general protection of fundamental rights as being ensured by each Member State's internal legal order.[167] Most prominently, the EU Charter on fundamental rights is relevant for the protection of individuals' fundamental rights but only insofar as one can identify a concrete EU legal basis conferring to the Union some competencies on matters that have a bearing on the situations wherein individuals face coercive police or law-enforcement powers.

Finally, one of the most serious factors, if not the most serious issue, experienced by individuals who want to claim that their fundamental rights have been violated by police forces is the issue of lack of evidence. This factor, as well as all the other restrictive factors mentioned above, contribute to the obstruction of access to justice for individuals and often consequently result in the individuals refraining from taking action which would ensure the exercising of their rights:

> "When access to justice is not guaranteed or is obstructed, individuals will not only refrain from seeking remedy through formal or informal institutions of justice, but will often also refrain from exercising their rights to freedom of peaceful assembly and of association in the first place."[168]

In conclusion, the current trend of police and law-enforcement authorities' powers being gradually expanded on one hand, without the corresponding provisions to further protect peoples' fundamental human rights on the other, is more than evident both globally and within the EU. The prolonged COVID-19 pandemic has greatly augmented the severity of

[167] European Commission, Presumption of innocence and right of defence, at https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/justice/presumption-innocence-and-right-defence_en.

[168] HRC, Access to justice as an integral element of the protection of rights to freedom of peaceful assembly and association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, A/HRC/47/24, distr. gen. on 12 May 2021, p. 6, para. 21.

this growing discrepancy and the statistics on discrimination and violation of fundamental rights of individuals during police stops and while in police custody within the EU are alarming.

In this post, we laid out the legal context in which this is happening. In doing so, Access to Justice intends not only to draw attention to this serious issue, but also to openly call on all relevant institutions and bodies, as well as all other concerned governmental or nongovernmental human rights experts and activists, to engage their respective capacities and come up with concrete proposals and specific solutions to this problem.

15.12.2021

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Proposals for remedying the diminishing trend of access to justice during police stops and custody in the EU

In the previous post, Just Access drew attention to the concerning current growing trend, worldwide and in Europe, of increasingly expanding legal and practical prerogatives of the police, without the corresponding additional protection of the fundamental rights of those they stop or keep in custody.[169] It maintained that access to justice during police stops and custody has especially been diminishing during the prolonged COVID-19 pandemic. It laid out the legal context in which this is happening and openly called on all relevant institutions and bodies, as well as other concerned governmental or nongovernmental human rights experts and activists, to engage their respective capacities and come up with concrete proposals and specific solutions to this problem.

In this post, Just Access intends to take the first step and propose some initial concrete solutions for the individuals who suffer violations of their basic right to access justice. Just Access does not aim at reinventing the wheel. It however observes that the long-standing issue of the lack of genuine understanding by individuals about what their fundamental rights are when they face police or law-enforcement authorities' coercive powers are even

[169] Just Access, Diminishing access to justice during police stops and custody within the EU during the COVID-19 pandemic, 07 December 2021, at https://just-access.de/diminishing-access-to-justice-during-police-stops-and-custody-within-the-eu-during-the-covid-19-pandemic/

more pervasive during our current challenging times. The following article will first deal with some of the fundamental rights that persons who are victims of police and law-enforcement authorities' coercive powers have and what they can do when such violations occur (A.) before they are deprived of liberty and (B.) after they are deprived of liberty.

A) Reaching out to non-judicial bodies that provide legal aid, advice and representation when individuals aren't being deprived of their liberty

One specific form of protection that individuals can seek due to having been mishandled by law-enforcement authorities is free legal aid, advice, and representation. There are various forms of support that individuals living in the EU can seek. In general, it is important that those forms of protection are sufficiently qualified to appropriately respond to the needs of the individuals seeking redress:

> "Legal aid refers to the service provided at no cost for those without sufficient means or when the interests of justice so require. Legal assistance must meet certain requirements: among other things, it must be prompt and confidential. It should also be free of charge when the person does not have sufficient means to pay for it."[170]

These forms of legal assistance and support contribute to ensuring that individuals can seek for accountability from the police forces and law-enforcement authorities, when they violate their fundamental rights.[171] Actually, EU law obliges EU member States to provide for non-judicial bodies for enabling individuals to claim their rights that are protected under EU law, including in cases of discrimination by law-enforcement authorities.

A broader view of access to justice as protected under international and European human rights law, encompasses non-judicial bodies as well as courts. This may include equality bodies, administrative and non-judicial institutions that deal with cases of discrimination,

[170] HRC, Access to justice as an integral element of the protection of rights to freedom of peaceful assembly and association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, A/HRC/47/24, distr. gen. on 12 May 2021, p. 10, par. 37.
[171] Ibid., p. 12, para. 45.

national human rights institutions, ombudsperson institutions, data protection authorities, labour inspectorates and specialised tribunals.[172] EU Member States have to establish some of these bodies pursuant to specific EU legislative requirements – for example, equality bodies on racial or ethnic and gender equality were set up under the Racial Equality Directive, and national data protection authorities under the Data Protection directive. Quasi-judicial procedures brought before non-judicial bodies may provide faster, less formalistic and cheaper alternatives for claimants. However, the majority of non-judicial bodies do not have the power to issue binding decisions (exceptions include, for example, data protection authorities and some equality bodies), and their powers for compensation are generally limited.[173] Administrative, non-judicial bodies may also advance access to justice by allowing collective redress or complaints. This permits complainants to join forces so that many individual claims relating to the same case can be combined into a single court action. This may allow organisations, such as NGOs, to file complaints on behalf of individuals.[174]

Consequently, all member States of the EU must under Union law designate a national equality body responsible for promoting equal treatment, including before national law-enforcement authorities, that have at least the obligations to "provide independent assistance to the victims of discrimination," "conduct survey and studies" and "publish independent reports and recommendations."[175] For instance, besides addressing national courts, individuals living in Germany can reach out to the German Institute for Human Rights, the Federal Anti-Discrimination Agency or to the Federal Commissioner for Data Protection and Freedom of Information.[176] Similarly, individuals living in France can address complaints or requests to the National Consultative Commission on Human Rights, the Defender of Rights (the national ombudsperson), the Data protection

[172] European Union Agency for Fundamental Rights, Handbook on European law relating to access to justice, 16 April 2016, at https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice, p. 48.
[173] Ibid., p. 49.
[174] Ibid.
[175] European Commission, How to report a breach of your rights, at https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/how-report-breach-your-rights_en. See for a list of main institutions for protecting rights in each EU country: european-justice, National courts and other non-judicial bodies, at https://e-justice.europa.eu/content_fundamental_rights-176-en.do.
[176] European-justice, National courts and other non-judicial bodies: Germany, at https://e-justice.europa.eu/176/EN/national_courts_and_other_nonjudicial_bodies?GERMANY&clang=en&idSubpage=&mtContentRequested=1.

supervisory authority, the Controller-General of Places of Detention or to local legal access points, legal advice centres and justice outreach units.[177] Individuals living in Greece can contact the Ombudsperson, the Ombudsperson for rights of the child, the Equality Body, the Data protection authority or EPANODOS (a non-profit public service organisation governed by private law, under the supervision of the Ministry of Justice, Transparency and Human Rights).[178] In Italy, the equality body dealing with discrimination on grounds of race or ethnic origin – the National Office Against Racial Discrimination – established anti-discrimination offices and focal points in some locations in cooperation with local authorities and NGOs.

In addition, equality counsellors, who address discrimination on the ground of sex, exist at national and regional levels; they are mandated to receive complaints, provide counselling, and offer mediation services. They cooperate with labour inspectors who have investigative powers to establish the facts in discrimination cases. They also have legal standing in court in cases of collective impact when no individual victim can be identified. More generally, individuals living in the EU (or in countries applying to join the Union) can seek redress before national[179] or regional[180] ombudsmen.

B) Improving the right to information when law-enforcement authorities deprive individuals of their freedom and violate their fundamental rights

With respect to arrestation and placement in police custody by law-enforcement authorities, one of the most important obligations of States under international human rights law concerns the right to non-discrimination ensured for any person who finds her-/himself under criminal charges in this context:

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[177] European-justice, National courts and other non-judicial bodies: France, at https://e-justice.europa.eu/176/EN/national_courts_and_other_nonjudicial_bodies?FRANCE&member=1.

[178] European-justice, National courts and other non-judicial bodies: Greece, at https://e-justice.europa.eu/176/EN/national_courts_and_other_nonjudicial_bodies?GREECE&member=1.

[179] European Ombudsman, Members of the European Network of Ombudsmen, at https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/members/all-members.

[180] European Ombudsman, Regional Ombudsmen, at https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/members/regional-ombudsmen.

> "The State has an obligation to ensure, without discrimination, that all individuals detained, criminally charged or otherwise subjected to the criminal and disciplinary mechanisms of the state are provided with legal assistance, including in the form of free, publicly funded legal assistance where needed. Whatever its source, the state must ensure legal assistance is of a high quality, prompt, and confidential. Where individuals' rights have been violated, legal assistance should be oriented not only towards criminal defence and release from detention, but also towards remedies for those violations."[181]

This protection must not only be afforded to citizens and nationals of EU Member States. According to the Special Rapporteur on the rights to freedom of assembly and association, the principle of equality must be respected for ensuring access to justice, including for non-citizens:

> "States have reaffirmed the right of equal access to justice for all, including groups in vulnerable situations, and have committed to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all. The right to equality in accessing justice is not limited to citizens. It must be available to all individuals, regardless of nationality or statelessness, to asylum seekers, refugees, migrant workers, unaccompanied children, or any other persons in vulnerable situations. This right also ensures equality of arms, which in exceptional cases might also require that the free assistance of an interpreter be provided."[182]

Under EU law and the European Convention on Human Rights (ECHR), the right to access to a court (arising from the right to a fair hearing) should be effective for all individuals, regardless of their financial means. This requires states to take steps to ensure equal access to proceedings; for example, by setting up appropriate legal aid systems. Legal aid can also facilitate the administration of justice because unrepresented litigants

[181] HRC, Guidelines for lawyers in support of peaceful assemblies, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/47/24/Add.3, distr. gen. on 29 June 2021, p. 4, para. 4.

[182] HRC, Access to justice as an integral element of the protection of rights to freedom of peaceful assembly and association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, A/HRC/47/24, distr. gen. on 12 May 2021, p. 5, para. 15.

are frequently unaware of procedural rules and require considerable assistance from courts, which can cause delays.[183] With respect to violations of fundamental rights that occur in the context of police and law-enforcement prerogatives, there are specific forms of obligations for States in the European context to provide legal aids to victims.

Under the law of the Council of Europe, an explicit right to legal aid in criminal proceedings is set out in ECHR Art. 6(3)(c). This article provides that everyone charged with a criminal offence has a right to free legal aid if they do not have 'sufficient means' to pay for legal assistance (the financial or means test), or where the 'interests of justice' so require (the interests of justice test). The right of access to a lawyer in criminal proceedings applies throughout the entire proceedings, from the police questioning to the appeal.[184] Art. 6(3)© of the ECHR also sets out the right to be defended by a lawyer of one's own choosing, which can be subjected to limitations if the interests of justice so require.[185]

Under EU law, in addition to the rights protected under Art. 47, the EU Charter of Fundamental Rights (the Charter), Art. 48(2), guarantees respect of the right to defence for anyone who has been charged. The Explanations to the Charter confirm that Art. 48(2) has the same meaning as that of ECHR Art. 6(3). Thus, the European Court on Human Rights' (ECtHR) case law outlined below is relevant for the purposes of Article 48. In terms of EU secondary legislation, the European Council has agreed to strengthen by legislation the procedural rights of suspects or accused persons in criminal proceedings.[186]

To this effect, the European Parliament and the Council have adopted several directives, including the Directive 2012/13/EU on the right to information in criminal proceedings.[187] Under this Directive, persons suspected or accused of having committed a criminal offence until the conclusion of the proceedings[188] must be promptly provided with information concerning at least the following procedural rights, as they apply under the

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183 European Union Agency for Fundamental Rights, Handbook on European law relating to access to justice, 16 April 2016, at https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice, p. 59.
184 Ibid., pp. 65-6.
185 Ibid., p. 66.
186 Ibid., p. 67.
187 European Union, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, L 142/1, *OJ L 142*, 1 June 2012, at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1496243297811&uri=CELEX:32012L0013.
188 Ibid., Art. 2(1).

national laws of EU Member States, in order to allow for those rights to be exercised effectively:

- the right to access to a lawyer;
- any entitlement to free legal advice and the conditions for obtaining such advice;
- the right to be informed of the accusation;
- the right to interpretation and translation; and
- the right to remain silent.[189]

All of those information shall be given to concerned persons orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.[190] The same Directive obliges Member States to promptly provide suspected or accused persons with a written Letter of Rights outlining their rights, when they are arrested or detained.[191] In addition, this Letter of Rights shall contain information about the following rights as they apply under national law:

(a) the right to access to the materials of the case;
(b) the right to have consular authorities or one person informed;
(c) the right of access to urgent medical assistance; and
(d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.[192]

Finally, the Letter of Rights shall contain basic information about any possibility, under national law, of challenging the lawfulness of arrest; obtaining a review of the detention; or making a request for a provisional release.[193] In case suspected or accused persons cannot be provided with such a Letter of Rights in the appropriate language, they shall be orally informed in a language they understand and subsequently be given a Letter of Rights in that same language without undue delays.[194]

189 Ibid., Art. 3(1).
190 Ibid., Art. 3(2).
191 Ibid., Art. 4(1).
192 Ibid., Art. 4(2).
193 Ibid., Art. 4(3).
194 Art. 4(5).

The right to information in criminal proceedings aims to ensure that defendants receive the necessary information concerning the accusation and reasons for their arrest, so that they are able to effectively exercise their rights and defend themselves effectively. The right to information in criminal proceedings originates from Articles 5 and 6 of the ECHR, which are reflected in Articles 6, 47 and 48 of the Charter. Article 6 (3) (a) of the ECHR specifically lists the right to information about the accusation as a minimum safeguard in criminal proceedings, while Article 5 (2) provides for the right of arrested persons to be informed of the reasons for their arrest and any charges against them. Although the ECHR does not specifically set out the right to information about procedural rights, the ECtHR ruled that authorities must ensure that the accused has sufficient knowledge of their right to legal assistance and legal aid, and of their right to remain silent and not incriminate themselves.[195]

Directive 2012/13/EU on the right to information obliges relevant authorities to inform persons deprived of liberty about the reasons for their arrest or detention, including information on the criminal act that they are suspected or accused of having committed. According to the case law of the ECtHR, this information is necessary to enable defendants to challenge their arrest before the court. Therefore, defendants should, as soon as possible, receive the information in a way that ensures they understand why they are being arrested.

While detailed information on the criminal act that they are accused of must be conveyed ‘promptly’, this information need not be provided in its entirety by the arresting officer at the actual moment of arrest. Whether or not the content and promptness of the information provided are sufficient is assessed on a case-by-case basis. In general, the ECtHR has interpreted ‘promptly’ to mean that several hours is within the appropriate range and in compliance with Article 5 (2), 38 but several days is too long.[196]

While all those basic rights relating to information about the fundamental charges are crucial in the context of deprivation of liberty or coercive measures that are imposed upon

[195] European Union Agency for Fundamental Rights, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 13 September 2019, at https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest, p. 23.

[196] Ibid., p. 24.

individuals by law-enforcement authorities, they are in practice oftentimes not respected by EU Member States' law-enforcement authorities. Individuals who find themselves arrested by police forces within the EU can rely on protective measures as organised under EU law, the law of the ECHR and international human rights law for contesting any treatment imposed upon them by law-enforcement authorities when they disrespect them. One particularly important case is the oftentimes neglected individuals' right to be informed of their right to remain silent while being questioned by law-enforcement authorities. For instance, a French judge explained that in France "the defendant is not really informed of their rights until they arrive at the police or gendarmerie station. This causes big problems because some spontaneous remarks are often written down in the procedures before the notification of rights took place. There is a vacuum which can be interpreted as a 'right to pursue' (droit de suite) in favour of the investigators."[197] In Greece, only one defendant out of the six interviewed claims to have been informed about the right to remain silent and not incriminate themselves, and only after the questioning.[198]

Furthermore, the European Parliament and the Council have adopted the Directive 2013/48/EU which imposes the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, in order to strengthen fundamental rights due to individuals under the national laws of EU member States in those contexts.[199] This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the

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197 European Union Agency for Fundamental Rights, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 13 September 2019, at https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest, p. 29.

198 Ibid., p. 30.

199 European Parliament and the Council, Directive 2013/48/EU of 22 October 2013 on the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, L 294/1, *OJ L 294*, 6 November 2013, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0048.

question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.[200]

Similarly, it also applies to persons other than suspects or accused persons who in the course of the questioning by the police, or by another law enforcement authority, become suspects or accused persons. This Directive only applies to the proceedings before a court having jurisdiction in criminal matters, and in any event, it fully applies where the suspect or accused person is deprived of liberty, irrespective of the stage of criminal proceedings.[201] This means that the rights that this Directive 2013/48/EU confers to individuals apply in the situations where persons are arrested or placed into police custody by law-enforcement authorities.

Art. 3 of this Directive obliges EU Member States to ensure that suspects and accused persons have the right to access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively. This means that suspects or accused persons shall have access to a lawyer without undue delay. In any event, they shall have access to a lawyer from whichever of the following points in time is the earliest: (a) before they are questioned by the police or by another law enforcement or judicial authority; (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3; without undue delay after deprivation of liberty; (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that Court. Concretely, individuals who are fulfilling those conditions in the EU have:

- the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;
- the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right

[200] Ibid., Art. 2.
[201] Ibid.

concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

- the right, as a minimum, for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned: (i) identity parades; (ii) confrontations; (iii) reconstructions of the scene of crime.

Directive 2013/48/3U Art. 3 also requires from EU Member States to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons. This means that Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in the position to effectively exercise their right to access to a lawyer.

Restrictions to the afore-mentioned right of the individual to have their lawyers attending investigative or evidence-gathering acts, can be temporarily derogated by EU Member States under exceptional circumstances and only at the pre-trial stage, if either (a) there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings. In addition, the case-law of the ECtHR has also contributed to regulate the imposition of restrictions by EU Member States to suspects or accused persons' fundamental rights. In 2008, the ECtHR established the principles (a two-stage test) to consider when a restriction on the right to access to a lawyer is compatible with the right to a fair trial. First, the test takes into account whether there are any compelling reasons for restricting the right for a defendant to have access to a lawyer; second, it considers whether or not such a restriction irretrievably prejudices the overall fairness of the criminal proceedings.

Drawing from its case law, the ECtHR set out a non-exhaustive list of factors for assessing the impact of procedural failure at the pre-trial stage on overall fairness, including the vulnerability of the applicant (age and mental capacity) and the possibility of challenging

the authenticity or the quality of the evidence.[202] However, in practice, while those temporary derogations by EU Member States to individuals' rights protected under EU law must be exceptional, they are actually commonly employed by EU law-enforcement authorities in everyday life to excessively restrict the right to legal assistance and access to justice for individuals that find themselves under coercive measures imposed by law-enforcement authorities.

Other fundamental rights are also protected under this EU Directive 2013/48/EU, including the right to confidentiality of communication between suspects or accused persons and their lawyers in the exercise of the right to access to a lawyer whether in meetings, correspondence, telephone conversations and other forms of communications permitted under national law (Art. 4); the right to have a third person informed of the deprivation of liberty (Art. 5); the right to communicate, while deprived of liberty, with third persons (Art. 6) and the right to communicate with consular authorities (Art. 7). In addition, Directive 2013/48/EU Art. 13 requires EU Member States to take the particular needs of vulnerable suspects and accused persons into account.

The European Parliament and the Council have also adopted the Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, that deepen the protection of fundamental rights of those persons, as they are protected under EU law by the afore-mentioned Directive 2013/48/EU.[203] This Directive applies to suspects and accused persons in criminal proceedings who have a right to access to a lawyer pursuant to Directive 2013/48/EU and who are deprived of liberty, required to be assisted by a lawyer or required/permitted to attend an investigative or evidence-gathering act, as well as "to persons who were not initially suspects or accused but become suspects or accused in the course of the questioning by the police or by another law-enforcement authority.[204] The

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202 European Union Agency for Fundamental Rights, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 13 September 2019, at https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest, p. 39.

203 European Parliament and the Council, Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, L 297/1, *OJ L 297*, 4 November 2016, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L1919.

204 Ibid., Art. 2.

European Committee for the Prevention of Torture and Inhumane or Degrading Treatment (CPT) recognised the right of access to a lawyer as one of the three most important rights in protecting against the risk of ill-treatment in cases of deprivation of liberty:

> "As part of its preventive mandate, the CPT has consistently highlighted the importance of **three procedural safeguards**, namely: the right of access to a lawyer, the right of access to a doctor and the right to have the fact of one's detention notified to a relative or another third party of one's choice. This presupposes that persons deprived of their liberty are duly informed of these rights, both orally upon apprehension and, as soon as possible, in writing (e.g. through a "letter of rights" or other document setting out the rights of persons in police custody) in a language they understand. This "trinity of rights" should apply as from the very outset of deprivation of liberty by the police – that is, when the person concerned is obliged to remain with the police. The main reason for this has repeatedly emerged from the CPT's findings: it is during the first hours of deprivation of liberty by the police that the risk of ill-treatment is at its highest."[205]

The right of access to a lawyer plays a significant role in facilitating other procedural rights, such as the right of the accused not to incriminate themselves, the right to competent and effective legal advice and the right to have adequate facilities for the preparation of a defence. The ECtHR has repeatedly considered that the right of access to a lawyer is a fundamental procedural safeguard of the right of an accused person not to self-incriminate. The ECtHR, by referring to the recommendations of the CPT, also highlighted the importance of the right to access to a lawyer as "a fundamental safeguard against ill-treatment."[206] Art. 4 of that Directive 2016/1919 set forth legal aid obligations for EU Member States, and it is specified under Art. 4(1) that they "shall ensure that suspects and

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[205] European Union Agency for Fundamental Rights, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 13 September 2019, at https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest, p. 38; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Preventing police torture and other forms of ill-treatment – reflections on good practices and emerging approaches, CPT/Inf(2019)9 – part, Extract from the 28th General Report of the CPT published in 2019, 26 April 2019, at https://www.coe.int/en/web/cpt/preventing-police-torture, para. 66.

[206] ECtHR, *Salduz v. Turkey*, Application No. 36391/02, Judgment of 27 November 2008, para. 54; ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment of 11 July 2006, para. 100.

accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require."[207] Art. 4(5) imposes strict time conditions for EU Member States to ensure the effective respect of the right to legal aid:

> "Member States shall ensure that legal aid is granted without undue delay, and at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before the investigative or evidence-gathering acts".[208]

Importantly, Directive 2016/1919 Art. 8 on Remedies provides that: "Member States shall ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive."[209] In addition, Art. 9 stresses the obligations for EU Member States to "ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive."[210]

Despite those clear EU procedural legal requirements for ensuring that individuals' fundamental rights are protected, there are many shortcomings in the practice of many EU Member States. That is why defendants may not be fully aware of their procedural rights owing to several factors. These include relevant authorities treating the defendants other than as a suspect at the initial stage of the criminal proceedings; a lack of practices to improve the accessibility of information, taking the defendants' vulnerabilities into account; and a lack of practices for verifying defendants' understanding of the information provided by the relevant authorities. Furthermore, individuals are sometimes questioned as a witness or are 'informally' asked questions by law enforcement authorities, when in fact there are plausible reasons to suspect the person's involvement in a crime. Hence, they should be provided with comprehensive information about their rights – in particular, the right to remain silent, as required by the legislation. In addition, law enforcement authorities sometimes establish informal practices so that defendants make self-incriminatory statements, which they generate as witnesses, that can be later used against them legally in the course of the proceedings. For example, they question former

207 Ibid., Art. 4(1).
208 Ibid., Art. 4(5).
209 Ibid., Art. 8.
210 Ibid., Art. 9.

witnesses again, this time as defendants, and ask them if they stand by their previous statements.[211]

Moreover, the police sometimes discourages defendants from exercising their right to a lawyer. For instance, they tell them that the case is simple and that there is no need for the presence of a lawyer; or that proceedings are just beginning, and lawyers are not needed at the initial stage. Secondly, defendants deprived of liberty particularly face practical difficulties in accessing lawyers directly. Sometimes law enforcement authorities or defendants' relatives contact lawyers on their behalf. This can mean the call is significantly delayed, depriving defendants of the opportunity to obtain legal advice – such as to remain silent – at an early stage. In addition, the indirect nature of the contact deprives lawyers of the opportunity to ask questions that may help them to prepare an effective defence. Thirdly, defendants deprived of liberty are not always allowed to talk to their lawyers in private before their first questioning. Instead, conversations – when they happen at all – are short and/or take place in public corridors in the presence of police officers.[212]

All these elements show that the right to access to justice in the European legal context requires further steps to ensure that everyone living in Europe can have a clearer understanding of what their fundamental rights specifically are when they find themselves under police forces' and law-enforcement authorities' coercive powers. This is a huge task but one worth pushing forward. One concrete solution that Just Access is seeking to achieve with other partnered European NGOs is the development of an innovative approach to foster a better understanding for the broader public as to what their protected fundamental rights vis-à-vis the police are in Europe. This innovative approach can contribute to tackling important structural dimensions of the disregard of individuals' fundamental rights in practice when they face the coercive powers of law-enforcement authorities.

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[211] European Union Agency for Fundamental Rights, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 13 September 2019, at https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest, pp. 23-24.

[212] Ibid., p. 37.

Since many issues negatively affecting access to justice for contesting arrestation by the police and placement in police custody are structural, one possible solution is to anchor rights related to access to justice in this context that enable individuals to raise claims for bringing structural reforms of national laws applicable to the police. This is one of the recommendations made by the Special Rapporteur for the rights to freedom of assembly and manifestation, who suggested in the June 2021 report that individuals must have the ability to advance claims oriented toward systemic reform where law or policy violates human rights obligations."[213] To this effect, it is a fundamental preliminary step to do more on the issue of better educating individuals about what their rights are. Just Access will continue to work on bringing about further concrete solutions to this issue and keep the public posted.

[213] HRC, Guidelines for lawyers in support of peaceful assemblies, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/47/24/Add.3, distr. gen. on 29 June 2021, p. 5, para. 6.

16.2.2021

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Joint Comments by Maat and Just Access for the Concluding Observations on Qatar's Initial Report about the implementation of the ICCPR

Maat for Peace, Development and Human Rights and Just Access e.V. submit jointly the following comments for the consideration of the Human Rights Committee (CCPR) in relation to its Concluding Observations concerning Qatar's Initial Report on the implementation of the International Covenant on Civil and Political Rights (ICCPR). Qatar ratified the ICCPR in 2018, but four years later there are still several areas in which the State is systematically infringing the Covenant. These infringements require immediate action by the State authorities, in order to ensure that the ICCPR is implemented effectively and without discrimination. Besides these systemic violations, after examining Qatar's replies to the List of Issues (LOI) issued by the CCPR in August 2020, we believe that this document contains a number of contradictions and misleading statements, as will be shown below.

Several of these misstatements and systemic violations will be shown through the example of a concrete case, that of Sheikh Talal Al Thani, his wife, and their four children. Following

his father's death, Sheikh Talal requested his inheritance from the Qatari authorities. Sheikh Talal sought a peaceful resolution of this issue by bringing it before the courts of Qatar. This appears to be the event that triggered Qatar's measures against Sheikh Talal and his family. The Government of Qatar refused to settle the inheritance claim, but offered to pay the inheritance in increments if Sheikh Talal returned to Qatar from having lived abroad. When the Sheikh returned to Qatar with his family, the Government proceeded to freeze and appropriate his assets. Having been deprived of his assets through the actions of the Government and the ruling family of Qatar, Sheikh Talal fell into debt. The Government's conduct resulted in multiple court proceedings against the Sheikh.

On 21 February 2013, Sheikh Talal was arrested by plain-clothes police at a gas station without a warrant, denying him information regarding the basis of his arrest and detention. Despite his repeated requests for legal representation, to this day he is still denied access to a lawyer of his choosing; and his case has never been reviewed by an independent and impartial tribunal. The proceeding that led to Sheikh Talal's imprisonment failed to meet the requirements of a fair and public hearing, in general violation of Article 14 of the ICCPR. Among other judgments, in May 2018 Sheikh Talal, already in detention for over five years at that time, received a sentence of 22 years' imprisonment, running from 21 March 2013 to 30 June 2035. This sentence was subsequently extended for another 15 years, until 2050. Having in mind his age and his deteriorating physical condition, this is a death sentence in all but name.

After his detention, the Sheikh's pregnant wife and small children were forced to move to a remote location outside Doha, where they lived in squalid conditions, exposed to raw sewage and pests. In consequence, the children fell ill and had to be frequently hospitalised. Eventually the family was allowed to travel abroad. They refused to return and now live in Germany, under police protection. In August 2020, the Qatari Authorities have cut off all communication between Sheikh Talal and his family. Due to the poor prison conditions, Sheikh Talal now suffers from a life-threatening diabetic condition, loss of teeth, hypertension, chronic back and joint pains and very limited mobility. In our organisations' view, this case exemplifies the structural nature of the violation of a number of ICCPR provisions, as will be explained in more detail below.

These joint comments will focus on (1) the impermissibility of Qatar's reservations to the ICCPR, (2) the lack of independence of Qatar's National Committee for Human Rights, (3) the non-participation of civil society organisations in Qatar's review process, (4) the acts of torture and other cruel, inhuman or degrading treatment or punishment with respect to persons deprived of their liberty, (5) the systematic imprisonment of individuals merely on the grounds of inability to fulfil a contractual obligation, and (6) the State's failure to guarantee the independence of the judiciary and the procedural safeguards of defendants.

I. The impermissibility of Qatar's reservations to the ICCPR

As highlighted in its initial report on the implementation of the ICCPR, Qatar has submitted reservations to Articles 3 (i.e. on its obligation to guarantee the equality between men and women) and 23 (4) of the Covenant (concerning the rights of spouses as to marriage, during marriage and at its dissolution).[214] In addition, the State submitted five interpretative declarations, concerning the interpretation of the term "punishment" in article 7 of the Covenant, the freedom to have or adopt a religion or belief under Article 18(2) of the ICCPR, the interpretation of the term ,"trade unions" and all related matters mentioned in Article 22 of the Covenant, the marriageable age for men and women (Article 23.2 of the ICCPR), and the rights of religious minorities to profess and practice their own religion under Article 27 of the Covenant. [215] The first four declarations are in practice modifying the extent of the State's legal obligations with respect to these provisions. Therefore, these four interpretative declarations do in fact also constitute reservations to the ICCPR,[216] and their permissibility will be examined together with the other reservations, in accordance with paragraph 3.5.1 of the International Law Commission (ILC) Guide to Practice on Reservations to Treaties.[217]

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[214] CCPR, Initial report submitted by Qatar under article 40 of the Convention (CCPR/C/QAT/1), 15 October 2019, paragraph 3.

[215] CCPR, Initial report submitted by Qatar under article 40 of the Convention (CCPR/C/QAT/1), 15 October 2019, paragraph 3.

[216] This is in accordance with Article 2(1)(d) of the Vienna Convention on the Law of Treaties (VCLT): "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State").

[217] ILC, Guide to Practice on Reservations to Treaties, 2011, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering work of that session (A/66/10, para. 75), para. 3.5

The CCPR inquired in its LOI whether Qatar intended to withdraw these reservations, to which the State replied that "[f]rom time to time, Qatar reviews its reservations to all international human rights treaties. No specific time frame has been established for the consideration of the reservations to the International Covenant on Civil and Political Rights".[218] This statement shows that currently Qatar has no intention to withdraw the aforementioned reservations.

Therefore, the CCPR should make clear in its Concluding Observations that the reservations to the ICCPR issued by Qatar are invalid. The reasons mentioned by the Government of Qatar for its reservations are that Article 3 ICCPR is contrary to Article 8 of Qatar's Constitution, and that Article 23(4) of the Covenant "contravenes Islamic sharia". With respect to the interpretative declarations, the States submits that the effect of Articles 7, 18(2), 22, 23(2) and 27 of the Covenant is also dependent on Islamic sharia or domestic laws.[219]

In relation to the reservations concerning the equality between men and women, there is currently no doubt that such reservations are incompatible with the object and purpose of a human rights treaty. These reservations are in consequence invalid, in accordance with Article 19 of the Vienna Convention on the Law of Treaties (VCLT). The same can also be applied to the reservations that introduce some form of discrimination on the basis of religion. The references to the compatibility with domestic laws made by Qatar in this context are irrelevant, since the VCLT also establishes in its Article 27 that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". The reservations made on the basis of Islamic Sharia are also lacking validity under international law. The reference to Islamic Sharia is in this regard formulated in vague and general terms, contrary to paragraph 3.1.5.2 of the ILC Guide on Treaty Reservations.[220] In

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218 CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 9.

219 CCPR, Initial report submitted by Qatar under article 40 of the Convention (CCPR/C/QAT/1), 15 October 2019, paragraph 3.

220 ILC, Guide to Practice on Reservations to Treaties, 2011, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering work of that session (A/66/10, para. 75), para. 3.1.5.2 ("A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty").

addition, the CCPR has previously stated that “state parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s rights to equality before the law and to equal enjoyment of all Covenant rights”,[221] as well as “that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground”.[222]

The Committee on the Elimination of Discrimination against Women already established in its Concluding Observations to Qatar’s initial report that “the reservations to articles 2 and 16 are contrary to the object and purpose of the Convention”.[223] Articles 2 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are substantively very close to Articles 3 and 23(4) of the ICCPR, as both concern the equality of men and women and the rights of spouses in the context of marriage. In our view, there is in consequence no doubt that these reservations to the ICCPR are incompatible with its object and purpose and therefore clearly invalid.

Finally, the reservation on the prohibition of torture affects a right which is absolute and non-derogable under the ICCPR. In accordance with the ILC Guide on Reservations, “a State or an international organization may not formulate a reservation to a treaty provision concerning rights from which no derogation is permissible under any circumstances, unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty”.[224] The latter is clearly not the case for Qatar’s reservation, as the definition of “punishment” is a central element to Article 7 of the Covenant. The Committee against Torture also urged Qatar to withdraw a reservation along the same lines in its Concluding Observation to the State’s third periodic report.[225]

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221 CCPR, General Comment No. 28 (2000) on the equality of rights between men and women, para. 5.
222 CCPR, General Comment No. 28 (2000) on the equality of rights between men and women, para. 19.
223 CEDAW Committee, Concluding observations on the initial report of Qatar (CEDAW/C/QAT/CO/1), 10 March 2014, paragraph 7.
224 ILC, Guide to Practice on Reservations to Treaties, 2011, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering work of that session (A/66/10, para. 75), para. 3.1.5.4.
225 CAT, Concluding observations on the third periodic report of Qatar (CAT/C/QAT/CO/3), 4 June 2018, paragraph 8 (b).

In sum, the two reservations and the first four declarations issued by Qatar with respect to the ICCPR should be declared impermissible and invalid by the CCPR.

II. The lack of independence of the Qatari National Committee for Human Rights

In the LOI, the CCPR requested Qatar to "describe the measures adopted to ensure the independence and effectiveness of the National Human Rights Committee".[226] In its Replies, Qatar argues that "Act No. 12 of 2015 amending certain provisions of Decree-Law No. 17 of 2010 governing the National Committee for Human Rights grants the Committee greater independence and provides immunity and legal safeguards for it and its members".[227] However, there were and still remain serious legal concerns regarding Qatar's National Human Rights Committee's (QNHRC) operations and independence. The QNHRC has violated multiple Paris Principles. Therefore, we believe that the lack of independence and impartiality should be highlighted in the Concluding Observations of the CCPR.

First, the QNHRC enabling law does not allow the institution to function effectively and independently. QHRC's enabling law is *Decree Law No. (17) of 2010 On the organization of the National Human Rights Committee (NHRC)*.[228] It is vital to note that this is not a parliamentary law but an executive decree, adopted exclusively by the Emir of Qatar, as stated clearly in its Preamble. This is a direct violation of the Paris Principles and of the General Observation No. 1.1 of the Global Alliance of National Human Rights Institutions' (GANHRI) Sub-Committee on Accreditation, according to which "the establishment of an NHRI by other means, such as an instrument of the Executive, does not provide sufficient protection to ensure permanency and independence".[229]

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226 CCPR, List of issues in relation to the initial report of Qatar (CCPR/C/QAT/Q/1), 24 August 2020, paragraph 2.

227 CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph, 10.

228 See, https://nhrc-qa.org/en/decree-law-no-17-of-2010-on-the-organization-of-the-national-human-rights-committee-nhrc/.

229 General Observations of GANHRI's Sub-Committee on Accreditation, adopted by the GANHRI Bureau at its Meeting held in Geneva on 21 February 2018, General Observation No. 1.1.

In addition, Decree Law No. (17) of 2010 falls short of meeting the Paris Principles by failing to address and regulate several fundamental issues, such as the funding of the QNHRC, its lines of accountability, or even the appointment mechanism for its members. Concerning funding, Decree Law No. (17) merely mentions that "the financial resources of the NHRC shall include appropriations allocated by the State [and] subsidies, donations, grants, and bequests made to it from national bodies".[230] This provision lacks specificity and certainty with respect to the allocation of resources, as the executive retains the full power to both allocate funds to the institution and decide on its expenses. With regard to the election of members, the law states only that they "shall be appointed by an Emiri Decree", and lists broad and vague conditions that members shall meet.[231] The decree lacks any detail concerning the methods for applying to this position, as well as the process and criteria used to determine the suitability of applicants. The decree is also silent on the lines of accountability for QNHRC members, and for the institution as a whole.

Secondly, the selection and appointment process for members of the QNHRC's decision-making body is neither clear, nor transparent or participatory. The QNHRC includes five Government representatives among its 14 members, not as a deviation but in accordance with Article 5 of the enabling decree law. Even if these members do not have a right to vote, the institution is not independent from the executive in its composition, decision-making and method of operation, as mandated by the Paris Principles. Moreover, with respect to the governing body of QNHRC, the current Chairman and Vice-Chairman are respectively Mr. Ali bin Samikh Al Marri and Dr. Mohammed bin Saif Al Kuwari.[232] The former used to work in the Qatar Ministry of Education,[233] and Dr. Al Kuwari is still the Director of the Municipal and Environmental Studies Center of the Qatar Ministry of Municipality and Environment.[234] Therefore, the governing body of QNHRC is clearly and directly linked to the Government, which affects both its perceived and its actual

[230] Decree Law No. (17) of 2010 On the organization of the National Human Rights Committee (NHRC), Art. 17.

[231] Decree Law No. (17) of 2010 On the organization of the National Human Rights Committee (NHRC), Art. 6.

[232] https://nhrc-qa.org/en/about-nhrc/members/.

[233] See, https://www.asianforum.uz/en/team/ali-bin-samikh-al-marri.

[234] See,https://qa.linkedin.com/in/dr-mohammad-saif-al-kuwari-a1281015b; see also http://www.mme.gov.qa/cui/view.dox?id=702&contentID=5945&siteID=2.

independence. This directly violates Paris Principle B.2, which states that the requirement of an appropriate infrastructure is intended to ensure the NHRI is “independent of the government”.

Another problematic issue concerning the composition of the QNHRC relates to the guarantee of tenure for its members. Paris Principle B.3 requires that members of an NHRI are appointed officially, thereby promoting a stable mandate “without which there can be no real independence”. However, there is no provision regulating the tenure of QNHRC mandates and the Emir still holds a wide discretion concerning the termination of members. According to Article 10 of the 2010 enabling decree law, termination of a member of the QNHRC is effected by an Emiri Decree upon a proposal of the QNHRC for reasons which include performing “an act contrary to the objectives of the NHRC or that would disrupt the performance of its duties and terms of reference” and “a disability which may prevent the member from performing the duties of his membership”. These reasons for the termination of the tenure of QNHRC members are clearly too vague and general to meet the Paris Principles.

The QNHRC’s lack of independence was also highlighted in Qatar’s last Universal Periodic Review. Indeed, the UPR outcome document included recommendations to “[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)”, and to “[c]ease to instrumentalize the National Human Rights Committee in carrying out activities for political ends”.[235] We believe that it would be appropriate to include a statement along these lines also in the Concluding Observations of the CCPR.

III. Participation of civil society organizations in Qatar’s review process

In relation to the participation of civil society organisations in this treaty review process, the CCPR asked Qatar to provide information of their “degree of participation in the process of

[235] 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.

formulating the State party's initial report to the Committee".[236] Qatar replied to this that the initial report was sent before its adoption to the Qatar Foundation for Social Action and to the National Committee for Human Rights in order for these organisations to express their views thereon.[237] However, neither the Qatar Foundation for Social Action nor the National Committee for Human Rights are civil society organisations, but rather quasi-governmental institutions.

The lack of independence and close links to Qatari Government of its National Committee for Human Rights were already shown in the previous section. It becomes clear that this Committee does not qualify as a civil society organisation. The situation of the Qatar Foundation for Social Action is similar. Qatar Foundation for Social Action (or Social Work) was established in 2013 by Sheikha Moza Bint Nasser, the second wife of the then-emir Hamad bin Khalifa Al Thani and mother of the current Emir of Qatar.[238] This foundation is financed through governmental funds, and it represents the interests of the Government of Qatar.

The Qatar Foundation for Social Action is therefore also not a civil society organisation but a governmental institution. This is even unintentionally recognised by Qatar in its reply to the LOI, when commenting on the equality between men and women. There, the State mentions that "[t]he position of Minister of Public Health is currently occupied by a woman and Qatari women head a number of *important national institutions including (…) the Qatar Foundation for Social Action".*[239] This statement clearly shows that Qatar does not see the Foundation for Social Action as a civil society organisation but as a national institution. In sum, the two civil society organisations that, according to Qatar, have participated in the adoption of the State's initial report to the ICCPR are in fact governmental institutions. Thus, there has been in practice no participation at all by civil society organisations in the initial stage of Qatar's process of review. The CCPR should therefore consider to request Qatar in its Concluding Observations to allow for the

[236] CCPR, List of issues in relation to the initial report of Qatar (CCPR/C/QAT/Q/1), 24 August 2020, paragraph 3.
[237] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 13.
[238] https://www.nama.org.qa/about-nama/about-qatar-social/about-qatar-social.
[239] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 27 (emphasis added).

participation of independent civil society organisations in the review process of international human rights treaty bodies.

IV. Prohibition of torture and other cruel, inhuman or degrading treatment or punishment and the treatment of persons deprived of their liberty

With respect to the prohibition of torture, the CCPR requested Qatar in the LOI to "provide disaggregated information about the number of investigations, prosecutions and convictions for such acts that have been secured since the State party's accession to the Covenant, including the penalties imposed and the compensation and psychosocial support provided to victims".[240] According to Qatar's reply, the number of investigations, prosecutions and convictions for acts of torture is zero. Actually, the Qatari Government argued that "it has received no complaints of torture or ill-treatment and detected no cases of either. Nor has it received any complaints of abuse of power by police officers assigned to the Ministry that involves acts meeting the definition of torture.[241]

This statement by Qatar is not correct. The case of Sheikh Talal serves as an example in this regard, as he has been detained for almost nine years under conditions that amount to torture and ill-treatment, including solitary confinement, incommunicado detention, threats and intimidation, denial of vital medical care and other forms of physical and mental suffering. These circumstances have been denounced before the Qatari Authorities and the UN Special Rapporteur on Torture, among others.

Specifically, the Special Rapporteur on Torture, together with the Working Group on Arbitrary Detentions (WGAD) and the Special Rapporteur on the Right to Health, sent a Joint Letter of Allegations to Qatar on 19 October 2020 concerning the case of Sheikh Talal (AL QAT 2/2020). The Government of Qatar replied on 15 January 2021. In its reply, the Government ignored the three Special Mandates' request for information concerning

[240] CCPR, List of issues in relation to the initial report of Qatar (CCPR/C/QAT/Q/1), 24 August 2020, paragraph 14.
[241] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 80.

Sheikh Talal's whereabouts and health condition in incommunicado detention, where he is denied access to his family, a lawyer of his own choosing, and independent medical care. Instead, the Government informed the Special Mandates that it had extended Sheikh Talal's sentence of imprisonment until December 2050, on charges that his family and legal representatives have not been informed of and which are highly improbable in the first place, as during his detention Sheikh Talal would not have been able to commit the crimes of which the Government freshly accused him. Thus, the argument in Qatar's reply to the CCPR's LOI that the State has had no knowledge of complaints related to torture and ill-treatment is an evident misstatement, as the Government even replied to such a complaint raised before international bodies.

Moreover, the use of torture in Qatari detention centres has also been highlighted by the UN Committee against Torture in its Concluding Observations on Qatar's third periodic report. There, it urged the Qatari Authorities to adopt several measures in this regard. Among other issues, the Committee emphasised that Qatar "should take effective measures to ensure that all detainees are afforded, in law and in practice, all fundamental safeguards from the very outset of their deprivation of liberty, in conformity with international standards".[242] The Committee against Torture specified that detainees should be informed about the charges against them and be permitted to have contact with family members, lawyers and independent medical professionals.[243] Additionally, the Committee against Torture referred to the lack of independence of the judiciary and the practice in Qatari detention facilities of obtaining confessions under torture or ill-treatment for use in court.[244] Other non-governmental organisations, such as Amnesty International, have also found that in Qatar "[t]here are not adequate systems in place, in practice, to ensure prompt, independent investigation of allegations of torture or ill-treatment and adequate remedy or redress for victims".[245]

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242 Committee against Torture, Concluding observations on the third periodic report of Qatar (CAT/C/QAT/CO/3), 4 June 2018, paragraph 14.

243 Committee against Torture, Concluding observations on the third periodic report of Qatar (CAT/C/QAT/CO/3), 4 June 2018, paragraph 16 a) and b).

244 Committee against Torture, Concluding observations on the third periodic report of Qatar (CAT/C/QAT/CO/3), 4 June 2018, paragraphs 18 and 20, respectively.

245 Amnesty International, Qatar Human Rights: Human Rights Concerns, available at: https://www.amnestyusa.org/countries/qatar/.

In sum, it becomes clear that the Government of Qatar is trying to mislead the CCPR in its Replies to the LOI, by stating that it has no knowledge of alleged acts of torture in its prisons. We believe that the Concluding Observations should focus, among others, on the prohibition and prevention of torture and ill-treatment in the Qatari detention centers.

V. The imprisonment merely on the grounds of inability to fulfill a contractual obligation

Another issue which was highlighted by the CCPR in its LOI is the imprisonment of an important number of individuals merely on the grounds of inability to fulfil a contractual obligation, in violation of Article 11 of the Covenant. In this regard the CCPR asked Qatar to "respond to reports that a large number of individuals, who are often foreign nationals, are held in detention owing to their inability to repay a debt following violations of articles 357 and 358 of the Criminal Code, under which it is a criminal offence to write a cheque without sufficient funds. Please provide disaggregated data on the number of individuals held on such a basis and indicate whether there have been efforts to reform such practices".[246] Qatar replied that a total number of 347 individuals are currently in detention for non-payment of debts.[247] The State did not indicate any intention to reform such practices. This shows that the State has been and is still violating Article 11 of the ICCPR on a structural basis and does not intend to put an end to it.

With respect to the same issue, the Government of Qatar also argued that 200 individuals convicted for the non-payment of debts had been released as part of precautionary and preventive measures related to COVID-19.[248] A similar statement was also included when indicating the COVID-19 related measures, with the State mentioning that "the Emir has issued amnesties for a number of prisoners in the light of the health and humanitarian conditions resulting from the COVID-19 pandemic".[249] These statements are also misleading, as it can be observed in the case of Sheikh Talal. The Sheikh was indeed

[246] CCPR, List of issues in relation to the initial report of Qatar (CCPR/C/QAT/Q/1), 24 August 2020, paragraph 16.
[247] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 83.
[248] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 83

released on health grounds on the basis of a “medical committee’s report dated 08 June 2020”, as stated by Qatar in its reply to the aforementioned Joint Letter of Allegations. However, the Sheikh was brought back to prison on 9 August 2020. This has also been confirmed by the State in the same reply. Thus, it can be observed that the fact that amnesties were issued by the Emir and that individuals detained for failing to fulfil a contractual obligation have been released does not mean that they remained out of prison. Actually, in some cases (such as the one of Sheikh Talal), these alleged “amnesties” lasted only for two months. This is therefore another misstatement by the Government of Qatar.

We believe it is of utmost importance that the CCPR reminds Qatar of its obligations with respect to Article 11 of the Covenant, which the State is systematically infringing. In addition, the release of the individuals imprisoned for their alleged inability to repay a debt should be requested.

VI. The independence of the judiciary and the procedural safeguards of defendants

Another important aspect in this context concerns the independence of the judiciary and the due process rights of the accused individuals in Qatar. In the LOI, the CCPR requested Qatar to “elaborate on the steps taken to ensure judicial impartiality and independence, and the autonomy of prosecutors” as well as to “respond to reports of individuals being denied the procedural safeguards of a fair trial, contrary to article 14 of the Covenant”.[250] The case of Sheikh Talal was actually included among such reports.[251] On the latter issue, the State replied that its domestic laws “offer full guarantees of a fair hearing, including the independence and impartiality of the judiciary; safeguards for accused persons; enabling the access of accused persons to the competent court; completion of proceedings within a reasonable period; access to and exercise of the right of defence; the enforcement of

[249] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 17.

[250] CCPR, List of issues in relation to the initial report of Qatar (CCPR/C/QAT/Q/1), 24 August 2020, paragraph 21.

[251] See Maat’s submission to the Human Rights Committee list of issues on the review of Qatar, submitted to the CCPR by Maat for Peace, Development and Human Rights on the 30 April 2020.

judicial decisions; the right of equality before the law and the courts; the right of accused persons not to be subjected to physical or mental duress or to any form of torture or cruel or degrading treatment; the presumption of innocence; a hearing before a competent, independent and impartial tribunal offering the guarantees required to exercise the right of defence; the right to a public hearing; the right of accused persons to call witnesses; and the right to appeal and to appeal in cassation".[252] In addition, the Government states that "[w]hen accused persons are brought before prosecutors they are asked if they have a lawyer and if they wish their lawyer to be present".[253]

Notwithstanding what the Qatari laws may establish in this respect, this is not what occurs in practice, as can be seen again through the example of Sheikh Talal's case. Over the past years of litigation before Qatari courts, Sheikh Talal has experienced how hearings before Qatari judges were kept extraordinarily short, with the conviction and sentence appearing to have been predetermined by the judges. In some instances, judgments were handed down against the Sheikh without a proper attempt to summon him to attend the hearing. Since his detention, Sheikh Talal has not been informed of his rights. While being detained incommunicado, Sheikh Talal has been unable to communicate with a lawyer of his own choosing despite his repeated requests to this effect, in violation of Article 14(3)(b) of the ICCPR. He was not provided his right to a fair hearing and was not afforded the presumption of innocence. Indeed, before his case was decided upon by Qatari courts of justice, Qatari Authorities sought to try Sheikh Talal in the court of public opinion using footage of false confessions they attempted to extract from him in prison. The conduct of the trials by the Qatari Authorities was therefore manifestly arbitrary and amounted to a denial of justice, in violation of Article 14 of the Covenant.

The violations of Sheikh Talal's fair trial and due process rights are convergent with the WGAD's observations during its most recent visit to Qatar. In its Preliminary Findings Report, the WGAD notes that many of the detainees it interviewed had described their hearings before the court as being of summary nature, lasting only a few minutes. Some

[252] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 94.
[253] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 101.

detainees described their proceedings as “a mere formality”, because the conviction and sentence had already been determined by the Qatari court judges. According to testimonies received by the WGAD, defendants were generally not permitted to address the court, even in cases involving serious offences for which the maximum penalty was a lengthy term of imprisonment; they were not allowed to present evidence, either.[254]

In addition, since Mrs. Asma Arian, Sheikh Talal’s wife, has been authorised by her husband to pursue court proceedings and appoint a lawyer on his behalf, both the appointed lawyer and she have been denied access to many of the documents concerning the lawsuits brought against the Sheikh. Indeed, as a result of its last visit to Qatar, the Special Rapporteur on the Independence of Judges and Lawyers expressed concern “to hear about the difficulties that lawyers [in Qatar] have had in discharging their professional functions, in particular regarding access to information, including expert reports and other essential documents, and the case file of their client during both investigation and trial phases”.[255]

Besides the Qatari State’s systemic failure to comply with the procedural safeguards of defendants, the lack of independence of Qatar’s judiciary is also manifest, as has been highlighted by several UN bodies. When the Emir of Qatar deems it necessary for the “public interest”, he can dismiss Qatari judges,[256] as well as prosecutors.[257] In her 2015 report on Qatar, the then Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, noted numerous cases of pressure by the Qatari executive on the judiciary, particularly in cases that concern potential political rivals of the Emir. The Special Rapporteur also reported allegations that the public prosecution is directly involved in fabricating charges and in tampering with evidence;[258] and noted that “[a]ll judges,

254 Working Group on Arbitrary Detention: Preliminary Findings from its visit to Qatar (3 - 14 November 2019)”, WGAD official website, 14 November 2019, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25296&LangID=E.

255 See, Report of the Special Rapporteur, Gabriela Knaul – Mission to Qatar, Human Rights Council, A/HRC/29/26/Add.1, 31 March 2015, paragraph 82, available at: https://undocs.org/en/A/HRC/29/26/Add.1.

256 See, Article 63(5) of Law No. 10 of 2003, available at: http://www.almeezan.qa/LawArticles.aspx?LawArticleID=55770&LawID=4052&language=en.

257 See, Article 44(5) of Law No. 10 of 2002, available at: http://www.almeezan.qa/LawArticles.aspx?LawArticleID=372&LawId=11&language=en.

258 See, Report of the Special Rapporteur, Gabriela Knaul – Mission to Qatar, Human Rights Council, A/HRC/29/26/Add.1, 31 March 2015, paragraph 77, available at:

including non-Qataris, are appointed by the Emir upon proposition of the Supreme Council of the Judiciary (as way of exception the president of the Court of Cassation is directly appointed by the Emir).[259] The Special Rapporteur was also troubled by Article 63, paragraph 5, of Law No. 10 of 2003, according to which the Emir has competence to dismiss judges "in the public interest". In her view, such ground for dismissal is vague and does not comply with international standards regarding disciplinary measures against judges.[260]

Moreover, the Committee against Torture called recently upon Qatar to "adopt all measures necessary to establish and ensure the independence of the judiciary, including by guaranteeing their tenure in office and severing administrative and other ties with the executive branch".[261] The 2019 Freedom in the World report, issued by Freedom House, also finds that Qatar's Emir continues to exert control over the judiciary.[262] None of these issues has been contested by Qatar in it reply to the LOI. The state has instead responded to the CCPR's request for information with broad statements that do not indicate how the judges are appointed or dismissed.[263] In sum, this shows that Articles 9 and 14 of the Covenant are also being systematically infringed by Qatar. The CCPR should therefore request an amendment of the State's domestic laws in order to guarantee the independence of the judiciary, as well as a reform of its judicial practice aiming to ensure the defendants due process rights in this context.

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https://undocs.org/en/A/HRC/29/26/Add.1.

259 See, Report of the Special Rapporteur, Gabriela Knaul – Mission to Qatar, Human Rights Council, A/HRC/29/26/Add.1, 31 March 2015, paragraph 39, available at: https://undocs.org/en/A/HRC/29/26/Add.1.

260 See, Report of the Special Rapporteur, Gabriela Knaul – Mission to Qatar, Human Rights Council, A/HRC/29/26/Add.1, 31 March 2015, paragraph 42, available at: https://undocs.org/en/A/HRC/29/26/Add.1.

261 See, Concluding observations on the third periodic report of Qatar, Committee against Torture, CAT/C/QAT/CO/3, 4 June 2018, paragraphs 19-20.

262 See, "Freedom in the World 2019 – Democracy in Retreat", Freedom House, available at: https://freedomhouse.org/report/freedom-world/2019/qatar.

263 CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraphs 95-100.

Conclusion

As it has been shown along these Joint Comments for the Concluding Observations on Qatar's Initial Report regarding the implementation of the ICCPR, the State's reply to the CCPR's LOI contains a number of contradictions and misleading statements. These concern, among others, the independence of Qatar's National Human Rights Committee, the genuine as opposed to pretended participation of civil society in the elaboration of the initial report, the release of prisoners after the COVID-19 outbreak and the independence of the judiciary. Although this joint submission by Maat and Just Access has focused only on some particular issues, these are far from exhausting the contradictions and misstatements in Qatar's reply to the LOI.

For example, the State argues that it has "abolished exit permits and has recognized the right of migrant workers to depart the country freely. This means that the kafalah system has been dismantled and abolished once and for all".[264] A few paragraphs later, Qatar specifies in this regard that a Decree of 2019 removes the need for workers in certain areas to acquire authorisation before leaving the country.[265] However, this decree does not comprise all categories of workers. Notably, construction workers are not included. In addition, even for the categories of workers under the scope of this decree, "employers can submit a motivated prior request to the Ministry of the Interior containing the names of persons who, due to the nature of their work, require prior approval before departing the country".[266] Therefore, it seems that Qatar has introduced certain exceptions and requirements to the application of the kafalah system, which is a positive development, but it is still a far cry from the Government's statement, according to which this system "has been dismantled and abolished once and for all".

Besides such misleading statements, the comments have shown how several provisions of the ICCPR that are being systematically infringed by that State. This applies among others

[264] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 54.
[265] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 60.
[266] CCPR, Replies of Qatar to the List of Issues in Relation to its Initial Report (CCPR/C/QAT/RQ/1), 08 April 2021, paragraph 61.

for Articles 07, 09, 11 and 14 of the Covenant. Finally, the impermissibility of Qatar's reservations and declarations to the Covenant has also been highlighted. Just Access and Maat respectfully ask the CCPR to mention in its Concluding Observations to Qatar's Initial Report that these reservations are invalid, that the State should allow for the participation of civil society organisations in the procedures of human rights treaty review, that it should ensure that torture and ill-treatment immediately cease in the State's detention centers, that the Qatari Government should release all individuals placed in detention merely due to their alleged inability to fulfil a contractual obligation, and that Qatar should take appropriate steps to guarantee the independence of the judiciary as well as the application of procedural safeguards for defendants, not only in law, but also in practice.

11.3.2022

9

More than just a home

Our legal fellow Sara Masetti, a volunteer in Avvocato di Strada, writes about the housing problem in Italy and the legislative that shapes it, the specific Italian context and the emerging creative solutions to it. She introduces the organisation and talks about her experience there as well as her motivation behind it.

Italy, alongside with other 170 States around the world, is party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) - one of the treaties at the base of international human rights law. This Covenant, signed in 1967 and ratified in 1978, states in article 11(1) the general right to an adequate standard of living, which is specified in four other fundamental rights: the right to food, to water, to clothing and the right to housing.

As is said in the General Comment no. 4 of the Committee on Economic, Social and Cultural Rights, issued on 13 December 1991, the right to adequate housing applies to everyone, regardless of age, gender, economic status and other such factors. According to the Committee's view, the right to housing is integrally linked to other human rights, and it therefore must not be interpreted in a narrow or restrictive way: the housing must meet the standards of adequacy.

This concept is not universal, since it is influenced by variables like economic, climatic or cultural ones. Despite this, the Committee considers that there are common elements that must be guaranteed and these concern: the legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.

Despite all these provisions, jurisprudence and annual reports show that there is a *de facto* gap between "the standards set in article 11(1) of the Covenant and the situation prevailing in many parts of the world". This happens both in developing countries as well as in some of the most economically developed societies.

According to Italian domestic law, the loss of housing can lead to loss of residence, which is defined in article 43 of the Civil Code as "*the place where the person has his habitual abode*". It may seem like an aseptic definition, but it represents much more: it represents the main dimension of a person's life. It concerns a person's bond with the territory - and its community - not only in a legal sense, but also in an economic and social sense.

In turn, the loss of residence results in the compromise of a series of fundamental human rights enshrined in the Constitution: the right to work (article 4, paragraph 1), the right to defense (article 24, paragraphs 1, 2, 3), the right to health (article 32, paragraph 1), the right to social safety nets (article 38) and the right to vote (article 48, paragraph 2). To all this, we add the fact that no identity card or health card is issued. Thus, a vicious and paradoxical circle is created in which personal situations that most need protection are at the same time those that receive the least.

For instance, people in a compromised state of health cannot take advantage of the general practitioner provided by law; those who have a difficult family situation or, more generally, need help cannot access the support of social services. Moreover, in order to be self-sufficient it is necessary to have a job and the vast majority of employers do not hire those who are without residence and are therefore homeless. Thus, those who find themselves homeless are, because of the circumstances, led to *remain* homeless.

It is in this scenario that the association Avvocato di Strada was born and operates. Founded in 2007 in Bologna by a group of volunteer lawyers, it aims to help and defend the rights of homeless people. It has offices in 54 Italian cities and sees the collaboration of more than a thousand volunteers including lawyers, jurists, retired judges and people who assist them. Each office works as if it was a real law firm, with reception times and days. Those who need legal aid go there and they can receive it for free; if the situation requires it, the relationship between the client and those who help him can even last for years and always without the former having to pay anything.

The type of legal assistance provided is very wide and ranges from the field of tax law to criminal law, from civil to administrative law; much of the aid is given in the sector of immigration and residence permit, as many immigrants live in precarious situations on Italian territory. One of the main battles of Avvocato di Strada concerns the residence and it being the main "front door" for the exercising of the fundamental rights mentioned above.

To overcome this problem, a trick has been created: the residence registered as domicile may not only be a place you live in such as your house, but also a selected association, a dining hall where you are known, a dormitory or a fictitious street that, as ISTAT (Italian National Institute of Statistics) has recommended for years to all Italian municipalities, must be established precisely for this purpose. For instance, in Verona the fictitious street is named after Olimpio Vianello, a popular homeless elder who tragically lost his life in 1990. Through this *escamotage* many people, helped by the volunteers of Avvocato di Strada, have found a way out of their condition and have been able to start a second - and hopefully better – life.

I started working for Avvocato di Strada as a volunteer last year. Although I do not have formal expertise because I am still a law student, I do have time and that I gladly give. I thought that volunteering at this association would be useful for my personal growth and a would give me an opportunity to look into possible directions I could pursue the future. Indeed it was, and not only that but in such a short time I actually already gained much more.

I had the opportunity to stand side by side with capable and selfless people and I was able to meet people with the most diverse background and stories. There were those, who arriving with only a shirt on in the middle of winter, had already walked all the way from Pakistan; parents who would do anything to guarantee a future for their children; and also people who born and raised here in Verona, my city, had lived a normal life until they suddenly lost everything. It was by watching these people and talking to them that I understood the true meaning of determination.

7.4.2022

10

The effect of equal access to education on reducing violence and extremism

The speech of our Director Dr. Mark Somos on the side event at the United Nations Economic Commission for Europe Regional Forum on Sustainable Development: Promoting the SDG4 and its Role in Combating Extremism in Europe.

Thank you very much for this opportunity to listen and speak to you.

When I was 16, I moved from Eastern Europe to a boarding school in London. I grew up in a half Christian, half Jewish household, and in this boarding school I found myself surrounded by Muslims. I was fascinated, and they very kindly taught me about their religion, culture and customs. We started an interfaith student group, a magazine, and invited a range of speakers to address the whole school.

One day my friends told me they were upset by the sermons of extremist imams in mosques they've been attending. They wanted to call the police both because these imams' views offended their religion, and because they didn't want extremism to tarnish the reputation of London's Muslim communities. They called the police, the imams were

arrested and deported. So far so good. But to our surprise, some Muslims in the school wanted to beat us up. We spoke to them over months after that, and I saw a culture shock arise and dissipate between Muslims from Pakistan or Palestine or Malaysia or the United States.

We graduated and left for university, and many of us established little interfaith unions all over the UK. We formed an association, and from 1996, the Committee of Vice-Chancellors and Principals, now called Universities UK, asked us to formally report on extremism on campus. Since then, I've worked extensively with UK, Dutch and Swiss educational authorities on extremism, and had the good fortune to edit a major report for the European Commission based on stellar work by 12 European research centres.

I've also taught for 16 years, in UK, US and Dutch universities, and had to address extremism in my classroom. In my experience, it was always linked to deprivation. It was the poor kids with difficult family backgrounds who had the consistency of anger to block their natural empathy and intellect and come up with conspiracy theories and violent schemes.

I don't want to talk about community-based deradicalisation, an exchange of best practices, or other very well-known policy mainstays against extremism in education.[267] What I miss from the toolkit is ethnography, epidemiology and transparency.

Education isn't limited to the classroom. It occurs at home, on the streets, via television and social media. Let me cite extreme cases. Prisoners in Nazi death camps, Rwandan camps for Tutsis, and in Syrian prisons today, taught and teach other. It's an extraordinary thing. The Syrian version is known as the "university of whispers", because prisoners aren't allowed to speak, so they teach other, especially the children, in whispers. When prisoners die and new ones take their place, or as kids get older and younger ones join them, they pass on what they've learned from those who died. For thousands, this is their only education.

[267] Useful overviews include https://en.unesco.org/preventingviolentextremismthrougheducation and https://documents.worldbank.org/curated/en/448221510079762554/120997-WP-revised-PUBLIC-Role-of-Education-in-Prevention-of-Violence-Extremism-Final.pdf

Or take the tribes of Myanmar and South Yemen. Since Myanmar's military coup, and the unification of Yemen, these tribes have created an educational counterculture to the dominant curricula enforced upon them. They write and reproduce manually textbooks, and compose and teach songs, to preserve not only a general sense of community, but specific details of a past they aren't willing to lose, but they hope will support a better future.[268] Obviously, religious minorities from every continent and century can offer similarly complex and vibrant studies in education-as-resistance.

Such unauthorised spheres of education also produce extremism. Home schooling in rural America, a rampant counterculture of conspiracy theories and violent white extremism are shown to be causally connected. Bangladesh banned Islamic Relief from working in the Rohingya refugee camps as a 'preventative measure against potential radicalization in the camps'.[269] Lorenzo Vidino documented how the Muslim Brotherhood infiltrated and hijacked Western educational systems claiming they represented the Muslim majority, but designing and delivering educational content that was and remains highly conducive to radicalisation.[270] I sat with Dutch lawyers working for boards that certify educational programmes, as they were trying to figure out the finer ideological points in curricula proposed by Salafists and by Jehovah's Witnesses who wished to run independent schools in small Dutch cities. I saw the shock of Swiss authorities when they discovered the ideologies and practices of hatred and violence taught in kindergartens under the control of extremist NGOs. I listened to history teachers unable to convince their students in Marseille that the crusades really have ended and aren't ongoing as a thousand-year uninterrupted conspiracy, and I've been debating the role of the Muslim Brotherhood in British community education for decades. 26 years ago, when I started, the level of governmental ignorance was striking. That improved to an extent, but it's impossible to spot every dangerous nuance without community involvement. What I've found very informative is legally oriented ethnography, such as Vidino's or Amira Augustin's, which

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268 Anne-Linda Amira Augustin, *South Yemen's Independence Struggle: Generations of Resistance* (Cairo: AUC Press, 2021). Ed. Helen Maria Kyed, *Everyday Justice in Myanmar: Informal Resolutions and State Evasion in a Time of Contested Transition* (Copenhagen: NIAS Press, 2020).

269 https://rlp.hds.harvard.edu/news/rohingya-flee-myanmar-bangladesh-bans-three-muslim-aid-groups.

270 Lorenzo Vidino, *The Closed Circle: Joining and Leaving the Muslim Brotherhood in the West* (New York: Columbia University Press, 2020).

distills hundreds of interviews to show the strengths and risks of various forms of unofficial education. More of this, please.

The other thing I miss very much from the practice and research of anti-extremism in education is public health and epidemiology. Students without proper sleep, diet and exercise are far more likely to have mental health issues, and there is a strong and clear correlation between mental health issues and extremism. Yet we'd need metastudies to generate data on the impact of poor sleep, diet and exercise on extremism, because direct studies are all too scarce. To my mind, a well-fed, rested and healthy child or teen is significantly less likely to be trapped in a violent subculture's irrational counternarrative, and suppress empathy consistently enough to become a dangerous extremist. But the vast majority of kindergartens, primary schools and universities I know suffer from woefully underfunded or ill-designed nutritional schemes; they keep students indoors far too much; and operate tests and work habits that don't support normal sleep habits. Epidemiological studies of the burden of disease and the ages of onset paint a clear and horrifying picture – and this is the situation in stable States. Think about failing States, unable to provide a healthy educational environment, and typically riddled with militias, gangs or other alternative entities with State-like functions – for instance, Hezbollah – which often produce their own educational and propaganda materials.[271] The correlation between pediatric and juvenile epidemiology and extremism in an educational setting is unlikely to be lower in failing than in stable States.

Even without robust data, I'd wager that pediatric and juvenile epidemiology shows direct correlations with extremism in an educational setting worldwide. One reason why the Sustainable Development Goals is such a well-chosen and helpful framework for studying extremism and education is because SDGs were conceived holistically, and Goal 1 against poverty, Goal 2 against hunger, Goal 3 for good health, and so forth, are already connected to Goal 4 on education in a way that I think could be incredibly productive in addressing extremism and education in particular.

[271] Aurélie Daher, Le Hezbollah. Mobilisation et Pouvoir (Paris: Presses Universitaires de France, 2014), chapter 4.

Finally, transparency. It's not an exclusively Western or democratic value. Let me cite a few examples on why it's more fundamental and how it's misused. Prevent is a much-criticised, but I think fantastic organisation in the UK, and works with counter terrorism police units and extensively with local communities to prevent radicalisation.[272] But in order to reduce mistrust of governmental interference, Prevent can only ask, not compel, local authorities to share their risk assessments. To my mind, this is a design flaw and shows not respect, but neglect of the local communities' best interest. Similarly, an investigative journalist had to go undercover to be able to report on what's being taught in Muslim schools in Germany, with shocking findings of extremism, hate speech and incitement.[273] According to *Newsweek*, the Institute for Monitoring Peace and Cultural Tolerance in School Education reviewed over 200 official, authorised Qatari school textbooks and found pervasive antisemitism; and all Muslim pupils in Qatar, even expats from Europe, must use and are tested on these books.[274] Transparency is a line in the sand, and to allow communities to promote counternarratives in educational settings paid from tax money is to miss the link between public interest and responsibility. It's an erosion of, not an education in, solidarity.

Extremism is like cancer insofar as an ounce of prevention is worth a pound of cure. We know and do a great deal, and the Sustainable Development Goals provide a helpful framework for learning and doing more. I think legal ethnographies on unofficial spaces of education, low-cost high-reward investment in fundamental health and well-being policies in schools, and the presumption of and insistence upon transparency are three corrective and preventative measures that deserve more attention.

Thank you very much for your attention.

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[272] https://www.ltai.info/, https://educateagainsthate.com/. Criticism: https://www.theguardian.com/uk-news/2016/feb/03/prevent-strategy-sowing-mistrust-fear-muslim-communities

[273] Constantin Schreiber, *Inside Islam: Was in Deutschlands Moscheen gepredigt wird* (Berlin: Econ, 2017). Idem, *Kinder des Koran. Was muslimische Schüler lernen* (Berlin: Econ, 2019).

[274] https://www.newsweek.com/qatari-textbooks-teach-anti-semitism-opinion-1534102

8.4.2022

11

Director´s comments to the Deutsche Welle on How Russia could get away with attacks on Ukraine hospitals

Read our Director's comments to the Deutsche Welle[275] on 7 April 2022 on how Russia could get away with attacks on Ukraine hospitals:

His full statement to the Deutsche Welle read:

"International law has evolved over the past decades. It is no longer possible to misuse the incoherence between laws for combatants and civilians to argue that a functioning hospital could ever become a legitimate target. It is categorically a violation of international law, and requires prosecution under the strictest enforcement mechanisms of the international community."

[275]https://www.dw.com/en/how-russia-could-get-away-with-attacks-on-ukraine-hospitals/a-61383117

11.4.2022

12

Quick-fixes are not a solution to the century-long Balkan problems

A year ago, Just Access published an analysis[276] pointing to the abuse of EU's accession procedural rules committed by Bulgaria's blocking of the opening of the negotiations for North Macedonia's EU membership. It argued that: 1) by de facto and arbitrarily vetoing North Macedonia's bid to access the EU, Bulgaria violated the bilateral "Treaty of Friendship"[277] in force with its neighbor; 2) that Bulgaria's attitude towards North Macedonia constitutes unreasonable and harmful bad faith violating international law; 3) that Bulgaria's instrumentalization of EU accession rules for its mere internal political gains is abusive under international law; 4) that the veto constituted an abuse of rights and process in international law as applicable to the EU accession framework in light of the adherence to the Copenhagen criteria; and 5) that Bulgaria's abusive behavior is also harming the rights of the Macedonian minority living in Bulgaria as well as the authority of the Strasbourg Court. By highlighting that Bulgaria's blackmailing of North Macedonia is abusive under international law, especially in the wider institutional and legal context which concerns the entire Union and its neighborhood, Just Access recommended that in the negotiations between both countries one should not allow the aggressive and unfair stance of Bulgaria towards its "smaller" neighbor to go unnoticed, as its instrumentalization of EU

276 https://just-access.de/access-to-the-eu-and-justice-denied/
277 https://mfa.gov.mk/en/document/1712

procedures and cultural-identarian arguments could negatively impact the rule of law in Europe.

In this article Just Access gives a brief consolidated update on the issue and offers additional key recommendations on ways forward, arguing that the guardians of the international system must get involved in negotiating solutions to issues between EU Members States and candidate countries in order to prevent Member States abusing their situational power and membership privileges. Even more importantly, to prevent their attempts to deny neighbors' identity and language as well as appropriate and revise history, thereby undermining the international principles and standards that have been built by the community of states - a structure which is already under serious threat in light of the recent attack on Ukraine by Russia.[278] The proposed recommendations build upon previously published analyses, reports and interviews by Just Access team members, especially our Senior Advisor on Negotiations and Conflict Resolution, Ida Manton[279] and in order to further inform various audiences regarding the dispute between Bulgaria and North Macedonia from both legal and international relations angles, we provide an overview of relevant articles the links to which can be found at the bottom of the text.

The Bulgarian veto on North Macedonia's EU membership negotiations in November 2020 brought to the surface what lies at the core of the dispute between the two countries, and that is Bulgaria's non-recognition of its neighbor's separate national identity, i.e., denial of its right to self-identification and self-determination. By extension, the non-recognition of the Macedonian minority in Bulgaria has also resurfaced, intertwined with the EU enlargement agenda, following Bulgaria's request that North Macedonia refrains from any action supporting the claims for its minority protection[280], while at the same time requesting constitutional guarantees for the observance of the rights of the Macedonian Bulgarians before the start of negotiations for EU membership.[281] Bulgaria maintains a hard-line toward any formal recognition of the Macedonian minority in Bulgaria, despite the

278 Manton, Ida, *Above all, Gentlemen, no excessive enthusiasm*, Fazan.mk, 22 February 2022.
279 https://just-access.de/ida-manton-senior-adviser-negotiations-and-conflict-resolution/
280 https://www.txtreport.com/news/2022-01-16-petkov--there-is-no-macedonian-minority-in-bulgaria.Sk8jE1faF.html
281 https://www.euractiv.com/section/politics/short_news/north-macedonia-must-change-its-constitution-ahead-of-membership-talks-bulgaria-tells-eu/

recommendations of the Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM) to engage in dialogue with persons who identify as Macedonians[282] and despite the 14 findings of the European Court of Human Rights that Bulgaria violated the freedom of association of the Bulgarian Macedonians which remain unimplemented[283], and insists that there are no objective identity traits that would justify minority protection for Macedonians.[284]

Just Access concurs with analysts who rightly point out that using the EU accession process and the imbalance of powers stemming from asymmetric relationship is not in line with the European standards of good neighbourliness.[285] Just Access also concurs that the EU should offer solutions to the "Macedonian question" and other minority issues that correspond to the 21st century need for more nuanced diversity management, and that by doing so, it will avoid contributing, at least tacitly, to the perpetuation of paradigms from the time of the Balkan Wars of the early 20th century.[286]

Hence, the problem posed by Bulgaria cannot and should not be resolved through bilateral negotiation because it was already raised as a topic in the EU Council.[287] The dispute has not yielded any significant breakthroughs or resolutions using this current negotiating format. The process itself is a hostage to the asymmetric power relationship between the two parties in which the more powerful side, Bulgaria as an EU Member State, is simply blocking the EU accession aspirations of North Macedonia and abusing the unanimous decision-making procedure in spite of the consecutive recommendations by the European Commission[288] for starting the accession negotiations as well as the diplomatic efforts of many other Member States to prevent a veto. Instead of using the normative framework of the international (soft as well as legally binding hard) law, the process has so far been handled without genuine international participation and supervision, which leaves Bulgaria

282 https://www.coe.int/en/web/minorities/bulgaria
283 https://www.coe.int/en/web/execution/-/committee-of-ministers-urges-bulgaria-to-give-high-level-message-on-freedom-of-association-of-the-united-macedonian-organisation-ilinden-and-similar-a
284 Marika Djolai and Ljubica Djordjević, *Identity Disputes and the EU Enlargement: The Case of North Macedonia,* European Centre for Minority Issues, 19.07.2021
285 Ibid.
286 Ibid.
287 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5c334
288 Enlargement and Stabilisation and Association Process, the Republic of North Macedonia and the Republic of Albania, Council Conclusions, Council of the EU, 25 March 2020

with the power to decide what price the candidate country should pay. That much power should be handled with utmost care and responsibility. Hence our key recommendations envisage an increased role for the EU and its multilateral partners who have been creating and are responsible for maintaining the security and cooperation structures that regulate the relations of the European nations.

This situation cannot be properly overcome without a stronger involvement and a more active and meaningful role of the European Union, as this dispute has resurfaced in the context of the EU accession process. The dispute has been warping EU values and has allowed a Member State to question whether the Union itself will stand up to defend its own standards, integrity, and most of all its purpose of being. Instead of encouraging the candidate and the Member State to reach a compromise on their own, unavoidably asymmetrical, it would be much more appropriate and responsible for the EU and its Member States to develop a process and an action plan with concrete measures to resolve this impasse, including others of its type. We therefore suggest the following key recommendations: 1) the two processes (EU accession negotiations and bilateral issues settlement) must be divided; 2) the reconciliation or confidence-building process should take place according to the currently accepted international normative framework; 3) the guardians of the international system must get involved; 4) fundamental long-term grievances should not be resolved by quick-fixes; and 5) the war in Ukraine should stimulate actions based on principles and an agile diplomacy that will reject imperialist claims and revisions of history.

I. The two processes (EU accession negotiations and bilateral issues settlement) must be divided

If Bulgaria remains firm on its demands for concessions by North Macedonia in order to lift the veto, the EU could offer to separate the negotiations in two parallel and independent processes – one would be the EU negotiation framework and the other an internationally facilitated dialogue to overcome the misunderstandings and disagreements regarding history, language, minorities and identity in both Bulgaria and North Macedonia. The EU

accession negotiations assess the harmonization and implementation of the EU acquis and should therefore not be burdened with the interpretation of history and the origins of the Slavic languages. The latter process could be avoided should Bulgaria decide to lift the veto and drop their claims, however that would be a very unlikely turn of events given the internal political dynamics of Bulgaria, as well as the extensive list of demands which were included in the 2019 Parliamentary Declaration (approved by 129 votes in favour, 4 against and 1 abstention), followed by the 2020 Explanatory Memorandum sent to the EU capitals, which are in the way even if the Bulgarian PM Petkov is willing to chart a new direction. This means he is left with two options: to try to squeeze in the same demands in a new, upcoming, reframed and reworded proposal by the current French Presidency and pressure for concessions from the Macedonian side or to turn his words into action by lifting the veto while accepting a separate, internationally facilitated dialogue where experts will discuss and elaborate on the points of contention.

II. The reconciliation or confidence-building process should take place according to the currently accepted international normative framework

This process should not be a process through which Bulgaria can continue to condition its neighbour to accept their own reading of the common history. Instead, it should be a process that will promote the mutual understanding and validation of the different interpretations of history, international standards regarding minority rights, culture and linguistics and pave the way towards a joint European future. Both sides can benefit from in-kind contributions of expertise by EU and its Member States, as well as the OSCE, Council of Europe and the UN. Both Prime Ministers and their MFAs can choose to be informed by a process in which international experts will advise the parties: what can be a subject of the negotiations; which documents regulate the topics; which agreements are legally binding and which are legally non-binding recommendations but still have political relevance and disrespecting them might have other consequences; how can both countries harmonize their respective legislation with the international principles and commitments; thus avoid the option of finding excuses in their respective model of governance or constitutional arrangements for not adhering to international standards.

III. The guardians of the international system must get involved

The next step should be negotiating a new process design/roadmap with the EU at the table, not as an adjudicator, but within a supranational structure that will help the two delegations identify what can and should be negotiated, and what is already part of the EU acquis and has simply to be implemented by both states. This process design needs to be negotiated with the guarantors of the international standards framework – the International Community. Hence, the main urgent matter that should be achieved by the end of the French Presidency (June 2022) is to consult Member States and define the modalities for the creation of a dialogue-facilitation team of experts, who soon after being established can provide the knowledge on what has already been enshrined in the EU, OSCE, CoE and UN documents, commitments, covenants, conventions and guiding principles, thereby defining what remains to be discussed between these two countries.[289]

International experts on various topics would facilitate and bring clarity to the debates between the parties and set the process within a normative framework which will not risk violating already agreed-upon international standards. Their main job would be to enable constructive discussions within the realm of international principles and commitments that both sides have signed and aspire towards fulfilling. While this dispute poses the moral dilemma of whether these identity topics should be negotiated at all, in lack of decisive multilateral actions (that would sideline the Bulgarian conditioning of the EU accession with identity issues of a sovereign state), the best alternative would be to have a constructive dialogue under the EU auspices, but outside of the accession negotiations framework. In other words, to construct a process that will heal the old wounds and will focus on current and future possibilities for fruitful cooperation.

EU has to recognize and discourage politicizing of historiography, as Europe cannot afford one-sided judgments on historical ‘truths’ and should promote the recipe that holds the nations of the Union together, i.e., mutual respect for different historical ‘perspectives’. At the same time, the member states should collectively remind Bulgaria that this is a time for

[289] Ida Manton, statement in: *Organized and Strategic Action on several trajectories,* by Jasminka Pavlovska, Nova Makedonija, 21.02.2022.

renewing the vows for updated solidarity and generosity. If the maximalist Bulgarian demands are accepted and legitimized by the EU, as was the case with the Prespa Agreement between North Macedonia and Greece, it is possible that such demands will easily migrate, even mutate, into a dangerous negotiating card in future enlargement negotiations, but also in internal negotiations between current EU Member States. This is why Central European countries expressed serious concern in December 2020, when the Commission submitted a draft document that was not adopted, because the Czech Republic and Slovakia recognized in it elements of "falsification of history that would be harmful to the enlargement process and would bring additional complications in the future".[290]

IV. Quick fixes are just kicking the can down the road

Rushing to get any kind of general declaration signed, without a proper dialogue and without including experts who will facilitate a process towards mutually enticing opportunities, should not be encouraged because the Bulgarian claims will not evaporate and they deserve to be addressed, albeit outside of the accession process in order not to set a precedent and be misused by other Members States later on within the EU. Those advocating for short fixes are most likely motivated by one of these reasons: they come from countries with authoritarian leaders who nurture imperialist dreams about their nation, they want to be finally done with this dispute, they do not understand the intricacies and implications of this dispute for the two countries directly involved, or they do not see the implications and the danger such claims pose to European security and unity.

The major point to be taken into consideration is that the pressure for reaching a deal is rising and the concessions that need to be made raise serious political, legal, but also moral dilemmas for all involved. The main question is who will be forced to change its position: will it be Bulgaria, who can make a moral choice to abandon its realist nationalistic narrative and accept a plurality of views of the common history, or North Macedonia, who would have to accept the Bulgarian version of its own history, linguistics

[290] https://europeanwesternbalkans.com/2020/12/18/the-czech-republic-and-slovakia-have-blocked-eu-council-conclusions-on-enlargement/

and culture in order to start the accession negotiations. There is no room for enthusiasm on the North Macedonian side, despite the ardent statements by its Foreign Minister Osmani, who is eager to claim personal achievement and is therefore likely to make generous concessions at the expense of the interests of North Macedonia. Instead of creating false pre-election enthusiasm in North Macedonia that a deal is just around the corner and labelling those who are not accepting his deal as working for Russia [291] it would be much more constructive to seize the moment and start building up teams, designing strategies and tactics and identifying experts to prepare the ground for genuine problem-solving and principled process based on the existing normative framework.

A holistic approach can avoid quick-fixes for long-term problems and instead provide healthy, long-term solutions, facilitated by objective, knowledgeable experts. As this is not an easy process to set, nor are there standard operating procedures on international mediation and/or dialogue facilitation, in this case additionally complicated as one of the parties is a member state of the EU and the other is not, the most that can be done within this current French Presidency is to explore the possibilities for the creation of such a team, get the confirmations and tentative names for internal and external experts and provide the finances, auspices and overall logistics for the work of such a team. Any other approach, any additional ad-hoc meetings of politicians and badly communicated bilateral roadmaps, annexes or unilateral declarations will be insufficient, rushed and do more harm than good. Additionally, they raise false expectations that they can offer long-term solutions to century-long grievances.

V. The war in Ukraine is a game changer and Europe needs to adapt faster

Although similar approaches to that of Bulgaria of denying others' a separate national identity can be found elsewhere in Europe, it contradicts the principle established in international law that existence of a minority is a question of facts and not official

[291] Telma TV, Officials working for Macedonian institutions lobbying against a deal with Bulgaria, 03/04.2022, https://telma.com.mk/2022/04/03

recognition.[292] Since the war in Ukraine started, several analysts, including our Senior Adviser Ida Manton[293] and the American political scientist and philosopher Francis Fukuyama[294], have made comparisons between Russia's narrative regarding Ukraine and Bulgaria's narrative regarding North Macedonia. On the other hand, the EU's position, as expressed by the Head of the EU Delegation in Skopje, David Geer, was to "completely reject drawing of a parallel". The war in Ukraine illustrated what imperialist narratives can lead to. The invasion has changed the geopolitics of Europe and showed us that security in all of Europe is fragile and that imperialist narratives are still vibrant and need to be countered. The EU, through the words of its High Representative for Foreign Affairs and Security Policy, Josep Borrell, is now saying that Moscow's unprovoked invasion of Ukraine last month was a moment to "reinvigorate the enlargement process" of the EU.[295]

The shift in EU's foreign policy towards "starting formal accession talks with North Macedonia and Albania as soon as possible to enhance the security and defence of the Balkans" is a result of the "concerns that Russia's invasion of Ukraine will create volatility throughout the region".[296] However, this newly energized engagement will not happen by itself. There is a need for genuine paradigm shift, from not just sharing words of intent to actually achieving that change. The Bulgarian veto has been an obstacle on the path of such a change, and therefore the time has come to remove these obstacles. Maybe after all, despite the political hurdles Petkov will have to overcome at home, in light of the violence in Ukraine, Bulgaria will change its position, which is unlikely as the last MFA statement on the topic noted that the tragedy in Ukraine *is being used for a malicious campaign by politicians and members of the Macedonian public in North Macedonia aiming at inciting anti-Bulgarian sentiment.*[297]

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292 Marika Djolai and Ljubica Djordjević, *Identity Disputes and the EU Enlargement: The Case of North Macedonia,* European Centre for Minority Issues, 19.07.2021

293 https://www.novamakedonija.com.mk/pecateno-izdanie/principite-na-megjunarodnoto-pravo-kako-edinstven-rakurs-za-zaednichki-imenitel/

294 https://www.slobodnaevropa.mk/a/31746284.html

295 https://europeanwesternbalkans.com/2022/03/16/borrells-visit-to-the-balkans-it-is-high-time-to-reinvigorate-the-enlargement-process/

296 Ibid.

297 https://www.mfa.bg/en/news/33350

In conclusion, it is useful to reiterate that the obligations arising from the international commitments are not à la carte for countries to choose from in terms of what to implement and what not. And while the international system is not flawless (with its own dichotomies, ambiguities and shortcomings), those who built it and are responsible for guarding it must not allow bilateral agreements to undermine it, especially not as a price to join their club. If the approach towards reaching a solution for this dispute changes and becomes systematic, organized and more predictable, all three involved actors, namely North Macedonia, Bulgaria and the European Union, can come out of this process better off than they are right now. In order for that to happen, the following stages have to address and correct the current deficiencies that have exacerbated the problem. These largely stem from allowing the process to be handled by national politicians and local historians without international facilitation/mediation that would offer plausible directions within the normative EU framework. Without this intricate preparation, it would be detrimental to kick the can down the road again prior to the next Council meeting in June, claim success by agreeing to a very general recycled version of similar documents we have seen in the last few decades just because individual diplomats and politicians are desperate to show results to their forlorn electorate.

More on the topic by Ida Manton, Just Access Senior Adviser, Negotiations and Conflict Resolution in English:

1 PIN Network (Processes of International Negotiation) oPINion, 2021: Managing Diversity or Legitimizing Historical Manipulations?
2 ResPublica, 2021: The Road to Brussels is not via Sofia

In Macedonian:

3 Nova Makedonija, daily, 2022: https://www.novamakedonija.com.mk/makedonija/politika/principite-na-megjunarodnoto-pravo-kako-edinstven-rakurs-za-zaednichki-imenitel
4 Nova Makedonija, daily, 2022: https://www.novamakedonija.com.mk/makedonija/politika/organizirano-i-strategisko-dejstvuvanje-po-nekolku-traektorii
5 Nova Makedonija, daily, 2022: https://www.novamakedonija.com.mk/makedonija/politika/makedonija-nema-da-otstapi-pred-bugarskite-uceni
6 Nova Makedonija, daily, 2022: https://www.novamakedonija.com.mk/makedonija/politika/dosega-inferiorni-otsega-odgovorni/
7 Triling, 2022: https://triling.mk/
8 Fazan, online platform, 2022: http://fazan.mk/News/8/1
9 District, Civil Press Studio, 2021: https://www.youtube.com/watch?v=0hlnqtf1wfU&ab_channel=Civil
10 Nova Makedonija, Daily, 2021: https://www.novamakedonija.com.mk/danedozvolimedabidemezanemeni
11 Triling.mk, 2021: https://triling.mk/dvostepenostvopregovorite
12 Nova Makedonija, daily 2021: https://www.novamakedonija.com.mk/prakaodSofijadoBrisel
13 24 Vesti, Triling TV interview: https://www.24.mk/details/patot-od-skopje-za-brisel-ne-odi-preku-sofija
14 Expres, online platform, 2018: https://www.expres.mk/intervju-so-ida-manton-za-imeto-ne-smeeshe-da-se-pregovara-bilateralno/

2.5.2022

13

"Human Rights Situation in Qatar" at the side event of the 49th Human Rights Council Session

Our Director's keynote speech at the side event of the 49th Human Rights Council Session organised by Maat for Peace, Development and Human Rights on 24 March 2022.

Thank you very much for the invitation to discuss the human rights situation in Qatar. To keep things simple, I'd like to describe three reasons for optimism and three for pessimism.

I'm optimistic about the human rights situation because in 2018 Qatar finally signed the International Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, the two pillars of the so-called International Bill of Human Rights. That's an important step. The first ICCPR review concluded earlier this month, and the ICESCR review is in progress.

My second ground for optimism is Qatar's intense engagement with the UN. For instance, in the run-up to the World Cup, Qatar invited 10 Special Rapporteurs for country visits in quick succession. I think that's unprecedented.

The third reason for optimism is that Qatar's engagement with UN human rights treaties and mechanisms over the last 4 years has produced a huge body of perfectly clear and detailed criticisms and recommendations for improvement. The human rights mechanism is working and we know what needs to be done.

Which brings me to the first reason for pessimism. The defining feature of Qatar's engagement with human rights law and bodies has been instrumentalisation, not to say cynicism. If you look at most State replies to UPR or human rights treaty reviews, more often than not you'll find genuine attempts to constructively address criticisms and improve. This is not the case with Qatar. Look at the first ICCPR review concluded this month. The Committee on Human Rights pointed out that Qatar's reservations are invalid, the death sentence and widespread arbitrary detention violate *jus cogens* norms, that non-Qatari spouses are unprotected, that the Qatari National Human Rights Committee is wholly dependent on the Emir, that civil society does not participate in preparing human rights compliance reports, that discrimination against women and girls, and against migrant workers, remains systemic, and so on. The vast majority of responses by the Qatari delegation were simple repetitions of the country's original report, citing domestic legislation that both UN country visits and a vast number of NGOs have already pointed out either clash with international human rights law, or are in alignment, but are not effective.[298] Formulaic repetition is not engagement, especially when contrasted with most countries' replies to human rights treaty reviews.

The same applies to the aforementioned 10 invitations for country visits by Special Rapporteurs, initiated by Qatar in the run-up to the World Cup. The country visit reports by the Working Group on Arbitrary Detention, the Special Rapporteur on Racism, the Special Rapporteur on Education, and so on, were devastating. The WGAD noted that Qatar's

[298] https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=QAT&Lang=EN under CCPR.

treaty reservations are invalid, that Qatar keeps large numbers of people in arbitrary detention in violation of *jus cogens*, customary international law and treaties, while the Special Rapporteur on Education found systemic discrimination, lack of freedom of religion, and violation of the fundamental right to education. In its response, Qatar ignored the WGAD's findings, and berated the Special Rapporteur on Education for not repeating the material they had given her. It's an extraordinary document, and the contrast with most States' comments on Special Rapporteur country visit reports is striking.[299] After these failures to obtain any validation of its human rights record, Qatar cancelled or indefinitely postponed 4 of the 10 country visits.[300] That is instrumentalisation.

The second reason for my pessimism is Qatar's refusal to respond to constructive and detailed, actionable criticism from UN human rights bodies, even if they signal that Qatar is violating peremptory norms and non-derogable, fundamental human rights. I mentioned some Special Rapporteurs and the ICCPR review, and that's the tip of the iceberg. Look at recent review procedures by the Committee on the Elimination of Discrimination against Women, the Committee against Torture, the latest UPR, and so on.[301] You'll find that total neglect, or at best formulaic verbatim repetitions of the very statements that UN human rights bodies and NGOs are commenting on, are the norm, not the exception, in Qatar's case. And if you place this consistent pattern of non-engagement or fake engagement into the context of most other States' interactions with human rights law, the contrast is astonishing.

The third and last reason for pessimism is not about individual violations of human rights in Qatar, but about wide and deep institutional corruption. Institutional corruption is a legal doctrine developed at Harvard Law School between 2009 and 2016, and has now turned into a global agenda of legal research and practice.[302] The basic insight is that in conventional legal definitions of corruption, such as those embodied in UN treaties, bad people do bad things. In institutional corruption, by contrast, not only bad people do bad things, but good people cannot do the right thing either, because of institutional

299 https://www.ohchr.org/en/documents/country-reports/visit-qatar-report-special-rapporteur-right-education
300 https://spinternet.ohchr.org/ViewCountryVisits.aspx?visitType=all&lang=en under Qatar.
301 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=QAT&Lang=EN under Qatar; and https://www.ohchr.org/en/hr-bodies/upr/q-aindex
302 https://ethics.harvard.edu/lab

misalignments and constraints, for instance improper financial dependence or incentives. Institutional corruption always becomes visible and leads to widespread, damaging loss of public trust, more so than the corruption of individual officials. Classic examples include the ‘revolving door’, whereby officials abuse their legislative influence because their only real option after service is joining the private corporate world, which they prepare for while in government. Conflicts of interest that are ethically doubtful but at the time legal is another example. For instance, the ICJ has just recently began to restrict judges’ ability to take on highly profitable arbitration cases. The point is that in conditions of institutional corruption, even when rulers, governments, geopolitical and economic situations change, there is still zero or severely limited scope for improvement, because improvement would require dismantling and replacing embedded practices and institutions.

Let me cite three examples of institutional corruption in Qatar’s human rights environment: treaty reservations; the judiciary; and the National Human Rights Institute.

In some ways, treaty reservations are the most obvious case. UPR, the Committee on Human Rights, Special Mandates, and many other bodies and mechanisms have drawn attention to the invalidity of Qatar’s reservations to its human rights treaty obligations. Yet Qatar persists in claiming these unlawful excuses to uphold human rights. As time goes by, this persistence turns into entrenched opposition and raises the risk of crises, for instance in cases where Qatar does invoke its unlawful reservations against its human rights obligations.[303]

Secondly, as many UN bodies have noted, Qatar’s judiciary is not independent. The Emir can unilaterally nominate, appoint, and dismiss judges and prosecutors. The latest report by the Special Rapporteur on the independence of judges details numerous cases of pressure by the Qatari executive on the judiciary, particularly concerning potential political rivals. The Special Rapporteur also noted allegations that the public prosecution is directly involved in fabricating charges and tampering with evidence; and highlighted that 33 judges resigned in protest over the Qatari executive’s continued interference. In its most

[303] See e.g. https://just-access.de/joint-comments-by-maat-and-just-access-for-the-concluding-observations-on-qatars-initial-report-about-the-implementation-of-the-iccpr/ , https://just-access.de/on-qatars-reservations-to-the-icescr/

recent periodic report, the Committee against Torture called on Qatar to "adopt all measures necessary to establish and ensure the independence of the judiciary, including by guaranteeing their tenure in office and severing administrative and other ties with the executive branch, in conformity with international standards". Year after year, Freedom House consistently reports the Emir's control over the judiciary, and further evidence of this was presented by several States during Qatar's latest UPR.

The same applies to Qatar's National Human Rights Committee, which received the highest rating from the UN's Global Alliance of National Human Rights Institutions. Yet GANHRI's report on QNHRC notes that all members are appointed by Emiri decree; their tenure and funding depends on the Emir; the selection criteria are underdefined; transparency and meritocracy, even the real participation of civil society, are neither mandated nor guaranteed; and conflicts of interest are unregulated. Other States' NHRIs with only some of these problems have not received the highest rating, or have not even been approved. The UN's calls on Qatar, for instance in the UPR, to correct these major institutional design flaws of its NHRI have been fully and consistently ignored. In fact, current QNHRC members are former Government officials. QNHRC was due to be re-accredited in 2019, but right after the UPR criticisms of its independence, GANHRI elected the Chairman of QNHRC as GANHRI's own Vice-President and Secretary General. QNHRC's regular re-accreditation was then, for unexplained reasons, postponed indefinitely, and it recently received the highest rating again, though not a single UN or NGO criticism was addressed.[304]

In my view, the human rights treaty reservations and the undue and improper dependence of the judiciary and the National Human Rights Institute are more worrying than individual cases of egregious human rights violations. Even though 33 Qatari judges resigned in protest, and every UN human rights body and mechanism have repeatedly pointed out these three problems, at the moment it is difficult to have hope for the domestic legal and political reform necessary to make these three cornerstones of human rights protection in Qatar real. As time goes by, these manifestations of institutional corruption risk deepening and entrenching Qatar's inability and reluctance to honour human rights law.

[304] https://just-access.de/corruption-and-access-to-justice-in-international-law-part-3/

10.5.2022

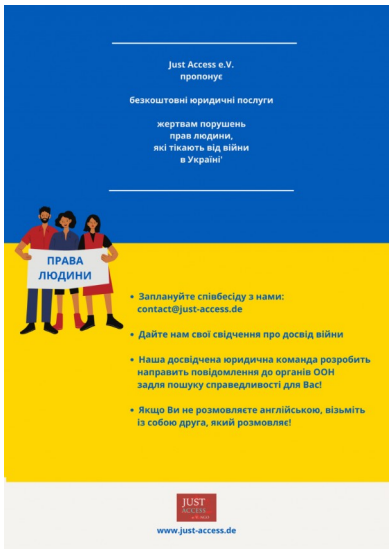
14

Free legal representation before UN bodies for Ukrainian victims of human rights violations

Just Access e.V. offers free legal services for victims of human rights violations fleeing the war in Ukraine.

- Schedule an interview with us;
- Give us your statement about the experiences of war;
- Our legal team will draft and submit communications to UN bodies in search for justice for you.

Please download the posters here: (in English and Ukrainian), print, distribute and share on social media! Spread the word!



19.5.2022

15

Improving Access to Justice - Gender Based Violence: Good Practices and Challenges

Good morning to everyone, I'm Sara Masetti and I'm part of Just Access, a non-governmental organization that works in the field of human rights, and in particular on improving access to justice.
First of all, I would like to thank *Maat for peace, development and human rights* for having us today since the theme of the meeting is such an important matter.

Women's rights are transversal: they are protected by norms that cross various international legal spheres. We can find them, for instance, from humanitarian law to international treaties (e.g. ICCPR, art. 3). Despite this, too many national legislations still allow – and sometimes even promote – differences and discriminations against women, regulating the same subject differently depending on whether the person involved is a man or a woman. This happens in the field of marriage, inheritance, divorce, work – just to name a few.

As we all know, **gender-based violence against women**, unfortunately, is such a widespread issue that the United Nations qualifies it as a "*global health and development issue*" and make it fall under sustainable development goal 5.2.

This is the most pervasive yet least recognized human rights violation in the world and transcends factors such as the age, social class, geographical area and education[305]. It is defined as an act that results in, or is likely to result in physical, sexual, or psychological harm to women, whether it occurres in public or private life (United Nations, 1995, Platform for Action D.112)[306]. It can be concretized in various behaviors, such as: marital rape, selective malnourishment of female children, forced prostitution, female genital mutilation, and sexual abuse of female children.

The most widespread form of gender-based violence is, though, the abuse of women perpetrated by their intimate male partners, that integrates the case of **domestic violence**[307].

Domestic violence is insidious: it happens for the most part inside one's own home, the place that should be the safest refuge, and is perpetrated by those who should love. It is a complex phenomenon that develops in different levels, which are connected to each other and are often simultaneous. It can be sexual, psychological and physical. As regards the latter, it can go from beating to throwing objects.

Psychological violence is instead harder to recognize since it’s more devious. The most common forms are verbal abuse, humiliation and belittling of one's identity and opinions.
The victims of domestic violence often feel helpless and afraid, live in a constant state of anxiety but at the same time they are trapped in this vicious cycle from which to get out is much more complex than one might think, both for psychological and non-psychological factors, for instance: economic dependence.

Despite all of this, victims all around the world are often invisible and, when they are not, social institution legitimize, obscure and deny abuse, favoring instead the phenomenon of *victim blaming*.

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305 L. Heise, M. Ellsberg, M. Gottmoeller, *A global overview of gender-based violence*, International Journal of Gynecology and Obstetrics 78 Suppl. 1 (2002) S5–S14.
306 Nancy Felipe Russo, Angela Pirlott, *Gender-Based Violence: Concepts, Methods, and Findings*, Department of Psychology, Arizona State University, Arizona, USA.
307 https://www.frauen-gegen-gewalt.de/en/

To better understand the spread of the phenomenon of domestic violence I took into consideration the data of the country where Just Access has its headquarters, Germany.

According to the *UN Global Database on Violence against Women* about one out of four women (22%) in Germany have experienced physical and/or sexual violence by their intimate partner during their lifetime[308]. In a survey conducted by the Fundamental Rights Agency (FRA) in 2014, German women who have experienced domestic violence come to be even one in three[309]!

Domestic violence and, more generally, gender-based violence against women are universal problems, they concern all of us because their roots lie in our minds and in our way of reasoning, whether we like it not, whether we *know* it or not. One of the fronts on which these issues can be addressed is that of culture and information. These are long processes that mainly take time and foresight; despite this, there are also concrete actions that can be taken and that can immediately offer help and support.

Around last November, Just Access made contact with **Gewalt Ambulanz**, a violence clinic within the institute of forensic and traffic medicine of Heidelberg University Hospitals. This clinic, through the work of a specially trained team of experts, documents injuries that can be used in court and offers protection of traces on body and clothing.

Our NGO, as mentioned at the beginning, aims to improve access to justice and wondered how it could contribute to the work already done by Gewalt Ambulanz.

I now leave the floor to my colleague Marketa Klicova who will explain to you the product of this collaboration.

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[308] https://evaw-global-database.unwomen.org/pt/countries/europe/germany?formofviolence=b51b5bac425b470883736a3245b7cbe6

[309] https://training.improdova.eu/en/data-and-statistics/data-and-statistics-in-germany/

Neoclassical economics, also known as standard or rational economics, dominated policy from the 1970s until the 2008 financial crisis. One of its core assumptions was that people have rational preferences which they pursue with optimal strategies based on perfect information. Neoclassical economics defined policy to such an extent that it created a flourishing subfield of law, known as "law and economics", proponents of which advised governments and international organisations on how to calibrate legal harmonisation, and deterrence and incentives, in criminal, constitutional or trade law both domestically and interstate in a way that creates a calculable and clean order that robustly resists shocks and surprises. The total collapse of neoclassical economics was emblematised by Alan Greenspan's memorable admission that markets and individuals aren't, contrary to decades' all-pervasive assumption, rational.[310]

The costly and creative destruction of rational economics gave birth to the healthy pluralist bewilderment we see today. One bright colour in the swirl is behavioural economics, which helps public policy take into account people's predictable mistakes due to cognitive biases. For instance, people are consistently irrationally risk-averse, unable to take responsibility, they prioritise information that confirms their beliefs, and so on. Law and behavioural economics, the new band in town, produced "nudge units" that governments around the world stood up to save pension funds (by turning higher savings from an opt-in option into an opt-out option, with equal liberty for employees to change their minds but appealing to their subconscious that the default savings rate should be higher), to save lives (by mandating checklists in hospitals to reduce death rates from superbugs and drug interactions) and to stop wars (by accepting that some dictators are really crazy, and not acting out some Machiavellian strategy).[311]

Ours is a law and behavioural economics project. It grew from a five-year project run by Harvard Law School about institutional corruption, which explored how cognitive biases become institutionalised, cause immense harm, and can be stopped.[312] In the legal field of

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310 https://www.pbs.org/newshour/show/greenspan-admits-flaw-to-congress-predicts-more-economic-problems

311 E.g. Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale, 2008). Daniel Kahneman, *Thinking, Fast and Slow* (New York, 2011). Robert J. Shiller, *Narrative Economics: How Stories Go Viral and Drive Major Economic Events* (Princeton, 2019).

312 https://ethics.harvard.edu/lab

access to justice, which is our NGO's mission, institutional corruption is most apparent when victims do not receive the information they need in a form they understand. When you are the victim of domestic or sexual violence or a street mugging, you'll be traumatised and misunderstand half of the things the police are telling you. They cross informing you off their list. If you get an information package, and wish to initiate legal proceedings, again, you probably won't understand every term, option, and legal consequences. Lab studies and real-life case studies have shown that what benefits victims of predatory lending or arbitrary insurance denial the most is a maximum two-page leaflet that is pellucid, legally accurate, and empowers victims to act.[313] This is a new and growing field but it's already clear that the best thing we can do for victims is to stop assuming that they're always necessarily rational or at least able to attend law school before they identify the optimal legal strategy for their case.

Just Access has been developing a set of leaflets for the University of Heidelberg's medical clinic for victims of violence. It's printed on an A4 sheet to make production and handling easy. It's folded to produce 4 pages. Pages 1 and 4, the outside, may look like this:

313 https://a2jlab.org/publications/

And pages 2 and 3 might look a bit like this:

If you have been hurt, you have several rights under German law. First and foremost, you have the **right to lodge a complaint** before the authorities. This can be done either at a police station or at the public prosecution service (Staatsanwaltschaft). If you have insufficient knowledge of German, you have the **right to ask for an interpreter**, as well as to **legal notifications in a language you speak**.

In some cases, you also have the **right to receive psychosocial support during the legal process**. This applies to victims suffering severe harm, as well as for victims of sexual violence.

Being the victim of a crime, you will be called as a witness. You can only refuse to testify when you are married or closely related to the accused. You will also need to provide your name and address. If you are threatened or in danger, you don't have to disclose your private address but can provide another contact address instead. **As a victim, you also have the right to ask for and receive information about the progress of the judicial procedure**.

If you have been a victim of certain criminal offences, such as attempted murder or sexual violence, you have the **right to appear in the proceedings** as a joint plaintiff. In this case, you have also specific procedural rights, such as the **right to be assisted by a lawyer**. If you cannot afford it, you can ask the Court for financial support or even for the appointment of a **lawyer free of charge**, under certain circumstances.

When you have suffered physical or moral injury from an act of violence, you have the **right to claim financial compensation** for pain and suffering. This can be done either in the criminal procedure itself through a so-called adhesion procedure (Adhäsionsverfahren), or in a separate procedure before a civil court.

Once we test its usability and incorporate every suggestion, we hope to eventually distribute the leaflet in hospital wards, police stations, prisons, refugee shelters and other NGOs, with group-specific adaptations and in multiple languages. We will also collect data from victims and carers as they use the leaflets, and publish a scientific study in a few years which, we hope, will allow us to refine and scale up the methodology, and make it freely available to other NGOs and State organs in every context in which victims need help.