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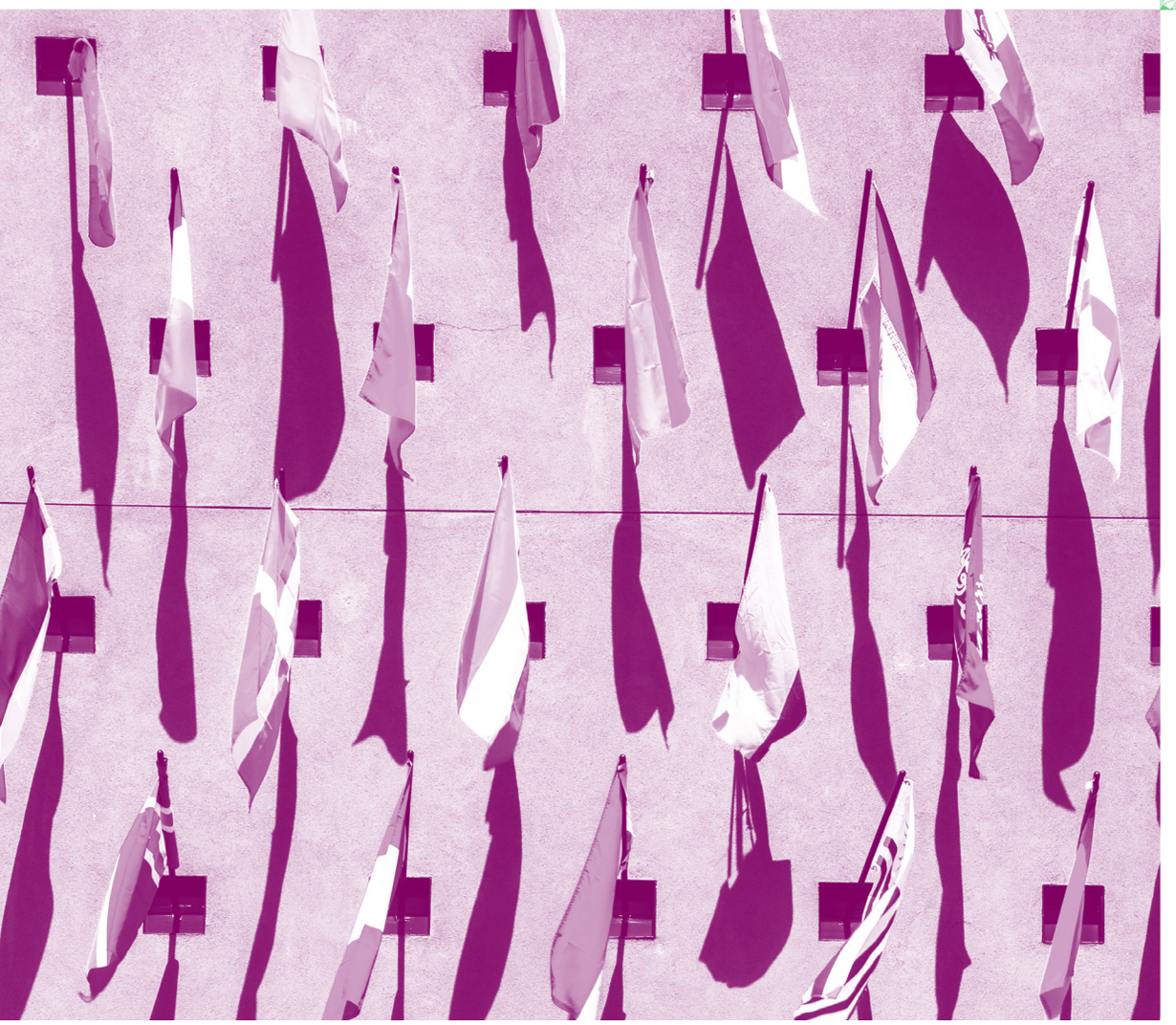

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CRAFTING HORIZONS

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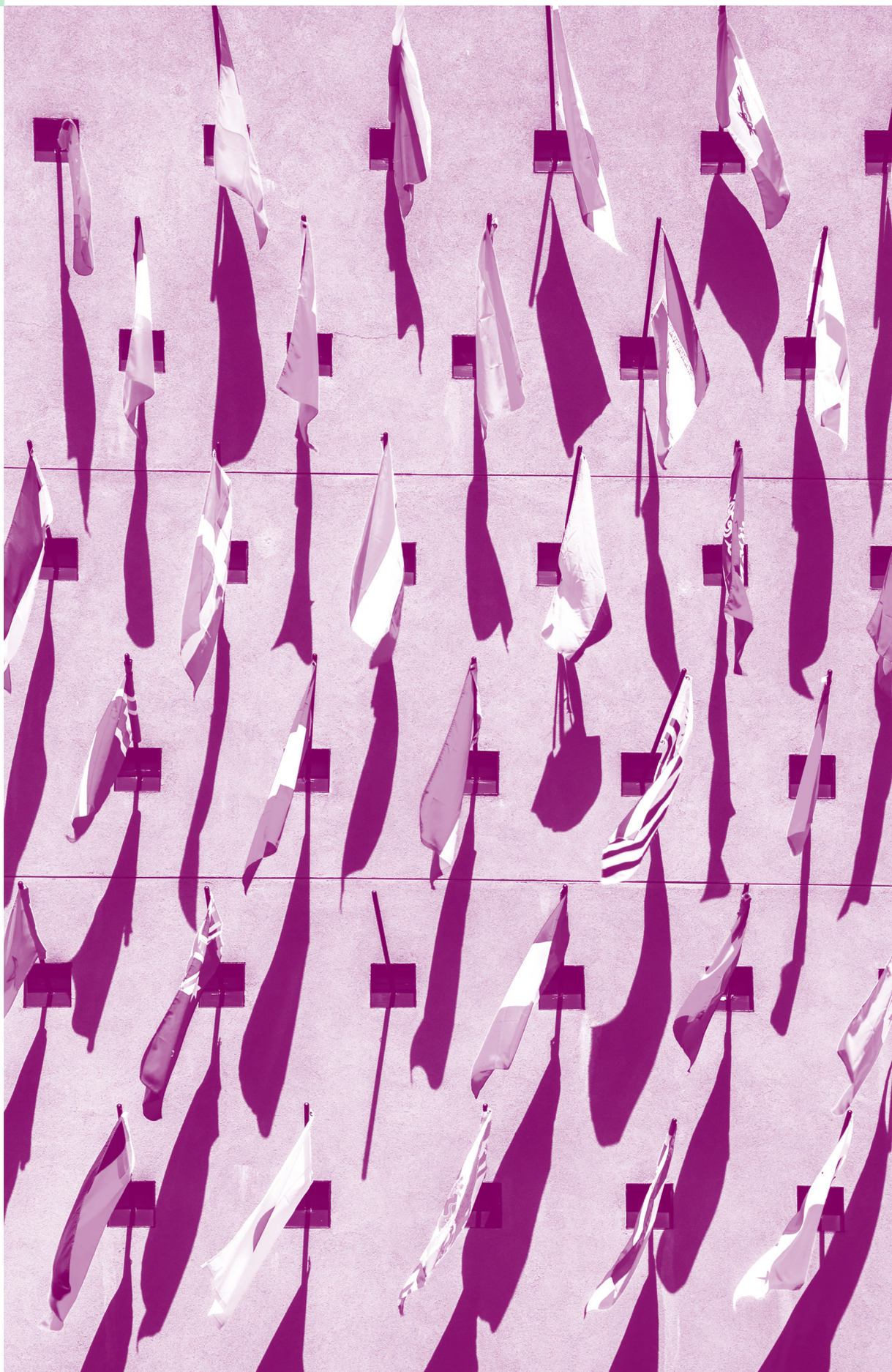

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EDITOR-IN-CHIEF'S AND PRESIDENT'S NOTE

Dear reader,

Hereby we would like to proudly introduce 2nd Issue of the 9th volume of the Groningen Journal of International Law. As all previous issues, this issue is readily available for free on our website at <https://grojil.org> and <https:// ugp.rug.nl/grojil>.

Being an open issue, GroJil 9(2) presents you with several articles on the various topics of International Law. All of the articles have been peer-reviewed. The editorial team worked very hard on them and thus our Publishing Director Medes Malaihollo has created an overview of the articles and the basic concepts they are discussing.

This issue opens with an article by Shuvra Dey who attempts to examine why and how multi-dimensional crimes during or in the aftermath of armed conflicts can be brought under transitional justice mechanisms. He argues that multiple discourses, e.g. human rights, humanitarian law and criminal law, come together to form heritage rights and shows how their recognition contributes to cultural heritage's entrance into the transitional justice project.

In the next article, Nurbanu Hayir evaluates the different approaches to the legal definition of Autonomous Weapons Systems (AWS) and refines the existing approach to defining AWS with respect to functions that enjoy autonomy. According to the author, the AWS definition by the International Committee of the Red Cross is vague and requires a framework on what should be defined as critical and an analysis on the matter contributes to resolving the impasse in the debate on the legal definition of AWS but also to efforts to regulate them.

Thereafter, Maxron Holder analyses the legal status of cyberspace under domestic law and international law. Specifically, he addresses the Budapest Convention on Cybercrime and proposals for a new Convention on cybersecurity at the level of the United Nations, in light of the Tallinn Manual and the Budapest Convention.

Aliyu Ibrahim addresses another challenging issue, namely the role of the reporting procedure of the United Nations Human Rights Committee in the Protection of Human Rights in Africa. By discussing two case studies, namely Morocco and Rwanda, he attempts to examine the effectiveness of the reporting procedure among African state parties. In doing so, he argues that the Human Rights Committee needs more visibility to be more effective, especially within the African Continent.

Questions related to Iran's migration standards concerning Afghan refugees are discussed by Maryam Jami. She argues that unheeding and violating human rights of refugees by host states lead to international backlash and humanitarian interference against them, thereby undermining their sovereignty.

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Finally, Fan Xiaoyu discusses the issues of confidentiality and transparency in investor-state mediation and argues that it is necessary to establish the right balance between the two notions. With that in mind, the author proposes that the degree of transparency of investor–state mediation should generally fall between the strict confidentiality of commercial mediation and the transparency of investor–state arbitration.

GroJil editorial Board would like like to recognise all the efforts made by the editors in order to prepare the articles for publication and express gratitude for their splendid work. Moreover, we personally would like to thank each Editorial Board Member for their great dedication and work on this issue.

Happy reading!

Kyrill Ryabtsev
Editor-in-Chief
Groningen Journal of International Law

Reet Varma
President
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About

The Groningen Journal of International Law (GroJIL) is a Dutch foundation (Stichting), founded in 2012. The Journal is a not-for-profit, open-access, electronic publication. GroJIL is run entirely by students at the University of Groningen, the Netherlands, with supervision conducted by an Advisory Board of academics. The Journal is edited by volunteering students from several different countries and reflects the broader internationalisation of law.

Mission

The Groningen Journal of International Law aims to promote knowledge, innovation and development. It seeks to achieve this by serving as a catalyst for author-generated ideas about where international law should or could move in order for it to successfully address the challenges of the 21st century. To this end, each issue of the Journal is focused on a current and relevant topic of international law.

The Journal aims to become a recognised platform for legal innovation and problem-solving with the purpose of developing and promoting the rule of international law through engaging analysis, innovative ideas, academic creativity, and exploratory scholarship.

Publishing Profile

The Groningen Journal of International Law is not a traditional journal, which means that the articles we accept are not traditional either. We invite writers to focus on what the law could be or should be, and to apply their creativity in presenting solutions, models and theories that in their view would strengthen the role and effectiveness of international law, however it may come to be defined.

To this end, the Journal requires its authors to submit articles written in an exploratory and non-descriptive style. For general queries or for information regarding submissions, visit www.grojil.org or contact board@grojil.org.

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Open Submissions

A Comprehensive Approach of Transitional Justice to Address the Deliberate Destruction of Cultural Heritage

Shuvra Dey*
DOI: 10.21827/GroJIL.9.2.212-238

Keywords:
CULTURAL HERITAGE, TRUTH, PROSECUTION, REPARATIONS, GUARANTEES OF NON-RECURRENCE

Abstract

Given the fact that cultural heritage has been the subject of multi-dimensional crimes during or in the aftermath of armed conflicts, this article attempts to analyze why and how such crimes can be brought under transitional justice (hereinafter TJ) mechanisms. It starts with the challenge to ascertain the inbuilt relationship, importantly, how cultural heritage enters into the domain of TJ. To this end, it fragmentises the rights of heritage and laws associated with these rights and examines how multiple discourses (i.e. human rights, humanitarian law, and criminal law) come together to form the notion of heritage rights and how their recognition contributes to cultural heritage's entrance into TJ project. Thereafter, it assesses the resonance of potential TJ mechanisms and elucidates how they can help reveal the truth concerning crimes against heritage, bring the perpetrators to justice, rehabilitate the destructed sites, redress the victims, and prevent future attacks. It reiterates the value of four measures widely accepted in the TJ discourse, namely, truth-seeking, prosecution, reparations, and the measures of guarantees of non-recurrence. Finally, it explains why a comprehensive approach in terms of implementing these measures is essential and how such approach facilitates taking into account all the factors associated with the crimes against heritage.

I. Introduction

From the outset, cultural heritage has been a subject of intentional destructions and attacks during or in the aftermath of armed conflicts.[1] Bypassing the international obligations, crimes against cultural heritage are taking place in multiform forms, ranging from destructing heritage

* Doctoral Student, Faculty of Law, Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU). This article is based on author's master's thesis written as part of the M. A. Human Rights programme at the Friedrich-Alexander-Universität Erlangen-Nürnberg. Author expresses his gratitude to Prof. Dr. Laura Clérico for her excellent supervision of the thesis and for her generous support and encouragement while writing the thesis. Author is equally grateful to Prof. Dr. Markus Krajewski for taking time to review the thesis and for sharing his valuable thoughts and comments. Views and errors, if any, are solely author's responsibility.

[1] Rush D Holt, 'Submission, on behalf of the American Association for the Advancement of Science (AAAS), to the United Nations Special Rapporteur in the field of cultural rights in response to the invitation to contribute to a consultation on the intentional destruction of cultural heritage as a violation of human rights, in particular cultural rights' (10 June 2016) <https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/AAAS-R.Holt.pdf> accessed 4 May 2021.

to the looting and organized trafficking of such cultural objects.[2] Over the past few decades, attacks against heritage have considerably increased, and many protected buildings have been fully or partially destructed. The war in Afghanistan and Iraq and also the continuing civil war in Syria, Mali and some other parts of the world have caused massive casualties, and the perpetrators in many cases targeted heritage as a means of reprisal 'on a symbolic and ideological level'.[3]

In 2012, the *jihadi* armed groups in Mali deliberately destructed ten mausoleums and mosques of Timbuktu.[4] All of those destructed sites (except the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) were designated by the United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO) as world heritage sites.[5] Mainly, the attacks were conducted by the leaders of the Ansar Dine and Al-Qaeda in the Islamic Maghreb (hereinafter AQIM) who wanted to impose their 'religious and political edicts' on the territory of Timbuktu.[6] But they considered the practices of the visitors and the residents of Timbuktu with regard to the said mausoleums and mosques as a threat to their political and religious ideology; and consequently, ended up destroying those protected sites. Likewise, the (non-state) armed groups in Iraq and Syria caused massive damage to many archaeological sites, and, some of the protected sites are still in danger. Out of the five Iraqi 'cultural sites' currently on the UNESCO World Heritage List (Ashur, Hatra, Samarra, Erbil Citadel, Babylon), the first three are according to the UNESCO facing 'imminent threat to their integrity as sites of major cultural heritage significance'.[7]And among the sites placed on the UNESCO World

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[2] Along with the destruction of cultural heritage, the Human Rights Council is also concerned about certain other crimes related to destructed heritage and calls for international cooperation to combat against and prevent the 'organized looting, smuggling and theft of and illicit trafficking in cultural objects'; see UNHRC Res 33/20 (6 October 2016) UN Doc A/HRC/RES/33/20, 2. The Security Council also called for preventing the trade in Iraqi and Syrian cultural property; see UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199, 17.

[3] To find the data about the incidents in Egypt, Iraq, Lebanon, Libya, Syria, Tunisia, Yemen, see Emma Cunliffe and others, 'Submission to Study on Intentional Destruction of Cultural Heritage: Heritage Destruction in the MENA region' <https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/EndangeredArcheology.pdf> accessed 4 May 2021; To read about the destruction of cultural property in Syria, see Emma Cunliffe, Nibal Muhesen and Marina Lostal, 'The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations' (2016) 23(1) International Journal of Cultural Property 1; With regard to the situation in Iraq, see Rashid International e.V., 'The Intentional Destruction of Cultural Heritage in Iraq as a Violation of Human Rights' <https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/RASHID.pdf> accessed 4 May 2021; See also Dacia Viejo-Rose, 'Reconstructing Heritage in the Aftermath of Civil War: Re-Visioning the Nation and the Implications of International Involvement' (2013) 7(2) Journal of Intervention and Statebuilding 144.

[4] To read about the situation in Mali, see Office of the Prosecutor (OTP), *Situation in Mali: Article 53(1) Report* (ICC OTP 2013) (henceforth 'OTP Report') <https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf> accessed 4 May 2021.

[5] Francesca Capone, 'An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage' (2018) 16 Journal of International Criminal Justice 645, 647.

[6] See *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171, T Ch VIII (27 September 2016) para 31.

[7] Rashid International e.V. (n 3) 7.

Heritage Tentative List, few of these (i.e. the Assyrian capital cities of Nimrud, Nineveh) have been subjected to serious destruction by 'Daesh'[8] during their occupation of the Mosul region.[9] Daesh, along with other armed groups (i.e. ANF, individuals and groups associated with Al-Qaida), were also active and dominant in Syria. They have caused heavy losses to the protected buildings and put many sites in danger, which include but are not limited to the heritage sites of Palmyra, Aleppo, Bosra, and Damascus.[10]

The United Nations (hereinafter UN) is highly concerned about the 'acts of destruction and looting of the cultural heritage', stressing the importance of holding such perpetrators accountable.[11] The Security Council (hereinafter SC) even adopted a resolution to *condemn* the destruction of cultural heritage in Iraq and Syria.[12] On the other hand, the role of the Human Rights Council (hereinafter HRC) was noteworthy, as the body adopted a resolution followed by a joint statement of 154 states which recognizes the need for a 'holistic' approach to address 'the destruction of tangible and intangible cultural heritage', aiming to prevent the attacks and hold the perpetrators accountable.[13] The HRC through its resolution called upon the states 'to respect, promote and protect the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage'.[14] The HRC also requested the UN High Commissioner for Human Rights to convene a 'one-day intersessional seminar' to find best ways to prevent or 'to mitigate the detrimental impact of the damage' to the cultural heritage.[15] The seminar was convened in July 2017 and the High Commissioner presented the summary of the seminar in the form of a report, the outcomes of which influenced the HRC to further adopt a resolution in March 2018.[16] Although the 2018 resolution reiterated the role of the states to respect, promote, and protect cultural rights, it also came up with certain recommendations that were absent in the previous resolution.[17] It *calls for* 'mainstreaming the protection of cultural heritage into…peacebuilding processes, and in post-conflict reconciliation initiatives'.[18] Reaching this point of recognizing the need to incorporate crimes against heritage into post-conflict recovery processes[19] is a very timely beginning that entails

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[8] The Islamic State of Iraq and the Levant (ISIL), also known as the Islamic State of Iraq and Syria (ISIS), officially as the Islamic State (IS), and by its Arabic language acronym 'Daesh' is a jihadist militant group.

[9] Rashid International e.V. (n 3) 7.

[10] See UNESCO list of World Heritage in danger <https://whc.unesco.org/en/danger/> accessed 4 May 2021; Holt (n 1) 2.

[11] See UNGA Res 69/281 'Saving the cultural heritage of Iraq' (May 2015) UN Doc A/RES/69/281, paras 1, 6.

[12] UNSC Res 2199 (n 2) paras 15, 17.

[13] UNHRC Res 33/20 (n 2).

[14] ibid para 1.

[15] ibid para 13.

[16] See Report of the United Nations High Commissioner for Human Rights, *Intersessional seminar on cultural rights and the protection of cultural heritage* UN Doc A/HRC/37/29 (December 2017).

[17] See UNHRC Res 37/L.30 (19 March 2018) UN Doc A/HRC/37/L.30.

[18] ibid para 8.

[19] Likewise, the Special Rapporteur in the field of cultural rights in her report also stressed that the acts of heritage destruction require 'to be addressed in the context of holistic strategies for the promotion of human rights, and peace-building'; see Karima Bennoune, 'Report of the Special Rapporteur in the Field of Cultural Rights', UN Doc A/HRC/31/59 (February 2016) para 82. The UNESCO also developed strategy, which provides-'rehabilitation of cultural heritage as an important cultural dimension, which can strengthen intercultural dialogue, humanitarian action, security strategies and peacebuilding'; see UNESCO, 'Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralisms in the Event of Armed Conflict' UNESCO Doc 38 C/49 and 197/EX/10.

more scrutiny, mainly about the relevancy, possible scopes, or limitations. Guided by the concerns raised by the UN organs, recommendations made by the HRC, and alarmed by the growth of deliberate destructions and crimes against cultural heritage, this article therefore stresses the need of bringing such crimes under the mechanisms of TJ. To this end, it analyses the scope of possible TJ mechanisms and their importance of implementing in a comprehensive way to better address such destructions and the consequences.

II. Working Definition and Related Concept

A. What is Cultural Heritage?

The scope of cultural heritage[20] is very wide and evolving where a better approach for acknowledging it would be to understand its characteristics instead of confining it within a circle. In a broad sense, the cultural heritage does not belong only to any individual or even a community, but is rather connected 'to the whole of humankind'.[21] The cultural heritage, either tangible or intangible, always accompanies certain value which is handed on by the past to the present and which deserves to be transmitted to the future generations.[22]

For the purpose of this study, cultural heritage is characterised at least from two contexts: first, tangible heritage which includes, but is not limited to, archaeological sites, cemeteries, cultural centres, historic structures, libraries, monuments, museums, and religious sites;[23] and second, intangible heritage which may encompasses social practices, rituals, religious ceremonies, oral traditions, and expressions.[24] On the other hand, the deliberate destruction of cultural heritage normally falls into three categories: destruction during armed conflicts, targeted destructive acts, or looting of cultural objects during or in the aftermath of armed conflicts.[25] These destruction or attacks can be done with a motive to destroy any tangible heritage or to erase any intangible heritage.

B. Why cultural heritage calls for consideration in transitional justice?

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[20] Throughout this article, the expressions cultural heritage, cultural property and protected buildings/sites are interchangeably used.

[21] Jukka Jokilehto, *A History of Architectural Conservation: The Contribution of English, French, German and Italian Thought towards an International Approach to the Conservation of Cultural Property* (PhD dissertation defended at York University, ICCROM 1986) 1; Johan Brosché and others, 'Heritage under attack: motives for targeting cultural property during armed conflict' (2017) 23(3) International Journal of Heritage Studies 248, 250.

[22] Lyndel V Prott and Patrick J O'Keefe, '"Cultural Heritage" or "Cultural Property"?' (1992) 1(2) International Journal of Cultural Property 307, 311.

[23] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) [1954 Hague Convention]; article I of the Convention provides a persuasive definition of tangible cultural heritage, but defined it as 'cultural property'; Also see Holt (n 1) 1.

[24] The UNESCO in 2003 adopted the convention for the protection and safeguarding of the intangible cultural heritage; see Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) art 2; See also Karima Bennoune, *Report of the Special Rapporteur in the field of cultural rights* UN Doc A/71/317 (Human Rights Council 2016) para 10.

[25] Holt (n 1) 1-2.

At first, it is essential to find a reasonable justification of this question since TJ 'is not a panacea for all ills'.[26] Of course, bringing every concern in the TJ discourse may challenge its innate sanctity; however, the cultural heritage has its own appeal, as on the one hand, it is continuously subjected to attacks during or in the aftermath of armed conflict, while on the other, it heavily influences the post-conflict recovery processes.

Notably, the cultural heritage has an intrinsic connection to the objectives TJ always strives to achieve. For instance, what the culture and cultural heritage can offer, i.e. healing, opening space for dialogue and participation, creating atmosphere of tolerance, and reconciliation,[27] are central to the goals of TJ. So the attacks or threats to the heritage naturally have a direct impact to the TJ, meaning that such acts may not only affect the 'stability, social cohesion, and cultural identity', but also can create a major obstacle to peace and reconciliation.[28] Therefore, the crimes against cultural heritage require to be addressed by holistic mechanisms; along with prosecuting the perpetrators, preference should also be given to the needs of victims, importantly, in assisting the start of the process of rehabilitation and reconciliation.[29] Consequently, considering the mutual interconnection between cultural heritage and TJ, and recognizing the need of 'full range of processes and mechanisms' to deal with the multitude of heritage crimes, this study emphasizes on a comprehensive TJ approach.[30]

III. The Relevance and the Entry of Cultural Heritage in Transitional Justice

First and foremost, it is necessary to identify how cultural heritage enters into the domain of TJ. In recent times, a line of research has been developed by certain authors, advocating the idea of incorporating crimes against heritage into TJ processes.[31] What has mostly been emphasized is the interrelationship between cultural heritage and human rights or right to

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[26] Cheryl Lawther, Luke Moffett, and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017).

[27] Ereshnee Naidu-Silverman, *The Contribution of Art and Culture in Peace and Reconciliation Processes in Asia. A literature review and case studies from Pakistan, Nepal, Myanmar, Indonesia, Afghanistan, Sri Lanka and Bangladesh* (Danish Centre for Culture and Development 2015) 10; Also see Andrea Breslin, 'Art and Transitional Justice: The 'infinite incompleteness' of transition' in Lawther, Moffett, and Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 268.

[28] UNHRC Res 33/20 (n 2) 2.

[29] Recognizing the importance of TJ measures, and acknowledging the limitations of national criminal law, Louise Arbour opined that, 'analogies to national criminal law were necessary but insufficient to deal with the range of grievances and remedial actions required in societies emerging from conflict'; see Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) International Law and Politics 1, 2.

[30] With respect to a holistic approach of transitional justice (TJ), or what it may offer, Alexander L Boraine observed: transitional justice is 'a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation'; see Alexander L Boraine, 'Transitional Justice: A Holistic Interpretation' (2006) 60(1) Journal of International Affairs 17, 18; Also see Arbour (n 29) 2.

[31] Marina Lostal and Emma Cunliffe, 'The Aftermath of Destruction of Cultural Heritage: Factoring in Cultural Rights in Post-Conflict Recovery Processes' (2016) Human Rights Office of the High Commissioner Submission to Study on Intentional Destruction of Cultural Heritage <https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/> accessed 04 May 2021; Also see Marina Lostal and Emma Cunliffe, 'Cultural Heritage that Heals: Factoring in Cultural Heritage Discourses in the Syrian Peacebuilding Process' (2016) 7 The Historic Environment: Policy & Practice 248.

memory (or to truth) that gives a strong basis to think about heritage in the TJ context.[32] But what still deserves to be expounded is the interconnection and interdependence between human rights, humanitarian law, and criminal law; their role in defining and shaping the notion of heritage rights; and how their recognitions influence cultural heritage's entrance into TJ project. Taking care of the interconnection between all three discourses and their distinct role in narrating heritage rights, this part of the article identifies two main approaches to portray how heritage enters into the realm of TJ and can be addressed by its mechanisms. Firstly, the human rights discourse, which is defined here as 'human rights approach' to cultural heritage, serves as an entrance gate for cultural heritage. Secondly, an intertwined approach of humanitarian law and criminal law that elevates crimes against heritage to the legal status of international crimes and generates criminal responsibility, serves as a strong ground to bring such crimes to justice and guarantee non-recurrence in the future.

A. Human Rights Approach to Cultural Heritage

To initiate TJ measures to address the past oppression, primarily, focus is given on the consideration of whether it was a grave human rights violation or serious humanitarian abuse.[33] Thus, human rights always stand as one of the dominant pathways through which the victims of gross violations can embark on the way of TJ. Therefore, the consideration of cultural heritage from the perspective of TJ would naturally demand to understand its relation with human rights.

From manifold grounds cultural heritage may be seen as an intrinsic part of human rights, especially when it reflects the 'spiritual, religious, cultural' values of certain groups, minorities or communities,[34] and also when it comes to respect and protection of such values. It seems that the interconnection between heritage and culture gives it more legitimacy in the human rights discourse since cultural rights are commonly accepted as 'part of the wider human rights system'.[35] Nonetheless, what is also relevant and goes beyond an individualistic and culture centric approach is that the heritage is considered as a 'public patrimony', which states have duty to safeguard and transmit to future generations for the sake of all

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[32] Lucas Lixinski, 'Cultural Heritage Law and Transitional Justice: Lessons from South Africa' (2015) 9(2) International Journal of Transitional Justice 278, 281-286.

[33] Pablo De Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (foundation of the mandate) UN Doc A/HRC/21/46 (9 August 2012) paras 21-22.

[34] Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22(1) European Journal of International Law 9, 10. Also see Bennoune, UN Doc A/HRC/31/59 (n 19) para 47; A/HRC/17/38 and Corr.1, para 77.

[35] Farida Shaheed, 'Report of the independent expert in the field of cultural rights', UN Doc A/HRC/14/36 (22 march 2010) 3-4. See Preamble of the Constitution of the United Nations Educational, Scientific and Cultural Organization (16 November 1945), provides: 'the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern'. Also see UNESCO, 'UNESCO World Report: Investing in Cultural Diversity and Intercultural Dialogue' (2009) <https://unesdoc.unesco.org/ark:/48223/pf0000185202225> accessed 4 May 2021, the *World Report* asserts, 'recognition of cultural diversity grounds the universality of human rights in the realities of our societies'. See Bennoune, UN Doc A/HRC/31/59 (n 19) para 23.

humankind.[36] However, in the following paragraphs, the human dimension of cultural heritage and its relation with human rights are assessed elaborately.

i. Human Dimension of Cultural Heritage

From the human rights perspective a cultural heritage is important not for its aesthetic dimension, but rather for its 'human dimension', in particular 'its significance for individuals and groups and their identity and development processes'.[37]A heritage is a symbol of historic truth, tradition, and identity which it speaks to present and future generations through its metaphoric mouth. People or communities can identify their existence through the eyes of heritage, and can embark on the way of future enrichments and developments through the strength of its symbolic feet. Importantly, the resonance it has for any particular group or community, much more it has for the humanity at large. The preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict recognized that 'the preservation of the cultural heritage is of great importance for all peoples of the world'.[38] Even the International Court of Justice (ICJ) elsewhere reiterated this notion and observed that: 'the ultimate titulaires of the right to the safeguard and preservation of […] cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole'.[39] The ICTY also in one of its judgements gave indication of how destruction of heritage could lead to the demonization of humanity. In response to the attack on the Old Town of Dubrovnik, the ICTY Trial Chamber articulated that: '[t]he shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind'.[40]

The attack against heritage does not only cause loss to a particular community, but also poses a threat to the cultural heritage of the entire humankind. Thus, the rationale behind the protection of heritage is more profound and universal, and its purpose is the welfare of all human beings. And this relevance and importance of cultural heritage for the human beings or humankind clearly depicts its human dimension, in particular its intrinsic connection to human rights.[41]

On a different note, it is evident that certain principles which are part of the human rights discourse and demonstrate respect to human dignity are also being adopted and developed by the heritage laws. The obligation to respect cultural heritage is one of those recognized extensively by the heritage discourse, revealing its connection to humanness as well as human rights. Starting from the 1954 Hague Convention to the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, both oblige the states to respect heritage 'by refraining from any act of hostility',[42] as well as 'to respect international rules' that criminalise the intentional destruction of heritage.[43] Interestingly, the Committee on Economic, Social and Cultural Rights also recognised the need to respect and protect

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[36] Francioni (n 34) 10.

[37] See Bennoune, UN Doc A/HRC/31/59 (n 19) para 47; Bennoune, UN Doc A/71/317 (n 24) para 6; UN Doc A/HRC/17/38 and Corr.1, para 77.

[38] 1954 Hague Convention (n 23) third recital of the preamble

[39] *Request for Interpretation of the Judgement of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Separate Opinion of Judge Cançado Trindade) ICJ Rep 2013, para 114. See Bennoune, UN Doc A/HRC/31/59 (n 19) para 48.

[40] *Prosecutor v Miodrag Jokic* (Judgment) IT-01-42/1-S (18 March 2004) para 51.

[41] Francioni (n 34) 13.

[42] 1954 Hague Convention (n 23) art 4.

[43] UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (17 October 2003) art IX.

cultural heritage and stated that the right to participate in cultural life imposes obligations on state parties to '[r]espect and protect cultural heritage in all its forms, in times of war and peace […]'.[44] The Committee actually has clarified the relation between the right to heritage and the right to participate in cultural life, which in turn demonstrates the connection between cultural heritage and human rights. This connection or relation is also visible in the Convention for the Safeguarding of Intangible Cultural Heritage adopted in 2003. The crucial aspect of this convention is that its addressees are the human groups and communities, including minorities, and it aims to safeguard their traditions and cultural practices (hereinafter intangible cultural heritage).[45] However, in 2007, the human dimension of cultural heritage law found a new synthesis upon the adoption of the UN Declaration on the Rights of Indigenous Peoples which expressly recognizes the rights of the indigenous peoples to practise their 'cultural traditions and customs'.[46] The Declaration carries significance in the context of TJ since in many war-affected states, cultural traditions of indigenous communities are deliberately targeted and they are also being deprived of their communal property. In such circumstances, the Declaration requires states to provide redress through 'effective mechanisms' when their 'cultural, intellectual, religious and spiritual property' is taken in violation of their laws, traditions and customs.[47] Although the Declaration partially defines the term 'effective mechanism', referring to 'restitution' as one of the key elements,[48] in a broader context, a state may find TJ mechanisms as a sustainable means to serve the aggrieved indigenous communities.

ii. The Relationship between Human Rights, Cultural Rights and Heritage Rights, and their Role in Transitional Justice

A number of scholars are concerned about the role of human rights in the context of TJ, such as Lucas Lixinski who expressly warned against 'overemphasizing the role of human rights with respect to heritage'.[49] It was an important proposition Lixinski put forward until it propagated a different line of argumentation where certain authors reiterated his view, arguing that it would be 'unprecedented' if anyone claims that the destruction of heritage site is a violation of his 'human right to take part in cultural life'.[50] They opined that this kind of approach would 'miss the wider effects' of such massive loss has had on the direct victims as well as the international community.[51]

Undoubtedly, the violation of the right to cultural heritage has large-scale impacts than violating the human right to take part in cultural life, because what destruction of heritage can cause by eliminating the memory and identity of a community is not equal to the loss caused, for example, due to the prohibition on performing particular rituals or traditional practices.

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[44] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General comment no. 21, Right of everyone to take part in cultural life (art 15, para 1a of the Covenant on Economic, Social and Cultural Rights)', UN Doc E/C.12/GC/21 (2009) para 50; Shaheed (n 35) para 9.

[45] Convention for the Safeguarding of the Intangible Cultural Heritage (n 24) arts1 & 2.

[46] United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295 (2007) art. 11.1. See Francioni (n 34) 15.

[47] United Nations Declaration on the Rights of Indigenous Peoples (n 46) art 11.2.

[48] ibid.

[49] Lixinski (n 32) 285.

[50] Lostal and Cunliffe, 'Cultural Heritage that Heals' (n 31) 4.

[51] ibid.

But what we also cannot ignore is that heritage plays a vital role in cultural life, and the so-called traditions and practices form part of the cultural heritage,[52] meaning that the concept of heritage and cultural rights converge or tend to meet at a particular point. Therefore, it is important to search for convergence and take into consideration the 'conceptual link' that exists between heritage, human rights, and cultural rights.[53] To that end, this part, firstly, assesses how cultural rights are strongly connected to heritage rights with a view to clarifying the perceived hierarchy that exists between them; secondly, offers an effect based discussion to understand the effects of cultural rights in the post-conflict societies; and thirdly, narrates how the human rights discourse operates and complements the heritage rights and laws.

a. Interconnection between Cultural Rights and Heritage Rights

Cultural rights as a part of human rights should not be generalised when human rights and heritage rights are contested. Rather, it is crucial to understand the synergy that exists between these two rights. Although the traditional conception of cultural heritage encompasses tangible objects of historic importance (i.e. historic monuments, sites, etc.), yet a substantial part of it deals with the intangible components, (i.e. rituals, traditional ceremonies, performing arts, oral history, etc.), which are widely accepted as 'intangible cultural heritage'.[54] The intangible cultural heritages are nothing but an expression of cultural practices and values. Although the rights generated from them might be sub-divided into cultural rights and heritage rights but both are closely connected, and often co-exist. The Inter-American Court of Human Rights (IACtHR), in the case of the *Yakye Axa Indigenous Community*, has made a very comprehensive observation.[55] At first, the Court recognized the cultural practices (i.e. art, rituals, oral expressions and traditions, customs, etc.) and their values as 'non-material cultural heritage'.[56] Then, the Court opined that 'to guarantee the right of indigenous peoples to communal property, it is necessary to take into account that their land is closely linked' to their 'traditional practices and culture'.[57] From the overall findings of the Court, one can identify that the right to communal property of a community has strong connection to their 'traditional practices and culture',[58] and the recognition of such right may contribute to the free development and transmission of culture to the future generations,[59] which is one of the fundamental aims of protecting cultural heritage. Since the communal property does have heritage value, one must need to acknowledge its inbuilt relation with 'traditional practices and culture', meaning that such practices and culture are the intrinsic part of cultural heritage. In 2003, the UNESCO adopted a binding convention for safeguarding the intangible cultural

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[52] Intangible heritage encompasses 'traditions, customs and practices, knowledge, vernacular or other languages, forms of artistic expression and folklore'; see First Expert Report, ICC-01/12-01/15-214-AnxI-Red3, 5; *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017) para 15.

[53] See Francesco Francioni, 'Culture, Heritage and Human Rights: An Introduction' in Francesco Francioni and Martin Scheinin (eds), *Cultural human rights* (Martinus Nijhoff Publishers 2008) 7.

[54] Prott and O'keefe (n 22) 308. To find how tangible cultural heritage is linked to intangible heritage, see *Report of the Special Rapporteur in the field of cultural rights,* UN Doc A/71/317 (n 24) para 7.

[55] *Case of the Yakye Axa Indigenous Community v. Paraguay* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 125 (Judgment of 17 June 2005).

[56] ibid para 154. Also see Bennoune (n 24) para 10.

[57] *Case of the Yakye Axa Indigenous Community v. Paraguay* (n 55) para 154.

[58] ibid para 155.

[59] Bennoune (n 24) para 6.

heritage.[60] The convention defines wide spectrum of 'practices, representations, expressions, knowledge, skills' as intangible cultural heritage[61] and acknowledges the 'deep seated interdependence' between such intangible cultural heritage and the tangible cultural heritage.[62] Being aware of the interconnection and interdependence between heritage rights and the rights associated with intangible 'traditional practice and culture', it appears that a proactive approach would be to understand their role and status conjointly in the process of TJ instead of categorizing them on a hierarchical basis.

b. Cultural Rights and their Effects in Transitional Justice

We need to be careful before incurring a demarcation between cultural rights and heritage rights based on their perceived 'effects' in the process of TJ. Since a considerable part of cultural rights carry heritage value and co-exist with heritage rights, subjugation of any of the rights can have an adverse impact in the community.[63] We can take the example of the Case of *the Plan de Sánchez Massacre*, where the victims were unable to perform the funeral rites, ceremonies, and other traditional manifestations.[64] The Court seriously took into consideration of 'the magnitude of the damage caused to the victims' due to the non-adherence of those traditional rites and customs.[65] The Court acknowledged that the loss of the 'cultural identity and cultural vacuum' can cause psychological damage and the consequences sometimes 'go beyond the individual sphere and affect the family and community fabric'.[66] To better understand the consequences of the denial of the cultural practices and rituals, one can revisit the experiences of the apartheid regime of Africa. One of the worst practices was the disrespect for the traditional rituals around death that incited the anger and pain among many people.[67] Ms Tony Mazwai whose son died in 1988 explained the cruel atmosphere of the funeral:

> I was informed that my son was a well-trained guerrilla and that the people who attend the funeral have to be limited to 200 in number ... They insisted there should be no speeches, no freedom songs, nothing. It was like a war.[68]

The rituals were not only part of traditional practices but also connected to the dignity of the victims. Recognizing the significance of those cultural practices and the gravity of their denial, the then Truth and Reconciliation Commission (hereinafter TRC) recommended for 'exhumations and reburials', and provided financial and logistic assistance to the families of the victims so that 'dignified reburials' could take place.[69] These initiatives demonstrated

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60 Convention for the Safeguarding of the Intangible Cultural Heritage (n 24).
61 ibid arts 1 & 2.
62 Convention for the Safeguarding of the Intangible Cultural Heritage (n 24) third recital of the preamble.
63 Bennoune, UN Doc A/71/317 (n 24) paras 7-8.
64 *Case of the Plan de Sánchez Massacre v. Guatemala* (Reparations) Inter-American Court of Human Rights Series C No 116 (Judgment of 19 November 2004).
65 ibid 82.
66 ibid 78.
67 Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (Vol 5 1999) 152-154 <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf> accessed 04 May 2021.
68 ibid 153.
69 Truth and Reconciliation Commission (n 67) 366.

respect to the dignity of the victims which helped to diminish the anger and mental pain of their families.

On a different note, it would not be unrealistic if anyone implies that cultural and religious values are sometimes used as a means to prolong the transition. This approach lies in the history of Africa where certain religious values (non-Christian faith) in education were repressed and other 'alien values' were imposed to perpetuate the apartheid goals.[70] Consequently, one cannot ignore the danger a savage culture or its values might have in post-conflict settings. It is therefore crucial to identify those savage cultures and resist them, so that they cannot block the TJ movement. On the other hand, same cultural values can have completely different, in fact remarkable effects in process of TJ. For example, ideology like *ubuntuism*[71] - grounded in the traditional African culture - played a significant role in the process of transformation from apartheid to democracy in Africa. This is not only about the transformation, these days war affected societies adopt multi-cultural practices as strong means to revive by overcoming the past trauma they have endured.[72] Thus culture and cultural practices have become a strong means to recover psychological loss, contributing considerably in the process of social reconstruction and transformation. Taking care of the inbuilt relation between culture and heritage and their importance for the progress of TJ, this study, therefore, prefers to understand the synergies and how they can complement each other in the process of TJ.

c. Role of Human Rights in the Metaphor of Heritage Law

This section attempts to go into deep and asses the concerns raised by a group of scholars against overemphasizing the role of human rights with respect to heritage and heritage laws. Although the concerns raised provoke one's thought, still it deserves further analysis to have a comprehensive understanding. One might be curious to learn as to when we overemphasize human rights and when we should be cautious not to do it the moment heritage rights are at transition. To explain the caution thesis against the role of human rights, one may refer to the interplay between the right to property and tangible heritage rights. While the property rights seek to protect the rights of the possessor only, fundamental principles behind the heritage rights are more profound, aiming to protect the heritage for the enjoyment of present and future generations.[73] Unlike individual property rights, protection of heritage is indispensible for the 'general interest of universal culture'.[74] Now the question is if both the rights contest each other, what role human rights can play considering the fact that both are connected to it. To elucidate the issue more clearly, we can take the facts of the case of *Beyeler v. Italy*, decided

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[70] ibid 91-92.

[71] ibid 92; footnote 60 of the report it is explained. that: '*Ubuntu*, generally translated as "humaneness", expresses itself metaphorically in *umuntu ngumuntu ngabantu* – "people are people through other people"'.

[72] To find how art and culture contribute to transitional justice process, see Pablo De Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (guarantees of non-recurrence), UN Doc A/HRC/30/42 (7 September 2015) para 95; John Daniel Giblin, 'Post-conflict heritage: symbolic healing and cultural renewal' (2014) 20(5) International Journal of Heritage Studies 500; Daniel Golebiewski, 'The Arts as Healing Power in Transitional Justice' (*E-International Relation Students*, 2014) <https://www.e-ir.info/2014/02/19/the-arts-as-healing-power-in-transitional-justice/> accessed 04 May 2021; Breslin (n 27).

[73] Prott and O'keefe (n 22) 309.

[74] *Beyeler V. Italy* (ECtHR, Judgment of 5 January 2000) para 113.

by the European Court of Human Rights (ECtHR).[75] In that case, the Italian Government allowed the Ministry of Cultural Heritage to acquire a work of art by exercising the right of pre-emption in 1988. According to the Court, that acquisition violated the applicant's fundamental right to 'the peaceful enjoyment of his possessions' under article 1 of the Protocol No. 1.[76] In such a circumstance when community interest to safeguard the cultural heritage and individual's fundamental rights confront each other, an overly broad application of human rights that favours individual rights may not serve cultural value approach.

Having acknowledged this fact, this part of the article aims to understand the functioning mechanisms of human rights and how they complement the heritage discourse. Human rights entail obligations of states to respect, protect, and fulfil the rights arising from human rights treaties and laws.[77] Although this tripartite dimension of attributing duties and responsibilities to states was first championed by Henry Shue,[78] subsequently, it has been developed by General Comments and Concluding Observations of the UN Treaty Bodies.[79] In this context, the obligation to respect means that the state has a duty to respect heritage laws and not to interfere with the access to the enjoyment of heritage rights of the communities, groups, and individuals.[80] On the other hand, the obligation to protect entails that the state must protect heritage from the abuse of other non-state actors by preventing, investigating, punishing, and redressing such abuse 'through effective policies, legislation, regulations, and adjudication'.[81] Similarly, the obligation to fulfil means that the state must take measures 'to progressively realise' heritage rights, 'to the maximum of available resources and by all appropriate means'.[82] The obligation to fulfil has a lot to do in a post-conflict state; for instance, a state requires to initiate educational or awareness-raising programs, or to build memorials, so as to guarantee non-repetition of attacks against cultural heritage. It seems that a state has enormous duties to accomplish, such as respecting heritage laws, legislating, and enforcing laws to protect heritage, and to also perform the obligations under international

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75 *Beyeler V. Italy* (n 74).

76 ibid para 122.

77 For a comprehensive understanding, see Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (CUP 2015) 49-51.

78 Henry Shue, 'Rights in the Light of Duties' in Peter Brown and Douglas Maclean (eds), *Human Rights and US Foreign Policy* (Lexington: Lexington Books 1979) 65–81;Further elaborated in Henry Shue, 'The Interdependence of Duties' in Philip Alston and Katarina Tomasevski (eds), *The Right to Food* (Martinus Nijhoff 1984) 83–95;Schmid (n 77) 50.

79 Committee on Economic, Social and Cultural Rights, 'General Comment 12 on the Right to Adequate Food' (1999) UN Doc E/C.12/1999/5, para 15; Committee on Economic, Social and Cultural Rights, 'General Comment 14 on the Right to the Highest Attainable Standard of Health' (2000) UN Doc E/CN.12/2000/4, para 33; CEDAW Committee, 'General Recommendation No. 26 on Women Migrant Workers' (2008) UN Doc. CEDAW/C/2009/WP.1/R, para 2. Also see *Protect, Respect and Remedy: a Framework for Business and Human Rights* (2008) UN Doc A/HRC/8/5, endorsed by Resolution A/HRC/RES/8/7 (2008); *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011) UN Doc A/HRC/17/31, endorsed by Resolution A/HRC/RES/17/4 (2011).

80 Roger Matthews and others, 'Heritage and Cultural Healing: Iraq in a Post-Daesh Era' (2019) International Journal of Heritage Studies 1, 4.

81 Guiding Principles on Business and Human Rights (n 79) Principle 1.

82 Schmid (n 77) 50-51.

treaties that a state is committed to do.[83] And the non-performance of such obligations may give rise to state responsibility under human rights law. The human rights discourse helps to perceive such responsibilities and attribute them to a state.

Interestingly, the norms and principles of human rights have not remained confined within the traditional conception of state responsibilities of respecting and protecting human rights, but rather carries ample significance in the heritage discourse by generating both state and individual responsibility. For instance, the obligation to respect, a recognized principle of the human rights discourse, not only entails the responsibility of states, but also can trigger the responsibilities of individuals. As F. Francioni observed, the obligation to respect has 'transcended the static scheme of state responsibility and has implicated the international criminal liability of individuals' for the attack against or destruction of cultural heritage.[84] If we analyse this context, it can be identified that the so called individual criminal liability, which is the subject of criminal law, has spawned from human rights principles for the violation of heritage law, which is nothing but an expression of humanitarian law. So the heritage laws together constitute a complex branch, accommodating multiple discourses that may not ideally be realised 'on their own' in isolation of others.

Moving back to the Lixinski's caution against overemphasizing the role of human rights with respect to heritage where he tried to make himself align with the views of C. Bell and launched a competing claim for heritage law to govern (at least some) TJ dilemmas.[85] There is no doubt that the heritage laws as a distinct regime can be used on their own to govern the dilemmas of TJ, but what C. Bell also emphasized was that the justice issued in transition would be pursued 'within best applicable legal framework', meaning the framework which is more relevant and suitable.[86] He identified four competing (but complementary) legal regimes which are relevant to the normative requirements of TJ: domestic criminal law, international human rights law, humanitarian law, and international criminal law.[87] These are four distinct regimes having different purposes, but in pursuing justice they can co-exist and complement each other.[88] The co-existence does not always mean the colonisation of one by another, at least when it is grounded on necessity. And this sort of complementary approach is crucial for heritage laws because they are closely connected with (and dependent on) all these regimes and their institutions.

This connection and dependency has been more clear and reflected in the decision of the *Claims Commission* provided in response to the Eritrea's claims against Ethiopia as result of the alleged violation of international law during the armed conflict occurring on 1998–2000.[89] One of the claims was against the unlawful damage caused to the *Stela of Matara*, an

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[83] Matthews and others (n 80); where the authors argued that the 'International Cultural Heritage Law (ICHL) largely focuses on states as the owners and guardians of cultural property'.

[84] Francioni (n 34) 13.

[85] Lixinski (n 32) 285.

[86] Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"' (2009) 3(1) International Journal of Transitional Justice 5, 21.

[87] ibid 19.

[88] The International Court of Justice (ICJ) emphasized the interdependence between human rights and humanitarian law and opined that the human rights treaties *continue to apply in war time.* See *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> accessed 04 May 2021 [106]; *Case Concerning the Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) [2005] ICJ Rep 168 [216].

[89] *Eritrea-Ethiopia Claims Commission - Partial Award: Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22*, (Decision of 28 April 2004) XXIV Report of International Arbitral Awards 115.

object of great historical and cultural significance.[90] But the traditional heritage laws could not give resort to the claim since neither of the state was a party to the 1954 Hague Convention. As the article 56 of the Hague Regulations prohibits deliberate damage of historic monuments, the Commission held that such prohibition is also a part of customary law.[91] Hence, the damage of *Stela* was a violation of customary international humanitarian law.[92] It is worth mentioning that the recognition and protection of heritage rights sometimes goes beyond heritage treaty laws, and is complemented by the norms and rules of different legal regimes. In such cases, a holistic approach would be to interpret heritage law as a flexible corpus that does not create differences but accommodates and, if necessary, co-exists with other supportive regimes. Such an approach will not deflate, but rather enable heritage laws to play an effective role in post-conflict settings.

B. Intertwined Approach of International Humanitarian Law and Criminal Law

As with human rights law, the international humanitarian law (hereinafter IHL) primarily obliges states to respect rules of war, and the states, if fail to comply with such obligations, are generally held responsible internationally for their wrongful conducts. But the IHL goes beyond dealing with state responsibility, covering also the conduct of the non-state armed groups to a limited extent.[93] This part of the article raises concern about the continuing attacks against cultural heritage by the individuals and members of the armed groups, and importantly, analyses how the IHL, largely complemented by the international criminal law (hereinafter ICL), has been serving to hold such crimes responsible under TJ mechanisms. One may find at least from two directions that ICL and IHL mutually complement each other to bring heritage crimes to justice and guarantee non-recurrence of such crimes: i) by elevating the attacks against cultural heritage to the legal status of international crimes; and ii) by developing legal ground for criminal responsibility in response to the growing attacks against heritage conducted by individuals or their groups.[94]

i. Elevation of Crimes against Heritage to the Legal Status of International Crimes

Whereas the human rights law in the majority of cases generates a duty to respect or a duty to protect heritage rights, the intertwined approach of IHL and ICL on the other hand entails a duty to prosecute, punish, or extradite the perpetrators of the heritage crimes. Mainly, an intertwined approach of IHL and ICL differs from the human rights approach in a sense that

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90 ibid para 107.

91 ibid para 113. However, to read about how the 1954 Hague Convention emerged into customary international law, see David A. Meyer, 'The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law' (1993) 11 Boston University International Law Journal 349.

92 Eritrea-Ethiopia Claims Commission - Partial Award (n 89) para 113.

93 Applicability of IHL depends on circumstances whether non-state armed groups fulfill certain requirements or not. In general, Common Article 3 of the Geneva Conventions at least opens up the space for non-state actors to enter into IHL regime. For further analysis, see Annyssa Bellal and others, 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93 International Review of the Red Cross 47, 47–79.

94 See Francioni (n 34) 10.

it really elevates the heritage crimes to the level of 'international crimes'.[95] A crime is said to be accepted as international crime when it carries at least two characteristics. Primarily, to constitute international crime, as has been reflected in the views of Evelyne Schmid, 'international law must either directly establish criminal liability at the international level or require states to criminalise conduct in domestic criminal law'.[96] Generally, the treaties of the IHL and ICL discourse criminalise heritage crimes at the international level.[97] The international court and tribunals also play vital role while dealing with heritage crimes by progressively interpreting the treaties and defining such crimes in line with international crimes. For instance, the Statute of the International Criminal Court (hereinafter ICC) whereas characterises the attacks against cultural properties only as 'war crime', the international and quasi international judicial institutions on the other hand were far more progressive, searching even the genocidal intent or special intent (*dolus specialis)* behind the attacks on cultural property. The International Court of Justice (hereinafter ICJ), for example, had made an outstanding observation while deciding the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in 2007. As a result of the attacks against religious and cultural property, the Court held that such acts may be considered 'as evidence of a genocidal intent aimed at the extinction of a group'.[98] Even the *ad hoc* and hybrid tribunals elsewhere attempted to qualify heritage crimes not only as war crimes, but also as crimes against humanity and genocide.[99]

On a different note, the courts and tribunals do not always confine themselves to relying on the literal provisions of the international treaties, but often invoke customary norms and general principles of international law generating liability both at the domestic and international level.[100] Importantly, the IHL expressly urges the state parties 'to comply with general principles of law and international law' while punishing heritage crimes by imposing 'appropriate penalties'.[101] It is essential to mention here that the state parties can play a significant role by criminalising international crimes at the domestic level for which they are obliged under international treaties, customary norms, or general principles of international law. For example, article 28 of the 1954 Hague Convention, reiterated further by the 1999 Second Protocol,[102] obliges the state parties to take, 'within the framework of their ordinary

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[95] The international crimes recognized under the Rome Statute are– genocide, crimes against humanity and war crimes, and crimes of aggression, see *Rome Statute of the International Criminal Court*, 17 July 1998 (entered into force on 1 July 2002) (Rome Statute).

[96] Schmid (n 77) 63.

[97] Since 2002, the International Criminal Court (ICC) and its statute (hereinafter *Rome Statute*) has been providing the legal basis and institutional mechanism to criminalise and prosecute heritage crimes at the international level; see Rome Statute (n 95) art 8(2)(b)(ix) and art 8(2)(e)(iv).

[98] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] (Judgment) ICJ Rep 43 [344]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3 [390].

[99] *Prosecutor v Radislav Krstic* (Judgment) ICTY Case No. IT-98-33-A (19 April 2004) [25]; ECCC, Case 002 (Indictment) Case File No. 002/19-09-2007-ECCCOCIJ (15 September 2010) [1420]-[1421]. See Karolina Wierczynska and Andrzej Jakubowski, 'Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case' (2017) 16(4) Chinese Journal of International Law 695, 708.

[100] For instance, the ICTY places the offences against cultural property in the category of 'violations of the laws or customs of war'. See *Prosecutor v. Kordic and Cerkez,* ICTY Case No. IT-95-14/2-T (26 February 2001) [207].

[101] *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (1999) art 15(2).

[102] ibid arts 16-19.

criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons' who commit crimes against cultural property by breaching the obligations of the Convention.[103] The 2003 UNESCO Declaration also reiterated the obligations of state members to prosecute and punish 'any intentional destruction of cultural heritage'.[104] However, these kinds of manifold roles of international law, either by criminalising heritage crimes directly at the international level or requiring states parties to prosecute at the domestic level, can be one type of approaches to elevate heritage crimes to the status of international crimes. There remains one another ground as to why heritage crimes may achieve the international status. Normally, an international crime, which is considered a grave matter of international concern, may not adequately be dealt by a state only within whose jurisdictional sphere the crime has taken place or by the state of which the victim or perpetrator is a national.[105] Since the international crimes are directed against 'the vital interest of the international community',[106] an integral obligation therefore lies 'to the international community as a whole (*erga omnes*)'[107] rather than to any specific state directly connected to the crimes. Based on this principle of universality or universal jurisdiction, any state may criminalise or prosecute an international crime although the crime was not committed in its territory, or by its nationals, or with any other connection to it.[108] Given the fact that the cultural heritage has value which is universal, the duty to prosecute crimes against heritage therefore transcends the territoriality or nationality principle, and disseminates universally, extending the scope to the international community to take part in a spirit of solidarity. The 1999 Second Protocol to the Hague Convention seems to be proactive in opening up the scope of jurisdiction. This protocol does not aim to preclude 'the exercise of jurisdiction under national and international law',[109] but rather enables each state party to prosecute the perpetrators of heritage crimes if they reside or are present in its territory.[110] However, these sorts of developments help us to understand that the crimes against heritage are not only the concern of a single state, but also carry an international status that all other states and international institutions are entitled to address.

ii. Individual Criminal Responsibility for the Crimes against Cultural Heritage

In the time of both international and non-international armed conflicts, individuals or members of the armed groups often target and deliberately attack the cultural properties. But the early rules and regulations protecting the cultural properties were primarily concerned with the duties and interests of the states rendering the belligerent parties to be responsible 'for all

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[103] 1954 Hague Convention (n 23) art 28.

[104] *UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage* (2003).

[105] *Hostage Case, United States v List (Wilhelm) and ors* (Trial Judgment) Case No 7 (1948) Nuremberg Military Tribunal [NMT], 1241; Schmid (n 78) 64.

[106] Florian Jessberger, 'The Principle of Universal Jurisdiction in German Criminal Law', 7; <https://www.jura.uni-hamburg.de/die-fakultaet/professuren/professur-jessberger/forschung/landesbericht-jessberger-2007.pdf> accessed 04 May 2021. This paper was submitted on behalf of the German national group to the Fourth Section of the AIDP's XVIIIth World Congress

[107] See Francioni (n 34) 13.

[108] Zdzislaw Galicki, 'Preliminary Report of the Special Rapporteur on the Obligation to Extradite or Prosecute' (2006) UN Doc A/CN.4/571 [19]; Schmid (n 77) 278.

[109] Second Protocol to the Hague Convention (n 101) art 16.2 (a).

[110] ibid art 16.1 (c).

acts committed by persons forming part of its armed forces'.[111] It was not an easy task to come out from this cycle of attributing responsibility only to the states for the violations of international law which was addressed by the judgement of the Nuremberg International Tribunal in 1946 (followed later by the judgement of the Tokyo International Tribunal in 1948), affirming the individual criminal responsibility under international law.[112] The principles recognized by the Charter of the Nuremberg Tribunal which was affirmed by the UN General Assembly Resolution,[113] and subsequently, formulated as principles of international law by the International Law Commission (hereinafter ILC),[114] had outstanding implications to the development of modern international criminal law. The Charter also opened up the scope for the protection of cultural properties during armed conflict, providing that the acts of plundering 'public and private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity' are crimes that violate the laws or customs of war and give rise to individual responsibility.[115] Since then, a strong regulatory framework within the auspice of laws of war has emerged to protect against the deliberate destruction of cultural heritage. Importantly, the adoption of the 1954 Hague Convention, and its protocols (1999) supported by the 1977 Additional Protocols to the 1949 Geneva Conventions, provided legal basis to prevent and prosecute 'act of hostility' directed against cultural properties.[116]

The actual question of prosecution arose when massive war in former Yugoslavia caused heavy loss to their cultural heritage. As Igor Ordev described, a 'lot of unique, priceless churches, monasteries, mosques, shrines, and other religious objects dating from past centuries, as well as non-religious objects were harmed or destroyed' during the war.[117] The drafters of the Statute of the International Criminal Tribunal for the former Yugoslavia

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[111] 1907 Hague Regulations provided protection to the cultural properties, as art 27 clearly states: 'In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes'. But the responsibility was attributed only to the belligerent parties; see Convention (IV) respecting the Laws and Customs of War on Land and its annex (adopted 18 October 1907, entered into force 26 January 1910) (Hague Convention IV),art 3.

[112] According to the Nuremberg Tribunal: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced', see Official Record of Trial, Vol I, *Official Documents*, 223. Also see Ivan Anthony Shearer, *Starke's International Law* (11th ed. Oxford University Press, 1994) 55.

[113] UNGA Res 95(I) 'Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal' (11 December 1946) UN Doc A/64/Add.1. Also see Charter of the International Military Tribunal (IMT Charter) (8 August 1945) <http://avalon.law.yale.edu/imt/imtconst.asp> accessed 04 May 2021.

[114] The International Law Commission (ILC), which formulated the Nuremberg principles, defined war crimes 'as violations of the laws or customs of war which include, but are not limited to [...] plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity', see ILC, 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal' (1950) UN Doc A/CN.4/SER.A/1950/Add.1. Also see Wierczynska and Jakubowski (n 99) 704.

[115] IMT Charter (n 113) art 6.

[116] The 1954 Hague Convention provides protection to the cultural properties in the event of armed conflicts. It is supplemented by two Protocols – the First Protocol adopted in 1954 and the Second Protocol adopted in 1999. See Hague Convention (n 23).

[117] Igor Ordev, 'Erasing the Past: Destruction and Preservation of Cultural Heritage in Former Yugoslavia: Part 1' (2008) 28(4) Occasional Papers on Religion in Eastern Europe 16.

(hereinafter ICTY) thus incorporated provisions that secured the Tribunal's jurisdiction to prosecute the persons violating the laws or customs of war, especially, due to the 'seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments, and works of art and science'.[118] The ICTY in its judgments explained the scope of this provision [Art. 3(d) of the ICTY Statute], acknowledged the relevancy of the prosecution of the crimes against heritage under the Statute.[119] For instance, in the *Strugar* case, the Trial Chamber of the ICTY held that an act will fulfil the elements of the crime of destruction or wilful damage of cultural property within the meaning of article 3(d) of the Statute, if: "(i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question."[120]

In its judgment in the *Strugar* case, the Trial Chamber demarcated the criterion when attacks or damage can cause crimes against Cultural heritage; however, what is important here is that the ICTY recognized the fact that cultural properties deserve protection 'above and beyond their material dimension',[121] and therefore, defined any deliberate attack against cultural property as international crime within the meaning of its Statute, provided ground for accountability, and prosecuted the perpetrators of such crimes.

At present, it is the ICC which appears to be a dominant international judicial institution possessing jurisdiction to prosecute crimes against cultural properties. The Statute of the ICC (hereinafter Rome Statute) defines acts as war crimes if committed in the course of an international or non-international conflict which consist of 'intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives'.[122] However, it is axiomatic that this definition of the Rome Statute reflects the wording of traditional IHL documents, especially the language of the 1907 Hague Regulations, and contains a 'very general list of protected property' which keeps historic monuments together with hospitals and places where the sick and wounded are collected.[123] It is also noticeable that the definition focuses on the tangible properties of art and religion, whereas the intangible cultural heritages are to some extent overlooked. Consequently, the need to focus on the cultural values of the heritage and the clarity in terms of criminalising

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[118] *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted on 25 May 1993) (hereinafter *ICTY Statute*) art 3(d).

[119] See *Prosecutor v Kordi & Cerkez* (n 100); *Prosecutor v. Jokic´* (n 40).

[120] *Prosecutor v Pavle Strugar* (Judgment) ICTY Case No. IT-01-42-T (31 January 2005) [312].

[121] Micaela Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (2011) 22 European Journal of International Law 203, 207. However, the author disagreed with the above-mentioned idea, contending that 'the traditional IHL approach fails to address the concern that historic buildings, monuments, and works of art deserve protection above and beyond their material dimension, precisely because of their cultural value both for the local community and for humanity as a whole'.

[122] Rome Statute (n 95) art 8(2)(b)(ix) and art 8(2)(e)(iv).

[123] See Michael Bothe, 'War Crimes' in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 379, 409–410; Frulli, (n 121) 211.

attacks against such values has been blurred.[124] But what is remarkable is that the drafters of the Rome Statute at least have opened up the door to bring the perpetrators of the heritage crimes under the profound mechanisms of the ICC. From now onwards, if any attack against heritage takes place, which is a crime within the meaning of the Statute, the ICC can investigate and prosecute,[125] if necessary, adopt reparative measures to redress the victims or restore and rehabilitate the destructed sites.[126]

C. Preliminary Conclusion

The two approaches discussed here, namely, human rights approach to cultural heritage and the intertwined approach of IHL and ICL, help to understand the relevance of cultural heritage in TJ, and ascertain why or on what basis it can be considered in TJ. The human rights approach provides the ground based on which cultural heritage receives legitimacy to enter into the domain of TJ. Moreover, it is a timely response to the dilemmas posed by the existing literature with respect to the role of human rights in TJ. On the other hand, the intertwined approach of IHL and ICL is complementary to what human rights approach attains. It builds the substantive ground as to why crimes against heritage should be brought into TJ and addressed by its mechanisms.

IV. Comprehensive Approach of Transitional Justice to Address the Deliberate Destruction of Cultural Heritage

To start with the idea of a comprehensive approach of TJ, it is essential to explain what it stands for, or what resonance it has when comes to the concerns of deliberate destruction of cultural heritage. This part analyses the scopes of the potential TJ mechanisms which can be initiated comprehensively with the aims, mainly of preventing future attacks against cultural heritage, revealing the truth about the committed crimes, bringing the perpetrators to justice, rehabilitating the destructed sites, redressing the victims, and promoting 'social cohesion or reconciliation'.[127]

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[124] Frulli (n 121) 211.

[125] To date, the Trial Chamber of the ICC condemned Mr. Al Mahdi due to his direct affiliation with the heritage crimes in Timbuktu, Mali; see *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) (n 6).

[126] Article 75(1) of the Rome Statute requires the Court to 'establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. Generally, the Trust Fund for Victims (TFV), created in accordance with article 79 of the Rome Statute, is responsible to implement Court-Ordered reparations. For instance, to provide remedies to the victims and rehabilitate the destructed sites of Timbuktu, the Trial Chamber (VIII) of the ICC issued the reparations order on 17 August 2017 and directed to the TFV to submit a plan for the implementation of the reparations. Later, based on the submission, the Chamber issued its decision and approved the Updated Implementation Plan (UIP) of the TFV; see the 'Decision on the Updated Implementation Plan from the Trust Fund for Victims (UIP)' in the case of *The Prosecutor v. Ahmed Al Faqi Al Mahdi*, ICC-01/12-01/15 (4 March 2019). Also see *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) (n 52).

[127] Generally, the main goals of implementing TJ measures is 'to provide recognition to victims, foster trust among individuals and particularly in State institutions, strengthen the rule of law and promote social cohesion or reconciliation'. See Pablo De Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (prosecutorial prioritization strategies) UN Doc A/HRC/27/56 (27 August 2014) para 19; UNHRC Res 18/7, UN Doc A/HRC/RES/18/7 (13 October 2011); Greiff, UN Doc A/HRC/21/46 (n 33) para 28.

A. Comprehensive Approach of Transitional Justice

TJ is a response to a situation of large-scale human rights violations and serious humanitarian abuses.[128] Although the traditional conception of TJ refers to the 'post-conflict' justice, peace, and reconciliation processes,[129] in recent days, some scholars have held the opinion that the mechanisms of TJ may even have been tried in 'pre-transitional states' where there has not been a clear move from conflict to peace.[130] TJ is thus not only a project of post-conflict societies, but it also has importance for the cultural heritage which are in threat in a state of ongoing conflict (i.e. Syria, Mali). In the conflict and/or post-conflict societies, TJ normally functions by initiating a series of judicial and non-judicial measures.[131] The common measures that are mostly reflected in the TJ literatures include the truth-seeking initiatives, prosecution, reparations, and the guarantees of non-recurrence (i.e. institutional/security system reforms).[132]

However, when it comes to the destruction of cultural heritage, the situation is too complex and vast which cannot fully be redressed by any single action. To make it more clear and understandable, the prosecution of certain perpetrators without any truth-telling or granting reparations to victims or efforts to rehabilitate the destructed sites may be viewed as

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[128] Laurel E Fletcher, Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24(3) Human Rights Quarterly 573; Ruti G Teitel, 'Global Transitional Justice' (2010) Center for Global Studies, Working Paper 8, George Mason University <https://www.gmu.edu/centers/globalstudies/publications/hjd/hjd_wp_8.pdf> accessed 4 May 2021; 'Editorial Note' (2007) 1(1) International Journal of Transitional Justice, 1-5; Louis Bickford, 'Transitional Justice' in Dinah L. Shelton et al. (eds), *Encyclopedia of Genocide and Crimes Against Humanity*, vol. 3 (New York, 2004) 1045-1047; International Center for Transitional Justice (ICTJ), 'What is Transitional Justice?' (2009) <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> accessed 4 May 2021; Anja Seibert-Fohr, *Transitional Justice in Post-Conflict Situations* (Max Planck Encyclopedia of Public International Law 2011).

[129] The definition inscribed in the Secretary-General's report clearly mentioned that '[t]he notion of 'transitional justice' […] comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses'; see *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, UN Doc S/2004/616 (23 August 2004) 8.

[130] See Joanna R Quinn, 'Whither the "Transition" of Transitional Justice?' (16 May 2011) 12; this paper was prepared for the presentation at the Annual Meeting of the Canadian Political Science Association, Waterloo, Canada. In the views of Kai Ambos, the '*concept* deals with justice in societies in transition, either post-conflict or during an ongoing conflict'; see Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large, Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Springer 2009). Also see ICTJ (n 128).

[131] UN, 'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice' (2010) <https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf> accessed 23 March 2021; *Analytical Study on Human Rights and Transitional Justice,* Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, UN Doc A/HRC/12/18 (2009); Ambos (n 130) 19-103; Anika Oettler, 'The Scope and Selectivity of Comparative Area Studies: Transitional Justice Research', GIGA Working Papers No. 246 (2014) <https://www.giga-hamburg.de/de/system/files/publications/wp246_oettler.pdf> accessed 23 March 2021.

[132] See Report of the Secretary General (n 129); Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General (n 131); Greiff, UN Doc A/HRC/21/46 (n 33) paras 20-21; Elizabeth A Cole, 'Transitional Justice and the Reform of History Education' (2007) 1(1) The International Journal of Transitional Justice 115.

a very superficial attempt, leaving behind a broad context unnoticed or untouched.[133] Likewise, reparations without truth-telling or prosecutions can also be perceived as 'an effort to buy the acquiescence of victims'.[134] Considering these unexpected shortcomings, the then Special Rapporteur Pablo De Greiff suggested that TJ measures 'work best when designed and implemented in relation to one another'.[135] 'Individually inadequate, but mutually complementing, these measures, therefore, should be conceived of and implemented not as discrete and independent initiatives but rather as parts of an integrated policy'.[136] This kind of comprehensive approach facilitates to take into account the full range of factors that may have contributed to the destructions, and helps to respond in a sustainable manner.[137] In the following section of the article, as parts of comprehensive policy, four types of measures, namely, truth seeking, prosecution, reparations, and methods for the guarantees of non-recurrence have been described.

i. Truth-seeking Processes

The victims of heritage crimes have the 'imprescriptible right to know the truth about the circumstances in which violations took place'.[138] This right of knowing truth is a recognized right under international law[139], the fulfilment of which can 'promote and protect human rights'.[140] Revealing truth makes an indispensable contribution by officially and publicly acknowledging the facts that have taken place.[141] This acknowledgement serves as a form of recognition of the value of aggrieved persons 'as victims and as holders of rights'.[142] In this way, truth-seeking initiatives foster trust and resentment, increase transparency and accountability, and ultimately, lead to reconciliation.[143]

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[133] Greiff, UN Doc A/HRC/21/46 (n 33) para 23.

[134] ibid; ICTJ (n 128).

[135] Greiff, UN Doc A/HRC/27/56 (n 127) para 18.

[136] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (OUP 2006). See Greiff, UN Doc A/HRC/21/46 (n 33) para 27; Greiff, UN Doc A/HRC/27/56 (n 127) para 18.

[137] ICTJ (n 128).

[138] *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc E/CN.4/2005/102/Add.1 (2005) principle 4; Working Group on Enforced or Involuntary Disappearances, 'General Comment on the Right to the Truth in Relation to Enforced Disappearances' UN Doc A/HRC/16/48, 2.

[139] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I) 1125 UNTS 17512 (adopted on 8 June 1977) art 32; see the Preamble, *International Convention for the Protection of All Persons from Enforced Disappearance* (adopted 20 December 2006, entered into force 23 December 2010); UNGA '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', UN Doc A/RES/60/147 (21 March 2005) Principle 24.

[140] UNHRC Res 12/L.27, UN Doc A/HRC/12/L.27 (25 September 2009) para 1; E/CN.4/2006/91; A/HRC/5/7; CAT/C/COL/CO/4 (2010) para 27; A/HRC/16/48, para 39; A/HRC/22/52, paras 23-26, 32-34; A/HRC/7/3/Add.3, para 82; A/HRC/14/23, para 34. See Pablo De Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (truth), UN Doc A/HRC/24/42 (28 August 2013) para 18.

[141] Greiff, UN Doc A/HRC/21/46 (n 33) para 30.

[142] ibid.

[143] See Eduardo Gonzalez and Howard Varney (eds), *Truth Seeking: Elements of Creating an Effective Truth Commission* (Amnesty Commission of the Ministry of Justice of Brazil 2013) 4; Breslin (n 27) 274.

However, the right to truth is not confined to individual victims; even the 'society has the inalienable right to know the truth about past events'.[144] A society has the right to know about its past history of oppression or glorious traditions that are reflected in its heritage. This right entails at least two responsibilities: first, measures should be taken to protect heritage in order to preserve collective memory; and second, in case of violation against heritage, measures should be taken to reveal the truth so that the society can know and understand about the reasons of that violation.[145] If the truth is told at the society level, people can learn and prevent the repetition of such acts in the future. Therefore, it is important in a post-conflict society 'to establish institutions, mechanisms, and procedures' which are capable of seeking the truth.[146] These initiatives help to explore the roots of the violence, and 'influence consideration of how to reform the composition of society' so that the attacks or destructions will not happen again.[147]

The primary obligation to set-up such mechanisms and procedures lies with the state within whose territory the destructions took place.[148] A common phenomenon in the conflict-oriented societies is that the states establish truth commission either independently or with the cooperation of international community. In general, truth commissions are mandated to investigate the gross human rights violations or humanitarian abuses 'that took place over a period of time'.[149] For instance, the Truth, Justice and Reconciliation Commission (CVJR) of Mali was created in 2014 with a broad temporal mandate to ascertain the truth about the violations that have taken place between 1960 and the present day.[150] But this kind of a broad mandate is not always functional in reaching to the root of the causes since the Commissions are in majority of the cases overburdened with manifold crimes, and high number of victims and perpetrators. To take into account the experiences of Mali, although the mandate of the CVJR came to an end (which extended until 2021), some of its goals still remain

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144 In a judgment, the Inter-American Court of Human Rights framed the right to truth in the form of a positive State obligation, stressing that 'the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with the said violations'; see *Myrna Mack Chang v. Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 101 (25 November 2013) [274]; Greiff, UN Doc A/HRC/24/42 (n 140) para 19. The Working Group on Enforced or Involuntary Disappearances in its General Comment opined that: [t]he right to the truth is both a collective and an individual right; see Working Group on Enforced or Involuntary Disappearances (n 138) 2.

145 Golebiewski (n 72) footnote 93; Breslin (n 27) 274-5.

146 Greiff, UN Doc A/HRC/24/42 (n 140) para 20.

147 Breslin (n 27) 274-275.

148 To find the state's obligation to reveal truth, see the *Declaration on the Protection of All Persons from Enforced Disappearance* (1992) art 13; *International Convention for the Protection of All Persons from Enforced Disappearance* (2006) art 24. Also see Joanna R Quinn, 'The Development of Transitional Justice' in Lawther, Moffett, and Jacobs (eds) (n 26) 21; Melanie Klinkner and Ellie Smith, 'The Right to Truth, Appropriate Forum and the International Criminal Court' in Natalia Szablewska and Sascha-Dominik Bachmann (eds), *Current Issues in Transitional Justice: Towards a More Holistic Approach* (Springer 2015) 13.

149 Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011) at 11; Cheryl Lawther, 'Transitional Justice and Truth Commissions' in Cheryl Lawther, Luke Moffett, and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 343.

150 Truth, Justice and Reconciliation Commission (CVJR) of Mali was created upon adoption of the Ordinance No. 2014-003/P-RM of January 15, 2014.

unaccomplished.[151] Down the line, there are multiple reasons why national truth commissions face challenges to fulfil their mandates. On-going conflicts, lack of resources, experts, and technical capacity, are all stumbling blocks a commission has to go through to deal with the multitude of past abuses. In such cases, state's executive or judicial mechanisms can play a complementing role by undertaking 'effective investigation'.[152] An effective investigation has always been in the centre of the process of truth-seeking.[153] When the truth commission and state organs work simultaneously to investigate the reasons behind the perpetrations, there remains a better chance in those states of ensuring the right to truth.

The international actors, especially the special procedures of the Human Rights Council (hereinafter HRC) and the Office of the Prosecutor (hereinafter OTP) of the ICC, have also been contributing in revealing the truth. The special procedures of the HRC are made up of special rapporteurs, independent experts, or working groups who monitor or report on a wide range of human rights violations from a thematic or country specific perspective.[154] Special procedures undertake country visit to assess the situation of the human rights at the domestic level, and the findings and recommendations of the visit are published as a report and submitted to the HRC.[155] Generally, upon request of the mandate holder, the state sends an invitation for a fact-finding mission.[156] But the fate of the mission depends on the consent of the state, meaning that the mandate holder can visit only when the state accepts the request and sends the invitation. On the other hand, the OTP of the ICC can also initiate investigation if there is reasonable basis to believe that international crimes under the Rome Statute have taken place in the territory of a state Party.[157] The Prosecutor may initiate investigation either *proprio motu* or on the basis of referral of a situation by the state party, and commence the investigation only if the Pre-Trial Chamber authorises.[158] Unlike the special procedures of the HRC, the OTP does not stop with the consent of the state party. If a state is party to the Statute, and there is reasonable basis to believe that crimes against heritage have been taken place in its territory, the Prosecutor upon authorisation of the Pre-Trial Chamber may proceed to investigate.[159] Even if a state is not a party to the Statute, the Prosecutor may

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[151] Ephrem Rugiririza, 'Mali and the Difficulty of Seeking Truth under Fire' (*JusticeInfo.net,* 15 January 2019) <https://www.justiceinfo.net/en/truth-commissions/39996-mali-and-the-difficulty-of-seeking-truth-under-fire.html> accessed 23 March 2021.

[152] To find the obligation of the State to investigate, see Declaration on the Protection of All Persons from Enforced Disappearance (n 148) art 13. Also see Klinkner and Smith (n 148) 13.

[153] To find the nexus between the obligation to investigate and the realization of right to truth, see General Comment on the Right to the Truth in Relation to Enforced Disappearances (n 138) 4-5.

[154] See the Special Procedures' Homepage <https://ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> accessed 23 March 2021.

[155] See OHCHR, 'Human Rights Council and Special Procedures Division' (2011) <https://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/allegati/30_Human_Rights_Council_and_Special_Procedures.pdf> accessed 23 March 2021.

[156] See the official webpage of the Office of the High Commissioner for Human Rights (OHCHR) <https://www.ohchr.org/EN/HRBodies/SP/Pages/CountryandothervisitsSP.aspx> accessed 23 March 2021.

[157] The International Criminal Court (ICC) is established with the adoption of the treaty called the Rome Statute, strives to investigate and, where warranted, tries individuals charged with the most serious international crimes: genocide, war crimes, crimes against humanity and the crimes of aggression; see the Rome Statute (n 95). However, the Office of the Prosecutor (OTP) is an independent organ of the ICC, responsible to examine situations under the jurisdiction of the Court, carry out investigations and take part in the prosecutions.

[158] See Rome Statute (n 95) arts 14 & 15.

[159] ibid art 15 (4).

proceed if the Security Council acting under Chapter VII of the UN Charter refers the situation to the ICC.[160] However, such investigations conducted by the international actors and the subsequent publications of the findings contribute towards ascertaining and revealing the truth.

ii. Prosecution of Crimes against Cultural Heritage

In the context of TJ, a key question is whether a retributive or a restorative justice mechanism is best suited to achieve its ultimate goals.[161] The restorative justice model primarily focuses on redressing victims, or restoring peace and social cohesion in the post-conflict societies mainly by initiating truth seeking and reparative measures, and prefers to the use of truth and reconciliation commissions or informal customary mechanisms.[162] On the other hand, the prosecutorial or retributive model of formal legal justice emphasizes on prosecutions, mainly through the domestic courts or hybrid domestic/international courts, *ad hoc* international criminal tribunals, and the ICC.[163] But few scholars raise concerns about the possible conflict between both the models, arguing that 'a policy of consequent criminal prosecution' could endanger peaceful transition.[164] According to this school of thought, sometimes, 'refraining from criminal prosecution and/or punishment' is necessary to facilitate peace and reconciliation.[165] On the contrary, in the views of the opponents, it is by no means certain that the absence of prosecution could lead to peace and reconciliation; 'rather, in many cases, prosecution may be more promising to facilitate reconciliation and nation building'.[166] The prosecution provides the perpetrators with a scope to recompense for their past acts and reintegrate into the society. It is also a process that acknowledges the harm caused to the victims, giving them a sense that they are the holders of rights, which ultimately leads towards a sustainable peace.[167]

Of course, it goes without saying that the prosecution and the condemnation of the perpetrators are of high value to put an end to impunity and deter the future recurrence of serious crimes. The ICC Trial Chamber in its judgement held that the condemnation of the

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[160] ibid art 13 (b).

[161] Noëlle Quénivet, 'Transitional and Generational Justice: Children Involved in Armed Conflicts' in Natalia Szablewska and Sascha-Dominik Bachmann (eds), *Current Issues in Transitional Justice: Towards a More Holistic Approach* (Springer 2015) 59.

[162] Hayner (n 149); Deborah H Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (United States Institute of Peace Press 2011). Also see Wendy Lambourne, 'Transformative justice, reconciliation and peacebuilding' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 20.

[163] Antonio Cassese, *International Criminal Law* (OUP 2003); Cesare P R Romano, André Nollkaemper and Jann K Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004); B N Schiff, *Building the International Criminal Court* (CUP 2008). Also see Lambourne (n 162) 20.

[164] For instance, Noëlle Quénivet elsewhere stressed that the 'prosecution is unlikely to be a deterrent to future crimes'; see Quénivet (n 161) 59. Also see Ambos (n 130) 23.

[165] To read about the arguments against criminal prosecution, see Mark J. Osiel, 'Why prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 Human Rights Quarterly 118; Ambos (n 130) 23.

[166] Ambos (n 130) 25. Also see Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 European Journal of International Law 481, 489; Hector Olásolo, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?' (2003) 3 International Criminal Law Review 87, 139.

[167] *Prosecutor v. Ahmad Al Faqi Al Mahdi* (n 6) para 67; Greiff, UN Doc A/HRC/27/56 (n 127) para 22.

perpetrator by way of imposition of a proportionate sentence has both specific and general deterrent effect.[168] An adequate sentence would 'discourage a convicted person from recidivism (specific deterrence)', as well as prevent others from committing the similar crimes (general deterrence).[169] Thus, it is crucial for the transitional governments to initiate measures to prosecute and condemn the perpetrators in order to guarantee the non-repetition of attacks against cultural heritage.

iii. Reparations

The right to an effective remedy and reparations are widely recognized by the international and regional human rights and humanitarian law instruments, and 'elaborated upon in subsequent jurisprudence' of the human rights organs.[170] Victims of gross violations of international human rights law or serious violations of international humanitarian law by right deserve 'adequate, effective and prompt reparation'.[171] Adequate reparations, if ensured in good time, redress harm caused to the victims, and importantly, promote justice.[172] However, the reparatory justice model is distinctive from what retributive justice strives to achieve. Reparatory justice refers to victim-oriented measures,[173] and mainly focuses not on the perpetrator who has committed the crime, but on the victim who has suffered or on the object which has been affected by that crime. Thus reparation is the special form of TJ mechanism which aims at addressing the effects and consequences of gross violations of human rights and humanitarian law, and also offers measures to prevent the recurrence of such violations in the future.

There are multiple forms of reparation, but in a broad sense they can be divided at least into five categories: restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-recurrence.[174] When it comes to the large scale violations against cultural heritage, the restitution measures attempt to repair, or whenever possible, restore the destructed sites and buildings to the original situation; compensations ensure both pecuniary and non-pecuniary awards to cover the economic loss and moral harm suffered by the victims

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[168] *Prosecutor v. Ahmad Al Faqi Al Mahdi* (n 6) para 67.

[169] ibid.

[170] The Human Rights Committee, in its General comment No. 31, states: 'Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. […] reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.' For a case of State-to-State reparation for violations of international human rights law and international humanitarian law; see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 116. Also see UN, 'Guidance Note of the Secretary General: Reparations for Conflict Related Sexual Violence' (June 2014) 3 <https://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf> accessed 23 March 2021.

[171] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order (n 52) para 33; the Trial Chamber held that: '[i]t is of paramount importance that victims receive appropriate, adequate and prompt reparations'. Also see *Lubanga* Reparations AO, ICC-01/04-01/06-3129-AnxA, para 44.

[172] Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principle 15. Also see Moffett (n 26) 377.

[173] Lavinia Stan and Nadya Nedelsky (eds), *Encyclopedia of Transitional Justice* (vol.1, Cambridge University Press, 2013) 288; Moffett (n 172) 377.

[174] Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principles 19-23; Moffett (n 172) 379-80. Also see *Velásquez Rodriguez v Honduras* (Reparations and Costs) Inter-American Court of Human Rights Series C. No. 7 (21 July 1989).

due to the destructions of heritage; rehabilitation entails 'physical and mental care' to heal the victims and the community at large; measures of satisfaction include the symbolic measures, *inter alia,* public acknowledgement of victims' harm or letter of apology to the victims; and measures of guarantees of non-recurrence are long-term and sustainable initiatives intended to prevent future attacks against cultural heritage.[175]

In a nutshell, the reparation contributes to the process of TJ by focusing on the concerns of victims, giving them the sense that they are not just the victims, but rather the holders of rights.[176] Thus reparations enable victims to recover their dignity, reduce mental pain and anguishes, and ultimately, help to promote peace and reconciliation.[177]

iv. Guarantees of Non-recurrence

In post-conflict societies, guarantees of non-recurrence can be 'satisfied by a broad variety of measures' which may include, *inter alia,* institutional reforms, societal interventions, or interventions in the cultural and individual spheres.[178] In terms of the prevention of crimes against cultural heritage, intervention at the societal level is important at least to raise awareness or to build a positive outlook towards heritage, and for creating an atmosphere where society itself will be the saviour. To this end, initiation of the educational and awareness-building programmes, and constructing museums or memorials to preserve the historic memory can be some of the commendable attempts to break the existing stereotype.[179] On the other hand, institutional reforms at the state level are also beneficial, such as offering support to state mechanisms to protect the heritage which helps in pursuing the post-conflict reconstruction measures efficiently.[180] When it comes to the prevention of deliberate destructions, it is essential to educate and empower the security forces responsible to protect

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[175] To find the modalities of different forms of reparation, see Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principles 19-23. Also see Moffett (n 172) 80.

[176] Greiff, UN Doc A/HRC/21/46 (n 34) para 30; Pablo De Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (reparation) UN Doc A/69/518 (2014) para 9.

[177] ibid; *Lubanga* Reparations (n 171) para 71; *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order (n 52) para 28.

[178] Pablo De Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' ('guarantees of non-recurrence') UN Doc A/HRC/30/42 (7 September 2015) para 23. The UN Basic Principles and Guidelines also suggested number of measures to guarantee non-repetition; see Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principle 23.

[179] See *Prosecutor v. Ahmad Al Faqi Al Mahdi.* Reparations Order (n 52) para 83. Also see Greiff, UN Doc A/69/518 (n 176), para 33; Serge Brammertz and others, 'Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY' (2016) 14(5) Journal of International Criminal Justice 1143, 1174; where the authors emphasized on the need of 'positive education about the value of cultural property'.

[180] Lostal and Cunliffe (n 31) 6. Also see Carla Ferstman, 'Reparation as Prevention: Considering the law and practice of orders for cessation and guarantees of non-repetition in torture cases' (2010) 23-24 <http://projects.essex.ac.uk/ehrr/V6N2/Ferstman.pdf> accessed 23 March 2021. However, with regard to the institutional reforms, the UN Basic Principles and Guidelines underscore the importance of, inter alia, '(a) ensuring effective civilian control of military and security forces; (b) ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders'; see Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principle 23.

the cultural properties. States can organize training and workshops to improve the capacity of those protecting and maintaining the heritage.[181] Although it is not an easy project to implement all the measures at the post-conflict stage, the states at least can take them seriously and start implementing them one after another.

V. Concluding Remarks

The proposition nurtured by this article to incorporate crimes against cultural heritage into comprehensive TJ processes does not only aim to claim the retribution or the punitive consequences of deterring future recurrence, but more to facilitate rehabilitation of the destructed sites, redress the victims, and promote peace and reconciliation. With these aims in view, this article analyses the scopes and stresses the importance of four categories of TJ measures: truth-seeking, prosecution, reparations, and the measures of guarantees of non-recurrence. What is central to this study is the idea of comprehensive approach of TJ, meaning that such measures should be implemented not as independent initiatives but rather as parts of an integrated policy. This kind of holistic approach serves to take into consideration all the factors (including consequences) associated with the crimes against cultural heritage, and guarantee the non-recurrence of such crimes in the future.

However, the question which still awaits an answer is: How the transitional states would implement the measures given the fact that they always wrestle with a bundle of difficulties ranging from lack of enforcement mechanisms to the shortage of resources and logistics? It would therefore be essential to conduct empirical studies (along with doctrinal research) to identify the nuances of success and challenges when it comes to the implementation of a number of TJ measures in a comprehensive manner.

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[181] The TFV as a part of its implementation plan proposed measures which also included workshops 'designed to improve the capacity-building for those protecting and maintaining the buildings' of Mali; see Decision on the Updated Implementation Plan from the Trust Fund for Victims (UIP) (n 126) para 113.

Defining Weapon Systems with Autonomy: The Critical Functions in Theory and Practice

Nurbanu Hayir*
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Abstract

The rise of the use of Autonomous Weapon Systems (AWS) in the battlefield has engendered numerous ongoing legal debates, including that on their legal definition. There have been various approaches with respect to defining them in relation to their interaction with humans, the complexity of the technology behind them, and the features of their functions. The latter has been particularly endorsed by the International Committee of the Red Cross (ICRC), which defines AWS as weapon systems with autonomy in their critical functions of target selection and attack. None of these approaches received unanimous approval by States. Though scholars have addressed the advantages and the disadvantages of the first two approaches, not many amendments have been introduced on the functional approach of the ICRC.

The wording of the ICRC definition is vague and requires a framework on what should be defined as critical as well as on the functions of weapon systems. The critical nature of the function must be determined in relation to its relevance in terms of international humanitarian law (IHL) regulating AWS, which is the most important element in their definition. This analysis will benefit to resolve the impasse in the debate on the legal definition of AWS and further the efforts to regulate them.

I. Introduction

The advent of technology, among many things, changed the means of warfare. There is an accelerating impetus for the development and use of weapons with cutting-edge technology that leaves considerably less need for human involvement. This impetus triggered international law efforts to observe, define and regulate these weapons specifically in relation to international humanitarian law. One of the most prominent of these efforts is the Group of Governmental Experts (GGE) on Lethal Autonomous Weapon Systems, established in 2016 under the framework of the Convention on Certain Conventional Weapons (CCW). It has been working on the matter since 2013 and had been condemned for tardiness and futility. Though In 2019, contracting States to the CCW adopted 11 Guiding Principles to which all AWS must adhere on the recommendation of GGE.[1] Still, States and other critical actors have not reached a consensus on the definition of AWS. The problem with establishing the definition of AWS diminishes all the progress in other issues regarding the development and use of these systems. Like the 11 Guiding Principles, the steps taken are mainly in vain as long as they can be circumvented due to the contentiousness surrounding the definition of AWS. This makes it impossible to properly evaluate the new weapons systems being developed, let alone shed light on the existing

* *Nurbanu Hayir is a recent graduate of Galatasaray University Law School in Istanbul Turkey, and in the pursuit of LLM degree in international law.*

1 CCW, 'Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects' (13–15 November 2019) UN Doc CCW/MSP/2019/9 para 1.

ones. The objective of this paper is to evaluate the different approaches to the legal definition of AWS and refine the existing approach to defining AWS with respect to functions that enjoy autonomy.

In the second section, this paper will serve to reframe the debate on the legal definition of autonomous weapons systems by first evaluating the technical and legal definitions of autonomy, and then, in the third section, elaborating on one of the central notions in this debate; Autonomy in critical functions. Subsequently, a novel Turkish example in the autonomous weapon systems debate, STM-Kargu, will be scrutinized, which recently sparked concern after being cited by the United Nations Security Council Panel of Experts Report as the first Lethal Autonomous Weapon System having launched a fully autonomous attack in Libya.[2]

II. Definition(s) of AWS: An autonomous weapon system or a weapon system with autonomy?

Although there is no universally accepted definition for it,[3] there is relatively less controversy about the definition of a 'weapon'. As an essential tool for the use of force,[4] it is accepted as a means of warfare in international humanitarian law,[5] and can be broadly defined as:

Any device constructed, adapted, or used to kill, harm, disorient, incapacitate, or affect a person's behaviour against their will, or to damage or destroy buildings or materiel[6] which 'acts through the application of kinetic force or of other means, such as the transmission of electricity, the diffusion of chemical substances or biological agents or sound, or the direction of electromagnetic energy…'[7] and 'includes cyber weapons that damage computer systems and networks or result in physical harm to people or objects.[8]

Similarly, 'a weapons system' can be defined as 'a combination of one or more weapons with all related equipment, materials, services, personnel, and means of delivery and deployment (if applicable) required for self-sufficiency'.[9] In more technical terms, carrier and launch platforms,[10] sensors, communication systems, and fire control systems that accompany the weapon in a weapon system to form its ability to engage with the target.[11]

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2 UN Panel of Experts Established pursuant to Security Council Resolution 1973 (2011), 'Letter dated 8 March 2021 from the Panel of Experts on Libya Established pursuant to Resolution 1973 (2011) addressed to the President of the Security Council' (8 March 2021) UN Doc S/2021/229 (UNSC 2021)para 63.

3 Stuart Casey-Maslen, 'Weapons' in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law* (OUP 2020) 261, 267.

4 ibid.

5 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (1st edn, Edward Elgar Publishing 2019) 380; William H Boothby, *Weapons and the Law of Armed Conflict* (2nd edn, OUP 2016) 4; Michael N Schmitt and Jeffrey S Thurnher 'Out of the Loop: Autonomous Weapon Systems and the Law of Armed Conflict' (2013) 4 Harvard National Security Journal 231, 271.

6 Stuart Casey-Maslen, *Weapons Under International Human Rights Law* (Cambridge University Press 2014) xv-xx.

7 ibid.

8 ibid.

9 William C Barker, 'Guideline for Identifying an Information System as a National Security System' (August 2003) National Institute of Standards and Technology Special Publication 800-59 1, 8.

10 For the definition of Weapon Platform, see Vincent Boulanin and Maaike Verbruggen, *Mapping the Development of Autonomy in Weapon Systems* (SIPRI 2017) 124: '*The platform on which a weapon system is mounted (e.g. a combat aircraft on which missiles are mounted)*.'

11 ibid.

On the other hand, the term autonomy can mean a variety of things in a myriad of contexts. In linguistic terms, the Greek terms *autos* (self) and nomos (rule) signify a sense of independence.[12] Similarly, in everyday language, it can denote self-reliance[13] as well as a form of freedom to govern itself without external control.[14] The debate on the legal definition of AWS, on the other hand, is heavily influenced by the technical applications of autonomy. A technical perspective is an indispensable step, hence an inescapable source of confusion, to understand the legal problems accompanying the use of AWS. Accordingly, in this chapter, autonomy will be analysed as a technical term. In doing so, efforts will be made to explain the computational science behind autonomy. Then, autonomy in weapons systems will be examined. Subsequently, the existing efforts for a legal definition of AWS will be put through a critical lens to conclude which definition will best suit the exigencies of international law. For this purpose, a detailed analysis of the critical functions of the weapons systems will be made. After all, it is these technical innovations that outpace the evolution of existing norms and thus bring on legal challenges which necessitate defining AWS.

A. Autonomy as a technical phenomenon

Autonomy is the capability to perform some functions or tasks in the real world for a certain time without being controlled from outside.[15] Living organisms[16] such as humans and animals, unlike rocks, are autonomous systems. However, humans also create autonomous non-living systems to perform a specific function or task through the perks of computer programming and engineering. The creator can strictly determine this function or task, but there may be unexpected performance results, especially in complex systems. [17] The autonomy stems from the fact that these systems can make their own decisions[18] when it comes to performing a specific function or task i.e., without human control or supervision[19].

i. The functioning of autonomy

Autonomy is 'a means for transforming data sensed from the environment into purposeful plans and actions'.[20] It is a result of a process of 'observation and perception' of the environment where the machine is located, 'planning' of the actions required according to a pre-programmed model of the environment introduced to the machine, and according to the observations made by the machine, 'execution' of the action independently from a

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[12] George J Agich, 'Key Concepts: Autonomy' (1994) 1(4) Philosophy, Psychiatry, & Psychology 267, 267.

[13] Jeffrey M. Bradshaw and others, 'The Seven Deadly Myths of "Autonomous System" Human-Centred Computing (2013) 28(3) Intelligent Systems 2, 4-5.

[14] 'Autonomy, n' (Cambridge Dictionary)<https://dictionary.cambridge.org/dictionary/english/autonomy> accessed 20 March 2022.

[15] George A Bekey, *Autonomous Robots: From Biological Inspiration to Implementation and Control* (The MIT Press 2005) 2.

[16] ibid.

[17] ibid.

[18] Maja J Matarić, *The Robotics Primer* (The MIT Press 2007) 2.

[19] Merel Ekelhof, 'Human Control in the Targeting Process' in Robin Geiss (ed), *Lethal Autonomous Weapons Systems: Technology, Definition, Ethics, Law & Security* (Federal Foreign Office 2017) 66, 67.

[20] David A Mindell, *Our Robots, Ourselves: Robotics and the Myths of Autonomy* (Penguin 2015) 21.

human operator[21] through computer programming apt for interacting with the environment.[22]

An autonomous system has 'sensors' to observe and perceive its environment,[23] 'a control system' to plan and decide on its actions[24] , and 'effectors and actuators' to execute those actions.[25] At the end of this three-layered operation, an autonomous operation is performed. Sensors are a part of the hardware of the autonomous system to collect data about the environment[26] and they are equipped with the software to interpret the collected data into machine terms,[27] i.e., a computational model of the environment is introduced to the autonomous system.

Although there are different types of control systems that allow for the performance of actions to different extents, a control system can be generally thought of as the 'brain' of the autonomous system,[28] equipped with the software algorithms to transform the input of the environment into plans. The software algorithm, which can be thought as sets of mathematical functions prepared by computer programmers, is what allows the system to make a decision. In the roughest of terms, it could be a command function such as 'When you see X, do Y'. In this example, the input is X, and the output is Y. An important technique of algorithmics used in control systems is called 'randomized algorithms'[29] that allow systems to create different outputs under the same input, as in 'When you see X, do anything to attain T', which could have a significant potential to inject unpredictability into the system.[30]

Effectors are the arms and legs of the system to implement the decisions taken by the control system in the real world. In technical terms, effectors provide the ability of locomotion, [31] movement, manipulation, [32] and interaction with the physical environment in order to take actions.

ii. Software of Autonomy: Artificial Intelligence and Machine Learning

Artificial Intelligence (AI) is a set of computational methods.[33] These are studies of complex systems, such as the human mind, through simulations created by computer programming. Likewise, AI has the purpose of mimicking human intelligence[34] to equip the machines with the ability to untangle problems that have been so far only carried out through human intelligence.[35] Although the purpose is mimicking human intelligence, the method of achieving this goal is not via working for the best brain-like organ possible. It is

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21 Dimitri Scheftelowitsch, 'The State of Artificial Intelligence: An Engineer's Perspective on Autonomous Systems' in Vincent Boulanin (ed), *The Impact of Artificial Intelligence on Strategic Stability and Nuclear Risk* (Stockholm International Peace Research Institute 2019) 26.

22 Boulanin and Verbruggen (n 10) 19.

23 Matarić (n 18), 19.

24 Boulanin and Verbruggen (n 10) 9.

25 Matarić (n 18) 19.

26 ibid 27.

27 Boulanin and Verbruggen (n 10) 8.

28 Matarić (n 18) 26.

29 Boulanin and Verbruggen (n 10) 11.

30 ibid.

31 Matarić (n 18) 27.

32 ibid.

33 International Panel on the Regulation of Autonomous Weapons (IPRAW), *Focus on Computational Methods in The Context of Laws* (German Institute for International and Security Affairs2017) 9.

34 Vincent Boulanin, 'Artificial Intelligence: A Primer' in Vincent Boulanin (ed) *The Impact of Artificial Intelligence on Strategic Stability and Nuclear Risk* (SIPRI 2019) 13.

35 Tobias Vestner and Altea Rossi, 'Legal Reviews of War Algorithms' (2021) 97 International Law Studies 509, 513.

again through computer programming by which machines are taught to deliver results that humans bring thanks to their cognitive abilities. For instance, when a machine recognizes an image, it is because the pixels comprising that image has been previously introduced and it later recognizes the correlation of pixels in subsequent images.[36] Humans in contrast rarely pay attention to pixels when perceiving an image. Thus, AI systems are software programs that allow for the development of machine abilities yielding to human-like outcomes.[37]

General AI is a term used for a complete replica or a better version of human intelligence bestowed with a variety of traits to match a human's perception of the world and is considered more of a science-fiction topic than a near-future reality.[38] Narrow AI is the half-century old reality[39] found today in self-driving cars or voice assistants such as Siri. It has the purpose of AIisation[40] of specific intelligent traits of humans such as but not limited to learning, understanding speech patterns, and recognition of image patterns. In that, machines have a specific task and a particular environment where they operate.[41]

Autonomy is one of the traits of humans than can be the result of AIisation. Moreover, autonomy is an area of application[42] of a specific computer programming technique for AIisation, which is machine learning. In the past, other methods[43] such as hand-coded programming have also been used[44] for AIisation, where human programmers develop software by specifically defining the problems and solutions and introducing these into the system.[45] However, much of the progress in AI today is a result of machine learning.[46] Machine learning is a way of developing software that creates a system with an ability to learn and subsequently initiates a process of teaching the system to solve problems[47] or execute a task.[48] The learning of the machine is not a mirror to the mechanism of human learning, but rather a process where the machine is introduced and goes through a deluge of statistical data to abstract a general model in order to find a solution.[49]

Machine learning is more advantageous than hand-coded programming since it is impossible to predict and completely code encounters and changes in the environment where the machine operates beforehand.[50] Thus, machine learning provides a flexible way

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36 Boulanin (n 34) 20.
37 ibid 14.
38 ibid.
39 ibid.
40 This paper will use the term 'AIisation' to define the process of using AI to develop a human ability in order to correctly depict the meaning and function of AI.
41 Boulanin (n 34) 14.
42 Boulanin (n 34) 15.
43 Stuart J Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach, Global Edition* (4th edn, Pearson 2021) 19.
44 Vestner and Rossi (n 35) 515.
45 Boulanin and Verbruggen (n 10) 16.
46 Vestner and Rossi (n 35) 515; Russel and Norvig (n 43) 7.
47 Boulanin and Verbruggen (n 10) 16.
48 Michael Copeland, 'What's the Difference Between Artificial Intelligence, Machine Learning and Deep Learning?' (*NVIDIA*,29 July 2016) <https://blogs.nvidia.com/blog/2016/07/29/whats-difference-artificial-intelligence-machine-learning-deep-learning-ai/ > accessed 23 August 2021.
49 Russell and Norvig (n 43) 669; Christoph Molnar, *Interpretable Machine Learning* (Lean Publishing 2021) 18.
50 Russell and Norvig (n 43) 693.

of managing ever-incoming data to improve itself.[51] Also, some tasks and environments may be too difficult to program, for instance when the task is executed by humans through intuition.[52] However, this performance advantage of machine learning comes with the cost of losing track of the algorithm that allows the machine to reach a conclusion.[53] Contemporary uses of machine learning creates a 'black box', which is 'a system that does not reveal its internal mechanisms'.[54] This is primarily due to the fact that as the machine reaches a conclusion, the calculations conducted, thus the reasons of the conclusion, become too complex for understanding with the limited dimensionality of human perception.[55] The only parts that remain observable are the input, data received from sensors, and the output, action generated as a result of the decision making process.

As stated above, autonomy is the ability of a machine to perform tasks and functions independent of human control. AI, boosted tremendously with machine learning, allows the machines to develop human-like abilities without remaining dependent on humans in the performance of certain tasks and functions. For instance, a self-driving car is able to perceive the lines on the road and shifts the car to the right direction without needing a human operator to use the steering wheel. This is enabled by the advent of AI technologies based on machine learning techniques. Likewise, an autonomous weapon system would be able to detect a target and launch a strike without the need of a human eye to identify the target and a human arm to initiate the launching system.

All in all, autonomy is the end result of AI. Machine learning is now the major technology boosting the development of AI. Hence, it can be said that autonomy is a product of machine learning.[56]

B. Legal Debate on Autonomy: Different Approaches

The technical definition of autonomy clearly conveys an absence of human control for the execution of tasks and functions. However, this definition requires sophistication to correctly reflect the variety of ways autonomy can exist in different systems. Just as active human control might deprive a system of autonomy, absence of human control only in the refuelling capability of a system would also cast a shadow on the system's overall autonomy. Therefore, one of the biggest misconceptions about autonomy is thinking of it through one spectrum.[57] This is a crucial misconception for the legal debate because different applications of autonomy can pose different degrees of challenges in terms of compliance with IHL.

Different solutions to this problem were suggested by scientists. One such example is the Autonomy Levels for Unmanned Systems (ALFUS) approach. It evaluates autonomy as a product of three main factors: the system's human independence, the complexity of the mission assigned to the autonomous functions of the system, and the

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[51] Jonathan Kwik and Tom Van Engers, 'Algorithmic Fog of War' (2020) 2(1-2) Journal of Future Robot Life 1, 7.

[52] Russell and Norvig (n 43) 693.

[53] Will Knight, 'The Dark Secret at the Heart of AI' (*MIT Technology Review*,11 April 2017) <https://www.technologyreview.com/2017/04/11/5113/the-dark-secret-at-the-heart-of-ai/> accessed 23 August 2021.

[54] Molnar (n 49) 19.

[55] Knight (n 53).

[56] Boulanin (n 34) 21.

[57] Bradshaw and others (n 13) 2.

difficulty of the environment where the system operates in terms of qualities such as dynamism and risk of adversary. [58]

A popular solution reinforced in legal debates, which has also been often criticized[59] and abandoned by some of its previous supporters[60],is to think of autonomy in levels. Accordingly, the degree of autonomy can be analysed on a spectrum of: human operated systems (Level 1); human delegated systems (Level 2); human supervised systems (Level 3); and fully autonomous systems (Level 4).[61] In human operated systems, the system has no autonomous control of the environment and a human operator makes all the decisions.[62] In human delegated systems, the machine might carry out some functions independently subject to the activation/de-activation of a human operator.[63] Human supervised systems can initiate actions without a specific delegation by the human operator but only within the perimeters of the tasks it has been permitted.[64] Finally, fully autonomous systems are systems that are able to perceive a goal introduced by the human operator, and conducts the necessary steps in order to achieve that goal without the need of any additional human input; although humans can still intervene in times of emergency.[65]

This approach can be problematic primarily because these levels might fail at correctly classifying the existing weapon systems, since not all functions in a weapon system necessarily enjoy the same level of autonomy.[66] In opposition to the levels of autonomy approach, a three-dimensional classification of autonomous systems, seemingly inspired by the ALFUS approach, has been proposed[67] which. It must be noted that some also suggest that this classification is a way of understanding different levels of autonomy,[68] instead of opposing to it. According to this classification, there are three ways to evaluate autonomy: (1) the relationship between the human and the system in terms of command and control; (2) the complexity of the decision-making capabilities of the system; and (3) the types of functions enjoying autonomy.[69]

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[58] Hui-Min Huang and others, *Autonomy Levels for Unmanned Systems (ALFUS) Framework, Volume II: Framework Models Version 1.0* (National Institute for Science and Technology 2007) 21; Linell A Letendre, 'Lethal Autonomous Weapon Systems: Translating Geek Speak for Lawyers' (2020) 96 International Law Studies 274, 280-281.

[59] Paul Scharre, 'The Opportunity and Challenge of Autonomous Systems' in Andrew P Williams and Paul D Scharre (eds), *Autonomous Systems Issues for Defence Policymakers* (NATO Allied Command Transformation 2015) 3, 9; Bradshaw and others (n 13) 3-4; Chris Jenks, 'False Rubicons, Moral Panic, & Conceptual Cul-De-Sacs: Critiquing & Reframing the Call to Ban Lethal Autonomous Weapons' (2016) 44(1) Pepperdine Law Review 4, 16.

[60] Defense Science Board, 'Task Force Report: Role of Autonomy in DOD Systems' (*US Department of Defense* 2012), 23 <https://www.hsdl.org/?view&did=722318> accessed 28 August 2021.

[61] Defense Science Board, 'Unmadden Systems Integrated Roadmap FY 2011-2036' (*US Department of Defense*, 2011), 46 https://info.publicintelligence.net/DoD-UAS-2011-2036.pdf accessed 28 August 2021.

[62] ibid.

[63] ibid.

[64] ibid.

[65] ibid.

[66] Bradshaw and others (n13) 4.

[67] Scharre (n 59) 9.

[68] Boulanin (n 34) 21.

[69] ibid.

i. The human-system interaction

Since autonomy is the ability to perform tasks and functions independent of human control, thinking of autonomy through the interaction between the system and the human operator is a basic and plausible conclusion. This is also the underlying foundation present in the above-mentioned levels of autonomy approach.

According to this dimension, there are three types of interactions that characterize a system's autonomy. Systems that require human input on intervals to perform a task or function are human-in-the-loop or semiautonomous systems as they require humans to continue the tasks they perform on their own. [70] Human-on-the-loop or human-supervised autonomous systems are able to perform tasks and functions on their own however a human operator is able to intervene in case of failures and malfunctions.[71] Human-out-of-the-loop or fully autonomous systems are characterized by a human operator's inability to intervene in the system once the system is activated. [72]

The human-system interaction approach forms a part of the criteria to determine whether an AWS should be banned ,as per Human Rights Watch.[73] In their report, they campaigned for a ban on the development, production, and use of fully autonomous weapons,[74] which was later echoed in the Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions for characterizing AWS.[75]

The definition given to AWS by certain States also refers to this interaction. France defines AWS as weapons systems with absolute absence of human supervision once activated.[76] Similarly, according to the USA, an AWS is a weapon system that 'once activated, can select and engage targets without further intervention by a human operator'.[77] In the same manner, Japan defines them as weapon systems that 'once activated, can effectively select and engage a target without human intervention'.[78]

The criticisms for the levels of autonomy approach can also be applied to perceiving autonomy as a human-system interaction, since it also oversimplifies different types of systems with different levels of autonomous functions[79] in the same way. Similarly, the human-system interaction does not necessarily remain the same for different tasks on different occasions.[80] For instance, a weapon system that is able to take-off and land autonomously but unable to do so for targeting could be characterized both as human-in-the-loop and human-on or human-out-of-the-loop. Consequently, it can be concluded that

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70 Scharre (n 59) 10; Myriam Dunn Cavelty and others, '*Killer Robots' and Preventive Arms Control* (Taylor Francis 2016) 468, 458-459.

71 ibid.

72 ibid.

73 Human Rights Watch, 'Losing Humanity: The Case against Killer Robots' (*Human Rights Watch*, 19 November 2012) https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots accessed 25 August 2021.

74 'The Solution' (*Campaign to Stop Killer Robots*) <https://www.stopkillerrobots.org/learn/#solution> accessed 25 August 2021.

75 Christof Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns 23/47' (9 April 2013) UN Doc A/HRC/23/47 para 41.

76 Government of France, 'Statement to the Convention on Conventional Weapons informal meeting of experts on lethal autonomous weapons systems: 'Vers un définition opérationnelle des SALA'' (13 April 2016) <https://www.reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2016/meeting-experts-laws/statements/12April_France.pdf> accessed 31 October 2021.

77 'DoD Directive 3000.09' (US Department of Defense, November 2012) 13.

78 Government of Japan, 'Statement to the Convention on Conventional Weapons informal meeting of experts on lethal autonomous weapons systems' (9 April 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/9April_Japan.pdf> accessed 31 October 2021.

79 Jenks (n 59) 16.

80 ibid.

this approach overlooks the distinctions between the characteristics of the functions of the same weapons system and fails to be a generally applicable approach for defining AWS.

ii. The complexity of the decision-making capabilities

It is stated above that there are many techniques to develop narrow AI, i.e., human-like abilities for machines such as machine learning. Autonomy, which is a product of AI, can also be thought through the various steps in the development of AI technology. To describe this, a distinction is made between terms 'automatic', 'automated', and 'autonomous' on the basis of a system's ability to deal with its environment[81] and thus, the complexity of its decision-making algorithms[82] (mentioned above as the control system).

The distinction between each of them is far from clear. 'Automatic' is said to be a simple characteristic of machines that generate mechanical responses to inputs that have been previously introduced to them and only respond to what is foreseen by humans without the capability of dealing with environmental changes. [83] For instance, an anti-vehicle land mine that goes off when the increased pressure on the pressure plate triggers detonation is only capable of responding to pressure and it would not be able to respond to a heat change (unless it affects the pressure) however necessary that might be. Nonetheless, it is also suggested that 'automatic' is execution of a task without human intervention[84] and refers to the same concept of 'autonomy'.[85]

For some scientists, the simplicity of 'automatic' systems is actually 'automation', where humans use machines to perform a specific task.[86] According to them, 'automated' systems can also include more advanced systems where humans retain the ability to control machines through commands from a central computer system[87] without allowing the machine to operate on its own.[88]

In contrast, some engineers[89] and legal scholars observe 'automation' as a characteristic of unsupervised systems capable of independent operation, yet these operations are rather repetitious in nature without requiring the machines to develop complicated responses to the changes in the environment. Accordingly, an anti-vehicle landmine would be an example to an automated system[90] as well as a self-driving car[91] which are only capable of (until now) to make simple manoeuvres possible in each type of road. This limit of only being able to function in environments that are previously introduced to systems is called the ability to function only in *structured* environments. Thus,

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81 Boulanin and Verbruggen (n 10) 8.
82 Scharre (n 59) 10.
83 ibid.
84 Andrew Williams, 'Defining Autonomy in Systems: Challenges and Solutions' in Andrew P Williams and Paul D Scharre (eds) *Autonomous Systems Issues for Defence Policymakers* (NATO Allied Command Transformation 2015) 27, 32)
85 ibid.
86 Matarić (n 18) 2.
87 Stan Gibilisco, *Concise Encyclopedia of Robotics* (McGraw-Hill 2003) 16.
88 ibid 16.
89 Peter Asaro, 'On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making' (2012) 94(886) International Review of Red Cross 687, 690; Tetyana Krupiy, 'Of Souls, Spirits and Ghosts: Transposing the Application of the Rules of Targeting to Lethal Autonomous Robots' (2015) 16(1) Melbourne Journal of International Law 2, 4.
90 ibid.
91 Scharre (n 59) 10.

they are designed to operate on their own, but they cannot deviate from what they are pre-programmed to do so.[92]

In connection to this line of thinking, 'autonomous' systems can be defined as systems with the ability to generate actions in response in *unstructured* environments that cannot be foreseen from their coding.[93] Hence, 'autonomous' systems are able to perceive themselves, the world, and the changes in the world which they use to attain a specific objective by assessing the different options of action available.[94] A similar but perhaps more demanding definition puts an emphasis on the system's capability of understanding the goal and describes autonomy as the capability to perceive a 'higher-level of intent and direction'.[95]

In the legal debate on the definition of AWS, these distinctions have also been inconsistently adopted in the documents of international organizations such as the UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,[96] as well as by States; usually as a way excluding the pre-existing systems which might qualify as an AWS.[97] For instance, in the 2018 GGE meetings, Italy stated that 'existing automated weapons systems, governed by prescriptive rules and whose functioning is entirely predictable and intended' are excluded from the definition of AWS.[98] Similarly, Sweden stated that in addition to underlying that AWS do not exist today and are a future concern, 'systems such as remotely piloted or automated systems are not within the scope of the GGE'.[99] France also emphasized that the existing automated or teleoperated systems are not included in the scope of discussions on AWS.[100] On the other hand, the United Kingdom specifically defines AWS on the basis of the technical capabilities of the system and positions that an AWS 'is capable of understanding higher-level intent and

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92 Lawrence George Shattuck, 'Transitioning to Autonomy: A human systems integration perspective' (*Presentation at Transitioning to Autonomy: Changes in the role of humans in air transportation*, 11 March 2015),7 <https://human-factors.arc.nasa.gov/workshop/autonomy/download/presentations/Shaddock%20.pdf> accessed 26 August 2021; Defense Science Board, Report of the Defense Science Board Summer Study on Autonomy (*US Department of Defense*, 2016) 4.

93 Scharre (n 59) 10.

94 Shattuck (n 92).

95 Williams (n 84) 33.

96 Heyns (n 75) paras 42-43.

97 Cavelty and others (n 70) 458.

98 Statement of Italy, 'Statement in the Convention on Conventional Weapons informal meeting of experts on lethal autonomous weapons systems: 'Characterization of LAWS'' (9 April 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/9April_Italy-characterisation.pdf> accessed 31 October 2021.

99 Statement of Sweden, 'General statement by Sweden at the CCW GGE on Lethal Autonomous Weapons Systems (LAWS)' (9 April 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/9April_Sweden.pdf> accessed 30 October 2021.

100 Statement of France, 'Statement in the Convention on Conventional Weapons informal meeting of experts on lethal autonomous weapons system: 'Caractérisation'' (27 August 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/27August_France.pdf> accessed 26 August 2021: *'Nos discussions n'ont pas vocation à évoquer les systèmes automatisés ou téléopérés existant actuellement (tels que les drones, les torpilles, les systèmes de défenses automatisés)'.*

direction'.[101] In China, the term AI Weapon is preferred over autonomous weapon, which demonstrates the extent to which complexity of the machine is emphasized.[102]

Although these descriptions draw attention to the variations of the technological background of weapon systems, the distinctions in between are too disputed to be of use. [103] This was also observed by the Chair of the 2014 GGE meeting: 'It became quite obvious that there is no ready-made, generally accepted definition of what is an 'autonomous system' and as to where to draw the line between 'autonomous' and 'automatic' or 'automated'.[104] In the 2018 GGE meeting, the working paper prepared by Estonia and Finland also highlighted that:

The distinction between automated and autonomous functioning is not clear-cut. This is partly because both automated and autonomous systems can have a degree of unpredictability, therefore controlled and stable behaviour of any complex system must be achieved by means of thorough systems design and rigorous testing.[105]

Besides the inconsistency in distinguishing the terms, it is unclear whether they serve any legal use to be a preferable method for the legal definition of AWS. As such, it seems that it would be insignificant to characterize a weapon system as autonomous from the perspective of IHL, as long as it has automated (or automatic) functions in relation to target selection. Ergo, this approach alone does not provide a consistent and a legally direct use for defining AWS.

iii. The functional approach

As stated above, current technology does not seem to pave a speedy way to a General AI but rather towards Narrow AI where certain human-like abilities are developed in machines. Correspondingly, it is considered a misconception to talk about the autonomy of the overall system.[106] Instead, examination should focus on functions enjoying autonomy,[107] so to speak not of autonomous systems but rather autonomy in weapon systems.

International Committee of the Red Cross (ICRC), in an Expert Meeting in March 2014 defined AWS as 'weapons that can independently select and attack targets, i.e., with autonomy in the 'critical functions' of acquiring, tracking, selecting, and attacking targets'[108] and has asserted this definition ever since. The United Nations Institute for

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[101] Development, Concepts and Doctrine Centre, '*Joint Doctrine Publication 0-30.2 Unmanned Aircraft Systems'* (UK Ministry of Defence, 2017), 13 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/673940/doctrine_uk_uas_jdp_0_30_2.pdf> accessed 20 March 2022.

[102] Elsa B Kania, *AI Weapons in China's Military Innovation* (Brookings 2020) 2: The Chinese People's Liberation army defined these weapons as *'[…] a weapon that utilizes AI to pursue, distinguish, and destroy enemy targets automatically; often composed of information collection and management systems, knowledge base systems, decision assistance systems, mission implementation systems […]*'.

[103] Scharre (n 59) 11; Jenks (n 59) 16.

[104] Michael Biontino, 'Summary of Technical Issues at CCW Expert Meeting Lethal Autonomous Weapons Systems (LAWS)' (*German Permanent Missions Geneva*, May 16, 2014) as cited in Jenks (n 59) 13.

[105] Governments of Estonia and Finland, 'Categorizing lethal autonomous weapons systems - A technical and legal perspective to understanding LAWS' working paper by Estonia and Finland' (27- 31 August 2018) UN Doc CCW/GGE.2/2018/WP.2.**Error! Hyperlink reference not valid.**

[106] Bradshaw and others (n 13) 4-5; Scharre (n 59) 11; Boulanin and Verbruggen (n 10) 11; Jenks (n 59) 24-25.

[107] ibid.

[108] ICRC, 'Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects' (*ICRC* 2014), 1 <https://www.icrc.org/en/doc/assets/files/2014/expert-meeting-autonomous-weapons-icrc-report-2014-05-09.pdf> accessed 20 March 2022.

Disarmament Research (UNIDIR), also stressed the need to think about autonomy as a characteristic of functions and not of the system in general.[109]

This 'functional approach' also shaped the statements of many States. Examples include Belgium which stated that AWS discussions should focus on 'systems whose critical functions are autonomous'.[110] Estonia also emphasized that 'autonomy relates to particular functions of the system, rather than the system as a whole'.[111] Norway also defines AWS as systems with autonomy 'at least elements of autonomy, in their 'critical functions'.[112]

The 'functional approach' has found support primarily because of its flexibility to be applicable to the examination of all the weapon systems.[113] However, it was also criticized to be impractical considering the level of significance of human control in these critical functions was unclear.

Further, it is the autonomy in the most legally relevant functions that matters, and the functional approach correctly puts the focus on some functions that are most relevant from an IHL perspective as well as solving the problem of oversimplifying autonomous systems because it breaks them down into functions. For instance, most of the unmanned aerial vehicles (UAV), have autonomous take-off and landing functions but some of them equipped with weapons may as well have autonomous target development functions. Both these different groups of functions may have autonomy, in that, they might operate independently from a human operator. Meanwhile, it would not be plausible to define the former as autonomous because there are so many non-autonomous functions such as navigation destination, refuelling whereas the latter may not be classified as non-autonomous because it enjoys autonomy in certain functions worthy of attention.

It is true that the functional approach does not determine the degree of the absence of human control required in the critical functions.[114] Yet, the abovementioned human-

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[109] UNIDIR, 'Framing Discussions on the Weaponization of Increasingly Autonomous Technologies' (*UNIDIR* 2014), 4 <https://www.unidir.org/files/publications/pdfs/framing-discussions-on-the-weaponization-of-increasingly-autonomous-technologies-en-606.pdf> accessed 20 March 2022.

[110] Statement of Belgium, 'GGE, CCW, Geneva' (9 April 2018) >https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/9April_Belgium.pdf> accessed 20 March 2022 : *'Il est en effet important de mieux définir les contours de notre débat. Celui-ci doit se centrer sur les Systèmes d'armement létaux autonomes, c'est-à-dire des systèmes pour lesquels les fonctions létales critiques sont autonomes. Il est dès lors préférable d'écarter des débats les fonctions autonomes non létales'.*

[111] Statement of Estonia, 'Statement by Estonia in the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems: 'Agenda Item 6(a). Characterisation of the systems under consideration'' (27 August 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/27August_Estonia.pdf> accessed 31 October 2021.

[112] Statement of Norway, 'Comments made by Norway 28/8/2018 in CCW GGE LAWS Working Sessions 4: Further consideration of the human element in the use of lethal force; aspects of human-machine interaction in the development, deployment and use of emerging technologies in the area of lethal autonomous weapons systems.' (28 August 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/28August_Norway.pdf> accessed 31 October 2021.

[113] Scharre (n 59) 11; Boulanin and Verbruggen (n 10) 11; Jenks (n 59) 24-25.

[114] Russian Federation, 'Russia's Approaches to the Elaboration of a Working Definition and Basic Functions of Lethal Autonomous Weapons Systems in the Context of the Purposes and Objectives of the Convention' (4 April 2018) UN Doc CCW/GGE.1/2018/WP.6 **Error! Hyperlink reference not valid.**: ' […]*In ensuring these functions the states should rely on their own standards in this sphere. Attempts to develop certain universal parameters of the so-called 'critical functions' for both existing highly automated war systems and future LAWS – aim identification and hit command, maintaining 'significant' human control – can hardly give practical results. For example, it is doubtful whether criteria to determine a due level of 'significance' of human control over the machine could be developed […]'.*

system interaction approach is only relevant on the point of how an autonomous system is being used and whether this use is legal. As for the decision-making complexity approach, it should only relevant insofar as they respond to the question of whether the task is performed independently of humans, i.e., whether there is autonomy in any function. They should not be relevant in terms of whether the weapon system should be qualified as autonomous. As such, without regard to whether humans can intervene in a system the system should be qualified as 'automatic', 'automated', or 'autonomous', a technical focus must be on whether the function has the ability to perform a task on its own. Thus, the decision-making complexity approach should only complement the functional approach in determining the autonomy in a function. Fortunately, the functional approach is suitable for combination with other approaches.

Nonetheless, what distinguishes one function from another in terms of criticality has been underexamined. This is why in the next chapter, autonomy in 'critical functions' will be elaborately analysed to fully determine the scope of application of IHL in AWS. For this purpose, it will firstly be established that any legal definition of AWS serves the primary purpose of defining the scope of IHL rules, which is why defining 'critical functions' must contain IHL as the main element. Next, the legality of AWS under IHL will be briefly examined to provide the context in which IHL becomes relevant.

III. The pre-eminence of IHL Rules in the legal definition of AWS

The advent of technology is likely to challenge the existing norms of law. The GGE is the international forum for States to regulate AWS[115] to sufficiently address the repercussions of the technology behind AWS on the existing norms that regulate them in international law. The central use of AWS is currently in battlefield and GGE States agree[116] that AWS, as a means of warfare, are regulated by the applicable treaties and norms of customary IHL.[117] Ergo, any international legal definition of AWS must essentially address the needs of the changes brought by the emergence of AWS at the expense of the current norms that regulate weapon systems.

This rationale forms the backbone of many IHL treaties[118] that specifically ban or regulate the use of certain weapons such as the Convention on the prohibition of biological weapons;[119] CCW Protocol III on incendiary weapons;[120] CCW Protocol IV on blinding

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[115] CCW (n 1).

[116] Dustin Lewis, 'An Enduring Impasse on Autonomous Weapons' (*Just Security*, 20 September 2020) <https://www.justsecurity.org/72610/an-enduring-impasse-on-autonomous-weapons/> accessed 20 November 2021.

[117] Maslen (n 3) 261; Boothby (n 5) 20-25.

[118] 'Treaties, State Parties and Commentiaries' (International Committee of Red Cross) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByTopics.xsp> accessed 20 March 2022.

[119] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (adopted 16 December 1971, entered into force 26 March 1975) 115 UNTS 163.

[120] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137.

lasers;[121] Convention on Chemical Weapons;[122] Revised CCW Protocol II on mines, booby traps and other devices;[123] Anti-Personnel Mine Ban Convention[124] and the Convention on Cluster Munitions.[125] These treaties define the weapons or weapon systems they regulate in a sufficient manner to properly determine their scope of application. Some of them are confined to a general definition, such as but not limited to[126] Article 1 of the Biological Weapons Convention, which defines biological weapons as 'microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes'. A similar but more detailed approach is to provide sub-definitions that complete the general definition as well as provide an annex that mentions these weapons. For instance, Article 2 of the Convention on Chemical Weapons defines chemical weapons as 'toxic chemicals and their precursors' as well as 'munitions and devices' designed to cause harm through them. Subsequently, toxic chemicals are defined as 'any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals', and 'precursor' as 'any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical' in addition to referring to annex that enumerates these definitions. Another way is an exclusionary definition. Article 2 of the Convention on Cluster Munitions offers a long list of what is not a cluster munition[127] after defining them as 'means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms and includes those explosive submunitions'.

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[121] Protocol on Blinding Laser Weapons (Protocol IV) to the Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 13 October 1995, entered into force 30 July 1998) 1342 UNTS 137.

[122] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45.

[123] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II) to the to the Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects as amended on 3 May 1996 (adopted 3 May 1996, entered into force 3 December 1998) 2048 UNTS 93.

[124] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

[125] Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39.

[126] CCW Protocol IV (n 121), Art 1 on blinding lasers: 'It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices […]'; CCW Protocol III (n 120), Art 1 on incendiary weapons: ' 'Incendiary weapon' means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.'

[127] Convention on Cluster Munitions (n 125), Art 2(2): 2. 'Cluster munition' means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:(a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;(b) A munition or submunition designed to produce electrical or electronic effects;(c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
(i) Each munition contains fewer than ten explosive submunitions;
(ii) Each explosive submunition weighs more than four kilograms;
(iii) Each explosive submunition is designed to detect and engage a single target object;
(iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
(v) Each explosive submunition is equipped with an electronic self-deactivating feature.

There is no such treaty specific to AWS but the approach in weapon-specific treaties should shed some light on the debate on the definition of AWS. The common point in each of these weapon-specific treaties is to define the distinguishing characteristics of weapons or weapon systems. These are not irrelevant technical characteristics but rather characteristics that make the nature or use of these weapons substantially likely to trigger incompliance with IHL because after all, this is the reason that these definitions are stipulated in an IHL treaty.

It is thus inevitable that critical functions in the definition of AWS should include IHL as the pre-eminent element. In the next chapter, the interaction between AWS and IHL will be briefly examined.

IV. AWS under IHL and Critical Functions of a Weapon System

It must be born in mind that an essential part of the 'functional approach' to the definition of AWS should be the focus on critical functions of weapon systems, as suggested by ICRC. In the 2018 GGE meeting, Poland conveniently put an emphasis on the ultimate goal of the debate on the definition of AWS by asking:

Do we want to define AWS in order to ban them? Or do we want to create a broad definition of fully autonomous weapons systems and then determine to what extent a human control over specific functions of these systems is required?[128]

Putting aside the potential answers to this question, this question brings attention to the fact that the overall challenge of the legal discussion on the definition of AWS is to assess their legality under IHL better. The *raison d'être* of any legal definition is to define the scope of application of the law. Particularly for IHL, definitions take the most painstaking part. For instance, drawing the line between the definitions of a civilian and a civilian directly participating in hostilities is the heart of the ground of protection provided by IHL.[129] Similarly, if one falls into the definition of a combatant, they acquire rights and responsibilities that has significant repercussions.[130] In the same manner, if a weapon system is an AWS, as the current debates show, IHL will either require additional norms of IHL, such as the obligation to ensure meaningful human control,[131] or require different applications of them. Seemingly to this vein, Switzerland defines AWS as 'weapons systems that are capable of carrying out tasks governed by IHL in partial or full replacement of a human in the use of force, notably in the targeting cycle'.[132]

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[128] Government of Poland, 'Working Paper on Lethal Autonomous Weapons Systems submitted by Poland' (28 March 2018) <https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_(2018)/CCW_GGE.1_2018_WP.3.pdf> accessed 31 October 2021.

[129] Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 [AP1], Art 43(2).

[130] ibid Art 51(3) of AP1.

[131] Netta Goussac, 'Safety Net or Tangled Web: Legal Reviews of AI in Weapons and War-Fighting' Humanitarian Law & Policy (*ICRC,* 18 April 2019) <https://blogs.icrc.org/law-and-policy/2019/04/18/safety-net-tangled-web-legal-reviews-ai-weapons-war-fighting/> accessed 31 October 2021.

[132] Statement of Switzerland, 'Statement in Group of Governmental Experts on lethal autonomous weapons systems (LAWS) 2018, Convention on Certain Conventional Weapons: 'Agenda item 6 a) Characterization of the systems under consideration in order to promote a common understanding on concepts and characteristics relevant to the objectives and purposes of the Convention'' (10 April 2018) <https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_(2018)/2018_LAWS6a_Switzerland.pdf> accessed 31 October 2021.

Another utility of the 'functional approach' is to explore the weapon systems through a lens that demonstrates their importance for the application of IHL. After all, it is insignificant to IHL that a trifle is dark grey or black, but crucial when its bullets are more than 1 calibre as this might cause unnecessary suffering.[133] Therefore, a meticulous examination of autonomy in 'critical functions' will determine the scope of application of IHL in AWS.

This section of the article will first examine the rules regulating the weapon systems under IHL. It will then explain how AWS might raise concerns under IHL. Subsequently, it will expand on the functions of weapon systems and suggest a list of categorizing and characterizing them. Finally, it will draw up a conclusion on which of these functions must be deemed critical based on these explanations.

A. Weapon systems under IHL

There is considerably little debate on the applicability of IHL to weapon systems.[134] Weapons, as a means of warfare, are regulated by the applicable treaties and norms of customary IHL.[135] In this regard, Additional Protocol 1 to the 1949 Geneva Conventions (AP1) is a prominent source, most of the relevant parts of which is accepted to reflect the norms of customary IHL.[136] According to Article 35(1) of AP1, parties to an armed conflict are not unlimited in their choice of methods or means of warfare.[137]

A distinction must be made between the rules applicable to the inherent nature of weapons due to their design, and the use of weapons.[138] Weapons that cause unnecessary harm by their nature[139] and weapons 'that are incapable of distinguishing between civilian and military targets'[140] are illegal under IHL due to their design. The use of weapons, on the other hand, must be in compliance with the principle of distinction (the obligation to distinguish between lawful and unlawful targets),[141] the principle of precaution (the obligation to take all reasonable measures to minimize civilian harm),[142] and the principle of proportionality (the obligation to strike a balance between the collateral damage and military advantage).[143] In addition to these general rules, the above-mentioned treaties bear obligations to restrict or ban certain weapons among States that are party to these treaties.

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133 AP1 (n 129) Art 35(2).

134 Dustin Lewis, 'An Enduring Impasse on Autonomous Weapons' (*Just Security*, 20 September 2020) <https://www.justsecurity.org/72610/an-enduring-impasse-on-autonomous-weapons/> accessed 20 November 2021; See also on the fact that IHL applicability on AWS is undisputed in Neil Davidson, 'A Legal Perspective: Autonomous Weapon Systems under International Humanitarian Law' [2016] UNODA Occasional Papers No. 30 5, 7.

135 Maslen (n 3) 261.

136 Boothby (n 5) 17; Michael N Schmitt, 'War, Technology and the Law of Armed Conflict' (2006) 82 International Law Studies - The Law of War in the 21st Century: Weaponry and the Use of Force 137, 139.

137 AP1 (n 129) Art 35(1).

138 Maslen (n 3) 263; Robin M Coupland, The SIrUS Project Towards a determination of which weapons cause 'superfluous injury or unnecessary suffering (*International Committee of Red Cross* 1997) 10-1.

139 AP1 (n 129) Art 35(2); Boothby (n 5) 60; Coupland (n 138) 10-11; Kwik and Van Engers (n 51) 10.

140 AP1 (n 129) Art 51(4)(b)-(c); *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 66 [78]; Boothby (n 5) 60; Kwik and Van Engers (n 51) 10.

141 AP1 (n 129) Art 51(4)(a).

142 AP1 (n 129) Art 57(2)(a)(iii); *The Prosecutor v Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic* (Judgment) (2000) ICTY-95-16 [533]; Boothby (n 5) 37; Krupiy (n 89) 16.

143 AP1 (n 129) Art 57(2); Boothby (n 5) 37.

B. AWS under IHL

Like the other weapon systems, AWS' compliance with IHL raises questions stemming from the nature of the system or its use. Regarding its nature, problems are more likely to arise on the capability of AWS to distinguish between lawful and unlawful targets (the indiscriminate weapons rule) than the prohibition of superfluous injury and unnecessary suffering. Considering that AWS are weapon platforms on which a variety of weapons might be installed, AWS might as well violate the prohibition on superfluous injury and unnecessary suffering. Yet this is not a result of the peculiarity of AWS, which is autonomy through AI and machine learning, but rather the choice of weaponry installed on it.[144]

On the other hand, indiscriminate weapons rule stipulates that it is prohibited to use weapons which 'cannot be directed at a specific military objective' or 'the effects of which cannot be limited' and thus, cannot by their nature distinguish between lawful and unlawful targets under IHL.[145] Concerns raised for AWS in this regard can be explained in two parts. To begin with, it is unsettled whether AWS will be able to make the distinctions required by IHL.[146] Further, in the likely possibility that they can, the randomized algorithms and 'black box' operations as a result of machine learning techniques in the decision-making process of the systems will create significant predictability problems in guaranteeing this result. [147] Human operators will not be able to foresee a failure likely to be caused by a system able to operate on its own for the simple fact that their transparent observation is limited to the input into the system, but decision-making process is too complicated for them to humanly untangle.[148] This is especially the case when the training of weapon systems unable to take place in the real world due to ethical reasons will complicate the functioning of the system in the existence of rich data from the real world.[149] Consequently, the output might also be clouded. In fact, perhaps for systems where pre-programming is dominant and the machine learning applications are limited, this is not a serious issue. Nevertheless, as explained above, machine learning is an advantageous option that more and more replaces hand-coded programming. Ergo, the likelihood of predictability issues is not ignorable.

As stated, an AWS which might perhaps not be indiscriminate by design must also comply with the with the principle of distinction under IHL when it is in use. But at that point, parallel to the prohibition on superfluous injury and unnecessary suffering, this will no longer be a problem peculiar to the autonomy of weapon systems.

More critically, AWS must comply with the principle of proportionality, which obliges quantitative and qualitative analyses conducted to ensure that the civilian harm to be inflicted in the process of achieving a military advantage is not excessive.[150] A quantitative analysis is likely to be accurately made by the AWS[151] whereas the balance between collateral damage and military advantage is thought to be difficult to translate into codes for the AWS to assess through permutations[152] and without sacrificing predictability

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144 Kwik and Van Engers (n 51) 10.
145 AP1 (n 129) Art 51(4)(b)-(c); Boothby (n 5) 17, 66, 67.
146 Amanda Sharkey, 'Autonomous Weapons Systems, Killer Robots and Human Dignity' (2019) 21 Ethics and Information Technology 75, 76; Noel E Sharkey, 'The Evitability of Autonomous Robot Warfare' (2012) 94(886) International Review of the Red Cross 787, 788; Kwik and Van Engers (n 51) 11.
147 Kwik and Engers (n 51) 12.
148 ibid.
149 ibid.
150 Kwik and Engers (n 51) 13; Sharkey (n 146) 788.
151 Ronald C Arkin, *Governing Lethal Behavior in Autonomous Systems* (Taylor Francis 2009) 47–48.
152 Krupiy (n 89) 17.

in the use of machine learning.[153] Similarly, the principle of precaution, which requires all feasible measures to be taken to minimize collateral damage, might also incur problems[154] particularly for it will require subjective evaluations of what qualifies as feasible.[155]

As can be seen from this brief legality assessment, IHL focuses on the interaction between the weapon systems and the targets, and it is this interaction that creates the context of questions arising from compliance with IHL. For AWS, autonomy in critical functions is what creates this context and triggers a substantial likelihood of incompliance with IHL. As such, autonomy in some functions (e.g., refuelling functions) raise lesser concerns under IHL than others (e.g., attack functions).[156] The likelihood of a particular function must be 'substantial' to form a context in IHL considerations may rise. This is why an emphasis on autonomy in critical functions should be an integral part to the definition of AWS.

C. Functions of a weapon system and critical functions

ICRC always mentioned these critical functions in a consistent manner as 'critical functions of acquiring, tracking, selecting and attacking targets'.[157] What these functions cover exactly and whether other functions should be included are worthy of attention to correctly elaborate on this notion so much so that calls have been made to refocus the debate in CCW meetings on critical functions instead of futilely trying to define what would make a system 'fully' autonomous.[158] There are three reasons why this paper will attempt to provide a detailed analysis of the critical functions.

First, unlike the definition of AWS in general, the content of the concept of critical functions has not been challenged in detail. Although ICRC broadly categorizes them as target selection and attack, it does not correctly capture the technical nuances that might lead to an IHL violation. For instance, as will be further elaborated below, many studies point to the fact that the advance of weapon technologies is likely to lead to autonomy in an increasing number of functions.[159] functions related to provision of information (i.e., intelligence functions) may also be critical with the advance of technology provided that they influence targeting. Thus, more discussion on whether critical functions are limited to a specific section of the targeting process i.e., acquiring, tracking, selecting, and attacking targets or they can be expanded will be fruitful.

Second, it can be said that there is an increasing acceptance of the concept, and it is becoming more prevalent in the definitions of States.[160] Defining its content is crucial to render this acceptance meaningful and prevent possible circumventions of the notion by stretching it in the absence of any.

Last but not least, the concept of critical functions started to be the backbone of the discussions on meaningful human control (MHC). It is a requirement that a meaningful

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153 Sharkey (n 146) 788; Kwik and Van Engers (n 51) 13.

154 Maya Brehm, 'Defending the Boundaries: Constraints and Requirements on the Use of Autonomous Weapon Systems Under International Humanitarian and Human Rights Law' [2017] Geneva Academy Briefing No 9 51-52; Krupiy (n 89) 17.

155 Kwik and Van Engers (n 51) 13.

156 Jenks (n 659) 25: See Figures 2 and 3.

157 ICRC, Report of the ICRC Expert Meeting on 'Autonomous weapon systems technical, military, legal and humanitarian aspects' (*ICRC* 2014) 62.

158 Chris Jenks, 'The Distraction of Full Autonomy and the Need to Refocus the CCW Laws Discussion on Critical Functions' in Robin Geiss (ed), Lethal Autonomous Weapons Systems: Technology, Definition, Ethics, Law & Security (Federal Foreign Office 2017) 171, 183.

159 Boulanin and Verbruggen (n 10) 27, 29, 33.

160 ibid 6.

human control must be exerted on AWS[161] and there is almost a consensus that there should be some form of MHC, although there are serious debates on its content. These debates depend on the dichotomy of thought of the normative nature of this requirement. On the one hand, it is asserted that MHC is an independent underlying requirement of IHL. [162] Accordingly, even with all problems pertaining to the capacity and predictability of AWS, MHC will still be needed for the reason that the rules of IHL are addressed to humans[163] and 'it is humans that comply with and implement the law'.[164] On the other hand, it is claimed that MHC is a principle for ensuring compliance with IHL[165] and if AWS will ever be better in terms of compliance with IHL, there will be no need for such principle.[166] Some even go so far as to suggest that then it might be an obligation for States to use AWS.[167] In any event, discussions on MHC are heavily reliant on where the criticality lies in the functions of weapon systems. Many States suggest that the meaningful human control should be on the AWS' critical functions.[168] Another approach has also been defining MHC in a flexible way to allow for determination of functions that are critical for each weapon system, considering their peculiarities.[169] In any case, the

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[161] UK Government'Killer Robots: UK Government Policy on Fully Autonomous Weapons' (*Article 36*, April 2013) <https://article36.org/wp-content/uploads/2013/04/Policy_Paper1.pdf> accessed 28 August 2021.

[162] Nette Goussac (n 131).

[163] Eric Talbot Jensen, 'The (Erroneous) Requirement for Human Judgment (and Error) in the Law of Armed Conflict' (2021) 96 International Law Studies 26, 55.

[164] ICRC, *Artificial Intelligence and Machine Learning in Armed Conflict: A Human-Centred Approach* (ICRC 2019) 7, 8.

[165] Tim McFarland, 'Autonomous Weapons and Human Control' (*ICRC,* 18 July 2018)<https://blogs.icrc.org/law-and-policy/2018/07/18/autonomous-weapons-and-human-control/>accessed 31 October 2021: *'[…]exercising meaningful human control means employing whatever measures are necessary, whether human or technical, to ensure that an operation involving an AWS is completed in accordance with a commander's intent and with all applicable legal, ethical and other constraints'.*

[166] Jensen (n 163) 55.

[167] ibid 56.

[168] Statement of Austria, 'Statement in Group of Governmental Experts on Lethal Autonomous Weapon Systems: 'General Exchange of views'' (9 April 2018) <*https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/9April_Austria.pdf*> accessed 31 October 2021: MHC focus should be on *'[…] level of autonomy or human involvement in critical functions […]'*; Statement of Germany, 'Intervention of the Germany on Agenda Item: 'Further Consideration of the Human Element in the use of Lethal Force' (28 August 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/28August_Germany.pdf> accessed 31 October 2021: solution to the accountability problemrelies on the fact that '*[…] humans retain sufficient control over the critical functions […]*'; Statement of Poland, 'Statement of the Delegation of Poland in 2nd GGE on LAWS' (11 April 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/11April_Poland.pdf> accessed 31 October 2021: *'[…]human control over the critical functions of weapon systems need to be retained […]*'.

[169] Statement of United States, 'U.S. Delegation Statement on Human-Machine Interaction at the Meeting of the Group of Governmental Experts of the High Contracting Parties to the CCW on Lethal Autonomous Weapons Systems' (28 August 2018) <https://geneva.usmission.gov/2018/08/28/u-s-delegation-statement-on-human-machine-interaction/> accessed 31 October 2021: *' […]Because advances in autonomous technologies could support both military and humanitarian interests, the United States believes that we need to be very careful in addressing issues of emerging technologies. We must not stigmatize new technologies nor seek to set new international standards. Instead, States should ensure the responsible use of emerging technologies in military operations by implementing holistic, proactive review processes that are guided by the fundamental principles of the law of war […]'.*

understanding of MHC has a great impact on the realization of advantages[170] and disadvantages of AWS in the battlefield. Therefore, it can be concluded that a comprehensive analysis on the concept of critical functions will also be crucially beneficial for the debate on MHC.

To properly analyse the concept of critical functions, two sets of questions must be raised. What are the functions of a weapon system? Which of them are critical and why? First and foremost, it must be clarified that this chapter will not portray a complete picture of all the technical functions of a weapon system since this would vary from one weapon to another and not be of great use. Instead, common functions of weapon systems will be scrutinized.

As explained above, functions of a weapon system are 'AIised' and develop autonomy as a result. Stockholm International Peace Institute (SIPRI) developed a dataset through a study of 381 weapon systems with some autonomy in some of their functions[171] and grouped these functions as: (1) 'Mobility' functions; (2) Functions related to 'health management'; (3) 'Targeting' functions'; (4) 'Intelligence' functions; and (5) 'Interoperability' functions'.[172] These groups are sufficiently inclusive of contemplating on the functions of a weapon system and their criticality as they are not constrained to functions of targeting and attacking. For this reason, this chapter will be based on the groupings of functions in the SIPRI report prepared by Vincent Boulanin and Maaike Verbruggen.

i. 'Mobility' functions

Main mobility functions include homing and follow-me functions; navigation and functions related to take off-and landing.[173] Homing is the function of following a specified target and follow me is following another system or soldier.[174] Navigation is system's function to position itself and plan/follow a route. [175] Take-off and landing are the aircraft's operation of leaving the ground and returning to it.

Autonomy in these functions exists to various extents.[176] Nevertheless, despite forming a critical part of an AWS' operation, autonomy in these functions cannot be deemed critical. They may be important in terms of the functionality of the AWS, but if there were to be an IHL violation for the reasons explained above, it would not be because mobility functions enjoy autonomy. Ergo, they do not raise the substantial likelihood of incompliance with IHL They cannot play a part in the interaction between the weapon system and the targets, nor this interaction is dependent on it. They only precede this interaction and failure in mobility functions is the failure of the use of the system as a whole.

ii. Functions related to 'health management'

Functions performed for health management can be grouped mainly as functions of 'health-monitoring'[177] of the system's own health, 'self-recharging/-refuelling' of the system once it runs out of the required operational energy,[178] 'fault detection and

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[170] Rebecca Crootof, 'A Meaningful Floor for 'Meaningful Human Control' (2015) 30 Temple International & Comparative Law Journal 53, 62.
[171] Boulanin and Verbruggen (n 10) 19.
[172] ibid 21.
[173] Boulanin and Verbruggen (n 10) 23.
[174] ibid.
[175] ibid.
[176] ibid.
[177] ibid.
[178] ibid 35.

diagnosis',[179] and 'self-repair'.[180] Much as it can be stated that these functions are critical for the overall functioning of the system, they are not as critical in the interaction between the weapon system and the targets considering they are independent of whether or not that interaction takes place.

iii. 'Targeting' functions

Targeting is, first and foremost, a military term the content of which has been intricately described and regulated by military standards. In IHL terms, it can be thought of as 'attack'.[181] However, it would be misleading since targeting is more of a process than a single step. It can be roughly defined as the deliberate application of 'means (weapons) of warfare to affect addressees (people or objects) using a variety of methods (tactics) that create effects contributing to designated goals'.[182] It acts as a 'bridge between the ends and means of warfare'.[183] From this perspective, it truly seems to be the interaction itself between the weapon system and the targets, let alone playing a part of it, which is why there seems to be much less discussion on the critical nature of targeting functions although the debate on the legality of autonomy in these functions is still ongoing.

iv. 'Intelligence' functions

One part of 'intelligence' functions is related to system's ability to collect and process data and it is comprised of functions related to the system's ability to handle information.[184] This includes, but not limited to, 'detection of explosive devices' for destruction purposes,[185] detection of intrusion by unauthorized living beings into a predefined area,[186] detection and location of the gunfire or other weapon fire in terms of direction and range,[187] as well as 'detection of objects of interest' in intelligence, surveillance and reconnaissance (ISR) missions.[188]

Another part of 'intelligence' functions is related to system's ability to generate data.[189] Examples include 'map generation' where the systems map the environment with certain details,[190] 'threat assessment' where the systems asses the risk potential of certain objects based on predefined criteria[191], and use of 'big data analytics' to find correlations and recognize patterns.[192]

To the extent that these functions form an integral part of the interaction between the weapon system and the targets, they will be critical, and assessment must be made for each function *in casu.* For instance, the detection of explosive devices forms an important part of the use of the weapon system to destroy explosives such as landmines, sea mines or

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179 ibid.
180 ibid.
181 Michael N Schmitt and Eric Widmar ,'The Law of Targeting' in Paul AL. Ducheine, Michael N Schmitt and Frans PB Osinga (eds) *Targeting: The Challenges of Modern Warfare* (Springer 2016) 121, 123.
182 Paul AL Ducheine, Michael N Schmitt and Frans PB. Osinga, 'Introduction' in Paul AL Ducheine, Michael N Schmitt and Frans PB. Osinga (eds) *Targeting: The Challenges of Modern Warfare* (Springer 2016) 2.
183 ibid.
184 Boulanin and Verbruggen (n 10) 27.
185 ibid.
186 ibid 28.
187 ibid.
188 ibid.
189 ibid 29.
190 ibid.
191 ibid.
192 ibid.

improvised explosive devices,[193] in the sense that engagement with the target depends on the information gathered by the system. Similarly, information in threat assessment, can sometimes form the bulk of target development.[194] Therefore, functions related to intelligence must be handled with care when determining their criticality as they might form an integral part to the engagement with targets.

v. 'Interoperability' functions

Interoperability is the ability of the system 'to operate in conjunction'[195] with other systems[196] or humans.[197]

Interoperability between systems may vary from rather primitive forms of exchange of data to 'collaborative autonomy' where systems work in coordination to achieve one common goal.[198] The latter may be collaboration for coordination in mobility[199] and in ISR operations,[200] for surveillance and protection of a predefined area[201] and carrying out 'distributed attacks'.[202] It must be noted that collaborative autonomy in these functions are more in the research phase.[203]

Interoperability between systems is likely to be critical in the interaction between the weapon system and the targets in the perimeters for which independent function the cooperation will occur. For instance, carrying out distributed attacks is definitely a critical function in the interaction between the weapon system and the targets, but this is due to the functions related to attack not interoperability. From this perspective, interoperability functions do not seem to have critical value independent from other functions in a weapon system. However, with the increasing use of randomized algorithms and the advent of machine learning, systems' cooperation to achieve a common goal may involve decision-making processes that humans are either incapable of understanding or worse; of intervening. After all, randomized algorithms and machine learning are ways to make systems solve problems and solutions may sometimes exclude humans. Therefore, although it is premature to suggest that interoperability functions are critical at this stage, future versions might have consequences on decision-making processes that will naturally have an impact on the interaction between the weapon system and the targets, thus, play a critical role.

As to interoperability between systems and humans, despite lacking real-world applications due to a primary problem of human-machine communication, it can be thought as a model where humans cooperate with the systems as if they sense the world with human-like abilities such as speech recognition and demand for assistance over actions.[204] This would also depend on the functions assumed by the system and the sophistication of the decision-making capability of the system to affect the role of humans in the cooperation.

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193 ibid.
194 ibid.
195 ibid.
196 ibid 30.
197 ibid 33.
198 ibid 30.
199 ibid.
200 ibid.
201 ibid.
202 Boulanin and Verbruggen (n 10) 31.
203 ibid 30.
204 ibid 34.

D. A brief case study of critical functions: Turkish Autonomous Weapon Systems in Libya 'STM-KARGU'

One of the most novel examples in the discussion of AWS is brought about by the recent impetus in the 'dronization' of the Turkish National Defence Industry. that led to the emergence of the loitering munition system STM-KARGU,[205] by STM (*Savunma Teknolojileri Ticaret AŞ*), a state-owned company.

KARGU has been used actively in Libya in Turkish support for the Libyan Government of National Support against Hafter, and it has recently been cited by the panel of experts in their report to the United Nations Security Council as the first Lethal Autonomous Weapon System having launched a fully autonomous attack in Libya.[206] It is worth analysing whether this report was an early bird.

In the following two sections, STM-Kargu will be briefly introduced, and then functions of it will be scrutinized according to the SIPRI groupings of functions of weapon systems with somewhat autonomy which were: 1) 'Mobility' functions ; (2) Functions related to 'health management' ; (3) 'Targeting' functions' ; (4) 'Intelligence' functions; and (5) 'Interoperability' functions'.[207] Finally, the autonomy in its critical functions will be evaluated.

i. Overview of STM-Kargu

Kargu, which means 'watchtower' in ancient Turkish, is defined by STM as a 'Rotary Wing Attack Drone Loitering Munition System'.[208] It became operational in 2020 after its introduction to the Turkish Armed Forces.[209] Later, it was deployed and used in Libya in the spring of 2020[210] and disputably in Nagorno-Karabagh in October 2020.[211] Though little is known about their use in Nagorno-Karabagh, in Libya, they became notorious for having performed an autonomous target engagement. [212]

Loitering munitions are unmanned aerial vehicles equipped with an explosive warhead.[213] They are also known as suicide drones since the majority of them are not recoverable after they detonate. [214] They *loiter* for an extended period in a conflict zone to find and strike the target based on the ground[215] through high-resolution cameras,[216] then they hit their target with the sort of explosive with which they are equipped.

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[205] STM, 'Kargu: Rotary Wing Attack UAV' (*STM*) <https://www.stm.com.tr/en/KARGU-autonomous-tactical-multi-rotor-attack-uav> accessed 28 October 2021.

[206] UNSC 2021 (n 2) para 63.

[207] Boulanin and Verbruggen (n 10) 21.

[208] STM,'Tactical Mini UAV Systems' (*STM*) 2 <https://www.stm.com.tr/uploads/docs/1628858259_tacticalminiuavsystems.pdf> accessed 29 October 2021.

[209] Emre Eser, 'İlk Drone Gücü' (*Hürriyet,* 12 September 2019) <https://www.hurriyet.com.tr/ekonomi/ilk-drone-gucu-2020de-41328505> accessed 29 October 2021.

[210] UNSC 2021 (n 2) para 63.

[211] 'İlk kez Libya'da kullanılmıştı! Bu kez Azerbaycan'da görüntülendi' (*CNN Türk,* 28 October 2020) <https://www.cnnturk.com/dunya/ilk-kez-libyada-kullanilmisti-bu-kez-azerbaycanda-goruntulendi> accessed 29 October 2021.

[212] UNSC 2021 (n 2) para 63.

[213] Dan Gettinger andArthur H Michel, 'Loitering Munitions in Focus' (*Center for the Study of Drones* 2017), 1 https://dronecenter.bard.edu/loitering-munitions-in-focus/ accessed 20 March 2022.

[214] ibid.

[215] Andrea Gilli andMauro Gilli, 'The Diffusion of Drone Warfare? Industrial, Organizational, and Infrastructural Constraints' (2016) 25(1) Security Studies 50, 67.

[216] Gettinger and Michel (n 213).

ii. Technical aspects of STM-Kargu and autonomy in its functions

To begin with the technical features of STM-Kargu, it consists of an 'Attack Drone Platform' and the 'Mobile Ground Control Station'.[217] It may be equipped with multiple warheads (such as anti-personnel or armour piercing)[218] limited to a payload of up to 1,3 kg.[219] It can loiter for 30 minutes before aborting the mission and returning home;[220] thus, it is recoverable. At the Mobile Ground Control Station, it is operable by single personnel.[221] Capable of detecting and recognizing targets in and beyond sight through its electro-optical and infrared cameras, STM-Kargu allows the personnel to conduct reconnaissance, surveillance, intelligence missions, and carry out precision strikes by day and night.[222]

STM-Kargu's mobility functions are stated to be fully autonomous.[223] No data of critical importance may be discussed concerning its health management functions. STM-Kargu uses its electro-optical and infrared cameras to gather information. Still, there is no available data to assume autonomy in intelligence functions since nothing suggests that it processes or generates data based on this piece of information.

STM-Kargu has interoperability functions as indicated by its reported full swarming capabilities[224] and operation in a swarm of 30 drones.[225] However, in addition to the current stage of technology in general and lack of evidence on autonomous machine-machine interaction of STM-Kargu in particular, the small number of drones and the short loitering time denotes the unlikelihood of autonomy in STM-Kargu's interoperability functions.

The more attention-grabbing part is STM-Kargu's targeting functions. STM-Kargu can be operated by single personnel, but STM designed STM-Kargu with an Automatic Target Recognition System[226] and states that it has automatic target detection and tracking capabilities in its video advertisement.[227] Ergo, 'target recognition' may be carried out autonomously. However, it is stated in exact words on the company's website that 'Precision strike mission is fully performed by the operator, in line with the Man-in-the-Loop principle'.[228] The CEO of STM indicated that STM-Kargu could only strike once the operator confirms and commands it, and the operator is able to abort the mission at any

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[217] STM (n 208).

[218] STM, 'KARGU – Rotary Wing Attack Drone Loitering Munition System' (*STM*) <https://www.youtube.com/watch?v=auRlh-f2wwQ> accessed 29 October 2021.

[219] STM (n 208) 3.

[220] ibid.

[221] STM, 'KARGU - Taşınabilir Döner Kanatlı Vurucu İHA Sistemi' (*STM*) <https://www.stm.com.tr/tr/cozumlerimiz/otonom-sistemler/KARGU> accessed 29 October 2021.

[222] ibid.

[223] STM (n 208).

[224] STM, 'KARGU - Autonomous Tactical Multi-Rotor Attack UAV' (*STM*, 2018) <https://www.youtube.com/watch?v=Oqv9yaPLhEk&t=1s>accessed 29 October 2021; Goksel Yildirim, 'Anadolu Agency tours state-of-the-art Turkish UAV maker' (*Anadolu Agency*, 15 June 2020) <https://www.aa.com.tr/en/economy/anadolu-agency-tours-state-of-the-art-turkish-uav-maker/1877808> accessed 29 October 2021; Diane Francis, 'Turkey's Terminator' (*The Mackenzie Institute*, 25 June 2021) https://mackenzieinstitute.com/2021/06/turkeys-terminator/accessed 29 October 2021; David Hambling, 'Turkish Military To Receive 500 Swarming Kamikaze Drones' (*Forbes*, 17 June 2020) <https://www.forbes.com/sites/davidhambling/2020/06/17/turkish-military-to-receive-500-swarming-kamikaze-drones/?sh=488c8fda251a> accessed 29 October 2021.

[225] Frank Slijper, 'Slippery Slope: The Arms Industry And Increasingly Autonomous Weapons' (*Pax for Peace* 2019), 9 https://paxforpeace.nl/media/download/pax-report-slippery-slope.pdf accessed 20 March 2022; Emre Eser, 'İlk Drone Gücü' (*Hürriyet*, 12 September 2019) <https://www.hurriyet.com.tr/ekonomi/ilk-drone-gucu-2020de-41328505> accessed 29 October 2021.

[226] STM (n 208)3.

[227] STM (n 218).

[228] STM (n 208) 3.

time.[229] Thus, one might consider that 'target engagement' is not carried out autonomously. Nevertheless, another video advertisement by STM indicates that it may be used both in autonomous and manual modes.[230] According to the video, it has the advantage of an autonomous and precise hit with minimum collateral damage as well as an ability to autonomously fire and forget through the entry of target coordinates.[231] Consequently, it is evident that both the 'target recognition' and 'target engagement' *may* be carried out autonomously.

Following the conclusion above, critical functions are first and foremost functions related to some of the targeting stages of the targeting cycle, including the 'target development' and 'mission planning and execution' stages. Whether or not STM-Kargu has been used in an autonomous mode in Libya is, as defended firmly above, insignificant to the debate on whether it is autonomous. Based on the information on its capabilities in various stages of the targeting cycle, STM-Kargu is an autonomous weapon system with autonomy in its functions related to 'target recognition' and 'target engagement'. The *use* of STM-Kargu in the autonomous mode and to what extent this is illegal are two independent and ongoing issues. The latter will fall outside the scope of this article on defining critical functions of AWS.

E. Concluding definition of AWS and current weapon systems

A legal definition in IHL of a weapon system has the primary purpose of defining the scope of application of legal rules. From the perspective of IHL, what is important is the interaction between the weapon system and the targets that creates the context of questions arising from compliance with IHL. For AWS, autonomy in critical functions is what creates this context and triggers a substantial likelihood of incompliance with IHL. Hence, AWS are weapon systems with autonomy in their critical functions that increase the likelihood of incompliance with IHL.

Autonomy is the ability to operate independently from human control. Critical functions are functions related to targeting which are functions related to targeting and intelligence functions, on occasions that they form an integral part to the engagement with targets and thus, which must be analysed *in casu.* Interoperability is a premature technology to think about autonomy independent of other functions assumed by the system, yet, to the extent that the ultimate technology affects the involvement of humans in the cooperation, functions related to interoperability will also be critical.

This definition is inclusive of some of the current weapon systems besides the above-mentioned example STM-Kargu. The US made air-defence system of the navy ships, the Phalanx, is programmed to engage targets with a speed within a predefined velocity range it detects through its radar system then 'the target threat software makes the decision to engage or not and the priority of engagement'.[232] Although it is intended to operate under human supervision, the interaction between the Phalanx and the targets can be brought about in an autonomous way. The Phalanx has autonomy in its critical functions. The Israeli-made active protection system, Trophy Active Protection System has

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[229] Kamer Kurunç, 'BM Raporundaki STM-KARGU-2 iddiaları yetkililerce yalanlandı' (*Savunma Sanayi ST*, 21 June 2021) <https://www.savunmasanayist.com/bm-raporu-KARGU-2-iddialari-yalanlandi/> accessed 29 October 2021.

[230] STM (n 224)

[231] ibid.

[232] Robert H Stoner, 'History and Technology, R2D2 with Attitude: The Story of the Phalanx Close-In Weapons' (*Navweaps*, 2009) <http://www.navweaps.com/index_tech/tech-103.php> accessed 29 October 2021.

a 'man-out-of-the-loop' reaction, requiring an autonomous shooting robot'. [233] These systems are designed to protect 'armoured vehicles against incoming anti-tank missiles or rocket' and they detect, identify, track, and select targets (the incoming tank missiles or rockets) in complete autonomy. By nature, they operate in a speed that exceeds human capabilities[234] to provide better protection, so using them with human supervision is renders the use of the system devoid of utility. Accordingly, it can be safely concluded that these systems also have autonomy in their critical functions and thus, qualify as AWS.

Serious efforts have been made to divert the definition of AWS in order to exclude from the debate the current weapon systems in the fear that a ban on these weapon systems would discourage States to regulate AWS effectively. Many of these systems are used in 'highly structured and predictable environments' 'with very low risk of civilian harm'; they cannot 'dynamically initiate a new targeting goal'; they are under constant supervision by humans; only used in 'defensive' modes and not in 'offensive' modes; designed as 'anti-material' systems as opposed to 'anti-personnel' systems, thus incapable of engaging with 'human or human-inhabited targets'.[235]

Most of these diverting distinctions are about the legality of the use of the AWS than about its definition. Some of these distinctions are about whether the effects of the weapon can be controlled to comply with the indiscriminate weapons rule, such as operating in structured environments with low risks of predictability issues. Some are about a more advanced AWS technology, such as the ability to change goals, and are of limited use considering from the perspective of IHL functions should matter more than the sophistication of the machine. More importantly, some distinctions that add the most confusion are about the use of AWS in a legal way to ensure compliance with IHL and not about the definition of AWS. Take the distinction between anti-material and anti-personnel weapon systems, which is a common way to, so to say, 'excuse' the Phalanx system from the category of an AWS since it is deployed in naval areas with almost no civilian presence. Anti-personnel mines are banned by the 1997 Anti-Personnel Mine Convention whereas anti-vehicle land mines are not. This does not change the fact that anti-vehicle land mines also qualify as 'mines'. A parallel logic can be found in the use of explosive weapons in populated areas. These have been considered illegal due to their indiscriminatory effect if used in populated areas where there are 'concentrations of civilians' be it a city, a town, a village; be it permanent or temporary, such as camps for internally displaced persons (IDPs)'.[236] In areas that are not as populated, their legality does not raise similar concerns. Once again, a consistent way of using of a weapons system, in this case explosive weapons in populated areas, does not change its definition , but does affects its legality.

Limiting the definition excludes some current weapon systems from the overall discussion and undermines the discussions on MHC and other means of improving the legal use of AWS. It also diverts the attention on the precautions and improvements of the

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[233] Rafael, 'Trophy Family: Active Protection Suite for Armored Vehicles' (*Rafael*), 2 <https://www.rafael.co.il/wp-content/uploads/2019/03/Trophy-Family-brochure.pdf> accessed 20 March 2022.

[234] Boulanin and Verbruggen (n 10) 43.

[235] Daniele Amoroso and others,*Autonomy in Weapon Systems: The Military Application of Artificial Intelligence as a Litmus Test for Germany's New Foreign and Security Policy* (Heinrich Böll Foundation 2018) 21.

[236] ICRC, *Explosive Weapons in Populated Areas Humanitarian, Legal, Technical and Military Aspects* (ICRC 2015) 3.

unexpected outcomes of the use of current AWS,[237] such as the misidentification of the Phalanx system of the US warships and opening of a friendly fire.[238]

Ergo, it must be reminded with caution that defining critical functions and developing an enhanced definition of AWS is not an exercise of determining their legality. There are so many weapon systems with autonomous functions that are not being used in the autonomous mode, which does not influence their characterization of having autonomous functions but rather their likelihood of complying with IHL. Under IHL, the definition of the weapons and weapon systems is distinct from the limitations on their use to comply with IHL. Mixing these two have damaging effects on the assessment of the legality of the weapon systems.

V. Conclusion

Autonomy as a technical phenomenon indicates a performance of a task independent of human control. It is the end result of the advances in Artificial Intelligence owing to Machine Learning. This is also what gives autonomy to certain functions of an Autonomous Weapons System.

Autonomy in weapon systems has been explained through the interaction between humans and the weapon system, the complexity of the weapon system, and the functions which enjoy autonomy. The latter is the most relevant for the application of IHL, but it requires further analysis of what the critical functions are that make a weapon system autonomous. Based on a useful SIPRI Report, the functions of a weapon system can be grouped as: (1) Mobility functions; (2) Functions related to health management; (3) Targeting' functions; (4) Intelligence functions; and (5) Interoperability functions. The critical functions are those which trigger substantial likelihood of incompliance with International Humanitarian Law. Whether or not a weapon system is being used in the autonomous mode or does not violate IHL is irrelevant in determining the autonomy in the weapon system. Critical functions are functions related to targeting as well as intelligence functions, which must be analysed *in casu* for that they may also be critical to the extent that they form an integral part to the engagement with targets. To the extent that the ultimate technology affects the involvement of humans in cooperation, functions related to interoperability will also be critical. These are all functions that contribute considerably to the engagement of the weapon system with the target, which creates the context in which questions of IHL arise.

The Turkish weapon system STM-Kargu is a weapon system with an autonomous mode. It has autonomy in its critical function of target development and mission planning and execution. In that, it is an Autonomous Weapons System independent of the question of whether it was used in the autonomous mode, which is disputed, but this dispute is negligible.

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[237] Jenks (n 59) 27.

[238] Bernard Rostker, 'Friendly Fire Incidents' (*GulfLINK Home*, 13 December 2000) <https://gulflink.health.mil/du_ii/du_ii_tabh.htm> accessed 28 August 2021.

Cyberspace in a State of Flux: Regulating cyberspace through International Law

Maxron Holder*
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Abstract

Cyberspace continues to become increasingly integral to our way of life. It has brought with it many benefits but has recently become a domain used for misdeed, as was evident from the recent WannaCry ransomware, the Stuxnet virus issue, and the much-publicized US 2016 Election hacking. These incidents have caused the issue of cyberspace to be on the international agenda, but there is a lack of consensus among the various nations on how cyberspace should be regulated. The article analyzes the legal status of cyberspace by first embarking on a discussion on what is cyberspace, followed by a discussion on recent notable cyberattacks. It is against this backdrop that: (1) the legal status of cyberspace in domestic law is analyzed; (2) the application of the existing rules of international law to cyberspace are considered; (3) the problems with the Budapest Convention on Cybercrime are discussed; and (4) proposals for a new Convention on cybersecurity at the UN level in light of the Tallinn Manual, and the Budapest Convention of Cybercrime are made.

I. Introduction

Defined as 'the notional environment in which communication over computer networks occurs',[1] cyberspace has, in recent decades, become woven into the fabric of societies around the world,[2] becoming the most highly demanded service in contemporary times. It is nowadays considered a global norm, offering its users because of its open and global nature great advantages in political, economic, social and information domains. At the same time, however, cyberspace can be the source of new and unpredictable threats non-existent in other environments, thus necessitating the need for effective regulations and enforceable laws.

In this article, I critically analyse the current legal state of cyberspace and have advocated for a treaty to regulate cyberspace. The article embarks on a discussion on what is cyberspace, followed by a discussion on recent notable cyberattacks. It is against this backdrop that: (1) the legal status of cyberspace in domestic law is analyzed; (2) the application of the existing rules of international law to cyberspace are considered; (3) the problems with the Budapest Convention on Cybercrime are discussed; (4) and proposals for a new Convention on cybersecurity at the United Nations (UN) level in light of the Tallinn Manual, and the Budapest Convention of Cybercrime are made.

* LL. B(Hons.) UWI, LEC (Candidate) Hugh Wooding Law School, holdermaxron@gmail.com.

1 *Oxford Dictionary of English* (3rd edn, Oxford University Press 2010).

2 Barrie Sander, 'Cyber Insecurity and the Politics of International Law' (2017) 6(5) European Society of International Law Reflections 1, pg.1.

II. What is Cyberspace?

According to Clough, '[t]echnology brings you great gifts with one hand, and it stabs you in the back with the other'.[3] Cyberspace is often presented as a purely non-legal domain.[4] It is ubiquitous and borderless thus no definition embraces all of its possibilities. A comprehensive definition which aims to encompass its uniqueness is coined by Kuel. Kuel believes that cyberspace is a global domain within the information environment. Besides, Kuel argues that the 'distinctive and unique character is framed by the use of electronics and the electromagnetic spectrum to create, store, modify, exchange, and exploit information-communication via interdependent and interconnected networks using information-communication technologies'.[5] The definition contains a threefold layers division: (1) physical layer which consists of computers, cable, communications infrastructure; (2) a second layer which consists of software programs and logics; and (3) a third layer which consists of data packets and electronics,[6] showing that cyberspace, although a virtual domain is braced by physical objects which connect the irreducible part of cyberspace to the physical world and interaction, is independent of constraints whether space or time.

It is misconceived that cyberspace is the internet, but in reality, cyberspace goes far beyond the internet.[7] However, this does not mean that they are acquaintances, as the internet comprises the main component of cyberspace. The internet is one of the significant cyberspace channels[8] as internet network providers exchange their traffic at physical sites located across the globe by cables beneath the earth and oceans, making the man-made domain of cyberspace a reality. The internet operates on a communications protocol which breaks messages into small blocks, or packets, fired across a network through the fastest route available at a particular time to reach their final destination where the messages are then reassembled.[9] While the usefulness of the internet and cyberspace is universally acknowledged, its misuse in the form of cybercrimes and espionage cannot be ignored. Today, governments and private corporations conduct most of their functions and activities in cyberspace, and the increasing reliance on cyberspace for daily living is multiplying by the minute.[10] Thus, safety, protection, and resilience in the cyberworld are matters of prominence.

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3 Jonathan Clough, *Principles of Cybercrime* (2nd edn, Cambridge University Press 2015) 3.

4 Nicholas Tsagourias, 'The legal status of Cyberspace' in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Edgar Publishing 2015) 13.

5 DT Keul, 'From Cyberspace to Cyberpower: Defining the Problem' in Franklin D Kramer, Stuart H Starr and Larry K Wentz,*Cyberpower and National Security* (National Defense Press 2009) 28.

6 Lior Tobanksy, 'Basic concepts in cyber warfare' (2011) 3 Military and Strategic Affairs 75, 77-78.

7 Peter W Singer and Allan Friedman, *Cybersecurity and Cyberwar: What Everyone Needs to Know* (Oxford University Press 2014) 3.

8 Kriangsak Kittichaisaree, *Public International Law of Cyberspace* (1st edn, Springer International Publishing 2017) 3.

9 ibid

10 ibid.

III. The Spectre of Cyber Aggression, Recent Cyberattacks and the Call for International Regulation

The growing availability of internet access and decreasing access costs have resulted in essentially anonymous global access, which increasingly facilitates the availability, assembly and use of cyber weapons on a global scale.[11] Nowadays, hackers can steal money through online bank accounts, they can hack university networks, modern cars can now be hacked by intercepting their computer-controlled navigation systems and much more because the possibilities of cyberspace are endless.[12] Generally, cyberattacks are separated into three major categories: (1) automated malicious software delivered over the internet which utilizes a computer system to infect a computer system; (2) denial-of-service attacks which overwhelms a computer system until it cannot function properly; and (3) unauthorized remote intrusions into computer systems which involves accessing a computer system without permission.[13] Most attacks taking attention in the News today fall within one of these distinct categories, which sometimes overlap.[14]

A notable example of cyberattacks falling within a category was the Stuxnet virus used to disrupt Iran's nuclear facilities in 2010. The Stuxnet virus uncovered in 2010 was widely reported to have been developed by the United States (US) and Israeli intelligence. It penetrated the rogue nuclear program of Iran, taking control and sabotaging parts of its enrichment processes by speeding up its centrifuges. Up to 1,000 centrifuges out of 5,000 were eventually damaged by the virus, setting back the nuclear program.[15]

The surveillance activities of the US National Security Agency (NSA) alleged in the disclosures of Edward Snowden in 2013[16] is also of critical importance with regards to the right to privacy. BBC reported that the scandal broke in early June 2013 when the Guardian newspaper reported that the NSA was collecting the telephone records of tens of millions of Americans.[17] The paper published the secret court order directing telecommunications company Verizon to hand over all its telephone data to the NSA on an 'ongoing daily basis'.[18] That report was followed by revelations in both the Washington Post and Guardian that the NSA tapped directly into the servers of nine internet firms, including Facebook, Google, Microsoft, and Yahoo, to track online communication in a surveillance programme known as Prism.[19]

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[11] William M Stahl, 'The Uncharted Waters of Cyberspace: Applying the Principles of International Maritime Law to the Problem of Cybersecurity' (2011) 40(1) Georgia Journal of International and Comparative Law 247, 254.

[12] Kittichaisaree (n 8) 265.

[13] Matthew J Sklerov, 'Solving the Dilemma of State Responses to Cyberattacks: A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent' (2009) 201(1) Military Law Review 1, 14.

[14] ibid.

[15] Stuart Winer, '"Dutch mole" planted Stuxnet virus in Iran nuclear site on behalf of CIA, Mossad' (*Times of Israel*, 19 October 2019) <https://www.timesofisrael.com/dutch-mole-planted-infamous-stuxnet-virus-in-iran-nuclear-site> accessed 1 October 2019.

[16] Sander (n 2) 2.

[17] ibid.

[18] ibid.

[19] BBC, 'Edward Snowden: Leaks that exposed US spy programme' (*BBC News*, 17 January 2014) <https://www.bbc.com/news/world-us-canada-23123964> accessed 1 October 2019.

The WannaCry ransomware that attacked computers across the world in 2017 has been subject to much international conversation.[20] The WannaCry incident involved hackers exploiting malicious software stolen from the NSA. It executed damaging cyberattacks that hit dozens of countries worldwide. One website reported that it forced Britain's public health system to send patients away, froze computers at Russia's Interior Ministry, and wreaked havoc on tens of thousands of computers elsewhere. According to Sanger:

> [T]he attacks amounted to an audacious global blackmail attempt spread by the internet and underscored the vulnerabilities of the digital age. The malicious software, which was transmitted by email, locked British hospitals out of their computer systems and demanded ransom before users could be let back in — with a threat that data would be destroyed if the demands were not met.[21]

The Guardian reported that 'in October 2016, the United States accused Russia of hacking political organizations involved in the US elections and leaking pilfered information to influence the outcome'.[22] According to US intelligence officials, Russian hackers made repeated attempts before the 2016 elections to get into major US institutions, including the White House and the State Department. According to one news article online, the tactics were simple: send out volleys of phishing emails and hope that someone clicked.[23] One of those who did was John Podesta, the chairman of Hillary Clinton's campaign. A New York Times investigation revealed that a Podesta aide spotted the dodgy email and forwarded it to a technician. This allowed Moscow to access about 60,000 of Podesta's emails. The hackers also breached the Democratic National Committee (DNC). The emails were passed to the WikiLeaks website, which published them before the US election. The furor dominated the news bulletins and damaged presidential candidate Hilary Clinton's campaign. Security experts believe that two Kremlin-connected groups were behind the hacks: one from the FSB spy agency; the other from Russian military intelligence.[24] This unearths the interference of a government into the domestic affairs of another country and realistically, it is impossible to hold such a government accountable under the regular domestic provisions given the principle of sovereignty of nations which is of prominence in international law.[25]

In 2014, North Korea was held responsible for hacking Sony in an attempt to prevent the release of a film that was baleful to the North Korean leader Kim Jong Un.[26] In late November 2014, Sony Pictures Entertainment was hacked by a group calling itself the Guardians of Peace. The hackers, who are widely believed to be working in at least some capacity with North Korea,

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[20] Nicole Perlroth and David E Sanger, 'Hackers Hit Dozens of Countries Exploiting Stolen NSA Tool' (*The New York Times*, 12 March 2017) <https://www.nytimes.com/2017/05/12/world/europe/uk-national-health-service-cyberattack.html> accessed 20 October 2019.

[21] Perlroth and Sanger (n 20).

[22] Luke Harding ,'What we know about Russia's interference in the US election' (*The Guardian*, 16 December 2016) <https://www.theguardian.com/us-news/2016/dec/16/qa-russian-hackers-vladimir-putin-donald-trump-us-presidential-election> accessed 14 October 2019.

[23] ibid.

[24] ibid.

[25] David Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (7thedn, Sweet & Maxwell 2015).

[26] Emily VanDerWerff and Timothy B Lee, 'The 2014 Sony hacks, explained' (*Vox,* 3 June 2015) <https://www.vox.com/2015/1/20/18089084/sony-hack-north-korea> accessed 23 October 2019.

stole huge amounts of information off of Sony's network. They leaked the information to journalists, who wrote about demeaning things Sony employees had said to each other. Then the hackers, using one of their near daily communiqués via the website Pastebin, threatened to commit acts of terrorism against movie theaters, demanding that Sony cancel the planned release of 'The Interview', a comedy about two Americans who assassinate North Korean leader Kim Jong Un.[27]

The presence of hackers is growing by the day as more and more people are acquiring the relevant skills to access or manipulate computer systems to their advantage.[28] In 2014, Microsoft Taiwan Corp. unveiled research findings, including evidence that Asia has become the frontline battlefield for computer hackers and cyber attackers, striking 400 million computers around the world each year.[29] Every second, 12 computers are hacked or hit by computer viruses, the company said during a media briefing in which it gave details of seven global digital crime trends.[30] An October 2015 study by the Ponemon Institute determined that the average annual cost of cybercrime in the US is $15.42 million per the US company, which was an increase from $12.69 million only a year ago.[31] As the threat of cybersecurity continues to increase, and costs associated with that threat continue to rise, businesses are now forced to find ways to mitigate these damages.[32] Thus, the need for proper cyberspace regulations is of crucial importance now more than ever.

The above cyberactivities unearth a myriad of instances where there have been cyberattacks, but it is worth noting that they all span across international borders. There are few reported cases of cyberactivities within the domestic domain for which domestic laws may be conveniently applied. However, the source of these activities is usually unknown, and investigations carried out by domestic cyber professionals are sometimes inconclusive as skilled attackers can lead investigations into trails to which they desire.[33] The application of domestic laws in the above situations must be based on the international corporation, and with the growing reluctance of States to assist in international investigations in another State, these regulations would not reach their full potential.[34] Thus, the use of domestic statutory provisions, while of crucial importance in regulating internal cyberactivities is now under scrutiny to meet the new demands of cyberspace which have proven to be a burdensome chore.

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27 VanDerWerff and Lee (n 27).

28 Scott J Shackelford and others, 'Toward a Global Cybersecurity Standard of Care: Exploring the Implications of the 2014 NIST Cybersecurity Framework on Shaping Reasonable National and International Cybersecurity Practices' (2015) 50(1) Texas International Law Journal 305, 308.

29 CNA, 'Asia has become frontline for computer hackers' (*The China Post*, 27 November 2014) <https://chinapost.nownews.com/20141127-64669> accessed 20 October 2019.

30 ibid.

31 Ponemon Institute, *2015 Cost of Cyber Crime Study: United States* (Ponemon Institute 2015). <https://www.ponemon.org/news-updates/blog/security/2015-cost-of-cyber-crime-study-united-states.html> accessed 12 January 2022.

32 Andrew Z R Smith, 'FTC Regulating Cybersecurity Post Wyndham: An International Common Law Comparison on the Impact of Regulation of Cybersecurity' (2017) 45(1) Georgia Journal of International & Comparative Law 377, 378.

33 ibid.

34 ibid.

IV. Can Cyberspace be Regulated Sufficiently Through Domestic Law?

Given the increasing dependence of the world on cyberspace, it was inevitable for legislators of various nations to enact criminal offence to address online behavior.[35] Thus, many countries have implemented cybersecurity legislations.[36] Still, challenges arose in regulating cyberspace at the domestic level. One of the most important challenges is the issue of jurisdiction over offenders who may be located anywhere in the world. Thus, both the internet and computer networks have deeply changed contemporary legal systems. As a network spanning the globe, cyberspace offers criminals multiple refuges that cannot easily be detected. Therefore, the problem with holding a perpetrator liable is finding them. Studies show that the most popular of cybercrimes occur across international boundaries, showing the insufficiency of domestic law to address transnational cybercrimes.[37] The rise of a global computer network is destroying the power of local legislatures to assert control over cyberspace. Cyberspace has no territorial based boundaries. Cyberspace is independent of physical location. Location in these jurisdictions remains vitally important. Thus, efforts to control the flow of information across physical boarders are likely to prove futile. Individual electrons can easily, and without any realistic prospect of detection, enter any foreign territory. Cyberspace has thrown the law into disarray by creating an entirely new phenomenon that needs to become subject to clear international law rules.

Moreover, technology has created new types of offences of the like that have never been seen before. Offences arising from the field of computer crimes now affects traditional rights, such as copyright and privacy. Technology has also obscured the traditional national boundaries as information on the internet tends to be omnipresent. Thus, it has challenged the very notion of law as enforced through palpable sanctions in the nation State. Hacking offers a good example; it can originate anywhere in the world, and it is not hindered despite prevailing criminal laws against its prohibition. This is the traditional way of regulating cyberspace which was through the narrow lenses of domestic law. However, cyberspace has now had an impact on a larger and worldwide scale. Thus, in many countries, cyberspace is at a crossroad and there is no direction for legal practitioners and scholars on this issue.

There is also no cooperation among States on the issue of cyberspace. Where cases arise that have a foreign source, there is a need for States to cooperate on these cross-border investigations for domestic legislation to work. Without the cooperation of other States, wrongdoers cannot be prosecuted thus, making the domestic law futile.

Another problem faced at the domestic level is a lack of infrastructure and professionals to carry out these cyber related investigations.[38] The lack of professional training in the field of technology by law enforcement officials has contributed significantly to the struggle towards cybersecurity nationally, giving the perpetrators the upper hand in the war against cyberattacks.[39] Thus, the provisions are disempowering as they are not met with the relevant enforcement capacity.

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[35] Smith (n 32) 378.

[36] UK's Computer Misuse Act 1990; Australia's Criminal Code 1995, parts 10.7-10.8; Canada's Criminal Code, sections 148, 342, 402-403; United States' Computer Fraud and Abuse Act.

[37] Singer and Friedman (n 7) 69.

[38] Martha Finnemore and Duncan B Hollis, 'Constructing Norms for Global Cybersecurity' (2016) 110(3) The American Journal of International Law 425, 450.

[39] Finnemore and Holli (n 38) 450.

The foregoing has shown that many countries across the globe have a legislation to regulate cyberspace.[40] However, the traditional way of regulating cyberspace through the narrow lenses of domestic law can no longer survive alone. There is a need for a treaty to regulate cyberspace to complement these domestic laws. This would provide cooperation and support with regard to investigating and prosecuting wrongdoers.

V. Can Cyberspace Be Regulated Through Existing Rules of International Law

A. What is International Law and its Relevance to Cyberspace?

The definition formulated by Professor Shearer is that body of law which is composed for its greater part of the principles and rules of conduct which States feel bound to observe, and therefore, do commonly observe in their relations with each other.[41] To date, international lawyers have primarily engaged with issues of cybersecurity by examining the extent to which existing international legal frameworks already apply to cyberactivities.[42] This engagement reflects a clear preference amongst international lawyers and scholars for elevating rules of international law to manage contemporary problems in cyberspace. This posture has also been legitimised by States and international organizations, many of which have affirmed the application of existing international law rules to cyberactivities.[43] As activists for the application of existing rules of international law to cybersecurity, international lawyers are inescapably embroiled in the exercise of legal interpretation to fit this jigsaw puzzle into place.

A careful analysis is required to correctly understand how existing public international law applies to cyberspace. There seems to be an emerging consensus that cyberattacks have certain special characteristics that set them in some ways difficult for rules to apply existing rules of international law. However, there have been calls to still apply them. It is argued that this is more convenient, as Zimmermann correctly argued that the traditional ways of developing new rules of international law through multilateral agreements or the process of widespread State practice giving rise to customary international law can never catch up with new technological developments in cyberspace.[44] Thus, the existing rules of international law have to be applied, however imperfect they may be, to cyberspace.

The law governing international relations differs substantially from domestic law in that, unlike the legal system within a State, its application spans the globe. Thus, the ubiquity of cyberspace, which is not restricted by national borders, renders strictly single State regulation largely ineffective.[45] International law is essential to effectively ensure cybersecurity in the common interest of all States and without international law, cybersecurity cannot achieve its full potential.

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40 Kittichaisaree (n 8) 326.

41 Ivan A Shearer, *Starke's International Law* (11th edn, Butterworths 1994) 3.

42 Sander (n 2).

43 Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012) 108.

44 Andreas Zimmermann, 'International Law and "Cyber Space"' (2014) 3(1) European Soc. International Law Reflections 1, 1.

45 Matthias C Kettemann, 'Ensuring Cybersecurity through International Law' (2017) 69(2) Revista Española de Derecho Internacional 281, 284.

While we can count a handful of international specialized conventions that may be applied to this space such as the Outer Space Treaty and the Budapest Convention on Cybercrime, there is currently no major international consensus. Furthermore, it is also difficult to identify any practice repeated over time that would count as customary law applicable to this space, nor has any specific case-law emerged in the area of cyberspace.

B. Applying the Principles of Criminal Jurisdiction Under International Law

Jurisdiction in the context of public international law refers to the legal competence of a State to make, apply, and enforce rules with regards to persons, property, and situations/events outside its territory, and the limits of that competence.[46] Professor Mann describes the term as a State's right under international law to regulate conduct in matters not exclusively of domestic concern.[47] Criminal jurisdiction is an important concept in international law as it concerns not just the extent of sovereign powers of States but limitations on those powers at the international level.[48] Sales concluded that the context of cybersecurity requires answers considering a range of the different questions. Following Sale's opinion, the questions refer to: (1) the person responsible for launching a particular attack; (2) court jurisdiction; (3) determination of the court's jurisdiction based on the attack or local attacker; and (4) the applicability of extradition treaties.[49] Concerning criminal jurisdiction in 1935, Harvard Law School conducted a study that resulted in a Draft Convention on 'Jurisdiction concerning Crime', which identified five traditional bases upon which a State can exercise criminal jurisdiction.[50] These are: (1) the nationality principle; (2) the territoriality principle; (3) the passive personality principle; (4) the universality principle; and (5) the protective principle.

Under the territoriality principle, given the fact that a State enjoys sovereign powers within its territory, a State may exercise jurisdiction for crimes that either started or ended in their respective borders. This principle is based on the assumption that the attacker is within the territory affected, but usually, in cyberspace, the attacker is sometimes millions of miles away in another country. Thus, this principle cannot be realistically applied to cyberspace.

Under the universality principle, States may exercise jurisdiction over international crimes committed anywhere in the world. The use of this principle has proven controversial as judges are reluctant to find jurisdiction based on the universality principle. Moreover, there is no established practice in which States exercise universal jurisdiction, properly so called and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction.[51] In its application to cyberspace, cybercrimes must be given the status of international crimes which would be the concern of the international community.[52] Still with the lack of consensus on the legal status of cyberspace in international law, this principle is of no use to the cyberworld.

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46 Alina Kaczorowska-Ireland, *Public International Law* (5th edn, Routledge 2015) 356.

47 Frederick A Mann, *The Doctrine of Jurisdiction in International Law* (A W Sijthoff 1964) 9.

48 Kaczorowska-Ireland (n 46) 358.

49 Nathan A Sales, 'Regulating Cyber-Security' (2013) 107(4) Northwestern University Law Review 1503,1522.

50 Harvard Law School, 'Research in International Law' (1935) 29 The American Journal on International Law 1.

51 *Arrest Warrant of 11 April 2000 (the Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3.

52 Sean Kanuck, 'Sovereign Discourse on Cyber Conflict under International Law' (2010) 88 Texas Law Review 1571.

The passive personality principle which was seen in the case of *Yunis v US*,[53] suggests that States may exercise jurisdiction to punish aliens for acts committed abroad against its nationals. This principle of jurisdiction is proven controversial where the national is not within the State of the jurisdiction of the State, and the extradition of persons to answer before domestic courts are usually discretionary or based on an extradition treaty which provides a multitude of exceptions.

The protective principle allows States to exercise jurisdiction where crime affects national security or other interests of a State. The following mentioned principle can have its application in limited circumstances in cyberspace, and it would have to reach the threshold of national interest. Thus, a cyberattack on government servers unearths such.

The nationality principle is worth mentioning. It involves the competence of a State to punish its nationals. This would also be limited in its application as it would seem to apply to instances where cyberattacks were carried out on the State by its own national. These situations are not popular as most attacks are carried out across international borders against persons who are not a national of the victim State.

C. Application of the Rules of Use of Force. Is a Cyberattack a Use of Force?

The prohibition on the threat of the use of force acquires a prominent place in international law. It was born out of customary international law, found a home under article 2(4) of the UN Charter and is now being held in abeyance after being awarded the status of *jus cogens*. Article 2(4) of the UN Charter provides that:

> *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or any other manner inconsistent with the purposes of the United Nations*.[54]

Dinstein opined that, 'the force prohibited is armed force. The general view is that the article does not preclude a State from taking unilateral economic or other measures not involving the threat or use of force, in retaliation for a breach of international law by another State.'[55] This suggests that the force prohibited is that of military force. The view is supported by Kaczorowska, who has the opinion that non-violent actions might be in breach of other provisions of the UN Charter.[56] However, today cyberspace is becoming a new field for tracking military operations, and as military experts have acknowledged, cyberspace is emerging as a new domain of war.[57] This is premised on the idea that cyberattacks could disable a government's installations and civilian infrastructure such as power grids, railways, oil pipelines, airlines, transportation systems, financial markets, etc. and thus threaten the life of a State.[58] As seen earlier, cases of cyberattacks have been increasing, and governments have been the target of cyberattacks, and in some cases, governments have been the main suspect in the attacks, for example, the US has been the target of several cyberattacks that are claimed to have been performed by China.

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[53] *United States v. Yunis,* 681 F. Supp. 896, 1988 U.S. Dist. LEXIS 1857 (D.D.C. Feb. 12, 1988).
[54] Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI, art 2(4).
[55] Yoram Dinstein, *War, Aggression and Self-defence* (3rd edn, Cambridge University Press 2001) 81.
[56] Kaczorowska-Ireland (n 47) 689.
[57] Nazanin Baradaran and Homayoun Habibi, 'Cyber Warfare and Self-Defense from the Perspective of International Law' (2017) 10(4) Journal of Politics & Law 40, 40.
[58] Baradaran and Habibi (n 57) 40.

Another famous case is attacking in Estonia in April 2007, where for three weeks, the country was the target of cyberattacks, which caused the failure of official government websites, TV stations, banks, and so on.[59]

To define cyber warfare, and its relevance to the prohibition of the use of force under the UN Charter, the international community must somehow reach a consensus as to whether these activities are covered particularly by Article 2(4) and Article 51 that provides the right to self-defence. Article 2(4) of the Charter describes the original sentence on the use of force in international law but the question as to whether this extends its hands of gratitude to cyberspace is one that needs to be answered by the community of nations.

Article 51 of the UN Charter, which should be read alongside Article 2(4) provides 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'.[60] There is not any definition of what constitutes an armed attack in the UN Charter. Thus, it is the submission of some academics that a cyberattack as the use of force should be defined by its intensity and effects and not based on tools used.[61] The merits for these arguments are found in the decision of International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons (Advisory opinion).*[62] In that regard, the court explained that an armed attack is the most severe form of using the force in terms of scale and its effect.[63] It is thereby inevitably argued by some that a cyberattack that causes fundamental destruction and the loss of human lives, or great material destruction could be considered as an armed attack, and requires the right of self-defence.[64] There is still no State practice to accept this form of attack to constitute an armed attack. States have not responded in self-defence under the UN Charter when they have been subject to a cyberattack. Thus, this unearths the reluctance of States to accept a cyberattack as a use of force.

D. The Principle of Non-Intervention?

The principle of non-intervention is the right of every sovereign State to conduct its affairs without outside interference.[65] Although the principle of non-intervention is found under Article 2(4) of the UN Charter, in the *Nicaragua case*, the International Court of Justice (ICJ) held that it is also part and parcel of customary international law.[66] Conceived in the Friendly Relations Declaration, the principle of non-intervention indicates that no State, for whatever reason, has the right to intervene in the internal or external affairs of another State.[67] The Declaration went on to state that armed intervention and all other forms of interference or attempted threats against the personality of the State or political, economic, and cultural elements of the State violate

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59 ibid 41.

60 Charter of the United Nations (n 54) art 51.

61 Duncan B Hollis, 'Why States Need an International Law for Information Operations' (2007) 11(4) Lewis & Clark Law Review 1023, 1041.

62 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

63 ibid [262].

64 Baradaran and Habibi (n 57) 42.

65 *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [73].

66 ibid.

67 UNGA, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/2625.

international law. The Declaration also notes that no State may use or encourage the use of economic, political or any other type of measures to coerce another State, and that no State shall inter alia organise, assist, finance, or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State or interfere in civil strife in another State. While the formulation is somewhat ambiguous, the core meaning of an intervention is clear. It seems to be precise to a cyberattack, especially where it is aimed towards a government system by another government as all States should enjoy the right to non-intervention, and a State sponsored cyber operation is contrary to this principle. This principle has thus far provided a standard for future cyberspace regulation, but the sole fault in this application to cyberspace is its failure to regulate the actions of non-State actors.

VI. The Budapest Convention on Cybercrime: Why has it not Achieved Universality?

According to the International Governance Framework for Cybersecurity Website, to date, the only effort to develop a unitary procedural approach to cybercrime is the Budapest Convention on Cybercrime developed by the Council of Europe. It aspires to create a single set of cyber laws and procedures internationally to ensure that there is no safe harbor for cybercriminals.[68] The object and purpose of the treaty is to address internet and computer crime by harmonizing national laws, improving investigative techniques, and increasing cooperation among nations. It also contains a series of powers and procedures such as the search of computer networks and lawful interception.[69]

The Budapest Convention has been unsuccessful in achieving universality. As of July 2021, 66 States have ratified the convention, while a further two States had signed the convention but not ratified it.[70] Since it entered into force, countries like Brazil and India have declined to adopt the Convention on the grounds that they did not participate in its drafting.[71] Russia opposes the Convention, stating that adoption would violate Russian sovereignty, and has usually refused to cooperate in law enforcement investigations relating to cybercrime.[72] The absence of these States appears to be a deterrent for more signatories. States may have taken the view that without these cyber giants, the treaty is pointless. This is understandable as to regulate cyberspace there is a need for universality, meaning consensus at the international level.

Another deterrent appears to be signatory and ratification procedures. While the Council of Europe provides regulations for the accession of non-Member States to the Budapest Convention, the procedure for such includes a requirement for non-Member States to make a written request for accession, and scrutiny by Council experts to determine the compatibility of the domestic laws of the State in question with the standards of the Council of Europe. Moreover,

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[68] Paul Rosenzweig, 'The International Governance Framework for Cybersecurity' (2012) 37(2) Canada-United States Law Journal 405, 419.

[69] Budapest Convention on Cybercrime (Opening of the treaty 23 November 2001, entry into force 1 July 2004) E.T.S 185.

[70] Council of Europe, 'Chart of signatures and ratifications of Treaty 185' <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=185> accessed 11 July 2021.

[71] Jonathan Clough, 'A World of Difference: The Budapest Convention on Cybercrime and the Challenges of Harmonisation' (2014) 40(3) Monash University Law Review 698, 711.

[72] ibid.

non-Member States would have to finance their participation in the Convention. Thus, these have acted as further deterrents especially for States outside the Council of Europe.

III. Proposals for Regulating Cyberspace

A. Why a Treaty?

The most fundamental benefit of an international treaty regulating cyberspace is to provide certainty. This would enable States to know the nature of their international legal obligations with certainty. Currently under international law, States are unaware of what constitutes a cyberattack, and what are their obligations if such is instituted by another State or even non-State actors.

A treaty would also allow States to negotiate terms that they are going to be bound by. This would encourage compliance, and those States which sign and ratify the treaty will show that they are willing to be bound by the provisions within.

B. Can the Tallin Manuals be Used as a Guide?

With growing cyberactivity, the risk to States individually and to the international community as a whole, both States and multinational organizations are on the quest to seek solutions. Thus, the North Atlantic Treaty Organization (NATO) has engaged its Cooperative Cyber Defense Center of Excellence (CCD COE) to help facilitate the original Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual 1.0)[73] and the newly released Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations.[74] There was no significant change between the two, but a few points added for clarification. Some useful provisions for a Treaty on Cyberspace was extracted below:

> *A State may exercise territorial jurisdiction over: (a) cyberinfrastructure and persons engaged in cyber activities on its territory; (b) cyberactivities originating in, or completed on its territory, or (c) cyber activities having a substantial effect in its territory.*[75]

This rule (Rule 9) is premised on the basis for a State to exercise the jurisdiction given the physical or legal presence of a person or object. This unearths that a person will be subject to the laws of the territory on which the person is found.

> *A State may exercise extraterritorial prescriptive jurisdiction concerning cyber activities:*
> (a) *conducted by its nationals;*
> (b) *committed on board vessels and aircraft possessing its nationality;*

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[73] Michael N Schmitt, *Tallinn Manual on International Law Applicable to Cyber Warfare* (Cambridge University Press 2012).

[74] Michael N Schmitt, *Tallinn Manual 2.0 On the International Law Applicable To Cyber Operations* (2nd edn, Cambridge University Press 2017) [Hereinafter Tallinn Manual 2.0].

[75] Schmitt (n 73) rule 9.

(c) *conducted by foreign nationals and designed to undermine essential State interests seriously;*
(d) *conducted by foreign nationals against its nationals, with certain limitations; or*
(e) *that constitute crimes under international law subject to the universality principle*.[76]

This rule (Rule 10) goes beyond that which is provided in Rule 9. It addresses the scope of a State's prescriptive jurisdiction regarding them outside its territory.

> *A State may only exercise extraterritorial enforcement jurisdiction concerning persons, objects, and cyber activities based on (a) a specific allocation of authority under international law; or (b) valid consent by a foreign government to exercise jurisdiction on its territory*.[77]

> *Although as a general matter, States are not obliged to cooperate in the investigation and prosecution of cybercrime, such cooperation may be required by the terms of an applicable treaty or other international law obligation*.[78]

> *A State bears international responsibility for a cyber-related act that is attributable to the State. and that constitutes a breach of an international legal obligation*.[79]

States bear 'responsibility' for their internationally wrongful acts according to the law of State responsibility as was discussed earlier.

> *Cyber operations conducted by organs of a State, or by persons or entities empowered by domestic law to exercise elements of governmental authority, are attributable to the State*.[80]

> *Cyber operations conducted by a non-State actor are attributable to a State when: (a) engaged in or under its direction or control, or (b) the State acknowledges and adopts the operations as its own.*[81]

> *Cyber operations executed in the context of armed conflict are subject to the law of armed conflict*.[82]

> *Cyber operations may amount to war crimes and thus give rise to individual criminal responsibility under international law.*[83]

The Tallinn Manual can be considered as soft law; thus, it is not legally binding. However, many of its provisions should be considered when drafting the prospective treaty. Its provisions relating to the exercise of jurisdiction, whether territorial or prescriptive, should be the basis of exercising jurisdiction under such a treaty. Its regulations on non-State actors should also be of importance,

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[76] Schmitt (n 73) rule 10.
[77] ibid rule 12.
[78] ibid rule 13.
[79] ibid rule 14.
[80] ibid rule 15.
[81] ibid rule 17.
[82] ibid rule 80.
[83] ibid rule 84.

especially with regards to State responsibility. There should also be provisions in such a treaty that a State will undertake all necessary measures to ensure no cyberactivities occur within its territory aimed at causing disturbances in another. What must also be of importance for drafting a cyberspace treaty which was excluded from the Tallinn Manual was a clause providing that all parties must undertake to assist other parties in the investigation of cybercrimes, which have a transnational element. It is only through this cooperation that domestic legislation on cyberspace can achieve their full potential.

C. How Useful is the Budapest Convention on Cybercrime?

The Budapest Convention has provided a number of measures for the regulation of cyberspace. It places positive obligations on State parties. It places an obligation on State parties to adopt legislation and other measures necessary to establish as criminal offences under domestic law in a number of categories. These included offences against confidentiality, integrity and availability of computer data and systems, computer related offences, content related offences, offences related to infringements of copyright and related rights, ancillary liability, sanctions, the search and seizure of stored computer data, real time collection of data. These positive obligations are essential for a treaty regulating cyberspace. It requires States to enact a legislation to criminalise computer misuse offences.[84]

The Convention also includes a provision granting a State party jurisdiction over offences committed within the State's territory. This allows a State to assert jurisdiction in computer crimes involving a computer system within its territory even if the perpetrator committed the offence from outside of the State. The Convention grants a State jurisdiction over its citizens who commit an offence outside of the state.[85]

The Convention makes further provisions for international cooperation and mutual assistance in criminal matters for the purposes of investigation or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic. It makes further provisions for the extradition between parties for criminal offences within the meaning of the treaty.[86]

The forgoing provisions are necessary as it affords enforceable cooperation between the host and the victim State. This would complement domestic laws in making them enforceable.

VII. Conclusion

Although cyberspace has become woven into the fabric of modern society, its regulation remains in a state of flux. While there exist some domestic legislation regulating cyberspace, recent notable cyberattacks have questioned the effectiveness of these pieces of legislation, and the existing rules of international law remain unclear in their application to cyberspace. The problems associated with the Council of Europe's Budapest Convention on Cybercrimes have impeded it from achieving international support. Thus, there is a need for discussions and negotiations at the UN level for clear rules, and provisions for cooperation in cybercrime investigations and proceedings. This interest is one not just of national concern but also of

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84 Budapest Convention on Cybercrime (n 69) section 1 arts 2-6.
85 ibid section 3 art 22.
86 ibid section 3 arts 23-35.

international concern. Thus, it is best advanced by pursuing and collaborating partnerships, and a multilateral approach. In order to regulate cyberspace sufficiently, States must be willing to have open discussions about the threats of cybersecurity and the development of appropriate rules for its regulation. It must have universal application and consensus with all States making substantial contributions to the discussion.

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Raising the Bar: The Role of the Reporting Procedure of the United Nations Human Rights Committee in the Protection of Human Rights in Africa

Aliyu Ibrahim, LL.M., Ph.D. *
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ICCPR, HUMAN RIGHTS COMMITTEE, FREEDOM OF EXPRESSION, RIGHT TO LIBERTY

Abstract

The United Nations Human Rights Committee (HRC) is saddled with the responsibility of supervising the implementation of the provisions of the ICCPR by its state parties. However, it is only the reporting procedure that mandates each state party to submit a report to the HRC periodically, outlining the steps it has taken to fulfil its obligations to the treaty. Over the years, it was observed that states tend to embellish these reports before submitting them to the HRC because it had no means of checking the veracity of the contents of the reports. Consequently, the HRC has continued to introduce novel ways of checking the accuracy of the state parties' reports, which includes the Committee partnering with National Human Rights Institutions (NHRIs) and Non-Governmental Organisations (NGOs) within the territories of state parties. This is to monitor the implementation of the provisions of the ICCPR and submit alternative reports to the HRC for it to have a more objective perspective on the level of the state compliance. To examine the effectiveness of the reporting procedure among African state parties, two states (Morocco and Rwanda) have been selected with the aim of gauging the effect of the reporting procedure in influencing state parties to fulfil their obligations to the treaty. In the course of the study, the jurisprudence of the HRC and domestic legislation of states were analysed and it is observed that for the HRC to be more effective it needs more visibility, especially within the African Continent.

I. Introduction

The International Convention on Civil and Political Rights (ICCPR) was adopted by the United Nations (UN) on 16 December 1966.[1] These rights in the ICCPR are divided into two sub-groups with civil rights comprising of rights that protect the physical integrity, procedural due process and non-discrimination rights of a person, while political rights enable one to participate fully in the political life of one's country.[2] Civil and political rights are human rights that are clearly guaranteed by the treaty.[3] Once a state becomes a party to the ICCPR, it has

* Aliyu Ibrahim, Lecturer, Faculty of Law, Umaru Musa Yar'adua University, Katsina, Nigeria, aliyudanmusa@gmail.com.

1 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

2 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press 2000) 3; These political rights include the right to vote and be voted for, participate in public affairs, freedom of expression and assembly.

3 ibid 4.

an obligation to implement its provisions within its jurisdiction.[4] The treaty has 173 state parties[5] among which 51 are African states.[6] The ICCPR has been described as 'one of the most important guarantees of human rights in history'.[7]

To supervise the implementation of the provisions of the ICCPR, an 18 member committee was established by the treaty, referred to as the Human Rights Committee (HRC).[8] The members of the HRC compose of nationals of state parties to the treaty of high moral character with evident competence in human rights.[9] While members are elected to the Committee, they serve in their personal capacities and not as the representatives of their states.[10] The HRC is saddled with four responsibilities: First, it examines reports submitted by state parties to the ICCPR on the measures they have taken in the implementation of the ICCPR within their territories.[11] These reports should outline the successes and challenges states encounter in the course of implementing the ICCPR.[12]

While examining a state report, the HRC engages the representatives of the state in a 'constructive dialogue',[13] recommending steps to the state in order to improve on the implementation of the ICCPR.[14] Secondly, the HRC has jurisdiction to receive inter-state complaints regarding breaches of the ICCPR.[15] Thirdly, the individual complaints mechanism, where persons alleging that any of their rights contained in the ICCPR have been violated by any state party to the First Optional Protocol (OP1) can submit 'communications' (complaints) to the HRC against that state party.[16] Finally, the HRC issues general comments, which are commentaries on the scope of rights contained in the ICCPR.[17] The HRC has, over the years, influenced some state parties into changing their laws or practices so as to conform to the ICCPR.[18]

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4 Hari O Agarwal, *International Law and Human Rights* (18th edn, Central Law Publishing 2011) 756.

5 OHCHR, 'International Covenant on Civil and Political Rights' (Database of the United Nations Office of Legal Affairs, 4 July 2019) <https://www.ohchr.org/Documents/HRBodies/CCPR/OHCHR_Map_ICCPR.pdf> accessed 7 January 2022.

6 HRC, 'Ratification status for CCPR - International Covenant on Civil and Political Rights' (*UN Treaty Body Database*) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en> accessed 25 August 2021.

7 Margaret Thomas, '"Rogue States" within American Borders: Remedying State Compliance with the International Covenant on Civil and Political Rights' (2002) 90(1) California Law Review 165, 168.

8 ICCPR (n 1) art 28(1).

9 ibid art 28(2).

10 ibid art 28(3).

11 ibid art 40(1).

12 ibid art 40(2).

13 OHCHR 'Human Rights Fact Sheet No. 15 (Rev.1) Civil and Political Rights: The Human Rights Committee' (*UNCHR* , May 2005) <https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf > accessed 25 September 2021.

14 Nomthandazo Ntlama, 'Monitoring the Implementation of Socio-Economic Rights in South Africa: Some Lessons from the International Community' (2004) 8(2) Law Democracy and Development 207, 209.

15 ICCPR (n 1) art 41.

16 ibid art 1.

17 ibid art 40(4).

18 Joseph and Castan (n 2) 14.

The procedure obliging state parties to submit their reports for review by the HRC is the only mandatory requirement of the ICCPR once a state accedes to or ratifies the treaty.[19] The sole objective of the review of state reports is for the HRC to assess the level of implementation of ICCPR rights among state parties and where they fail to do so, take steps to prompt them to comply with their obligations to the treaty.[20] The HRC holds three sessions annually to carry out its mandate.[21] These sessions are regularly held either in Geneva or New York, but may be moved to any other location after consultations with the Secretary-General of the UN.[22]

II. State Reporting System under the ICCPR

The state reporting system is viewed as an enforcement mechanism of international human rights law, as it gives the UN human rights mechanisms an opportunity to assess the level of human rights protection within the territories of state parties.[23] Consequently, it is mandatory under the ICCPR for each state party to submit an initial report one year after becoming a party to the ICCPR, and whenever the committee requests for it.[24] As a matter of practice, the HRC requests periodic reports at five years intervals.[25] The Committee derives its mandate to review reports from art. 40 (4) which provides that:

> The Committee shall study the reports submitted by the State Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States parties. The Committee may also transmit to the Economic and Social Council, these comments along with the copies of the reports it has received from States parties to the present Covenant.[26]

At the end of the review, concluding observations are issued to each state party. These concluding observations are 'the mainstay of treaty body's work' as they emanate from tailored assessments made by the HRC on country specific reports. Concluding observations are divided into four parts: an introduction, which assess the quality of the report; the positive steps taken by the state to comply with its obligations; challenges of compliance by the state; and the recommendations of the HRC to the state party that would remedy the concerns that were raised in the concluding observations.[27]

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[19] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press 1994) 62.

[20] HRC 'Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights' (29 September 1999) UN Doc CCPR/C/66/GUI/Rev.2, para E.1.

[21] HRC 'Rules of Procedure of the Human Rights Committee' (4 January 2021) UN Doc CCPR/C/3/Rev.12, Rule 2.

[22] ibid Rule 5.

[23] Cosette D Creamer and Beth A Simmons, 'The Proof is in the Process: Self-Reporting under International Law' (2020) 114(1) American Journal of International Law 1, 9.

[24] ICCPR (n 1) art 40(1).

[25] Thomas Buergenthal, 'The UN Human Rights Committee' (2001) 5 Max Planck Yearbook of United Nations Law 341, 348.

[26] ICCPR (n 1) art 40(4).

[27] Michael O'Flaherty, 'The Concluding Observations of the United Nations Human Rights Treaty Bodies' (2006) 6(1) Human Rights Law Review 27, 30.

The HRC, in preparing the concluding observations, resorts to going beyond the provisions of ICCPR to other human rights instruments that overlap or support the implementation of the provisions of the ICCPR. It adopts a number of approaches in doing so, which includes encouraging state parties' ratification or accession to certain human rights instruments that will facilitate the implementation of the ICCPR. These human rights treaties are sometimes included in the concluding observations issued to respective state parties.[28]

The International Court of Justice (ICJ) had cited the concluding observations of the HRC issued to Israel with approval, and ruled that the provisions of the ICCPR are applicable to the acts of a state party done outside its territory in pursuance of its jurisdiction.[29]
The HRC also appointed a special rapporteur to follow-up on its concluding observations and to remind state parties to submit their reports on the level of implementation of the concluding observations of the Committee. This has improved the level of compliance by individual states.[30] It is through the follow-up procedure that the HRC can assess the level of implementation of the ICCPR by state parties. International law lacks a central enforcement mechanism. Hence, human rights bodies such as the HRC rely on soft methods in persuading state parties to fulfil their treaty obligations.[31] Tuomisaari describes the HRC as the UN's 'most important component in its entire human rights framework'.[32]

To determine the effect of the ICCPR review procedure, two state parties have been selected for this study, namely: Morocco and Rwanda. These state parties have been chosen based on the fact that they have undergone the review process before the HRC more than twice, with Morocco submitting six reports thus far, which is the highest among African state parties and all of them have had their reports reviewed recently.[33] Analysing the participation of these two state parties will show the effect of the reporting procedure, especially with the introduction of some novel innovations, which are aimed at increasing the participation of state parties to the procedure and will show whether it has had the desired effect. In addition, two provisions of the ICCPR were chosen to be examined in more detail in the course of reviewing the effectiveness of the reporting procedure. These provisions are the right to liberty and security of person (art. 9), and the freedom of opinion and expression (art. 19).[34] These rights have all been subjects about which the HRC has adopted general comments, with art. 9

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[28] David Weissbrodt, 'The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law' (2010) 31(4) University of Pennsylvania Journal of International Law 1185, 1216, 1218.

[29] *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 [179]– [180].

[30] O'Flaherty (n 27) 33.

[31] Adriene Komaovics, 'Strengthening the Human Rights Treaty Bodies: A Modest but Important Step Forward' (2014) 17 Pécs Journal of International and European Law 7, 28-29.

[32] Miia Halme-Tuomisaari, 'Guarding Utopia: Law, Vulnerability and Frustration at the UN Human Rights Committee' (2020) 28(1) Social Anthropology 35, 38.

[33] Morocco submitted its 6th Periodic Report UN Doc CCPR/C/MAR /6 on 15 June 2015. The report was considered at the 118th Session of the HRC on 24 and 25 October 2016 after which it proceeded to issue concluding observations; See HRC 'Concluding Observations on the Sixth Periodic Report of Morocco' (1 December 2016) UN Doc CCPR/C/MAR/CO/6; Rwanda submitted its 4th Periodic Report UN Doc CCPR /C/RWA/4 on 11 July 2014 which was reviewed at the 116th Session of the HRC on 17 and 18 March 2016 and it issued its concluding observations; See HRC 'Concluding Observations on the Fourth Periodic Report of Rwanda' (2 May 2016) UN Doc CCPR/RWA/CO/4.

[34] ICCPR (n 1) art 19.

being one of the most recent;[35] these rights that are subjects of these general comments have the propensity to being violated on a daily basis in some African states.[36]

To encourage the state parties to submit reports to the HRC for review, it had introduced some innovations to make the reporting procedure less cumbersome and to ensure objectivity in the reports before it. These include the following:

a. Optional reporting procedure
b. Submission of alternative reports by National Human Rights Institutions (NHRIs)
c. Inputs of Non-Governmental Organisations (NGOs)

A. Optional reporting procedure

Under this procedure, the HRC formulates a series of questions referred to as list of issues (LOIs) on particular provisions of the ICCPR which it requires the state to address on the level of implementation within its jurisdiction. These LOIs are sent to the reporting state party before it submits its state report. The response by the state party to the LOIs that is sent to the HRC will satisfy the requirement of a state report under art. 40 of the ICCPR. It should be noted that this procedure is optional as state parties can elect to undergo the review of their reports by submitting a state report under the regular procedure. This procedure makes the preparation of state reports less cumbersome, as it dispenses with the requirement of submitting state reports and replies to LOIs. Rather, LOIs are designed for individual state parties to address specific provisions of the ICCPR in their reports to the HRC, which makes the reports more focused.[37] It is also more beneficial to the HRC as the procedure encourages submission of detailed reports to it; this enables the committee to ascertain the level of implementation of treaty obligations by state parties. Also, the procedure provides an opportunity for the HRC to re-engage state parties with overdue reports, and those that lack the resources to prepare and submit reports to do so.[38]

This procedure is applicable to state parties whose periodic reports are due for review, while those state parties that are coming before the HRC for the first time are requested to submit a comprehensive report.[39] Where substantial changes in the 'political and legal' processes that conflict with ICCPR obligations had taken place within their jurisdictions, state parties may be required to submit standard reports.[40]

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[35] HRC 'General Comment No. 35 - Article 9: Liberty and Security of Person' (16 December 2014) UN Doc CCPR/C/GC/35.

[36] Amnesty International, 'Countries' (*Amnesty International*, 2021) <www.amnestyusa.org/our-work/countries/africa> accessed 25 August 2021.

[37] HRC 'Focused Reports Based on Replies to Lists of Issues Prior to Reporting (LOIPR): Implementation of the New Optional Reporting Procedure (LOIPR Procedure)' (12 - 30 July 2010) UN Doc CCPR/C/99/4, para I.

[38] ibid para A4.

[39] ibid para B8.

[40] ibid para B10.

B. Submission of alternative reports by National Human Rights Institutions (NHRIs)

The enforcement of 'internationally recognised human rights' would be more effective where internal monitoring mechanisms are created at the domestic levels.[41] The UN adopted the Paris Principles,[42] which enjoined states to establish NHRIs within their jurisdictions with a broad mandate to protect and promote human rights[43] and to be a bridge between states and the UN by promoting the ratification and implementation of human rights treaties.[44] There are 31 African states that have established NHRIs, out of which 20 have been accredited with 'A' status, which signifies that they have complied with the requirements of the Paris Principles.[45]

The HRC acknowledges the importance of these institutions as they act as a bridge between domestic and international law.[46] It called on these institutions to participate in its activities by submitting parallel reports on the level of implementation of ICCPR rights by individual states and furthermore to monitor the implementation of the concluding observations issued to individual state parties.[47] The HRC also expects the NHRIs to submit reports to it as part of the follow-up procedure on the level of compliance of state parties with its concluding observations.[48] NHRIs have access to information on the level of protection of ICCPR rights within the territories of individual states; hence, they will be in a better position to provide objective reports at every stage of the reporting procedure.

Because of the importance of these institutions, the Office of the High Commissioner for Human Rights (OHCHR) continues to financially support the creation of NHRIs in member states of the UN, which makes the institutions to be considered as 'less national institutions and more an international project'.[49]

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41 Chinedu Idike, 'Deflectionism or Activism? The Kenya National Human Rights Commission in Focus', (2004) 2(1) Essex Human Rights Review 40.

42 UNGA 'Principles Relating to the Status of National Institutions' (20 December 1993) UN Doc A/RES/48/134 (hereinafter Paris Principles).

43 ibid Principle 1.

44 ibid Principle 3c.

45 As of 2019, the Global Alliance of National Human Rights Institutions is composed of 114 members, 80 of which are 'A' status accredited NHRIs and 34 'B' status accredited NHRIs. Africa states that have 'A' status include: Cameroon, Democratic Republic of Congo, Egypt, Ghana, Kenya, Malawi, Mauritania, Mauritius, Morocco, Namibia, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, Tanzania, Uganda, Zambia, Zimbabwe; See Global Alliance of National Human Rights Institutions, 'Membership' (*GANHRI*, 2021) <ganhri.org/membership/> accessed 1 November 2020.

46 HRC 'Paper on the Relationship of the Human Rights Committee with National Human Rights Institutions, Adopted by the Committee at its 106th Session (15 October - 2 November 2012)' (13 November 2012) UN Doc CCPR/C/106/3, para 9.

47 ibid para 4.

48 ibid para 8.

49 Richard Carver, 'A New Answer to an Old Question: NHRIs and Domestication of International Law' (2010) 10(1) Human Rights Law Review 1, 2.

C. Inputs of Non-Governmental Organisations (NGOs) to the reporting procedure

One of the major weaknesses of the reporting procedure of the HRC is said to be the lack of independent fact-finding machinery that can check the veracity of state parties' reports.[50] NGOs became increasingly essential for the work of the HRC because they are domiciled in the territories of state parties and can easily collect data on the status of human rights. They also don't rely on the states for funding, which makes it difficult for state parties to influence the information it supplies to the HRC. On the downside, however, caution should be exercised as NGOs could furnish misleading information against the state in pursuance of its own set objectives against the state party concerned.[51]

NGOs participate in this procedure at three stages; at the initial stage, they are invited to make relevant submissions to the HRC with regard to the LOIs which are taken into consideration when they are drafted and prior to having been transmitted to the state party concerned. Secondly, representatives of NGOs are allowed to attend the public presentation of state reports; prior to the presentation, they are given the opportunity to brief the HRC informally on issues of concern. These meetings are closed as only members of HRC and those of NGOs are allowed to attend them. Finally, after the review of the state parties' reports, NGOs are expected to monitor the steps taken by the state parties in implementing the recommendations of the HRC and to publicise both the recommendations and the provisions of the ICCPR.[52]

Written reports are expected to be submitted by NGOs outlining the level of compliance by state parties with the HRC's concluding observations after a year of the review.[53] The support of NGOs will remain critical to human rights enforcement within the territories of states[54] as supported by a HRC member's assertion that 'the HRC would have been fifty percent less effective without NGOs' expertise.'[55]

III. Interpretation of the Scope of Rights in the ICCPR (General Comments)

General comments are issued by the HRC to guide state parties in the preparation of their state reports and implementation of the provisions of the ICCPR.[56] These assist the states that signify their intention to ratify the ICCPR to realise the level of obligations they are expected to implement within their respective jurisdictions. These general comments serve as a guide

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50 Yogesh K Tyagi, 'Cooperation between the Human Rights Committee and Nongovernmental Organisations: Permissibility and Propositions' (1983) 18 Texas International Law Journal 273, 286.

51 Gianluca Rubagotti, 'Non-Governmental Organisations and the Reporting Obligation under the ICCPR' (2005) 5 Non-State Actors and International Law 59, 74.

52 Peggy Brett and Patrick Mutzenberg, *UN Human Rights Committee, Participation in the Reporting Process: Guidelines for Non-Governmental Organisations (NGOs)* (2nd edn, Centre for Civil and Political Rights 2015).

53 HRC 'The Relationship of the Human Rights Committee with Non-Governmental Organizations' (4 June 2012) UN Doc CCPR/C/104/3, para 11.

54 Dinah Sheldon, 'International Human Rights Law: Principled, Double, or Absent Standards' (2007) 25(2) Law and Equality 467, 513, 472.

55 Ida Lintel and Cedric Ryngaert, 'Interface between Non-Governmental Organisations and the Human Rights Committee' (2013) 15(3) International Community Law Review 359, 375.

56 Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Courts' (2018) 67(1) British Institute of International and Comparative Law 201.

to the state parties in preparing their state reports, and NGOs too refer to them as a guide when monitoring state compliance with the treaty and in putting together a shadow report for submissions before the HRC. In order to appreciate the contributions of these general comments issued by the HRC, the right to freedom of opinion and expression (General Comment No: 34),[57] and the right to liberty (General Comment No: 35)[58] will be briefly examined:

A. Freedoms of opinion and expression (General Comment no 34)

Art. 19 of the ICCPR guarantees two rights: the right of an individual to hold an opinion without any interference,[59] and the freedom of expression, which:

> Shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[60]

General comment no 34 outlined the scope of art. 19 in order to guide state parties in the implementation of the right within their territories and in preparation of state reports to be reviewed by the HRC.[61]

The right to freedom of opinion is described by the HRC as not only critical for the development of an individual, but 'also constituting the foundation stone for every free and democratic society'. Equally, freedom of opinion and expression are inter-related in that the latter is the instrument through which opinions are developed and conveyed.[62] In addition, this right is essential for transparency and accountability in society and for the promotion and protection of human rights.[63] Freedom of expression is mandatory for the enjoyment of art. 17 (right to privacy); art. 18 (right to freedom of thought, conscience and religion; art. 25 (political rights); and finally art. 27 (minority rights).[64]

Restriction of information on the internet by state parties according to the HRC is only permitted if it is in accordance with art. 19 (3), which provides that freedom of expression may be curtailed where it is for the protection of reputation of others or protection of national security, public order, or morality. Any other ground is a violation of art. 19.[65] Journalists should also be allowed to exercise the right unimpeded and should only be restricted if it violates arts. 19 (3) and 20 ICCPR.[66]

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57 HRC 'General Comment No. 34 Article 19: Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34.
58 UN Doc CCPR/C/GC/35 (n 35).
59 ICCPR (n 1) art 19(1).
60 ibid art 19(2).
61 Alfred de Zayas and Ãurea Roldán Martín, 'Freedom of Opinion and Freedom of Expression: Some Reflections on General Comment No 34 of the Human Rights Committee' (2012) 59(3) Netherlands International Law Review 425, 427.
62 UN Doc CCPR/C/GC/34 (n 57) para 2.
63 ibid para 3.
64 ibid para 4.
65 ibid para 43.
66 ibid para 11.

B. Liberty and Security of Person (General Comment no 35)

The HRC issued an elaborate general comment on the right to liberty and security of person no 35.[67] This general comment elaborates on the provisions of art. 9, which provides:

> 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.[68]

Art. 9 recognises and protects the liberty and security of persons; the deprivation of this right affects the enjoyment of all other ICCPR rights.[69] The general comment defines liberty as the freedom from confinement of the body of the individual, while security of person protects the person from injury to his body, mind and mental integrity; when state agents assault an individual, it amounts to a violation of his right to security.[70] This protection is extended to 'everyone', including: girls, boys, soldiers, persons with disabilities, lesbians, gays, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crimes, and individuals alleged to have committed acts of terrorism.[71] An individual deprived of his liberty shall be entitled to appeal the process that led to his incarceration.[72]

The HRC further widened the scope of instances of deprivation of liberty from only confinement of an individual to include: police custody, short-term detention (*arraigo penal),* remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalisation of an individual, institutional custody of children, and confinement in restricted areas in airports.[73] To ensure an individual's right to the security of his person is protected, the HRC enjoins state parties to ensure that intentional infliction of bodily or mental injury to the individual is prohibited by law and measures to enforce the protection are to be put in place.

Also, the HRC widened the scope of the prohibition of arbitrary detention and went further to point out that any person deprived of his liberty on terms not provided by the law is arbitrary. Continued incarceration of individuals beyond their prison term limits is equally arbitrary, as is unlawful extension of all forms of detention. Refusal to release detainees in violation of court orders is unlawful and arbitrary.[74] Another procedural safeguard that protects the right to liberty is:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise

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67 UN Doc CCPR/C/GC/35 (n 35).
68 ICCPR (n 1) art 9(1).
69 UN Doc CCPR/C/GC/35 (n 35) para 2.
70 HCR 'Communication No. 2214/2012 – Views Adopted by the Committee at its 115th Session (19 October-6 November 2015 – John-Jacques Lumbala Tshidika v Democratic Republic of the Congo' (24 December 2015) UN Doc CCPR/C/115/D/2214/2012 para 12.6.
71 UN Doc CCPR/C/GC/35 (n 35) para 3.
72 ibid para 4.
73 ibid para 5.
74 ibid para 11.

> judicial power and shall be entitled to trial within a reasonable time or to release.[75]

The ICCPR did not specify the time-frame for arraigning a detained person before a judge, but the HRC has interpreted the word 'shall be brought promptly before a judge' to mean within 48 hours. It is only in exceptional circumstances that he may not be taken before a court within the 48-hour time-frame. As noted earlier, the longer an individual stays in detention, the higher the probability of being ill-treated by state officials. In the case of juvenile offenders, they should be taken before a judge within 24 hours.[76] It appears that the assertion that 'most sustainable contribution of the HRC to the international protection of human rights'[77] could turn out to be its general comments after all.

IV. Implementation of the ICCPR by State Parties

A. Morocco

Morocco ratified the ICCPR on 3 May 1979.[78] Being a state that falls under the civil law jurisdiction that applies the principle of *pacta sunt servanda* (agreements must be kept) means international treaties that are ratified or acceded to automatically becomes part of its domestic legislation. The ICCPR is therefore not only part of its domestic law, but also above it in order of precedence.[79] As pointed earlier, Morocco has submitted the highest number of reports to the HRC among African state parties; it submitted its sixth report in 2015, which was examined in 2016.[80]

i. Contributions of the CNDH in the Review of Morocco's 6th Periodic Report

The HRC encourages NHRIs to participate in its review procedure by submitting alternative reports to it. [81] The CNDH, a Paris Principles compliant NHRI, participated fully in the process.[82]

As pointed earlier, these institutions are required to engage in the promotion and protection of human rights within the territory of state parties[83] and they must be vested with as broad a mandate as possible.[84] Among the responsibilities expected to be assigned to an NHRI is that it participates in the review process of UN treaty bodies, which includes the HRC.[85] The CNDH participated in submitting a report at the LOIs stage[86] and made

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75 ICCPR (n 1) art 9(3); UN Doc CCPR/C/GC/35 (n 35).
76 UN Doc CCPR/C/GC/35 (n 35) para 33.
77 Eckart Klein and David Kretzmer, 'The UN General Comment - The Evolution of Autonomous Monitoring Instrument' (2015) 58 German Yearbook of International Law 189.
78 HRC (n 6).
79 Christopher Harland, 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents' (2000) 22(1) Human Rights Quarterly 187, 235.
80 UN Doc CCPR/C/MAR/CO/6 (n 33).
81 UN Doc CCPR/C/106/3 (n 46) para 9.
82 Global Alliance of National Human Rights Institutions (n 45).
83 Paris Principles (n 42) Principle 1.
84 ibid Principle 2.
85 ibid Principle 3e.
86 Conseil National des droits de l'Homme (CNDH) 'Contribution of the National Council of Human Rights of Kingdom of Morocco (CNDH) to the Human Rights Committee for the Establishment of the List of Issues

suggestions on issues that should be included in the LOIs that the HRC was to forward to the state party for its response. For instance, it requested the HRC to inquire from Morocco if it allows persons in custody immediate access to their lawyers.[87] The CNDH did not raise any issue related to art. 19 of the ICCPR;[88] doing so would have given the HRC more information which it could have included in the LOIs.

The HRC also made inquiries on whether the CNDH has competence to independently receive complaints on human rights violations.[89] However, in the report it submitted to the HRC after Morocco has submitted its response to the LOIs, it asserted that the law that established it mandates it to do so and faces no impediment from the state in discharging the mandate; it has received 10,050 complaints relating to human rights violations between January 2014 and June 2016.[90] Also, the CNDH urged the HRC to include in its concluding observations the need for the state party to increase funding for the Commission to enable it to carry out its mandate more effectively.[91] The CNDH was commended by the HRC for investigating and monitoring human rights violations within the territory of Morocco in its concluding observations.[92]

However, the HRC failed to include the request of the CNDH for more funds in its concluding observations, which could discourage other NHRIs from participating in its review since it does not request more support from state parties for the institutions.

ii. Inputs of NGOs into the Review Process

Before the review of the sixth report of Morocco as requested by the HRC, NGOs also made contributions by submitting alternative reports.[93] While NGOs do not have an official role in the review process as they are not provided with the opportunity to make presentations during the proceedings, by virtue of reports, they make submissions and the informal meetings they have with members of the HRC gives them an opportunity to influence the reviews of state parties reports.[94] Boerefijn is of the view that the reason why the participation of NGOs was not officially integrated into the review process was because of the objection of state parties to the use of NGO reports during the review.[95] In addition, allowing NGOs to directly participate in the review process will discourage some state parties from engaging in the process.

Diverse issues were raised by these NGOs in their reports to the HRC; for example, journalists are prosecuted for criticising government officials. An instance of this was the arrest

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(LOIs) by Morocco Prior to Consideration of the Sixth Report' (February 2016) UN Doc CCPR/MAR/23037.

87 ibid para 23.

88 UN Doc CCPR/MAR/23037 (n 86).

89 HRC 'List of Issues in Relation to the 6th Periodic Report of Morocco' (9 May 2016) UN Doc CCPR/C/MAR/Q/6, para 2.

90 Conseil National des droits de l'Homme (CNDH) 'Submission of the National Human Rights Council of Morocco to the Human Rights Committee on the List of Issues and Replies Provided by the Government' (19 September 2016) UN Doc CCPR/NHS/MAR/25254, para 8.

91 UN Doc CCPR/MAR/23037 (n 86), para 83.

92 UN Doc CCPR/C/MAR/CO/6 (n 33), para 27.

93 UN Doc CCPR/C/104/3 (n 53), para 7.

94 Michael O'Flaherty, *Human Rights and the UN: Practice before the Treaty bodies* (2nd edn, Springer 2002) 33.

95 Ineke Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights: Practice of the Human Rights Committee* (Intersentia 1999) 5.

of the editor of *Akhbar Al Yaoum* by the Moroccan judicial police on account of his article in which he criticised two government officials.[96] In addition, journalists are charged for supporting terrorism despite constitutional guarantees.[97] The state party even resorts to media blackouts and censorships to prevent the *Sarahawi* people from voicing out their agitations for the right to self-determination, including the blocking of websites.[98]

It was also observed that the state party should adopt preventive measures against the torture of detainees to include the introduction of medical examinations by independent medical doctors during periods of detention, and to grant immediate access to lawyers to all persons taken into its custody, including those accused of terrorism offences.[99] NGOs played a significant role in providing information on violations of human rights by the state party.

a. Freedom of Opinion and Expression

The Moroccan Constitution[100] guarantees the right to access information from government institutions to its citizens. This right is limited only on the grounds of national security and infringement of the rights of other citizens protected by the Constitution.[101] It equally protects the freedom of press and also prohibits prior censorship of the press.[102] However, it is observed that in Morocco, the internet gives individuals unhindered opportunity to exercise the right to freedom of expression. The state party has resorted to clamping down on this source of information with the intention to suppress dissent.[103] It has also adopted surveillance of the internet as a means of repressing opinions that oppose government policies. This is done by blocking websites and detaining journalists which has in turn heightened anxiety and self-censorship among the populace.[104] This is a major challenge to the implementation of the provision of art. 19 in Morocco.

The HRC in its LOIs to the state party sought information on the accusations of imprisonment and imposition of fines on journalists as provided by the Moroccan Press Code for publications that do not favour the government. Along with that, information on steps

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96 Dignity Forum for Human Rights published by the Human Rights Committee, 'Comments on the Sixth Periodic Report of the Kingdom of Morocco on the Implementation of the International Pact on Civil and Political Rights' (February 2016) UN Doc No CCPR/CSS/MAR/25211, 8.

97 Mediator for Democracy and Human Rights (MDDH) published by the Human Rights Committee, 'Parallel Report to the Sixth Periodic Report of Morocco on the Implementation of the ICCPR Submitted to the Human Rights Committee on 15 June 2015 at the Initiative and Coordination of the Moroccan Organisation of Human Rights' (18 December 2015) Doc No 1055232, para 211 < https://www.ecoi.net/en/file/local/1055232/1930_1454581496_int-ccpr-ico-mar-22571-e.doc> accessed 5 February 2021.

98 Robert F Kennedy Human Rights, 'Alternative Report: On the Occasion of the Human Rights Committee Review of the Kingdom of Morocco's Implementation of the International Covenant on Civil and Political Rights' (*Robert F Kennedy Human Rights*, 19 September 2016) <https://rfkhumanrights.org/assets/documents/western_sahara_alternative_report_human_rights_committee_english.pdf> accessed 13 December 2020.

99 HRC 'APT Submission on Morocco' (19 September 2016) UN Doc CCPR/CSS/MAR/25217, para 6.

100 Draft Text of the Constitution Adopted at the Referendum of 1 July 2011, Dahir No. 1-11-82 (17 June 2011).

101 ibid art 27.

102 ibid art 28.

103 Mustapha Zanzoun, 'The Use of Social Media in Promoting Human Rights Among Speakers of English in Morocco: The Case of Facebook' (2017) 5(19) International Journal of Education and Research 169, 175.

104 Bouziane Zaid, 'Internet and Democracy in Morocco: A Force for Change and an Instrument for Repression' Global Media and Communication (2016) 1, 3.

taken to align domestic legislation with provisions of art. 19 was requested by the HRC.[105] In its response, the state party informed the HRC that right to freedom of expression is guaranteed by art. 27 of its constitution.[106] Furthermore, its constitution also protects journalists from censorship.[107]

At the review of Morocco's sixth periodic review, the HRC requested its representatives to respond to allegations made by an NGO that despite the establishment of a Press Code, journalists were prosecuted under the Penal Code.[108] The delegation denied this claim and further informed the HRC that a new Press Code decriminalizing defamation had been established. This meant that the journalists found in violation of the law were only liable to fines and not a prison term.[109] At the end of the review, the HRC called on the State to desist from carrying out surveillance operations that target journalists.[110]

In its concluding observations, the HRC commended Morocco for the establishment of a new Press Code 2016 that does not contain custodial sentences. However, it did point out that the provisions of the state's new Criminal Code that provides jail terms for persons that are critical of the Monarchy or voice out opinions that are adverse to the territorial integrity of the state should be reviewed as it curtails the provision of art. 19. It urged the state party to align the restriction of free speech with the provision of art. 19 (3) ICCPR.[111]

b. Right to Liberty and Security of Person

In the 1970s and 1980s, the Moroccan State was accused of engaging in arbitrary detention of members of the opposition, with an estimated 50,000 persons held in various detention centres.[112] What made the situation grave was the absence of the Anglo-American legal right to *Habeas Corpus* (a writ requiring a person in custody to be brought before a court), which resulted in individuals being detained and kept in solitary confinement in Morocco for long periods of time in contradiction to art. 9 of the ICCPR.[113]

1. 48 Hour Police Custody Timeline

As pointed earlier, the HRC has recommended that individuals in the custody of the police should be arraigned before the courts within 48 hours after their arrest to avoid being mistreated while still in the custody of state officials.[114] However, under Moroccan law, the period for keeping individuals in police custody is 48 hours and may be extended by 24 hours. In cases of offences that affect the state, including terrorism charges, the period is 96 hours and may be extended twice. It is to be noted, however, that any breach in these periods of

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105 UN Doc CCPR/C/MAR/Q/6 (n 89) para 26.

106 HRC 'List of Issues in relation to the Sixth Periodic Report of Morocco - Addendum Replies of Morocco to the List of Issues' (10 August 2016) UN Doc CCPR/C/MAR/Q/6/Add.1, para 211.

107 ibid para 212.

108 HRC 'Consideration of Reports Submitted by State Parties under Article 40 of the Covenant (Continued) Sixth Periodic Report of Morocco' (25 October 2016) UN Doc CCPR/C/SR.3320, para 18.

109 ibid para 23.

110 UN Doc CCPR/C/MAR/CO/6 (n 33), para 37.

111 ibid para 44.

112 Francesco Cavatorta and Emanuela Dalmasso, 'The Emerging Power of Civil Society? Human Rights Doctrine' in Bruce Maddy-Wetzman and Daniel Zisenwine (eds), *Contemporary Morocco: State, Politics and Society under Mohammed VI* (Routledge 2013) 120, 120-135.

113 Susan Slyomovics, 'A Truth Commission for Morocco' (2001) 218 Middle East Report 18.

114 UN Doc UN Doc CCPR/C/GC/35 (n 35) para 33.

custody is arbitrary and unlawful and may lead to the initiation of disciplinary action against those culpable.[115]

This is an improvement from the previous period of prescribed time of detention by the police which was 92 hours and which could've been extended by a maximum period of 48 hours. Provided, approval for such extension is sought and granted to the police by the King's Prosecutor, except where the alleged offence was an attack on the state where the extension of time may be doubled.[116] The HRC recommended the state party to reduce the period of police custody to 48 hours.[117]

2. Arbitrary Detention

The HRC did not request information on incidences of arbitrary detention in its LOIs to the sixth periodic review of Morocco.[118] This is the result of the state party informing it on the steps it had taken to remedy the violations of art. 9 by its security services. It conducted comprehensive investigations into 17,000 complaints of human rights violations and had paid compensation to 7000 individuals at the time of the submission of the report in 2015. It also provided physical and psychological rehabilitation to the victims free of cost.[119]

The CNDH in its submission to the HRC in the build-up to the review of the sixth report gave out impressive statistics on the amount of compensation offered to victims of violations of human rights by Morocco. It reported that as of 30 July 2016, the state party had compensated 26,998 individuals who were victims of massive violations of human rights, to the tune of US$199,440,000, in local currency equivalent.[120]

The HRC also intervenes in cases of arbitrary detention brought to its attention. For example, it made inquiries into the veracity of the allegation that members of the Oufkir family were being kept in the custody of the state party for a period of 18 years without being arraigned before a court.[121] The delegation gave assurances that the family had been released and no further action was taken against them to inhibit the enjoyment of any of their human rights.[122] Other issues of concern to the HRC were the lack of clarity on the law guiding maximum periods of pre-trial detention[123] and additional information was received by the HRC from unnamed sources that hundreds of people were detained in numerous detention centres as a result.[124]

Despite these weighty allegations, the delegation merely informed the HRC that the Moroccan Criminal Code was reviewed recently and the maximum period for pre-trial

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115 UN Doc CCPR/C/MAR/6 (n 33), para 148.

116 HRC 'Summary of Record of the 332nd Meeting of the HRC where it considered the initial report of Morocco submitted under art. 40 ICCPR' (13 November 1981) UN Doc CCPR/C/SR 332, para 28.

117 UN Doc CCPR/C/MAR/CO/6 (n 33) para 26.

118 UN Doc CCPR/C/MAR/Q/6 (n 89) para 10.

119 UN Doc CCPR/C/MAR/6 (n 33) para 4.

120 UN Doc CCPR/NHS/MAR/25254 (n 90) para 23.

121 Jamal Amiar, 'Morocco Frees Family of Former Minister After 18 Years in Prison' (*Washington Report on Middle East Affairs*, 8 April 1991) <https://www.wrmea.org/1991-april/morocco-frees-family-of-former-minister-after-18-years-in-prison.html> accessed 2 January 2022.

122 UNGA 'Report of the UN Human Rights Committee (Volume I)' UN GAOR 50th Session Supp No 40 UN Doc CCPR/A/50/40 (1996) 24.

123 HRC 'Summary of Record of the 1365th Meeting: Consideration of Reports Submitted by State Parties under Article 40 of the Covenant - Third Periodic Report of Morocco' (25 October 1994) UN Doc CCPR/C/SR.1365, para 18.

124 ibid para 23.

detention was put at two months, which may be renewed periodically, not exceeding one year.[125] HRC was informed by the Moroccan Organisation for Human Rights that a person is only released at the end of the 12 months period with the consent of an investigative Magistrate, in violation with art. 154 of the Moroccan Code of Criminal Procedure.[126] The same human rights organisation further informed the HRC that the implementation of art. 9 (4) of the ICCPR was not complied with, as courts refuse to accept complaints of the arbitrary detention by persons in custody, unless the case files were already assigned to them for consideration by the state which also prolonged detention.[127]

The HRC further referred the state party to the report of the USA State Department which claimed that the alleged leader of a banned NGO, the Islamist organisation Justice and Charity, had been in the custody of the state for more than two years without trial, and this information was not listed in the state party report. The state party, however, refused to address these issues raised by the HRC.[128] The HRC did not raise the issue of pre-trial detention in the LOIs to the sixth periodic report of Morocco as a result of which it was not part of the dialogue during the review. This could have given it a clearer picture of the status of pre-trial procedure in the state party.[129] As Morocco had appeared consistently before the HRC, Viljoen viewed its cooperation during these reviews as impressive because of its frank responses to issues raised by the HRC.[130]

B. Rwanda

Rwanda was a colony of Belgium and it consequently inherited a German/Belgian civil law legal system after being granted independence in 1962.[131] However, it presently practices a hybrid system of civil and common law, and is shifting towards a common law legal system. For instance, it had adopted the concept of applying judicial precedents as a source of law in addition to its written laws.[132] Rwanda acceded to the ICCPR on 16 April 1975,[133] and made no reservations to the applicability of any of the provisions of the ICCPR within its territory.[134]

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[125] ibid para 40.

[126] UN Doc CCPR/C/SR.1365 (n 123) para 9.

[127] ibid para 10; An instance was given by the human rights NGO of the case of a union leader who was kept in preventive detention because he was alleged to have committed an offence which did not fall under the category of offences that provided for a person to be kept in preventive detention under Moroccan Law. His application for judicial intervention of his unlawful detention was not determined until his case went before the Court of Appeal after he had been in custody for 12 months.

[128] ibid para 26.

[129] UN Doc CCPR/C/MAR/MAR/6 (n 33) para 10.

[130] Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) 100-101.

[131] Eunice Musiime, 'Rwanda's Legal System and Legal Materials' (*Globalex*, 2007) <www.nyulawglobal.org/globalex/Rwanda.html> accessed 30 May 2017.

[132] William E. Kosar, 'Rwanda's Transition from Civil to Common Law' (2013) 16(3) Globe Trotter 1.

[133] OHCHR, 'Reporting Status for Rwanda' (*UN Human Rights Treaty Bodies Database*, 2021) < https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=RWA&Lang=EN> accessed 19 March 2021.

[134] 'ICCPR Declarations and Reservations' (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 9 January 2022.

The state party failed to submit its report for review on 22 March 1977, as recommended by the HRC. It, however, submitted the report on 20 January 1981,[135] which was subsequently reviewed in 1982.[136] It submitted its second periodic report within a reasonable time for consideration.[137] The failure of Rwanda to submit its third periodic report made the HRC send a reminder to its government urging it to do so in compliance with its obligation under art. 40 of the ICCPR.[138] However, before it could do so, civil war broke out resulting in massive human rights violations. Consequently, the HRC requested that the state party submit as a matter of urgency, its third periodic report not later than 31 January 1995 in a summary form if possible, with particular emphasis directed towards arts. 6, 7, 9, 10, 14 and 27 of the ICCPR.[139]

Rwanda failed to submit the report as requested by the HRC and despite several reminders thereafter, at its sixty-eighth session, two of its members met the Rwandan Ambassador to the UN, who assured them that the report would be submitted in the year 2000. The state party failed to do so again and as a result of this refusal, the HRC fixed March 2007 at its eighty-ninth session to consider the application of ICCPR rights within the territory of Rwanda.[140] Consequently, the HRC adopted a LOIs on Rwanda in the absence of its report [141] which raised issues such as the implementation of ICCPR rights within the territory of the state party,[142] compliance of the National Human Rights Commission of Rwanda (NHRC) with the Paris Principles,[143] measures adopted to curb domestic violence against women and remedies available to those affected by it,[144] and accusations made by the NHRC of the state party operating unlawful and secret detention centres within its territory.[145]

Also, the maximum time period of pre-trial detention and complaints of harassment and arbitrary detention of members of NGOs were matters to be considered by the HRC during the third periodic review.[146] As a response to the HRC's adoption of LOIs in the absence of a report, Rwanda submitted its report a year later after the adoption of the LOIs.[147] After the

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[135] UNGA 'Report of the UN Human Rights Committee' UN GAOR 36th Session Supp No 40 UN Doc CCPR/A/36/40 (1981) 99.

[136] HRC 'Summary of Record of the 345th Meeting: Consideration of Reports Submitted by State Parties under Article 40 of the Covenant - Initial Report of Rwanda' (1 April 1982) UN Doc CCPR/C/SR. 345.

[137] UNGA 'Report of the UN Human Rights Committee' UN GAOR 42th Session Supp No 40 UN Doc CCPR/A/42/40 (1987) 9.

[138] UNGA 'Report of the UN Human Rights Committee (Volume I)' UN GAOR 51st Session Supp No 40 UN Doc A/51/40 (1997) 12.

[139] UNGA 'Report of the Human Rights Committee (Volume I)' UN GAOR 50th Session Supp No 40 UN Doc A/50/40 (1996) 14.

[140] UNGA 'Report of the Human Rights Committee (Volume I)' UN GAOR 60th Session Supp No 40 UN Doc A/61/40 (2006) 19.

[141] HRC 'List of Issues to be Taken Up in Connection with the Consideration of Third Periodic Reports of States parties - Third Periodic Report of Rwanda (CCPR/C/RWA/3)' (3 November 2006) UN Doc CCPR/C/RWA/Q/3.

[142] ibid para 1.

[143] ibid para 3.

[144] ibid para 5.

[145] ibid para 8.

[146] ibid para 15.

[147] HRC 'Consideration of Reports Submitted by State Parties under Art. 40 of the Covenant: 3rd Periodic Report of Rwanda' (12 September 2007) UN Doc CCPR/C/RWA/3.

review of the third periodic report,[148] the failure of Rwanda to submit its report for more than 15 years was a major concern and Rwanda was urged to submit its next report when due;[149] there was a marked improvement as it submitted its fourth periodic report only a year later than it was due.[150]

i. Independence of the National Commission of Human Rights (NCHR)

The state party had established a National Commission on Human Rights (NCHR) which had been strengthened to comply with the Paris Principles, and it had been accredited as an 'A' status NHRI, which means that it is recognised as an institution that operates without external interference.[151] For an NHRI to be truly effective, it must operate independent from the government and that its members must be selected from different sectors of society, including NGOs.[152] However, the HRC was informed that with regard to the selection of members of the NCHR, the President establishes a committee which he mandates under his control in order to choose members of the Rwandan NHRI which he then submits to the Parliament for approval.[153] Another concern raised about the NCHR was its refusal to criticise the security agents of the state party when they violated the human rights of individuals, especially when they are political in nature. It was also accused of undermining the efforts of NGOs to carry out their mandate of monitoring human rights violations and further discrediting the work of international NGOs.[154] The concerns raised by various sources on the lack of independence of the NCHR also included the lack of transparency in the selection of members of the NCHR.

In addition, the NCHR is accused of subverting the work of human rights NGOs; for instance, it is alleged that it pressurised a particular NGO to withdraw a report it submitted to the Human Rights Council on the human rights record of Rwanda[155] In their response, the delegation claimed that the selection of members of the NCHR is done in an open and transparent manner, but did not dispute the fact that the selection process is not transparent.[156] It however denied the allegation that the NCHR undermines the functions of NGOs. With regard to its challenge of the contents of a report presented to the Human Rights Council by

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148 HRC 'Concluding Observations of the Human Rights Committee on Rwanda's 3rd Periodic Report' (30 March 2009) UN Doc CCPR/C/RWA/CO/3, para 2.

149 ibid.

150 UN Doc CCPR/C/RWA//4 (n 33).

151 HRC 'Replies of Government of Rwanda to the List of Issues in Relation to Rwanda 3rd Periodic Report' (9 March 2008) UN Doc CCPR/C/RWA/Q/3/ Rev.1/Add.1, para 13.

152 Institute for International Law and Human Rights, 'A Comparative Look at Implementing Human Rights Commissions Laws' (*IILHR*, March 2009) <hrlibrary.umn.edu/research/Egypt/Implementing%20HR%20Commission%20Laws.pdf> accessed 10 September 2017, 9 and 10.

153 Human Rights Watch, 'Submission to the Human Rights Committee in Advance of the Fourth Periodic Review of Rwanda' (*Human Rights Watch*, 12 February 2016) <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/RWA/INT_CCPR_CSS_RWA_23062_E.pdf > accessed 9 January 2020.

154 ibid.

155 HRC 'Summary of Record of the 3250th Meeting of the HRC Where it Considered the 4th Periodic Report of Rwanda Submitted under Article 40 ICCPR' (17 March 2016) UN Doc CCPR/C/SR. 3250, para 12.

156 ibid para 32.

an NGO, it stated it is within the scope of its mandate to do so in cases where reports contained facts that were not true as in that particular case.[157]

The HRC raised concerns about the level of compliance of the Rwandan NHRI with the Paris Principles[158] which the state party disputed, submitting that it was an independent NHRI with a mandate for the protection and promotion of human rights.[159] The HRC observed that the NCHR failed to submit a shadow report alongside that of the state party and inquired on the reason behind its omission. It further wanted to know which body the NHRI is answerable to and what its powers were.[160] It also noted its members were part of the government delegation that attended the review of Rwanda's third periodic report.[161] The delegation informed the HRC that it was felt that it wasn't appropriate for the NCHR to submit an alternative report to the HRC for consideration at that material time but they were evasive on the issue of the mandate of the NCHR and rather just outlined its functions as contained in the Rwandan Constitution and its enabling law.[162]

The HRC recommended the state party to make the selection of the members of the NHRI transparent and expand the scope of its mandate in line with the Paris Principles.[163] It is observed that the Rwandan NCHR is not an independent NHRI, and therefore cannot fulfil the mandate of promotion and protection of human rights. This calls into question the credibility of the 'A' status it has been conferred with. From the above discussion, it does not meet the criteria set by the Paris principles for a truly independent NHRI.

ii. Suppressing the Oversight Functions of the NGOs

NGOs play an active role in the protection of human rights at both the UN and domestic levels by collecting reliable information from the latter and submitting it to the former on the status of human rights protection.[164] As noted earlier, the HRC has also incorporated NGOs into its activities, especially the reporting procedure.[165] Despite the efforts of the NGOs to support the promotion of human rights in Rwanda, information on challenges faced by their members was submitted to the HRC in terms of the persecution they encounter. For instance, members of one of the few truly independent NGOs in Rwanda, known as the Human Rights League in the Great Lakes Region, had been barred from traveling freely within the territory of the state, and members of another NGO were arrested for being in possession of forged documents which they denied.[166]

Furthermore, NGOs complain of intimidation, harassment, and threats to their lives and administrative bottlenecks erected by the government to frustrate their abilities to carry out

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157 ibid para 33.

158 UN Doc CCPR/C/RWA/Q/3 (n 141) para 3.

159 HRC 'Replies of Government of Rwanda to the List of Issues in Relation to Rwanda 4th Periodic Report' (9 December 2015) UN Doc CCPR/C/RWA/Q/4/Add.1, para 5.

160 HRC 'Summary of Record of the 2603rd Meeting of the HRC Where it Considered the 3rd Periodic Report of Rwanda Submitted under Art. 40 ICCPR' (18 March 2009) UN Doc CCPR/C/SR. 2603, para 9.

161 HRC 'Summary of Record of the 2602nd Meeting of the HRC Where it Considered the 3rd Periodic Report of Rwanda Submitted under Art. 40 ICCPR' (18 March 2009) UN Doc CCPR/C/SR. 2602, para 36.

162 UN Doc CCPR/C/SR. 3250 (n 155) para 33.

163 UN Doc CCPR/RWA/CO/4 (n 33) para 10.

164 John C Mubangizi, 'The Role of Non-Governmental Organisations in the Protection of Human Rights in South Africa' (2004) 2 Journal of South African Law 324, 326.

165 UN Doc CCPR/C/104/3 (n 53), para 4.

166 HRC 'Summary of Record of the 3251st Meeting of the HRC Where it Considered the 4th Periodic Report of Rwanda, Submitted under Art. 40 ICCPR' (18 March 2016) UN Doc CCPR/C/SR. 3251, para 14.

their lawful duties. Most of the human rights activists have fled out of the state and those who have chosen to stay behind and speak out are arbitrarily detained. In 2013, one of the leading human rights activists was murdered by two members of the Rwandan police, and as a result of these threats, NGOs were facing extinction in Rwanda.[167]

The delegation was asked to respond to these allegations but they refused to do so.[168] While it is observed that the HRC showed concern in the restrictions on the registration of NGOs and their administration[169], it is submitted that the HRC ought to have raised the issue of the suppression of the NGOs in its concluding observations to Rwanda, as it had cogent information of its members fleeing the territory and some losing their lives. This certainly indicated the urgency of the need for intervention on their behalf as the HRC does for NHRIs, so that it will enable them to carry out their function of the promotion and protection of human rights in a more conducive environment.

a. Right to Freedom of Opinion and Expression

The media in Rwanda played a significant part in accelerating the genocide that occurred in the state by inciting the public, which precipitated the violence between the Hutus and Tutsis and led to the loss of millions of lives.[170] Hefti and Jonas argued that without the media, the level of genocide 'would not have reached the dimensions and levels of rage it did'.[171] However, after peace was restored in Rwanda, the state has stifled the independence of the media as journalists are afraid to report on issues that are not favourable to the government, especially those that concern human rights violations.[172]

In the build-up to review of the fourth periodic report, the HRC requested Rwanda to furnish it with information on steps it had taken to decriminalise defamation and insult laws,[173] and also, safeguards available to journalists against intimidation, harassment, and arbitrary detention.[174] The state party refused to address these issues in its reply. It only pointed out that the Constitution and domestic legislation provides regulations for the media.[175]

During the review of Rwanda's fourth report by the HRC, it was asked to comment on the veracity of the information that journalists are harassed by agents of the state, and that a correspondent of the Chronicles Newspaper was arrested and detained for requesting an investigation on the seizure of his laptop and phone by the police.[176] The HRC was also alarmed by the report of prosecutions of a high number of journalists, which discouraged them from reporting on issues that were not favourable for the state.[177] The Rwandan delegation

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167 Human Rights Watch (n 153).
168 UN Doc CCPR/C/SR. 3251 (n 166) para 14.
169 UN Doc CCPR/RWA/CO/4 (n 33) para 42.
170 Meghan Sobel and Karen McIntyre, 'The State of Journalism and Press Freedom in Postgenocide Rwanda' (2018) 96(2) Journalism and Mass Communication Quarterly 1, 2.
171 Angela Hefti and Laura A. Jonas, 'From Hate Speech to Incitement to Genocide: The Role of the Media in the Rwandan Genocide' (2020) 38(1) Boston University International Law 1, 3.
172 Meghan Sobel and Karen McIntyre, 'Journalists' Perceptions of Human Rights Reporting in Rwanda (2018) 39(3) African Journalism Studies 85, 101.
173 HRC 'List of Issues in Relation to the 4th Periodic Report of Rwanda' (21 August 2015) UN Doc CCPR/C/RWA/Q/4, para 20.
174 ibid para 23.
175 UN Doc CCPR/C/RWA/Q/4/Add.1 (n 159) para 55.
176 UN Doc CCPR/C/SR. 3251 (n 166) para 15.
177 ibid para 51.

refused to respond to these questions. They, however, informed the HRC that its Penal Code was being reviewed and steps were being taken to repeal criminal defamation and other insult laws from its legislation.[178]

The HRC enjoined the state party to strictly align its restrictions of freedom of expression with the provision of art. 19 (3) ICCPR. It also requested it to refrain from persecution of journalists and provide them with an environment free of any restrictions. The HRC reiterated its call to the state party to decriminalise defamation.[179]

b. Right to Liberty and Security of Person

After the 1994 Rwandan genocide, the maintenance of peace and security was one of the essential priorities of the state party, especially since the neighbouring states were grappling with instability within their own territories.[180] However, the state party has resorted to detaining individuals for long periods of time without arraigning them before a competent court of law. For example, it has a law that allows it to detain beggars and street vendors without proffering charges against them.[181] This type of detention was declared as unlawful by HRC, when it held that:

> Every decision to keep a person in detention should be open to review periodically, so that the grounds justifying the arrest can be assessed. In any event detention should not continue beyond the period for which the state can provide appropriate justification.[182]

The application by Rwanda of the safeguards provided under art. 9 of the ICCPR will be examined below.

1. Period of Police Custody

As highlighted earlier, the HRC in its general comment no 35 asserted that individuals alleged to have committed criminal offences should not be kept in detention for more than 48 hours without being arraigned before a court of law.[183] It also recommended that access must be given to detainees to challenge the legality of their detention before a court of law (*habeas corpus*).[184] Under Rwandan law, a person can be kept in custody for a maximum of 72 hours. The only improvement is the introduction of the procedure of *habeas corpus* to enable those detained unlawfully to enforce their rights.[185] This is a setback for Rwanda; in its initial report to the HRC, it asserted that the maximum period of police custody was 24 hours and if there was the need for an extension of stay in custody, the police must apply to a judge for a warrant which must not exceed five days.[186] However, during that period, the state was under one

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[178] ibid para 41.
[179] UN Doc CCPR/RWA/CO/4 (n 33) para 40.
[180] Andrea M. Grant, 'Quiet Insecurity and Quiet Agency in Post-Genocide Rwanda' (2015) 27(2) Etnofoor 15.
[181] William R. Pruitt, 'Crime and Punishment in Rwanda' (2017) 20(2) Contemporary Justice Review 193, 206.
[182] HRC 'Av Australia Communication No: 560/1993' (30 April 1997) UN Doc CCPR/C/59/D/560/1993, para 9.4.
[183] UN Doc CCPR/C/GC/35 (n 35) para 33.
[184] ibid para 39.
[185] UN Doc CCPR/RWA/CO/4 (n 33) paras 161, 168.
[186] UNGA 'Report of the Human Rights Committee' UN GAOR 37th Session Supp No 40 UN Doc A/37/40 (1982) 52.

party rule and dissent was suppressed by the only party in existence then.[187] At that particular time, state parties were accused of embellishing their reports because of the lack of independent organisations that could provide information to the HRC on the conduct of state parties within their territories by verifying the objectivity of their reports.[188] Consequently, it is submitted that it is doubtful that this provision of a 24 hour timeline ever existed under the Rwandan law.

2. Arbitrary Detention

Arbitrary detention takes many forms. For example, detention of individuals is deemed arbitrary if those accused of committing criminal offences have not been convicted of the allegations levelled against them or are unable to have the validity of their detention periodically reviewed.[189] The HRC further held that detainees are entitled to be taken before a court of law to determine the lawfulness of their incarceration.[190] The HRC, in the course of the review of Rwanda's report, requested information from the state party on the maximum period of pre-trial detention and at what stage a person accused of a crime is allowed access to a lawyer and his family.[191] Other issues raised with regard to the implementation of Art. 9 were whether the period of pre-trial detention can be extended indefinitely. The HRC was informed by an unnamed source that an individual was kept in detention for a period of 14 months and denied access to a lawyer and his family; it asked whether this type of detention was a regular occurrence.[192]

The delegation responded by saying that when a person is kept in pre-trial detention, if a judge issues a maximum 30-day remand order, provided he is satisfied with the materials put before the court that circumstances warrant the issuance of such an order, this order is subject to renewal at the expiry of 30 days as the situation warrants.[193] Pruitt restates this as the true position of the law, but he points out that in cases where bail is granted to an accused person, it is the prosecutor in most cases that sets the conditions for the bail of the person.[194] This power given to the prosecutor is detrimental to the detainees, and judges that are empowered to grant bail should also be allowed to set bail conditions. Also, the period of detention must not exceed the period of imprisonment of the alleged offence, should the detainee be found guilty.

The HRC was also reassured that a person taken into custody is granted immediate access to a lawyer of his or his family's choice at the onset of the investigation of the alleged

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[187] 'Constitutional History of Rwanda' (*ConstitutionNet*, *2016*) <www.constitutionnet.org/country/constitutional-history-rwanda> accessed 17 September 2017.

[188] Tyagi (n 50) 286.

[189] Kristin Hausler and Robert McCorqoudale, 'Pre-Trial Detention and Human Rights in the Commonwealth: Any Lessons from Civil Law Systems' (2014) 2(1) Journal of Human Rights in the Commonwealth 8, 14.

[190] HRC 'Luyeye Magana ex-Philibert v. Zaire, Communication No. 90/1981' (1990) UN Doc CCPR/C/OP/2, para 8.

[191] UN Doc CCPR/C/SR. 3250 (n 155) para 20.

[192] ibid para 21.

[193] ibid para 36.

[194] Pruitt (n 181) 205.

crime.[195] The delegation, however, denied any knowledge of a person held in detention for a period of 14 months.[196]

In its concluding observations to the fourth periodic report, the HRC observed that Rwanda's failure to provide information on measures it had taken to investigate these allegations were of concern to it and equally it was still concerned with the long periods of time for which the individuals are kept in the custody of the police before they are arraigned before a judge which was in violation of Art. 9.[197] Consequently, the concluding observations issued to the state party at the end of the review of its fourth periodic report with regards to the right to liberty, made the following recommendations: (1) reduction of the maximum period of police detention to 48 hours;[198] (2) persons lawfully arrested should be detained in government owned detention centres;[199] (3) complaints of arbitrary detention should be promptly investigated and those found culpable be prosecuted;[200] and (4) any individual who is alleged to have been unlawfully detained should be allowed to seek legal redress.[201]

As an initial stage to the follow-up procedure, the state party is requested to submit a report on the level of implementation of some of the recommendations made in the concluding observations highlighted by the HRC within one year of the issuance of the concluding observations, and in this case recommendation made to it on unlawful detention was chosen among them.[202]

V. Follow-up to HRC's Concluding Observation Procedure

Under the follow-up procedure, the HRC selects a minimum of two to four recommendations in the concluding observations issued to state parties for immediate implementation and state parties are expected to submit a report to the HRC on their level of progress within a year of the adoption of the concluding observations.[203] It mandates a Special Rapporteur on follow-up to the Concluding Observations, to monitor the compliance of the procedure, and report to it.[204] Morocco and Rwanda have participated in this procedure.

In the case of Morocco, it informed the HRC that it has not amended its law to comply with its recommendation for the individuals not to exceed 48 hours in the custody of the Police without being arraigned before a court.[205] It, however, outlined legal safeguards to protect the human rights of individuals in custody of the police. For instance, if the police seek to detain a person beyond 48 hours, an application must be made to the King's Prosecutor to justify the need for an extension, which must not exceed 24 hours.[206] Furthermore, it has revised the Code of Criminal Procedure (CCP) and has provided for several safeguards which includes

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[195] ibid.
[196] UNGA 'Report of the Human Rights Committee' UN GAOR 43rd Session Supp No 40 UN Doc A/43/40 (1988) 52.
[197] UN Doc CCPR/RWA/CO/4 (n 33) para 19.
[198] ibid para 20(a).
[199] ibid para 20(b).
[200] ibid para 20(c).
[201] ibid para 20(d).
[202] ibid para 50.
[203] HRC, 'Note by the Human Rights Committee on the Procedure for Follow-Up to Concluding Observations' (21 October 2013) UN Doc CCPR/C/108/2, para 7.
[204] ibid para 3.
[205] HRC 'Information Received from Morocco Concerning Action Taken to Concluding Observations Relating to its 6th Periodic Report' (27 December 2018) UN Doc CCPR/C/MAR/CO/6/Add.1, para 10.
[206] ibid para 12.

individuals receiving immediate access to a lawyer of their choice once taken into custody.[207] The state party also reported that the CNDH continues to be strengthened to carry out its functions as it collaborates with international partners like the Council of Europe to train its staff in techniques of protection of human rights.[208] The CNDH in collaboration with the UN High Commissioner for Human Rights and GANHRI, organised a regional conference on expanding civic space for the promotion and protection of human rights defenders. [209] NGOs are equally allowed to operate unhindered within its territory.[210] Morocco also asserts that its new Press Code abolishes jail terms for journalists who breach any provision of the law, replacing it with fines.[211]

The HRC seems to be satisfied with the response of Morocco on steps it had to address the challenges it has with the implementation of arts. 9 and 19 ICCPR; it did not raise any concerns in its report to the follow-up.[212] It, however, discontinued the follow-up procedure and requested the state party to address all pending issues in its seventh periodic report, which was due on 31 March 2019.[213] It is observed that the failure of the CNDH and NGOs to submit alternative reports to that of the state party makes it difficult for the HRC to ascertain the veracity of the claims by Morocco.

In the case of Rwanda, its report was not as detailed as that of Morocco, as it merely informed the HRC that its criminal procedures were under review.[214] It denied operating unofficial detention centres and further claimed that its detention centres comply with those of the UN and persons in custody are provided with legal safeguards.[215] On freedom of expression, the state party submitted that the right is guaranteed to all citizens, and curtailed on grounds of public order, good morals, the protection of youth and children, dignity of every citizen, and protection of personal and family privacy.[216] It also informed the HRC that it had decriminalised defamation and other 'related offences'.[217] The state party did not provide any information relating to steps it had taken on strengthening its NCHR and issues that have to do with the persecution of journalists and NGOs.

The HRC was concerned about the skeletal report submitted by Rwanda and it did not provide information on police custody, pre-trial detention, and measures taken to address unlawful detention.[218] It welcomed the decriminalisation of defamation by the state party and also sought to know if insult laws have been decriminalised as well.[219] It also requested

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[207] ibid para 14.
[208] ibid para 39.
[209] ibid para 55.
[210] UN Doc CCPR/C/MAR/CO/6/Add.1 (n 205) para 42.
[211] ibid para 51.
[212] HRC 'Report on Follow-Up to Concluding Observations of the Human Rights Committee: Evaluation of the Information on Follow-Up to the Concluding Observations on Morocco' (adopted at the 127th session 14 October - 8 November 2019) UN Doc CCPR/C/127/R.1/Add.4, paras 1-6.
[213] ibid 5.
[214] HRC 'Concluding Observations on the 4th Periodic Report of Rwanda: Information Received from Rwanda on Follow-Up to the Concluding Observations' (8 May 2018) UN Doc CCPR/C/RWA/CO/4/Add.1, para 8.
[215] ibid para 9.
[216] ibid para 16.
[217] ibid para 17.
[218] HRC 'Report on Follow-Up to Concluding Observations of the Human Rights Committee' (8 November 2018) UN Doc CCPR/C/124/2, para 4.
[219] ibid 5.

information on the protection afforded to journalists and NGOs in relation to the exercise of right to free speech as provided by art. 19 ICCPR.[220] The follow-up procedure was discontinued, and information requested by HRC from Rwanda was to be included in its fifth periodic report which was also due on 31 March 2019.[221] In the case of Rwanda also, the NCHR and NGOs did not submit any parallel report to the HRC in relation to the follow-up procedure. The HRC, therefore, could not test the veracity of the claims of Rwanda in its follow-up report.

The discontinuance of the follow-up procedure at this stage seems premature, as there is need for the HRC to continue supervising the compliance of its recommendations up to the period when state parties submit their reports. Also, the adoption of visits to the territories of state parties by members of the HRC after the completion of the review of state parties' reports will make the follow-up procedure more effective, as it will provide an opportunity to the members to interact with stakeholders in the state party concerned with the promotion and protection of human rights concerning the implementation of the committee's concluding observations. Recently, Members of the HRC were in Namibia on such a visit and they engaged officials of various departments who are responsible for the implementation of the concluding observations of the HRC. Representatives of NGOs equally interacted with members of the HRC on issues related with the implementation of the concluding observations in Namibia and the HRC was pleased with the interaction.[222] If the HRC can sustain these visits, it will add more teeth to the follow-up procedure and encourage state parties to put more efforts in fulfilling their obligations to the ICCPR.

VI. Conclusion

The HRC was established by the ICCPR to monitor the implementation of its provisions by state parties to the treaty. It is vested with four mechanisms to be able to discharge its mandate which includes the mandatory submission of reports by state parties for review by the HRC.[223] These reports are to contain the successes and challenges recorded by state parties in the implementation of the provisions of the treaty. As a result of the importance of the reporting procedure, Morocco and Rwanda were selected among the state parties to the HRC to test the efficacy of the procedure, which produced mixed results due to differences in their ability to implement the provisions of the ICCPR. At the inception of the HRC, its major challenge was its inability to verify the contents of reports submitted to it by state parties, as it lacked an independent mechanism within their territories. As a result, it encourages NHRIs and NGOs to submit parallel reports alongside that of the state parties at every stage of the review to close this gap. While these two institutions participated in various stages of the review of the selected state parties report, none participated in the follow-up procedure of the HRC, which is crucial in analysing the level of compliance by state parties.

There is a need for improvement in the reporting procedure of the HRC and its visibility must be increased by scheduling the consideration of these reports according to regions,

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[220] ibid.
[221] ibid 6.
[222] Centre for Civil and Political Rights, 'Follow-up Visit to Namibia' (*CCPR*, 19 August 2016) <https://ccprcentre.org/ccprpages/un-human-rights-committee-members-visit-namibia> accessed 12 January 2020.
[223] ICCPR (n 1) art. 40(1).

instead of the practice of holding its state parties' reviews in New York or Geneva.[224] It should select a number of African state parties two years prior to the review and notify them. The HRC should rotate its sessions between territories of African state parties. Doing so will improve the state reporting mechanism in three ways. It will add more pressure to the state parties to participate in the procedure, because if the HRC comes to Africa, there will be more awareness about its work, and put those African state parties in the spotlight, especially if it stays for one month in the territory of a particular State party. Secondly, the HRC will have the opportunity to engage more senior government officials, even Heads of State of state parties, and be able to present their recommendations before those officials who can influence the implementation of its concluding observations.

Finally, it can also embark on follow-up procedures on the implementation of the concluding observations as state parties neglect to implement these concluding observations because they know that the HRC will just send reminders which they may choose to ignore, and it seems NGOs and NHRIs are not keen in participating in the follow-up procedure. However, if members of the HRC in the course of the sessions embark on visits to various territories of state parties to make inquiries on the level of the implementation of the concluding observations, the state parties will put in more effort to implement them. As pointed out earlier, members of the HRC were in Namibia on such a visit recently.[225] Adopting this practice would spur state parties into compliance with the concluding observations of the HRC.

The inclusion of NGOs and NHRIs in the review procedure has benefitted the HRC, and it has been seen that NGOs make considerable contributions to the review process because they operate independent of the governments. Their members, however, face challenges and some have been threatened or even harmed for engaging in the collection of information of human rights violations by state parties. Rwanda, for instance, is alleged to have committed such acts against members of NGOs, which has resulted in some of them losing their lives.[226] As a result, there is a need for the HRC to make a point of including this issue in its LOIs and make inquiries about the level of freedom allowed to NGOs to operate within the respective territories.

The HRC has been described as akin to the 'babblings of a raggedly old man on the street corner; even if he is correct and even if passers-by periodically give him their attention, no one is really listening'.[227] It has, however, recorded modest success in ensuring state parties fulfil their obligations to the ICCPR. The participation of NGOs and NHRIs in the state reporting procedures have made a positive impact. However, there is a need for the reporting procedure of the HRC to be strengthened. In its current status, it has not made the desired impact and the HRC continues to be considered a 'raggedly old man' whose decisions are largely ignored by state parties to the ICCPR.

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[224] ibid art 37(3).
[225] Centre for Civil and Political Rights (n 222).
[226] Human Rights Watch (n 153) 15, 16.
[227] Cindy A Cohn, 'Who's Listening? Modest Suggestions for the Human Rights Committee' (1990) 59 Nordic Journal of International Law 321.

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Human Rights V. State Sovereignty - Conflict: Lessons from the Case Study of Afghan Refugees in Iran

Maryam Jami*
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Abstract

Refugee-hosting countries have long feared that abiding by international law principles that entrench the human rights of refugees might impair their state sovereignty. Iran is one example of such countries: so far, it has refused to effectively protect the legal rights of its Afghan population and has also violated these rights on various occasions. This paper, however, argues that unheeding and violating the human rights of refugees by the host states trigger international backlash and humanitarian interference against them, thereby undermining their sovereignty. The paper illustrates how Iran's anti-foreigner migration standards regarding Afghans have so far infringed its state sovereignty: they have led to the furious international condemnation of Iranian politics towards Afghan refugees and have left out a possibility of prospective humanitarian interventions. In doing so, the paper (1) charts how ignoring and violating the refugees' rights can indirectly but more robustly damage a host state's sovereignty, and (2) offers a new perspective into the orthodox understanding of the human rights and state sovereignty 'pull-and-tug': It refutes the longstanding conviction that the *protection* of refugees' rights strikes at the host state's sovereignty.

I. Introduction

There has been an ongoing debate in international law on whether, to preserve their sovereignty, states need to create their own norms for dealing with human rights issues rather than subscribing to an international system of laws protecting the human rights of both their nationals and the refugee population.[1] Against this backdrop, refugee-hosting states voice concerns that acceding to an international framework of human rights protection will put their sovereignty at stake.[2] Such a conviction has led to hurdles in the international implementation of human rights, especially in cases where the abuse of human rights is carried out directly by the host states.[3]

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* Researcher at the Institute of War and Peace Studies (IWPS). The paper is presented at the 10th Annual Cambridge International Law Conference.

1 Richard A Falk, *Human Rights and State Sovereignty* (Holmes & Meier 1981). See also Jost Delbruck, 'International Protection of Human Rights and State Sovereignty' (1982) IN. L J.; Michaelene Cox and Noha Shawki, *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Routledge 2009); Jack Donelly, 'State Sovereignty and Human Rights' (2004) HUM. RIGH. & HUM. WEL.

2 Philip Alston and Euan Macdonald, *Human Rights, Intervention, and the Use of Force* (OUP 2008).

3 In fact, Brooke generally refers to all those states which refuse to surrender to the international system of protecting the human rights of either their nationals or refugee population and create their own style of implementing human rights standards which might also lead to violation of human rights by their own governments and politics. See Holly Brooke, 'State Sovereignty and Human Rights—Irreconcilable Tensions'

Debates over the mutual interaction between human rights values and the principle of state sovereignty have been continuing with the same force and pace. Anthony Hallal argues that, in many cases, state sovereignty functions as 'a force against human rights'.[4] Reciprocally, Cole highlights the effects of implementing international human rights on state sovereignty by noting that when human rights values are placed above a state's domestic will, state sovereignty goes under an inviolable international check.[5] As opposed to Cole's argument, Jarczewska contends that the restrictive impact of enforcing international human rights on state sovereignty is mostly 'conceptual' and does not exceed limited cases.[6]

What is well captured throughout these debates is that the contending scholars have concretised their inquiry merely into the impact of 'implementing international human rights' on 'state sovereignty' and *vice versa*. Nevertheless, recent developments pertaining to international migration and the approaches of host countries thereto encourages us to also unpack the implications of ignoring and violating human rights values on state sovereignty. This paper aims to commence this unpacking by arguing that, to unheed the refugees' legal rights means to instigate international backlash against the host governments and prompt humanitarian interventions by foreign players.[7] To substantiate its argument, the paper presents, and offers lessons from, the popular, but particularly understudied, case study of Afghan refugees in Iran. Accordingly, the paper argues that Iran's violation of the human rights of Afghan refugees has sparked international outrage over its migration policies toward Afghans, left free space for international interventions, and thus has blemished Iran's state sovereignty.

The remainder of this Article proceeds in the following manner: Section II probes into the chronicle of Afghans in Iran, and elucidates how the Iranian government has evolved from a *hospitable* migration strategy toward Afghans, to a more self-centered and anti-foreigner method of refugee reception. Section III presents a general picture of the current social status of Afghans residing in Iran and those who attempt to enter Iran, particularly charting how they have been deprived of their right to non-discrimination. This part then turns to explore three recent cases of violation of the Afghan refugees' right to non-discrimination by the Iranian government – cases that have aroused unprecedented international backlash.

Section IV enumerates the implications of such politics of Iran on its national sovereignty and provides general lessons of such kind for the respective scholarship. It suggests that Iran's policies with regards to its Afghan population have largely been geared towards

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(*Medium,* 2017) <https://rileybrooke.medium.com/state-sovereignty-and-human-rights-irreconcilable-tensions-462d356ae063> accessed 2 September 2020.

4 Anthony Hallal, 'How Useful Are International Human Rights in a Sovereign and Democratic State?' (*Right Now,* 2014) <http://rightnow.org.au/opinion-3/how-useful-are-international-human-rights-in-a-sovereign-and-democratic-state/> accessed 5 September 2020.

5 See Wade Cole, 'Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants' (2005) 70(3) AMERICAN SOC. REV. 472. **Error! Hyperlink reference not valid.**

6 Daria Jarczewska, 'Do Human Rights Challenge State Sovereignty?' (*E-International Relations*, 15 March 2013) <https://www.e-ir.info/2013/03/15/do-human-rights-challenge-state-sovereignty/> accessed 4 September 2020.

7 Johan D Van Der Vyer, 'Part III Structural Principles, Chapter 16 Sovereignty' in Dinah Shelton (eds), *The Oxford Handbook of International Human Rights Law* (OUP 2013). See also Rajamanickam Srinivasan, 'State Sovereignty and International Human Rights Law: Complement or Compromise?' (2014) INT'L SCIEN. CON. <https://www.researchgate.net/publication/264197316_State_Sovereignty_and_International_Human_Rights_Law_Complement_or_Compromise> accessed 29 April 2021.

shielding its state sovereignty against non-nationals and the international legal sphere and thus have proved ineffective in regard to the protection of Afghan refugees' rights under international law. This has allowed the international community to criticise Iranian officials publicly and has left space for further humanitarian intervention. This situation poses a more robust deal of limiting and sabotaging effect to Iran's state sovereignty than the time when a host country protects the human rights of its refugee population. Section V presents the conclusion.

Throughout the article, especially in the first parts, which are theory based, the author has mostly used journals, books, and book chapters. However, the last parts of the article are related to the recent developments, and there is no academic work such as books and journals on it. The incidents have taken place in mid-2020. Thus, there are almost no academic sources directly on or at least touching on the topic. Therefore, for the last sections, the author has mostly benefited from newspapers, news magazines, and social media platforms such as Twitter.

II. From 'Guests' to 'Gate Crashers': A Brief History of Afghans in Iran

On 28 July 1976, the government of Iran adopted the Convention Relating to the Status of Refugees (Refugee Convention) and its Protocol which have defined the legal rights of refugees and have obliged signing countries to respect and protect them.[8] After signing the Convention, in 1979, Iran officially began accepting refugees mainly from Afghanistan and Iraq.[9] Particularly, Afghan migrations to Iran picked up pace since 1979 due to the Soviet War, inferior economic conditions and drought in Afghanistan,[10] and have been growing pervasive to date. This paper analyzes the history of Afghan migrations to Iran under upcoming rubrics:

A. First Wave of Migrations (From 1979 to 1989)

The Soviet war left in its wake approximately 5000000 homeless, and more than half of this population entered Iran seeking work, food, and suitable security conditions.[11] They were accepted in Iran as refugees and were given the required rights and facilities for living.[12] During this period, sheltering Afghans had mostly a religious aspect. In fact, Iranian religious leader Khomeini emphasized Iran's role in undertaking a mission to protect Afghan refugees who

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[8] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1; Optional Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (New York Protocol); UNHCR, 'Refugees in Iran' <https://www.unhcr.org/ir/> (*UNHCR*) accessed 9 January 2021.

[9] Shirin Ebadi, 'Refugee Rights in Iran' (Meeting Report, Chatham House June 2008) <https://reliefweb.int/sites/reliefweb.int/files/resources/D37E47829333FC88852574660071D063-Full_Report.pdf> accessed 21 September 2020.

[10] Joseph J Collins, *Understanding War in Afghanistan* (National Defense University Press 2011). **Error! Hyperlink reference not valid.**

[11] Gregory Feifer, The Great Gamble: The Soviet War in Afghanistan (2010) New York Times Book Review.

[12] Katrin Marchand and others, 'Afghanistan Migration Profile' (2014) INT'L ORG. MIG. <https://afghanistan.iom.int/sites/default/files/Reports/afghanistan_migration_profile.pdf> accessed 4 October 2020.

had fled the Soviet war, and thus contribute to the *jihad* (holy defence) of Afghans against the Soviet led government of Afghanistan.

This trend coincided with Iran's revolution of 1979 against the US backed regime of Reza Shah Pahlavi. Revolutionary Iran, led by Khomeini and his followers, supported the Afghan *Shiite* refugees who sided with the revolutionary forces. Moreover, it maintained within the Islamic Republic's Constitution that the government would protect those seeking political asylum.[13] The opportunity to request such an asylum was ostensibly given to those migrants who were fleeing their countries occupied by non-Muslim forces.

In the 1980s, the government of Iran prevented United Nations High Commissioner for Refugees (UNHCR) from getting involved in the management of issues related to Afghan refugees. This clearly charts the religious standpoint of Iran towards this issue. Iran deemed protecting refugees as an Islamic humanitarian act which every Muslim country would willingly perform, and that no external forces and authorities should and could intervene in such a holy - and *ipso facto* exclusionary - mission. However, it is notable in the present case that UNHCR has always preserved its right to intervene in cases related to Afghans in Iran whenever its involvement seemed required.[14] This is particularly pertinent as Iran especially strives not to allow any foreign or international interference with its domestic issues, including matters involving migrants and foreign nationals.

During this era, Afghans were granted three types of cards to maintain their need for protection: (1) the Refugee Booklet was the only document using the term 'refugee', and it needed to be renewed every three months; (2) the Permanent Card was a document introducing the holder as the one who is in the move for religious purposes;[15] and (3) the Temporary Card was given to undocumented Afghan refugees and was no longer valid as of 1996.[16]

It is interesting to note that despite professing its distaste for any external intervention, within this era, Iran's refugee protecting measures were in clear consonance with human rights provisions mandated under international law. As illustrated, under this framework, the undocumented refugees were also protected -a feature which does not exist in present Iranian migration policies. Such a sophisticated migration policy engineering comported with the provisions of the Refugee Convention, which has entrenched the *non-refoulement*[17] rule. This rule dictates that refugees, including undocumented ones, shall not be forcefully deported to the place where they were exposed to poor living qualities, insecurity, and persecution.[18] Thereby, the Convention realises, and alludes to, the need for the protection of undocumented refugees as well.

This period of Iran's refugee reception is characterised by relative success in hammering out a peaceful symbiosis between state sovereignty and the protection of refugees'

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[13] Political asylum is a kind of identity in a foreign country which is requested by migrants who fear of insecurity, terror and abuse in their homeland and look for a safe shelter elsewhere.

[14] Afsaneh Ashrafi and Haideh Moghissi, 'Afghans in Iran: Asylum Fatigue Overshadows Islamic Brotherhood' (2002) GLOB. DIA.< https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/6314/CRS0004.pdf?sequence=1&isAllowed=y > accessed 8 February 2022.

[15] This card had two colors. The blue ones were granted to Afghans and the Green ones were given to Iraqi refugees.

[16] Ashrafi and Moghissi (n 14).

[17] Refugee Convention (n 8) 31.

[18] Refugee Convention (n 8) 31.

rights. The government simultaneously furnished its refugee population with required standards of living and protected its state sovereignty by (justifiably) fighting off any international intervention.

The following subsections will elaborate upon how the Iranian regime strategically departed from this traditional trend of refugee reception, and how this departure has impinged upon Iran's national sovereignty and interactions with the international community.

B. The Second Wave (From 1989 to 1995)

Nearly 2500000 Afghans left their homeland and poured into Iran as a result of the civil war of Afghanistan beginning in 1989, most of who were educated and from middle class families.[19] After Kabul was taken by *Mujahidin*[20] in 1992, 1500000 Afghans returned to their home on their own will.[21] *Mujahidin's* takeover of Afghanistan after the Soviet war led to Iran's ideological evolution on the practice of refugee reception. During this reign, Iran started to gradually depart from its divine - and *ipso facto* obligatory - task of accepting refugees.

Such a diversion then opened the doors for the international community to find a justification for getting involved in the refugee-protecting industry in Iran anytime such involvement was seemingly needed.[22]

By the 1990s, the Afghan religious war against the Soviet powers had ended, and thus Iran did away with its traditional religious viewpoint towards the reception of Afghan refugees. Since then, Iran's refugee protection enterprise took a perfunctory form and was relegated to the backburner.[23] By contrast, Iranian authorities put on more efforts to bolster their national sovereignty in the face of increasing waves of migrations.

Iranian policies tightened to an extent which led the refugee protection system into leeway by forming baselines for, and indirectly encouraging discrimination against, Afghan refugees.[24] Identity cards were confiscated, and Afghan children were deprived of pursuing education in state schools. Undocumented refugees also faced the danger of mass deportation, harassment, and inhumane treatment.[25] This, in turn, created attenuated bottom lines for international intervention in the refugee-protecting projects in Iran. As such, in 1993, the UNHCR initiated the first formal repatriation programme to gradually send back Afghans to their homeland. It could repatriate around 300.000 refugees to Afghanistan.[26]

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19 See Ashrafi and Moghissi (n 14).

20 Islamic Afghan warriors who had fought against the Soviet Forces in Afghanistan from 1979 to 1989.

21 Barnett R Rubin, 'Afghanistan: The Forgotten Crisis' (*WRITENET,* 1 December 1996) <https://www.refworld.org/docid/3ae6a6c0c.html> accessed 11 January 2021.

22 Abbasi Shavazi and others, 'Second-generation Afghans in Iran: Integration, Identity and Return' (*Afghanistan Research and Evaluation Unit*, April 2008) <https://areu.org.af/publication/823/> accessed 8 February 2022.

23 ibid.

24 Aryaman Bhatnagar, 'Iran: Understanding the Policy towards Afghan Refugees' (2012) Institute of Peace and Conflict Studies <http://www.ipcs.org/focusthemsel.php?articleNo=3683> accessed 29 April 2021.

25 Islam Qala, 'Afghanistan: Forcible Returns from Iran Continue' (*The New Humanitarian,* 20 February 2002) <http://www.irinnews.org/report.aspx?reportid=18129> accessed 5 September 2020.**Error! Hyperlink reference not valid.**

26 The involvement of UNHCR here marks a turning point in Iran's migration strategy: As Iran's doctrine of refugee reception took a more optional form, it got easier for international players to intervene. See Shavazi (n 22).

C. The Third Wave (From 2001 Onwards)

The third wave of Afghan migrations towards Iran began in late 2001 as a result of the United States (US) military attack on Afghanistan, which was planned to oust the Taliban from power.[27] Iran-US relations have historically bred implications for Afghan refugees. Iran supported the former US led Afghan government, which was formed as a result of the American occupation of Afghanistan in 2001. The main factor behind this support was Iran's long term goal of curbing *Sunni* extremism in the region, which was spread by Al-Qaeda and the Taliban.[28]

Thus, in the beginning, the newly formed Afghan government seemed to have lowered the risk of violence against the Afghan *Shiite* community, who were strongly backed by the Iranian government. The new, apparently favorable conditions of Afghanistan for Afghan refugees, particularly for the *Shias*, in turn, caused Iranian repatriation plans to speed up. In 2002, the UNHCR in collaboration with the governments of Iran and Afghanistan, renewed the assistance programme for repatriation of the refugees who wanted to return to Afghanistan voluntarily.[29]

This programme ended in 2008, and by the time many repatriated Afghans found their way back to Iran for different reasons.[30] Against this backdrop, Iran marshaled more hastening efforts to insulate its state sovereignty and national resources against growing waves of Afghan migrations, increasing demands of refugees for their basic rights, and finally, against international interventions.[31] Nonetheless, such efforts have proved largely counterproductive.

The contemporary refugee management framework of Iran has long resulted in many cases of human rights violations against Afghan refugees. Although such cases encompass the violation of different basic rights, this paper intentionally studies the violation of these (different) rights under a general rubric: the violation of the right to non-discrimination. Such a focus is wise and important because: (1) the violation of the right to non-discrimination is the direct and most robust product of the historical bifurcation of the Iranian government from its 'religious strategy towards migrations that strike a balance between state sovereignty and the protection of refugees' rights' to 'a more sovereignty oriented refugee management apparatus'; and (2) the lack of protection from discrimination of the Afghan refugees in Iran has therefore resulted in the violation of their (different) basic rights under the Iranian regime.

Thus conceived, the gradually normalized sentiment of dislike for Afghans in Iran flows from the overwhelmingly sovereignty leaning Iranian stand against migrations, and this exclusionary approach has turned Afghans to be 'unwanted' in Iran, resulting in violations of their right to non-discrimination. The violation or restriction of other basic rights of the Afghan refugees has thus manifested as discrimination.

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[27] See Council on Foreign Relations, 'The U.S. War in Afghanistan' <https://www.cfr.org/timeline/us-war-afghanistan> accessed 11 January 2021.

[28] See Emmanuel Sivan, 'Sunni Radicalism in the Middle East and the Iranian Revolution' (1989) 21(1) INT'L JM EST 1.

[29] The New Humanitarian, 'Afghan Refugees Given Repatriation Extension' (*The New Humanitarian,* 28 February 2007) <https://www.thenewhumanitarian.org/report/70450/afghanistan-iran-afghan-refugees-given-repatriation-extension> accessed 4 October 2020.

[30] The New Humanitarian, 'Interview with UNHCR Head to Mark the Return of One Million Afghan Refugees' (*The New Humanitarian,* 2 September 2004) <https://www.thenewhumanitarian.org/news/2004/09/02/interview-unhcr-head-mark-return-one-million-afghans-refugees> accessed 7 October 2020

[31] Shavazi (n 22).

The following section offers a general view of how the contemporary Iranian senses of xenophobia and discrimination against Afghan refugees have been crystallized among the public. It touches upon discriminative rules, governmental practices, and public treatment which have perpetuated such undercurrents of intolerance against Afghans. Then, it goes on to explain more recent and specific cases of such kind, which have not only spurred heated international backlash against the Iranian regime but have also invoked reactions from Afghan authorities and Iranian nationals.

III. The *'Unwanted'* Label of Afghans in Iran: Violations of the Basic Rights and the Resulting Condemnations

Article 3 of the Refugee Convention, the main international instrument safeguarding the rights of refugees to which Iran is a party, maintains that: '[T]he Contracting States shall apply the provisions of this Convention to refugees *without discrimination* as to race, religion or country of origin'.[32] It means that the contracting state (Iran, in this case) should not restrict the rights of any refugee based on his/her country of origin, religion, or race. As the Convention also states in Article 7 paragraph 1[33] that, save where the Convention contains more advantageous provisions, a contracting state must provide refugees the same treatment as aliens in general, 'rights granted to aliens in general' must be taken into account and shall be granted to refugees as well. In light of the Convention's history and the objective expressed in the Preamble, it is reasonable to conclude that contracting states should not discriminate between different kinds of refugees within the Convention's mandatory provisions.

Albeit with different and more general wordings, the same provision pertaining to the illegality of discrimination against human beings has been enshrined in other international covenants as well.[34] Article 7 of the Universal Declaration of Human Rights (UDHR) provides that: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'. Article 7's equality and non-discrimination principle contributes to the formation of the rule of law. These obligations are expanded upon in a variety of other international treaties aimed at combating discrimination against indigenous peoples, migrants, minorities, and disabled people. Discrimination based on race, religion, sexual orientation, or gender identity is likewise prohibited. A series of international human rights treaties have expanded on the rights enumerated in Article 7, and jurisprudence has added to the prohibition on discrimination over the years. It is now not enough for countries to refrain from discriminating against particular populations. They must also take proactive measures to address discrimination. Thus, Article 3 of the Refugee Convention is also an expansion to the general provisions of Article 7 of UDHR, as it obliges the contracting states to grant the rights and freedoms mentioned in the Convention to all refugees without discrimination.

However, contrary to the obligations on the part of signing countries with regards to refraining from discrimination, the miserable conditions of Afghans in Iran mirror a quite

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[32] Refugee Convention (n 8) art 3 (emphasis added).

[33] Refugee Convention (n 8) art 7.

[34] Universal Declaration of Human Rights (1948) (adopted 10 December 1948)UNGA Res 217 A(III) (UDHR) art 7; International Covenant on Economic, Social and Cultural Rights (1966) (adopted 16 December 1966) UNTS 993 art 2.

different picture. Although a small community of Afghans enjoy basic rights and are accepted with public sympathy among Iranians, circumstances are different for most others as they face violence, abuse, and discrimination.[35]

Afghans are perceived to be triggers of anarchy and disorder in Iran.[36] Thus understood, they are mostly treated as lawbreakers and the ones who have to be punished, persecuted, and sidelined.[37] It is under such a pessimistic and discriminative perspective that the Afghan refugees forfeit their (different) basic rights. At the same time, this gradually cemented perspective towards Afghans in Iran violates article 3 of the Refugee Convention, as Afghan refugees are treated much differently than other aliens and refugees due to their country of origin.

Afghan workers usually receive a lower income than their Iranian counterparts.[38] Iranian patrons who work in dangerous industries tend to hire undocumented Afghan workers who would fare in the face of insecurity, heavy workload, and low salaries.[39] Moreover, Afghan workers do not enjoy any political or social rights and are prevented from requesting insurance or any other document which safeguards their social security.[40] Such discriminative bans also amount to a general breach of the International Covenant on Economic, Social, and Cultural Rights which confers basic social rights to all human beings without discrimination.[41]

Iran's government has, in some cases, issued discriminative rules against foreigners inside the country, including Afghans.[42] What is more, Iranian state channels tend to publicize these sorts of rules as propaganda,[43] injecting into the Iranian culture an anti-foreigner sentiment against Afghans. One of the legal restrictions Iran has imposed on Afghan refugees pertains to the right to nationality. Regarding Article 15 of the UDHR: '(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality'.[44] The language of the Article is general. It has granted to every human being the right to nationality, regardless of the fact that he/she lives or is born in his/her own country or not. The Article thus encompasses the refugees as well. Therefore, according to the provisions of this Article, no one should remain stateless. Similarly, Article 7 of the Convention on the Rights of the Child imposes an obligation on states to confer the right to nationality to a child who is born inside their territory and 'ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.'[45] Accordingly, the states which are party to this

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35 Fariba Nawa, 'The Precarious Lives of Afghan Children in Iran' *(Refugees Deeply*, 7 June 2018) <https://www.newsdeeply.com/refugees/articles/2018/06/07/the-precarious-lives-of-afghan-children-in-iran> accessed 2 September 2020.

36 Janne Bjerre Christensen, *Guests or Trash: Iran's Precarious Policies towards the Afghan Refugees in the Wake of Sanctions and Regional Wars* (Report Number 11, Danish Institute for International Studies 2016).

37 ibid.

38 Shavazi (n 22).

39 Zahra Karimi Moughari, 'The Effects of Afghan Immigrants on the Iranian Labour Market' (2007) 13 (20) IR ECON REV 57.

40 ibid 59-65.

41 International Covenant on Economic, Social, and Cultural Rights (n 34).

42 Bhatnagar (n 24).

43 Shabnam Moinipour, 'Refugees against Refugees the Iranian Migrants' Perception of the Human Rights of Afghans in Iran' (2017) 21(7) INT'L J HR 823.

44 UDHR (n 34) art 15.

45 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 7.

Convention must refrain from depriving the child of a refugee of their nationality on any basis, including his/her country of origin.

That said, according to Article 976 of the Iranian Civil Code, Afghan women who marry Iranian men can obtain Iranian citizenship and their children will be as well entitled to the conditions of an Iranian citizen. However, if Iranian women marry Afghan men, the man is not considered an Iranian citizen, and he may apply for citizenship separately.[46] This is the primary impediment to second generation Afghan refugee children obtaining Iranian citizenship[47] as the Iranian Civil Code does not confer Iranian citizenship on the child based on that of its mother. Therefore, in case an Iranian woman who is married to an Afghan man gives birth to a child, the Iranian Civil Code denies the child's right to Iranian nationality and makes the child's nationality subject to conflict. Therefore, Afghan refugee children born in Iran are at high risk of statelessness.[48] That is because thousands of children born to Iranian mothers and non-Iranian fathers are denied citizenship in Iran. Hence, they do not have access to government funded education and health care there. The uncertain futures of these children have also highlighted Iranian women's unequal status as mothers and has fueled calls for changes to the country's citizenship regulations.[49]

Afghan refugees also struggle with restrictions set for owning properties. Article 13 of the Refugee Convention expressly stipulates:

The Contracting States shall accord to a refugee treatment *as favorable as possible* and, in any event, *not less favorable than* that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.[50]

In this Article, as well as Articles 18 (self-employment), 19 (liberal professions), 21 (housing), and 22 paragraph 2, the norm of treatment is 'treatment as favorable as practicable and, in any event, not less favorable than that granted to aliens generally in the same circumstances'. Therefore, it is not only a binding requirement to accord aliens in similar circumstances the same treatment as other aliens, but also a recommendation for more favorable treatment.[51] It must be noted here that in some countries, including Iran, foreigners (including refugees) are not covered by national legislation for the protection of tenants, unless by virtue of such treaties and conventions. If contrary to the provisions of this Convention, refugees, who are frequently penniless, are denied the treatment afforded to foreigners under treaties, they will be denied the benefits of such laws, which will be disastrous for them.[52]

Not only this, but some national laws of certain countries restrict the acquisition of properties by refugees. As such, Article 1 of the Iranian Civil Procedure Code holds that only

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46 Civil Code of the Islamic Republic of Iran (1928) art 976.

47 Institute on Statelessness and Inclusion, 'Statelessness in Iran' (*Stateless Journeys,* 2019) <https://statelessjourneys.org/wp-content/uploads/StatelessJourneys-Iran-final.pdf> accessed 13 December 2021. See also Jason Tucker, 'Exploring Statelessness and Nationality in Iran' (*Tilburg University,* 2014) < https://www.academia.edu/7156718/Exploring_Statelessness_and_Nationality_in_Iran> accessed 13 December 2021.

48 ibid.

49 Ashraf Zahedi, 'Transnational Marriages, Gender Citizenship, and the Dilemma of Iranian Women Married to Afghan Men' (*Iranian Studies,* 2007) <https://www.jstor.org/stable/4311891> accessed 24 December 2021.

50 Refugee Convention (n 8) art 13.

51 ibid.

52 Refugee Convention (n 8) 81.

those foreign nationals who have *permanent residence* in Iran can own movable property.[53] Since many Afghans are undocumented refugees having temporary residence, they are not entitled to possess movable assets but only in some rare cases with the permission of the government. Many Afghans complain about not having a house, a car, insurance, or even a SIM card. In the long run, this situation has increased their susceptibility to insecurity, robbery, and sacking.[54]

Through a closer inspection of some criminal cases, Iran's discriminative perspective against Afghan refugees can be clearly captured. In a fairly recent case, on 21 July 2019, a video went viral on social media showing a young Afghan boy being beaten and intimidated by an Iranian guard after the boy attempted to unlock a donation box inside a shrine in the Bushehr province of Iran.[55] Normally, an individual who attempts to commit theft must be formally arrested by the police and be taken to the police station. There is no specific comment in the Refugee Convention on how to deal with the criminal charges of refugees. However, it does indicate that refugees shall be granted the right to access to the courts and formal trajectories channeling the criminal cases,[56] and that this right should be preserved for refugees just as it is conferred to national residents. In this way, the Iranian police is obligated to apply an *erga omnes* understanding of the criminal rules to both nationals and refugees *without discrimination*. However, in the present case, subjecting the boy to violence highlights a double standard between Afghan refugees and Iranian nationals regarding criminal responsibility. Although the guard then apologized to the boy's family, the video provoked reactions on social media,[57] raising concerns about the dominant discriminatory approach of the Iranian regime towards Afghan refugees.

Being unwanted in Iran has also brought illegal Afghan refugees face to face with the danger of mass deportation. Article 31 of the Refugee Convention maintains that '[T]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened'.[58] Such 'penalties' can encompass deportation or non-admittance, meaning that the host state would either deport a refugee who has already entered the country, or that it would refuse to admit refugees at the frontier. The sovereign power to expel or keep foreigners deemed undesirable from its territory is unassailable. Nonetheless, deportation or refusal to admit at the border are harsh measures in any situation; they are especially serious in the case of a refugee who cannot be sent back to his own country, and who cannot be forced to be accepted by another country.[59] Additionally, returning a refugee to the border of the country where his life or liberty is threatened because of his race, religion, nationality, or political beliefs, if those

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53 Civil Procedure Code of Iran (2000) 1.

54 Joshua Evangelista, 'Afghans in Iran: No SIM Card, No House, No Rights' (*Middle East Eye*, 29 December 2017) <https://www.middleeasteye.net/features/afghans-iran-no-sim-card-no-house-no-rights> accessed 29 April 2021.

55 Frud Bezhan, 'Afghan Migrant Boy's Rough Treatment in Iran Sparks Outrage' (*Radio Free Europe,* 26 July 2019) <https://www.rferl.org/a/afghan-migrant-boy-s-rough-treatment-in-iran-sparks-anger/30077657.html> accessed 12 September 2020.

56 Refugee Convention (n 8) art 16.

57 Frud Bezhan, 'Video Appears to Show Iranian Police Officer Assaulting Afghan Migrants' (*RadioFreeEurope, 2018)* <https://www.rferl.org/a/iranian-police-officer-video-assaulting-afghan-migrants/29665755.html> accessed 10 September 2021.

58 Refugee Convention (n 8) art 31.

59 Refugee Convention (n 8) 202.

beliefs are not in violation with human rights values, would be equal to handing him over to his persecutors.[60] This fact is very common in the case of Afghan refugees in Iran, as many of them flee their homeland due to violence, persecution, and discrimination against their ethnic or religious identity.[61] They cannot also choose another country as their destination since they face linguistic problems. These being said, Iran has, in many cases, deported undocumented Afghan children back to their home without their parents. The children narrate that they were also exploited by Iranian employers and then sent back home alone, amid miserable conditions.[62]

In sharp contrast to the first phase of Afghan migrations to Iran, wherein illegal refugees were afforded identity cards which preserved their right to reside in Iran,[63] in current conditions, illegal refugees are being treated as unwelcome by the Iranian government. This attitude is well captured and more substantially pinpointed through cases discussed in the below subsections.

Although there are several cases of violence and discrimination in Iran against Afghans [64] that are worth mentioning, the intention of this paper is to accentuate the cases which have recently urged serious international repercussions. The ensuing subsections will offer a more pointed account of how Iran's departure from its classical refugee protection trend, and the practice of its current politics towards Afghan refugees have sparked outrage among international players, thereby working to the disadvantage of Iran's national sovereignty.

A. The Case of Iranian Officer Slapping and Insulting Nine Afghan Men

In preceding cases, it was portrayed how the Afghan refugees who reside in Iran are being treated with discrimination, unfairness, and aversion. The recent cases will additionally depict how the 'unwanted' label of Afghans in Iran has also caused Iranian border guards to overreact over the entrance of new Afghan refugees to Iran.

On 18 December 2018, a video spread on Twitter showing an Iranian police officer slapping nine men who wore traditional Afghan clothes and asking them why they came to Iran.

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60 Refugee Convention (n 8) art 31(3), para 3, 203.

61 Roshan Noorzai, 'Thousands of Afghans Flee to Iran as Uncertainty Grows under Taliban' (*VOA News*, 2021) <https://www.voanews.com/a/thousands-of-afghans-flee-to-iran-as-uncertainty-grows-under-taliban/6244617.html> accessed 14 December 2021. See also Reuters Staff, 'Who Are the Hazaras and What Are They Escaping?' (*Reuters,* 2016) <https://www.reuters.com/article/us-europe-migrants-hazaras-idUSKCN11S0WG> accessed 14 December 2021.

62 Christensen (n 36).

63 See Part II A.

64 Ahmad Shoja, 'Iran Bans Afghan and Iraqi Refugees from Moving to Regions for Employment' (*UN DISPATCH*, 6 June 2012) <https://www.undispatch.com/facing-financial-pressure-iran-bans-afghan-and-iraqi-from-moving-to-cities-for-employment/> accessed 4 September 2020; Afghanistan News*,* 'In a First, Tehran Honors Beleaguered Afghan Community' (*Afghanistan News,* 22 March 2019) <https://www.afghanistannews.net/news/260057998/in-a-first-tehran-honors-beleaguered-afghan-community> accessed 6 September 2020; Tolo News, 'Afghan Embassy Approaches Iran Government about Torture Incident' (*Tolo News,* 3 October 2019) <https://tolonews.com/afghanistan/afghan-embassy-approaches-iran-government-about-torture-incident> accessed 5 October 2020; BBC News, 'Afghan Refugees in Iran Face Abuse, Says HRW' (*BBC News,* 20 November 2013) <https://www.bbc.com/news/world-middle-east-25007379> accessed 8 October 2020.

The video sparked anger among both Afghans and Iranians.[65] Many Iranian nationals and celebrities shared their sympathies with Afghans and stated that they were sorry for what their security forces had done. They mentioned that Afghans seek refuge in Iran, fleeing the degrading security and economic conditions.

Indeed, the situation is such for many Afghans. They enter Iran to find a job and escape from the poverty and degrading security conditions in Afghanistan.[66] Article 31 of the Refugee Convention explicitly provides that 'the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees …'.[67] Seemingly, the penalties covered by Article 31 only enclose formal punishment that, according to the Convention, may be imposed on refugees by the government on solid grounds. These penalties refer to administrative or court convictions for unauthorized entry or presence.[68] Formal punishment resulting from convictions can be in the form of deportation or fine on a legally solid basis. Even if the illegal migrants request to enter the contracting state, judicial proceedings for illegal entry or presence should be halted until their request is thoroughly investigated.[69] Also, according to the Legal Information Institute, a penalty is the punishment meted out to someone who breaks the law, whether it's a contract, a rule, or a regulation. Fines can be imposed in response to civil or criminal infractions, with civil penalties typically being less severe. Some fines merely involve the payment of a certain sum of money, which is defined by statute or by a judge depending on the extent of the other party's harm. Other sanctions entail the losing party's property being surrendered. More serious crimes can result in heavier penalties, such as imprisonment or even death, albeit the death penalty is only applied to capital offences and is not a penalty that can be imposed in every jurisdiction.[70] Therefore, the act of 'slapping' and 'unpleasant words' thus outrun the limits of 'formal punishment' or 'penalties' mentioned in this article, thereby making the treatment of the officer extreme, extralegal, and inhumane.

The sense of irritability against the Afghan men, in this case, can be directly linked to the general prejudicial stand of Iran against Afghan refugees, mostly against *illegal* ones. Furthermore, the lack of any legal action from Iranian officials against their security forces who exceed the scope of their duty while dealing with Afghan refugees has encouraged and gradually normalized, if not directly prescribed, the culture of persecuting and humiliating Afghan refugees under the (alleged) justification of their 'unwanted' status in Iran.

B. The Case of Iranian Border Guards Drowning Afghan Refugees into the Harirud River

On 1 May 2020 a group of nearly 70 Afghan refugees who tried to cross into Iran seeking work were tortured and then forced back to the border by Iranian police forces. After being beaten,

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65 Bezhan (n 55).

66 UNHCR, 'Refugees in Iran' (*UNHCR*) <https://www.unhcr.org/ir/refugees-in-iran/> accessed 14 December 2021. See also Christensen (n 36).

67 Refugee Convention (n 8) art 31.

68 ibid 219.

69 ibid.

70 Legal Information Institute, 'Penalty' (*LII,* 2020) < https://www.law.cornell.edu/wex/penalty> accessed 14 December 2021.

the refugees were asked to jump into the Harirud River and go back to Afghanistan.[71] Afghan officials claim that at least 17 dead bodies of refugees have been found from the river while others are missing.[72] Afghanistan's Ministry of Foreign Affairs shared a statement on 2 May informing that an inquiry was initiated and preliminary evaluations had revealed that approximately 70 Afghan refugees were forced into the Harirud River.[73]

Moreover, Afghanistan's Independent Human Rights Commission stated that they have had interviews with the survivors, finding out that they have been severely persecuted and humiliated by the Iranian guards before being pushed into the river.[74]

Article 31 of the Refugee Convention applies to this case as well. The penalties which, as per the Convention, may be imposed on refugees by the government on solid (mostly political) grounds cannot be applied to cases where refugees seek refuge from unfavorable conditions in their homeland or anywhere else. The primary act of drowning, resulting in the death of Afghan refugees, not only encroaches upon Article 31 of the Refugee Convention but also infringes upon the refugees' right to life. It is seemingly such multifaceted violating effect of this incident accruing from the anti-foreigner sense of Iranian guards against Afghan refugees that has provoked unprecedented repercussions. The incident caused sharp tensions in Iran and Afghanistan's diplomatic relations.

However, Iranian officials denied the accusations asserting that the event had taken place within the Afghan soil.[75] Iranian spokesman of Foreign Ministry also assured that they had already launched a probe into the case. Sharing a tweet on 3 May, former Governor of Herat province, Sayed Wahid Qattali blamed the Iranian police forces, rebuking that the ones they had drowned were not just some ordinary names and Afghanistan would one day settle accounts.[76] In addition, this case proves instructive in painting how violating human rights can keep the principle of state sovereignty under international scrutiny. It shows how international players, unprecedentedly, denounced Iran's policies towards Afghan refugees.

As such, on 4 May, Human Rights Watch (HRW) called for a comprehensive inquiry into the occurrence and stated that the incident was shocking. It added that in case the allegations are proven, it would be documented as 'a very serious human rights violation'.[77] Patricia Gossman, Associate Director for the Asia Division at HRW added: 'I haven't heard of a case like this in recent memory, although we have previously documented abuses by

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[71] A river at the border between Iran and Afghanistan.

[72] ABC News, 'Iranian Border Guards Accused of Forcing Afghan Migrants into Harirud River, Causing Some to Drown' *(ABC News,* 3 May 2020) <https://www.abc.net.au/news/2020-05-04/iranian-guards-force-afghan-migrants-into-river-many-drowned/12210514> accessed 4 September 2020.

[73] Al Arabiya, 'Kabul in Bid to Retrieve Bodies of Afghan Migrants Forced into River by Iran Guards' (*Al Arabiya,* 3 March 2010) <https://english.alarabiya.net/en/News/world/2020/05/03/Kabul-in-bid-to-retrieve-bodies-of-Afghan-migrants-forced-into-river-by-Iran-guards> accessed 3 October 2020.

[74] Shapoor Saber, 'They Were Laughing': Iranian Border Guards Accused of Torturing, Drowning Afghan Migrants', (*Radio Free Europe*, 6 May 2020) <https://www.rferl.org/a/iranian-border-guards-accused-of-torturing-drowning-afghan-migrants/30595702.html> accessed 2 September 2020.

[75] Abdul Qadir Sediqi and Storay Karimi, 'Exclusive: Afghan Lawmakers Say 45 Migrants Drowned after Iranian Guards Forced Them into the River' (*Reuters,* 7 May 2020) <https://www.reuters.com/article/us-afghanistan-iran-migrants-exclusive/exclusive-afghan-lawmakers-say-45-migrants-drowned-after-iranian-guards-forced-them-into-river-idUSKBN22J26U> accessed 5 September 2020.

[76] ibid.

[77] ibid.

Iranian border officials against Afghans for some time'.[78] Similarly, the former US Embassy in Kabul tweeted on 5 May sharing its condolence with Afghans.[79] Alice Wells, the acting US Assistant Secretary for South Asia, also shared a tweet on the same day: 'Iran's cruel treatment and abuse of Afghan migrants alleged in these reports are horrifying. We support calls for a thorough investigation. Those found guilty of such abuse must be held accountable'.[80] Former US Secretary of State, Mike Pompeo also noted on the event: 'I was appalled to see reports last week of Iranian guards on the border of Afghanistan's Herat province abused, tortured, drowned Afghan migrants who dared to cross the border simply in search of food and work'.[81] Likewise, on 11 May, hundreds of Afghans gathered outside the Iranian Consulate in Herat province and protested the drowning of Afghans by Iranian soldiers. Nafisa Danish, an activist who was among protesters called on Iranian officials: 'Where are the Human Rights? This Iranian massacre should be condemned'.[82]

C. The Case of Iranian Police Firing at the Car of Afghan Refugees

On 3 June 2020, two videos spread on social media showing Iranian security forces chasing after cars of human smugglers in the Yazd province of Iran. The forces shot at a car full of Afghan refugees. The car caught fire, killed three refugees, and injured eight others.[83] Injured survivors standing on the side of the road kept crying and begging for water. This incident not only marks a violation of Article 31 of the Refugee Convention but, similar to the previous case, the primary act of firing has resulted in the death of Afghan refugees, thereby encroaching upon general human rights provisions pertaining to the right to life enshrined in international law.

The event saddened and outraged Afghans and international players all over the world.[84] Many voiced their anger through social media using hashtags #StopkillingAfghans, #Iamburning, and spreading the message: 'Afghan Lives Matter'! Many others protested in Herat, Kabul, Helmand,[85] and Nangarhar provinces of Afghanistan. More serious

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78 Marion MacGregor, 'Iranian Border Guards Drowned 45 Afghan Migrants, Investigators Say' (*Info Migrants*, 5 August 2020) <https://www.infomigrants.net/en/post/24615/iranian-border-guards-drowned-45-afghan-migrants-investigators-say> accessed 5 October 2020.

79 US Embassy in Kabul, 'Iranian Border Guards Accused of' (*Twitter,* 5 May 2020) Twitter <https://twitter.com/USEmbassyKabul/status/1257557185959264262?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1257557185959264262&ref_url=https%3A%2F%2Fwww.rferl.org%2Fa%2Firanian-border-guards-accused-of-torturing-drowning-afghan-migrants%2F30595702.html> accessed 1 May 2021.

80 State SCA, 'Iran's Cruel Treatment' (*Twitter*, 5 May 2020) <https://twitter.com/State_SCA/status/1257412235598671876> accessed 1 May 2021.

81 Massoud Ansar, 'Pompeo Calls for Probe into Death of Afghan Migrants' (*Tolonews,* 2020) < https://tolonews.com/afghanistan/pompeo-calls-probe-death-afghan-migrants> accessed 8 February 2022.

82 Ashraq Al-Awsat, 'Hundreds Protest Afghan Migrant Drowning at Iran Border' (*Ashraq Al-Awsat,* 11 May 2020) <https://english.aawsat.com/home/article/2278921/hundreds-protest-afghan-migrant-drownings-iran-border> accessed 3 September 2020.

83 The Observers, 'Deaths of Afghan Migrants in Burning Car after Police Chase in Iran Sparks Fury' *The Observers* (11 April 2020) <https://observers.france24.com/en/20200611-fury-after-afghan-migrants-die-burning-car-after-police-chase-iran> accessed 4 September 2020.

84 ibid.

85 Omar, 'Horror, Outrage as Afghan Migrants Burned to Death by Iranian Forces' *Salaam Times* (9 April 2020) <https://afghanistan.asia-news.com/en_GB/articles/cnmi_st/features/2020/06/09/feature-01> accessed 3 September 2020.

demonstrations were planned in London and Washington DC. Afghans, in addition, launched an online petition for the diseased and injured refugees and collected more than 53.000 signatures.

Furthermore, some Afghan celebrities and politicians also raised their voices. Khaled Hosseini, author of The Kite Runner*,* an international bestseller book, said he had added his 'voice to the voice of ones who have condemned this incident'.[86] Some others even compared this event to the case of police violations against black people in the US[87] arguing that every day hundreds of Afghan George Floyds were being abused and humiliated in Iran. Afghans argue that the burning of refugees in Iran was particularly vexing following the support of Javad Zarif, Iranian Foreign Minister for Black Lives protests which were launched in the US as a result of police violation against George Floyd, a black American citizen.[88]

The case of the car blaze has also reminded many Afghan deportees of their dreadful memories while entering Iran.[89] According to Hassan, who was deported back to Afghanistan, Afghans are considered a reason for anarchy and disorder in Iran.[90] That is why the Iranian border guards, though not expressly, pledge themselves to resist the entry of new Afghan refugees to Iran and they mostly, as illustrated in the present cases, overreact over such entries. Such overreactions have, over time, attracted consequential condemnations, thereby tarnishing the image of Iranian regime both inside and on the international plane.

The overreactions have also devised dangerous ramifications for Iran's foreign policy, as they have created flashpoints for tension in Iran's diplomatic relations with Afghanistan and have angered human rights activists and protestors in different countries.

IV. Lessons Learnt: Iran's Policy Shift with Regards to Afghan Refugees and the Prospective Implications for Its National Sovereignty

In 1979, growing waves of Afghan refugees poured into Iran, mostly on the ground that the revolutionary Iran, led by Khomeini, had pledged itself to harbor Afghans who had fled the Soviet war in Afghanistan. Under this migration management apparatus, the Iranian regime consciously protected the basic rights of its Afghan population, dubbing it a divine duty.[91] Interestingly, by so doing, Iranian authorities could as well save their national sovereignty from being encroached upon by international interference. Nonetheless, from 1989 onwards,

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[86] Stefanie Glinski, 'Afghan Car Blaze Deaths Prompt Fury over Mistreatment of Refugees in Iran' (*RAWA News*, 2020) <http://www.rawa.org/temp/runews/2020/06/08/afghan-car-blaze-deaths-prompt-fury-over-mistreatment-of-refugees-in-iran.html> accessed 10 September 2021.

[87] BBC News, 'George Floyd: Huge Protests against Racism Held across US' (*BBC News,* 7 June 2020) <https://www.bbc.com/news/world-us-canada-52951093#sa-link_location=story-body&intlink_from_url=https%3A%2F%2Fwww.bbc.com%2Fnews%2Fworld-asia-52949429&intlink_ts=1592498815230-sa> accessed 4 September 2020.

[88] Ali F Khaliti, '"I am Burning": Afghans Condemn Iranian Police after Refugees Die in Car Blaze' (*Middle East Eye,* 6 June 2020) <https://www.middleeasteye.net/news/i-am-burning-afghans-condemn-iranian-police-after-refugees-die-car-blaze> accessed 1 May 2020.

[89] Roshan Noorzai and Mehdi Jedinia, '"Filled with Fear": An Afghan Account of Traveling to Iran' *(VOA News,* 18 June 2020) <https://www.voanews.com/extremism-watch/filled-fear-afghan-account-traveling-iran> accessed 24 March 2020.

[90] ibid.

[91] See Part II A.

the post-revolution Iran has taken a more sovereignty oriented tack towards Afghan migrations, tilting its attention towards the protection of its sovereignty from non-nationals and the international community, and thus pushing the protection of the refugees' rights into the background.[92] This policy shift has, over the long haul, devised a discriminative and marginalizing outlook on the Afghan refugees, resulting in the forfeit or limitation of their basic rights and their humiliation in some cases.[93]

As depicted in the previous section, Iran has continuously been criticised by the international community and its own nationals for its mistreatment, discrimination, and violation of human rights against Afghan refugees. The critiques gained momentum following the drowning of Afghan refugees by Iranian border forces and the burning of Afghan refugees' car. HRW has informed that Iran's policies towards Afghan refugees 'violate its legal obligations to protect this vulnerable group from abuse'.[94] HRW added that Iran has failed to take action to 'protect Afghan refugees from physical violence linked to rising anti-foreigner sentiment in Iran, or to hold those responsible accountable.'[95]

Thus, the Iranian government, despite its thrust to sustain Iranian national sovereignty, has in practice paved the way for international players, human rights groups, its own nationals, and the former Afghan government to point fingers at its migration policies towards Afghans. Iran's state sovereignty and international reputation will continue to be on shaky ground if the government does not consider reforming the criticised standards towards its Afghan population.

Furthermore, human rights activism, as a growing international movement, poses a strong challenge to the national sovereignty of those states which are alleged to have violated the human rights of their refugee population, as the states would go under vehement scrutiny of the international players and human rights groups. Additionally, the expansion of these human rights movements would also incur contentions in foreign relations of the violating states. This fact can be clearly portrayed by the recent protests of Afghans against the Iranian regime in Afghanistan, Washington, and London.

On 15 June 2020, a large wave of protestors gathered in London and Washington D.C., out-crying for justice for Afghan refugees who had been killed in the recent cases in Iran since May 2020. In London, protestors congregated outside the Iranian embassy and called the move of Iranian security forces against Afghan refugees a 'barbaric' action. They also requested international intervention in the case. Similar protests were also held outside the Iranian Embassy to Afghanistan in Kabul.[96]

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92 See Parts II. A,II. B.

93 This paper has intentionally discussed the cases of the violation or limitation of different basic rights under a unifying general outlook: the violation of the right to non-discrimination. It is due to the fact that the discussed rights have been violated as a result of the 'discriminatory' approach and the humiliating actions of the Iranian regime against Afghan refugees.

94 El-Gheressi, '"I am Burning": The Deadly Treatment of Afghan Refugees in Iran', (*Majalla,* 19 June 2020) <https://eng.majalla.com/node/92621/i-am-burning%E2%80%99-the-deadly-treatment-of-afghan-refugees-in-iran#:~:text=Iran%20has%20long%20faced%20criticism,this%20vulnerable%20group%20from%20abuse%E2%80%9D.> accessed 23 April 2020.

95 ibid.

96 Reporterly, 'Afghans Hold Anti-Iran Protests in US, UK' (*Reporterly,* 15 June 2020) <http://reporterly.net/live/newsfeed/monday-june-15-2020/afghans-hold-anti-iran-protests-in-us-uk/> accessed 24 August 2020.

Following the increase and intensity of protesting campaigns against the Iranian government, on 16 June, Iranian officials summoned Abdul Ghafoor Lewal, former Afghan Ambassador to Iran in order to give him notice that some protesters have dishonored the Iranian regime, and this would take a drastic toll on long-lasting relations of Iran and Afghanistan. Lewal, in response, argued that it was the right of Afghans to protest. However, the former Afghan government had promised Iranian authorities that it would pacify the protestors and investigate any desecration against Iran's government.[97]

Abbas Mousavi, spokesman to Iran's Foreign Ministry, also added that Iran wanted peace and justice for Afghans. However, it did not mean that the Iranian government would ignore defamation and disrespect by Afghan protestors. Mousavi also added that they would cooperate with the Afghan officials to investigate the death of refugees in the burning car.[98]

More violations down the line would mean more protests and this in turn can do more harm to Afghanistan and Iran's relations, and could even lead to forced closure of the Iranian embassy and consulate in Afghanistan. The protests taking place in many other countries by Afghans would also tarnish Iran's relations with the respective countries. Therefore, such a possibility will go far behind harming the domestic sovereignty of Iran, as it will restrict its foreign policy as well.

Peeling back the cover of the Iranian regime's sidelining outlook on the Afghan refugees, its sovereignty-leaning approach to Afghan migrations in general, and the impact of such politics on Iran's state sovereignty, one can easily recommend that Iran shall go back to guaranteeing the identified human rights for Afghan refugees, as the first phase of refugee reception obviously shows that guaranteeing such rights successfully wards off any external intervention and safeguards the state sovereignty.

IV. Conclusion

Refugee-hosting countries have long presumed that acquiescing to an international system of refugee-rights protection would leave their state sovereignty at stake. Nevertheless, this Article has utilized the case study of Afghan refugees in Iran to put forth an opposite view. This Article has offered an outlook of historically divergent policies of Iran with regard to Afghan refugees. It argues that Iran's divergence from its religious 'mission' of protecting the Afghan refugees, and the development of its current anti-foreigner perspective towards Afghan migrations in general, have resulted in the Afghan refugees being treated with discrimination and xenophobia by the Iranian government. Under the shadow of discrimination, different basic rights of Afghan refugees have been violated in Iran. The Article has reviewed the violation of these rights under a general heading: the right to non-discrimination.

Furthermore, it has been depicted how Iran's violation of Afghan refugees' rights has bred negative implications for its national sovereignty. The violations have urged the international community and external players to denounce Iran's politics towards Afghan refugees and warn of possible humanitarian interventions. Building on Iran's experience, the

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[97] The National Editorial, 'Iran Must Understand That Afghan Lives Matter' (*The National Editorial*) <https://www.thenational.ae/opinion/editorial/iran-must-understand-that-afghan-lives-matter-1.1034977> accessed 5 August 2020.

[98] Tolo News, 'Iran Warns Afghan Envoy Over "Intolerable" Protests in Kabul' (*Tolo News,* 6 June 2020) <https://tolonews.com/afghanistan/iran-warns-afghan-envoy-over-intolerable-protests-kabul> accessed 4 April 2020. **Error! Hyperlink reference not valid.**

Article has aspired to bring to debate challenging viewpoints against the dominant perspective that protecting the legal rights of refugees strikes at a host country's sovereignty. By narrating cases of human rights violation against Afghan refugees in Iran and the implications of these cases on Iran's sovereignty, the Article has tried to prove the opposite. In doing so, it aims to offer an alteration to the prevailing understanding of 'human rights-state sovereignty' dynamics by the refugee-hosting countries and the relevant scholarship.

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The Confidentiality and Transparency Debate Under Investor-State Mediation

Fan Xiaoyu*
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Abstract

As an important part of alternative dispute resolution, investor–state mediation is attracting increasing interest from the creators of investment treaties and institutional rules. Traditional mediation mechanisms are inherently confidential. Keeping mediation proceedings and related documents strictly confidential is crucial to successful mediation. However, investor–state disputes, which involve public interests, often do not allow for the strict confidentiality of traditional mediation. Rather, those involved in investor–state mediation face pressure to be transparent. To increase public acceptance and the perceived legitimacy of the investor–state mediation system, it is necessary to establish the right balance between confidentiality and transparency. The degrees of transparency in arbitration and mediation are not the same; there are many institutional differences in their transparency rules, such as those regarding public hearings, access to documents, and non-disputing party submissions. The degree of transparency of investor–state mediation should generally fall between the strict confidentiality of commercial mediation and the transparency of investor–state arbitration. Distinct from investor–state arbitration and its exceptions to transparency and confidentiality requirements, investor–state mediation applies confidentiality in principle, with appropriately expanded transparency exceptions to respond to the need for transparency. When constructing investor–state mediation transparency rules, it is necessary to consider many other factors, as there is no universally applicable optimal degree of transparency.

* Fan Xiaoyu (Ph.D. candidate, Wuhan University, with Concentration in International Investment Law and International Dispute Resolution) is a Legal Researcher of Wuhan University Institute of International Law and Wuhan University Center of Oversea Investment Law, fxyoyster@163.com.

I. Introduction

In the context of investor–state dispute settlement (ISDS), mediation[1] is not new. Some institutions provide mediation rules for investment disputes, some of which have existed for years. Conciliation is provided for by the International Centre for the Settlement of Investment Disputes (ICSID) Convention and Conciliation (Additional Facility) Rules as a method parallel to arbitration.[2] As a mechanism complementing ISDS, mediation has rarely been used;[3] instead, investor–state arbitration (ISA) has been foregrounded. In the last decade, however, the use of investor–state mediation (ISM) has increased in the ISDS field, attracting growing attention from the creators of investment treaties and institutional rules. In terms of international investment agreements (IIAs), the Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA), the

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[1] This article makes no distinction between conciliation and mediation. There is some controversy in the academic world concerning whether mediation and conciliation are identical. Some scholars believe that the differences between the two terms reflect conceptual differences. See Gabriele Ruscala, 'Latest Developments in Conciliation and Mediation in Investor-State Disputes' (2019) 16(63) Revista Brasileira de Arbitragem 98. Others believe that there is no clear boundary between conciliation and mediation and thus that they are interchangeable. See Michael E Schneider, 'Investment Disputes: Moving Beyond Arbitration' in Laurence Boisson de Chazournes, Marcelo G Kohen and Jorge E Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Brill 2012) 119. Recent treaties, such as the United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted on 20 December 2018, entered into force 12 September 2020) CN.154.2019.TREATIES-XXII.4 <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> accessed April 30 2020 and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (adopted in 2018, amending the Model Law on International Commercial Conciliation 2002) <https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation> accessed 30 April 2020), use the term 'mediation' with the understanding that the terms 'conciliation' and 'mediation' are interchangeable. Given these recent trends in international mediation rules, this article uses the term 'mediation' to refer to both mediation and conciliation and holds the view that the two terms can be used interchangeably, except in specific contexts where they denote two different procedures, such as under the International Centre for Settlement of Investment Disputes (ICSID). The Key 7 differences between ICSID conciliation and ICSID mediation can be found in ICSID, 'Background Paper on Investment Mediation' (July 2021) <https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation_Oct.2021.pdf> accessed 28 January 2022.

[2] The Conciliation Rules under the ICSID took effect on 1 January 1968. Article 33 of the ICSID Convention provides that conciliations be conducted and considered in effect on the date on which the parties consented to conciliation, except as the parties otherwise agree. The current rules came into effect on 10 April 10 2006. See ICSID Convention Conciliation Rules (adopted 25 September 1967, entered into force 1 January 1968, amended 10 April 2006) ICSID/15 <https://icsid.worldbank.org/en/Pages/process/ICSID-Convention-Conciliation.aspx#%23%23> accessed 30 April 2020.

[3] According to the ICSID, of the 728 cases registered since 1982, only 12 were conciliation cases, 10 (1.4%) of which were under the ICSID Convention, Regulations and Rules (entered into force 14 October 1966) and 2 (0.3%) were under the ICSID Conciliation (Additional Facility) Rules. See ICSID, 'Caseload: Statistics' (2019) 2019 (2) <https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282019-2%20Edition%29%20ENG.pdf> accessed 30 April 2020.

EU–Vietnam Investment Protection Agreement (EVIPA),[4] and the EU–Singapore Free Trade Agreement (EUSFTA)[5] are all examples of treaties providing incentives for investors to opt for mediation to resolve disputes.[6] At the institutional level, some new mediation (conciliation) rules reflect modern conceptions of mediation and its dynamics. In 2012, the International Bar Association (IBA) adopted the IBA Investor–State Mediation Rules.[7] The 2014 International Chamber of Commerce (ICC) Mediation Rules replaced the 2001 ICC Amicable Dispute Resolution (ADR) Rules (ICC: Legal Texts).[8] In July 2016, the Energy Charter Conference adopted the Guide on Investment Mediation of Energy Charter Treaty (ECT),[9] a document prepared to encourage investors and governments to consider voluntary mediation at any stage of a dispute. Later that year, the International Mediation Institute (IMI) Competency Criteria for Investor–State Mediators[10] came into effect. In 2018, the ICSID announced its fourth set of dispute resolution rules, incorporating the most extensive changes to date as well as proposing a new set of mediation rules.[11] The Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) provides a framework for the enforcement of mediated settlements.[12] These and many other incremental changes and developments have allowed investor–state mediation and conciliation to gain momentum, but none of them have had a significant impact on practice. Among the

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4 European Commission, 'EU-Vietnam Investment Protection Agreement, Annex 9: Mediation Mechanism' (*European Commission*, 18 June 2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 26 March 2022.

5 Free Trade Agreement Between the European Union and The Republic of Singapore [2018] OJ L294/3 (EU-Singapore Agreement).

6 Maria Beatrice Deli, 'Transparency in the Arbitral Procedure' in Andrea Gattini, Attila Tanzi, and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 54.

7 International Bar Association Council, IBA Rules for Investor-State Mediation (adopted 4 October 2012) <https://icsid.worldbank.org/sites/default/files/IBA%20Rules%20for%20Investor-State%20Mediation%20(Approved%20by%20IBA%20Council%204%20Oct%202012)_0.pdf> accessed 30 April 2020.

8 International Chamber of Commerce, ICC Mediation Rules (entered into force 1 January 2014) <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/> accessed 30 April 2020.

9 Energy Charter Secretar, Decision of the Energy Charter Conference: the Guide on Investment Mediation (19 July 2016) CCDEC 12 INV <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf> accessed 30 April 2020.

10 International Mediation Institute, 'IMI Competency Criteria for Investor-State Mediators,' (19 September 2017) <https://www.imimediation.org/wp-content/uploads/2017/07/IMI-IS-Med-Competency-Criteria625483FINAL-19-September-2016.pdf> accessed 30 April 2020.

11 The latest draft of the Mediation Rules can be found in International Centre for Settlement of Investment Disputes (ICSID), 'Proposals for Amendment of the ICSID Rules' (2020) ICSID World Bank Group Working Paper 4 (hereinafter ICSID Working Paper 4) <https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf> accessed 30 April 2020. This is the first set of institutional rules for ISM, released by the world's leading arbitral institution for investment disputes.

12 UN Convention on International Settlement Agreements Resulting from Mediation (n 1).

commonly perceived problems and key obstacles to facilitating access to mediation[13] is the tension that remains between transparency and confidentiality under ISM.

Many scholars argue that the confidentiality associated with mediation could pose a threat to transparency, which is crucial to ISDS.[14] Strict confidentiality is one of the most important attractions and strengths of mediation.[15] However, when the government is named as the respondent, public interest calls for more transparency in the dispute resolution process.[16] The call for transparency applies not only to ISA but also to ISM. To address the criticism of 'secrecy' ISA authorities have begun drafting related reforms, including those allowing for public hearings, amicus participation, and the publication of awards and other informative documents. However, ISM lags behind ISA in terms of transparency.[17] A significant argument against the mediation of investor–state disputes is that it may be used to keep cases confidential and remove them from public scrutiny.[18] To maintain mediation as a valuable alternative, there is no choice but to respond to the increasing call for transparency and make adaptations to address these concerns. Striking a balance between confidentiality and transparency is necessary to integrate mediation into the ISDS mechanism.

However, to what extent would increased transparency in ISDS impact the generally confidential mediation process?[19] This article focuses mainly on the transparency issue as regards the ISM mechanism. The article proceeds as follows. Section 2 explains why ISM requires transparency from the perspective of theoretical analysis and practical reform. Section 3 discusses the role of confidentiality in the investment mediation world. Section 4 provides a structural analysis of unique transparency in ISM by outlining consistencies and inconsistencies in transparency issues between ISA and ISM. Section 5 discusses how to redesign guidelines to achieve the right balance between transparency and confidentiality under ISM. Section 6 concludes the paper.

II. Importance of transparency in ISM

The drive for greater transparency in investment mediation stems from two main factors. The first is the public interest involved in investor–state disputes. The second is the transparency reforms undertaken for arbitration. In light of these reforms, it seems inappropriate for ISM to remain highly confidential, as the high level of confidentiality

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13 Seraphina Chew, Lucy Reed, and J Christopher Thomas, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes' (2018) NUS Centre for International Law Research Paper 18/01, NUS Law Working Paper 2018/022.

14 Shahla F Ali and Odysseas G Repousis, 'Investor–State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat' (2016) 45(2) Denv J Int'l L & Pol'y 225.

15 Jack J Coe Jr, 'Should Mediation of Investment Disputes Be Encouraged, and, If So, by Whom and How?' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Brill 2010) 349.

16 Deli (n 6) 56.

17 Coe (n 15) 349.

18 Ana Ubilava and Luke R Nottage, 'ICSID's New Mediation Rules: A Small but Positive Step Forward' (2018) ICSID World Bank, Submission to ICSID on ICSID Rules and Regulations Amendment Process 3 <https://icsid.worldbank.org/sites/default/files/amendments/public-input/Ubilava_Notage_10.17.2018.pdf> accessed 26 March 2022.

19 Catharine Titi, 'Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 35.

may be used by parties as a tool to circumvent the ever-increasing standards of transparency in investment arbitration.

A. Theoretical analysis of the characteristics of disputes to be resolved

Investor–state disputes inherently involve public interests.[20] As no public interests are involved in commercial arbitration and mediation, those disputes do not generate the same pressure for transparency.[21] In investor–state disputes, however, public interest is involved in many ways, as discussed below.

i. Public interests involved in investor–state disputes: the micro view

Investor–state disputes invariably involve a government as the respondent As one of the parties to such disputes, a democratic state must be accountable to its constituencies for its decisions and actions[22] and subject itself to public scrutiny.[23] In some states, influenced by internal legal conditions, political situations, and domestic perceptions of democracy, representatives of the state government are obliged to publish certain information.[24] For some governments, there is a legal duty to comply with domestic disclosure laws, such as the Freedom of Information Act in the United States.[25] Investor–state disputes also involve the exercise of regulatory autonomy over foreign investors by sovereign states and their agencies, and every investor–state arbitration alleges wrongful behaviour by a state.[26] 'Transparency of arbitral proceedings would allow parliament and the public […] to scrutinize better whether their government has honoured its international commitments and whether it does not compromise essential public interests in bargaining with the investor in the course of the arbitration proceedings.'[27] In this way, transparency and participation contribute to good governance.[28]

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[20] Susan D Franck and Anna Joubin-Bret (eds), 'Investor-State Disputes: Prevention and Alternatives to Arbitration II: Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, held on 29 March 2010 in Lexington, Virginia, United States of America' (UNCTAD 2010) 11.

[21] José E Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) 7(3) JIDS 541.

[22] Daniel Barstow Magraw and Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor–State Arbitration' (2009) 15 ILSA J Int'l & Comp L 337, 351.

[23] Ximena Bustamante, 'Investor–State Mediation: Reflections on its Feasibility from a Process Perspective' in Todd Weiler and Freya Baetens (eds), *New Directions in International Economic Law* (Brill 2011) 275, 297.

[24] Steffen Hindelang, 'Study on Investor–State Dispute Settlement (ISDS) and Alternatives to Dispute Resolution in International Investment Law' (2016) 13(1) TDM 1, 98.

[25] The 1967 Freedom of Information Act 5 USC § 552 (FOIA) imposes a statutory obligation on US federal government agencies to comply with requests for information contained in government records, subject to specific, enumerated exceptions.

[26] Barstow Magraw and Amerasinghe (n 22) 339.

[27] Hindelang (n 24) 88.

[28] Daniel Barstow Magraw, Sofia Plagakis and Jessica Schifano, 'Ways and Means of Citizens' Participation in Trade and Investment Dispute Settlement Procedures' (Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper, Geneva, 15 July 2008) 101 <http://dx.doi.org/10.2139/ssrn.1159770> accessed 26 March 2022..

Political issues, sensitive industries, or non-economic interests of states usually feature in investor–state claims.[29] Topics such as the state's public order, national security interests, environmental concerns, cross-border resource exploitation,[30] major infrastructure,[31] human rights, financial stability, environmental protection, public health, and other topics[32] related to the national interests of the host country are hot issues in investor–state disputes. As for investors, they often provide essential services, such as drinking water, sanitation, or electricity,[33] that also implicate public interest. For this reason, tribunals are required to treat the balance of investors' private law rights and the state's public interest with 'more caution.'[34] From this perspective, an investor–state dispute always implicates the host country's public policies and public interests.

Access to information and public participation are human rights in democratic systems worldwide, as is recognized on both the national and international levels.[35] 'When allowing international tribunals to review administrative, judicial, and legislative acts of host states, the public in these states has a vital interest in securing the integrity of the proceedings.'[36] To protect their interests, citizens of the host state have the right to know of and participate in the process of dispute settlement regarding government actions that directly affect them. After all, the losing party to a lawsuit must pay considerable arbitration costs and awarded damages, which fees are ultimately borne by the taxpayers of the host state.[37]

ii. Hybrid nature of the ISDS regime: the macro-view

ISDS has been described as both public and private.[38] However, to correct the commercial positioning of ISDS in the past, scholars are increasingly inclined to emphasize its 'public' side. Professor José E. Alvarez lists 10 reasons why ISDS is a system of 'public law,'[39] including the following: ISDS is based on a regulatory relationship between states as governors and foreign investors as the governed;[40] ISDS is well suited to disputes by

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29 Chester Brown and Phoebe Winch, 'The Confidentiality and Transparency Debate in Commercial and Investment' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 324.

30 Resources include important natural resources such as oil and gas, hard rock minerals, forests, freshwater resources, and fisheries.

31 Major forms of built infrastructure include facilities involving water, sanitation, roads and other transport, power generation, and dams.

32 Hindelang (n 24) 4.

33 Barstow Magraw and Amerasinghe (n 22) 339.

34 Hindelang (n 24) 12.

35 Barstow Magraw and Amerasinghe (n 22) 349.

36 Hindelang (n 24) 98.

37 Sarah J K Rauber, 'Investor–State Mediation in International Investment Dispute Settlement – a Critical, Integral Multi- and Transdisciplinary Analysis: Analysis & Development of Policy Implications and Practical Guidelines, with a Particular Focus on De-Biasing the Mediation Process' (22 August 2016) <http://dx.doi.org/10.2139/ssrn.3115955> accessed 26 March 2022.

38 Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 Harv Int'l LJ 55; Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56(2) Harv Int'l LJ 353.

39 Alvarez (n 21) 535.

40 Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) Am J Int'l L 45.

individual claimants directed against state action;[41] governmental decisions usually involve the public interest;[42] ISDS is a creature of public international law;[43] arbitral tribunals may review a host country's public national law or administrative or judicial activities, which is different from the settlement of commercial disputes between purely private parties;[44] ISDS generates a form of 'global governance'[45] and ISDS arbitrators must find a balance between private investors' rights and states' public interests.[46]

In line with the increased emphasis on the public nature of ISDS,[47] the public law agenda for reform to improve transparency came into being. It has received considerable attention and become an essential part of the reform to rid the traditional ISDS system of its 'confidential' label.

Most international dispute settlement mechanisms addressing matters of public interest follow the principles of transparency and due process. Typical representatives, such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the European Court of Justice (ECJ), and the European Court of Human Rights (ECtHR), all have rules for public hearing procedures and public access to documents.[48] Publication and transparency are inherent requirements of due process, which depends on the general understanding of society at a particular stage. As Professor Andrea Bianchi says,

Transparency epitomizes the prevailing mores in our society and becomes a standard of (political, moral, and, occasionally, legal) judgment of people's conduct. A narrative of transparency permeates our daily life. It is a deeply rooted belief that transparency is all around us. In contrast, the opposites of transparency, such as secrecy and confidentiality, have negative connotations. Although they remain paradigmatic narratives in some areas, overall, they are largely considered as manifestations of power and, often, of its abuse.[49]

B. Transparency reform of ISA in practice

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41 Roberts (n 40).

42 ibid.

43 ibid.

44 Hindelang (n 24) 44.

45 Roberts (n 40) 65–66.

46 ibid.

47 ibid.

48 Article 46 of the Statute of the International Court of Justice (entered into force 24 October 1945) USTS 993 (hereinafter ICJ Statute) provides: 'The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.' Similarly, Article 26(2) of the Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea (UNCLOS) (entered into force 10 December 1982) 1833 UNTS 397 (ITLOS Statute), Article 31 of the Consolidated version of the Treaty on the Functioning of the European Union – Protocol No 3 on the Statute of the Court of Justice of the European Union [2016] OJ C202/210 (CJEU Statute) and Article 40(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) make provisions regarding public hearings. In terms of access to information, Article 40(2) ECHR provides that 'Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.'

49 Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 2.

ISA, the most popular instrument of ISDS, has been used to resolve all types of investment disputes on six continents for more than 30 years. ISA is rooted in commercial arbitration, which is characterized by secrecy.[50] Traditional instruments, such as the ICSID Convention and most bilateral investment treaties (BITs), say little or nothing about the confidentiality of proceedings and awards.[51] This means that there is no general obligation to publish decisions and information related to the process without the mutual consent of the investor and state parties to the dispute.[52] For a long time, 'meetings of a small group of tribunals [have been] secret; their members [have been] generally unknown; the decisions they reach need not [have been] fully disclosed.'[53] Many scholars seriously question and criticize the confidentiality feature of the ISA system.[54]

i. Potential benefits of more transparent ISA

The call for ISDS transparency and its motivation to cast off the unwelcome tag of 'private' have led to related reforms of ISA. The main potential benefits of increased transparency cited by reformists to demonstrate the importance of transparency reform are discussed below.

First, increasing transparency promotes the public's trust in and acceptance of the ISA system, thereby increasing the legitimacy of ISA. Reducing the secretiveness of the process through the publication of arbitration awards, decisions, and other documents renders the public more familiar with and less suspicious of this system. Through public participation, the public is granted the opportunity to voice their perspectives, raise legal arguments, and protect their interests. Members of the public are more likely to approve of a decision or decision-making process in which they have participated or had the right to participate.[55] In this way, the credibility and reputation of ISDS can gain a certain degree of protection. Increasing the transparency of ISM is thus a useful way to enhance the political and social legitimacy of the ISDS system, particularly in response to criticisms of illegitimacy. It is also a meaningful way to make the international investment legal system more attuned to constitutional values, such as the rule of law and democracy.

Second, increased transparency is an effective means to increase the consistency of ISA. The most common criticisms leveled at ISDS in recent years involve the lack of transparency in ISDS proceedings, the lack of consistency in arbitral decision making, and the lack of appellate authority to correct substantive errors and ensure consistency of outcomes.[56] ISDS tribunals have proven to be highly inconsistent in the relationship between investment treaty norms and contractual terms expressly chosen by the parties.[57] Greater transparency of process and decisions allows arbitrators to look to previously

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50 Hindelang (n 24) 98.

51 Karl-Heinz Böckstiegel, 'Commercial and Investment Arbitration: How Different Are They Today? The Lalive Lecture 2012' (2012) 28(4) Arbitr Int 586.

52 Hindelang (n 24) 97.

53 Anthony Depalma, 'NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say' *New York Times* (New York City, (11 March 2001).

54 Hindelang (n 24) 97.

55 Barstow Magraw and Amerasinghe (n 22) 352.

56 Mark Baker and Cara Dowling, 'Interest in Investor-State Mediation is Growing' (2017) 8 Norton Rose Fullbright International Arbitration Report 22 <https://www.nortonrosefulbright.com/en-nl/knowledge/publications/b33662dc/interest-in-investor-state-mediation-is-growing> accessed 30 April 2020.

57 Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113(1) Am J Int' l L 29.

published cases for both guidance and procedural and analytical support for their actions. The tribunal in *El Paso v Argentina* articulated the position as follows: 'It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.'[58] 'It is precisely through the publication of such excerpts and awards that tribunals can follow in the footsteps of their predecessors and foster greater consistency in investment treaty cases.'[59] However, increasing the consistency of investment arbitration cannot be achieved by increasing transparency alone. It may also require the creation of an appeal mechanism, improved interpretation of investment treaties, and other such measures. Nevertheless, increasing transparency is a necessary step. Making ISA documents open to the public, especially the interpretations of investment treaties contained in their decisions and awards, is a crucial part of shaping the international investment legal system to reflect consistent values and unify international standards.

Third, greater transparency can increase the predictability of ISA for both the host country and its investors. Countries can learn lessons from published case rulings and awards, helping them draft bilateral, regional, and multilateral investment treaties to better meet future challenges. It can also improve a host country's ability to foresee the legitimacy of its investment management behavior in international law. For investors, the public disclosure of ISA documents, particularly the interpretations of investment treaties contained in tribunal decisions and rulings, can help to improve predictability. Investors can foresee whether and how rights and obligations will be protected under investment treaties. Increasing transparency enhances consistency, which in turn solidifies the predictability necessary in an investment treaty.

ii. Transparency reform in ISA

Due to the substantial benefits described above, the topic of transparency has continued to gain momentum in the field of investor–state arbitration, leading to some reform efforts. Many sets of institutional rules have made efforts to promote transparency in ISA, as have some tribunals in practice, leading to a steady improvement in ISA transparency over the last few years.[60] Scholars have analyzed this transparency reform movement to determine whether it is an unfinished effort or has already gone too far, with mixed results.[61] However, a trend toward improving transparency in the investment arbitration context is clearly confirmed in two aspects, namely in the norms of institution rules and in practice in arbitration cases.

Three institutions are responsible for most of the recent transparency reforms in institution rules: the United-States-Mexico-Canda Agreement (USMCA),[62] the United

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[58] *El Paso Energy International Company v The Argentine Republic*, ICSID Case ARB/03/15 Award (31 October 2011) para 39.

[59] Baker and Dowling (n 56) 11.

[60] Julia Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 142.

[61] Jeffrey Chieh Lo, 'An Unfinished Effort or a Push Goes Too Far: An Assessment of ICSID's Proposed Transparency Amendment' (2019) 12 Contemp Asia Arb J 231.

[62] On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA) came into force, replacing North America Free Trade Agreement (NAFTA).

Nations Commission on International Trade Law (UNCITRAL), and the International Center for Settlement of Investment Disputes (ICSID). The earliest proposal to include procedural transparency clauses was NAFTA. As early as 2001, the NAFTA Trade Commission issued a statement calling for greater transparency in NAFTA dispute resolution procedures.[63] Since then, increasing the transparency of ISA has gained importance both in and outside North America. UNCITRAL Working Group II has focused on improving the transparency of its arbitration procedures since 2007[64] and planned to make it a 'priority' in 2009.[65] The UNCITRAL
Rules on Transparency in Treaty-based Investor–State Arbitration[66] represent another significant development on the transparency front, establishing transparency as a general principle of international investment law. The United Nations Convention on Transparency in Treaty-Based Investor–State Arbitration[67] extended the application of the UNCITRAL Rules on Transparency, which so far have a minimal scope of application.[68] In 2006, the ICSID made amendments to increase transparency in the ICSID Arbitration Rules and the ICSID Additional Facility Arbitration Rules.[69] On February 28, 2020, the ICSID Secretariat published its fourth working paper on proposals for rule amendments, including a more significant reform of transparency.[70] (This is discussed further below.) All the changes made by these three institutions have increased transparency mainly by calling for the disclosure of case information and awards, allowing amicus curie briefs from non-disputing parties, and permitting the participation of non-parties to the arbitration.

Clear improvements in terms of transparency can also be witnessed in the practice of investment arbitration, exemplified in the following cases: *Methanex v. United States*,[71]

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63 Amokura Kawharu, 'Public Participation and Transparency in International Investment Arbitration: Suez v Argentina' (2007) 4 New Zealand Yearbook of International Law 159.

64 UNGA 'Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Sixth Session' UNCITRAL 40th Session (20 March 2007) UN Doc A/CN.9/619 para 61.

65 ibid para 121.

66 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (entered into force 1 April 2014) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> accessed 30 April 2020 (Mauritius Convention on Transparency). These Rules comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration.

67 The Mauritius Convention on Transparency is an instrument by which parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency.

68 Stephan Schill, 'The Mauritius Convention on Transparency' (2015) 16(2) JWIT 201.

69 Following the amendments to the ICSID Convention: Arbitration Rules of April 2006, the issue of participation of non-disputing parties as amicus curiae is no longer problematic, according to Antonietti. See Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21(2) ICSID Rev/FILJ 434-442. The amended ICSID Arbitration Rule 37(2) 'Visits and Enquiries, Submissions of Non-Disputing Parties' rules that the publication of excerpts of the 'legal reasoning of the tribunal' no longer applies to excerpts of the 'legal conclusions'. See ICSID Arbitration Rules, Rule 37(2) <https://academic.oup.com/icsidreview/article/21/2/427/ 628910> accessed 30 April 2020.

70 The ICSID Working Paper 4 is potentially the last in the series of working papers produced by the ICSID Secretariat to guide the rules amendment process. The ICSID Secretariat noted that its goal was to put the amended rules to a vote in the second half of 2020 for implementation in early 2021. Working Paper 4 builds on the previous working papers published in August 2018 (Working Paper 1), March 2019 (Working Paper2) and August 2019 (Working Paper 3). See ICSID Working Paper 4 (n 11).

71 *Methanex Corporation v The United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceedings, Award (3 August 2005).

The Glamis Gold Ltd v. United States,[72] *Aguas Argentinas et al. v. Argentina Republic*,[73] *Biwater v. Tanzania*,[74] and *Metalclad v. Mexico*.[75] These cases all involved a third party attempting to voice their perspective on the matter at hand either by submitting amicus curiae briefs or by obtaining documents related to arbitration. However, due to the lack of a binding code of transparency in the applicable rules, in the absence of agreement between the parties, each arbitral tribunal had virtually complete discretion and judged the matter according to the specific circumstances of the case. The lack of a uniform approach to the confidentiality or disclosure of information has been criticized. Although the UNCITRAL Transparency Rules, the Transparency Convention, and the revision of the ICSID Arbitration Rules have paved the way for transparency reform in investment arbitration, with new transparency rules reflecting an acknowledgment of public interest and enabling dispute participants to increase the legitimacy of ISA, it remains to be seen whether mandatory and high-level transparency standards will be implemented.[76]

III. Role of confidentiality in ISM

Most BITs are silent on the issue of confidentiality in ISM, and such matters are generally regulated by the applicable procedural rules. The importance of confidentiality is reflected in many ISM procedural rules. The rules require that mediation sessions be conducted in private and that related information be kept confidential. Documents from mediation are not to be used for any other purpose in any other proceedings. The high level of confidentiality is due to several factors. In terms of traditional practice, mediation thrives on the candor encouraged by strict confidentiality. Furthermore, confidentiality can address concerns about future repercussions, as documents from mediation cannot be used for other purposes. Confidentiality is one of the key institutional attractions of mediation, as opposed to the transparency of arbitration. As mediation is now facing calls for greater transparency, there is a tension between the values of confidentiality and transparency in ISM.

A. Confidentiality status quo in ISM under institutional rules and IIAs

Regardless of whether mediation takes place in a commercial or an investment setting, one of its essential features is confidentiality, as reflected in mediation regulations under investment treaties and institutional rules. The 2018 UNCITRAL Model Law on International Commercial Mediation indicates that confidentiality is an essential value of commercial mediation. Articles 9, 10, and 11 of the 2018 UNCITRAL Model Law text prescribe the disclosure of information, confidentiality, and admissibility of evidence in

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[72] *Glamis Gold Ltd v The United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceedings, Award (8 June 2009).

[73] *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v the Argentine Republic*, ICSID Case ARB/03/19 Award (9 April 2015).

[74] *Biwater GAUFF (Tanzania) Ltd v the United Republic of Tanzania*, ICSID Case ARB/05/22, Award (24 July 2018).

[75] *Metalclad Corp v Mexico*, ICSID Case ARB(AF)/97/1, Award (August 30, 2000).

[76] Hong-Lin Yu, 'Who Is In - Who Is Out - How the UNCITRAL Transparency Rules Can Influence the Upcoming Amendments of the ICSID Arbitration Rules' (2018) 11 Contemp Asia Arb J 45.

other proceedings, respectively. As this article focuses on investor–state mediation, the confidentiality of commercial mediation is not discussed in detail here.

As foreshadowed, many new institutional rules (including IBA, ICSID, ECT, ICC, IMI, and ARMO) and international investment agreements (IIAs, such as CETA, EVIPA, and EUSFTA) suggest that ISM has entered a new phase in its development. These rules and agreements have set confidentiality as a fundamental principle throughout the mediation process. The characteristics of confidentiality observed in the current ISM mechanism are discussed below.

i. Confidentiality of the process

Almost all mediation rules provide that all stages of the mediation proceeding are to be confidential.[77] This means that mediation sessions are conducted in private. Moreover, no persons other than the mediator, the parties, and their representatives are permitted to attend, hear, or view any part of the mediation, unless with the consent of the parties and with the mediator's permission.[78] It is up to the parties to decide whether the process is to be public. They can make their confidentiality and privacy arrangements in the mediation management conference.[79] Except as otherwise provided, parties may mutually decide whether, to whom, to what extent, and which part of the dispute, proceeding, or information can be disclosed at the conference. To ensure privacy, no audio or video recording of any part of the mediation proceedings is permitted.[80]

ii. Confidentiality of the information

The range of confidential information and documents is vast, and affected parties are subject to the obligation of confidentiality for a very long period. For example, the new ICSID Mediation Rules state that 'All information relating to the mediation, and all documents generated in or obtained during the mediation shall be confidential.' [81] 'Confidential information and documents' include any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms, or outcome of the proceedings.[82] This obligation of confidentiality requires the compliance of both the parties and the mediators. Nevertheless, specific exceptions to these rules, if set out, would save them from this kind of obligation. These exceptions are discussed below. To ensure that the confidentiality of information and documents is maintained past the mediation process, some rules stipulate a long obligation performance period. For example, the IBA rules stipulate that confidentiality

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77 See IBA Rules for Investor-State Mediation (n 7) art 10(1); EU-Canada Comprehensive Economic and Trade Agreement (CETA) 'Annex 29-C: Rules of Procedure for Mediation' (signed 30 October 2016, not entered into force) art 6(1); Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C; Chang-fa Lo and others, 'Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization' (2018) 13(1) Asian Journal of WTO & International Health Law and Policy 5, art 15.

78 IBA Rules for Investor-State Mediation (n 7) art 10(1).

79 ibid art 9(1)(c).

80 See Lo and others (n 77) art 15.

81 See ICSID Working Paper 4 (n 11) Rule 10(1). Similar regulations can be found in the following documents: CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(1); IBA Rules for Investor-State Mediation (n 7) art 10(2); Lo and others (n 77) art 15.

82 See Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.

continues to be valid after the termination of mediation unless otherwise specified in the agreement signed between the parties and the mediator.[83]

iii. 'Without prejudice' principle

Generally, no information or documents related to a mediation are to be used for any other purpose in any other proceedings, particularly legal proceedings. CETA 'Annex 29-c: Rules of Procedure for Mediation,' Article 6.4 provides:

> A Party shall not rely on or introduce as evidence in other dispute settlement proceedings under this Agreement or any other agreement, nor shall an arbitration panel take into consideration: (a) positions taken by the other Party in the course of the mediation proceeding or information gathered under Article 4.2; (b) the fact that the other Party has indicated its willingness to accept a solution to the measure subject to mediation; or (c) advice given or proposals made by the mediator.

The 'without prejudice' principle is also reflected in other ISM rules.[84] An essential part of the system design, the principle not only helps to maintain the confidentiality of mediation but also eliminates parties' concerns about the risk of leaking evidence in the ISM process.

B. Why confidentiality is a vital component of ISM

i. Mediation thrives on the candour encouraged by strict confidentiality[85]

Investment disputes involve socially sensitive information, critical political concerns, major issues of public policy, international finance, states' international obligations, and national sovereignty,[86] issues that may not be effectively discussed in the public eye.[87] Only when the involved parties and mediators can frankly discuss the core issues of the dispute, the actual positions of the parties, their interests and concerns, and potential solutions, is it possible to successfully settle disputes and reach a settlement agreement through the mediation process.[88] Such extensive and frank communication depends on a confidential environment and a low risk of disclosure.[89] If confidentiality, a cornerstone of ISM, were removed from the mediation system, this would destroy not only the working environment of mediation but also the possibility of a successful result. As Sussman states, 'Speaking in a confidential setting encourages an openness not otherwise achieved and often enables the parties to find innovative solutions.'[90]

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[83] See IBA Rules for Investor-State Mediation (n 7) art 10.

[84] See CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(4); Lo and others (n 77) art 15(3); ICSID Working Paper 4 (n 11) Rule 11.

[85] Lawrence R Freedman and Michael L Prigoff, 'Confidentiality in Mediation: The Need for Protection' (1986) 2 Ohio St J on Disp Resol 37.

[86] Peter D Cameron and Abba Kolo, 'Mediating International Energy Disputes' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 237.

[87] Titi (n 19) 35.

[88] Freedman and Prigoff (n 85) 37.

[89] UNCITRAL, 'Model Law on International Commercial Conciliation with Guide to Enactment and Use' (adopted in 2002) para 58 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf> accessed 30 April 2020.

[90] Edna Sussman, 'The Advantages of Mediation and the Special Challenges to its Utilization in Investor–State Disputes' (2010) 7 Revita Brasileira de Arbitrgem 6.

ii. Confidentiality can reduce concerns about future repercussions

Confidentiality can prevent the parties to mediation from being disadvantaged by their candour in follow-up procedures and consequently eliminate their worries concerning the future. To resolve disputes efficiently, parties may make some admissions of facts and promises, and the mediators may give some advice in the mediation. If a party were to be allowed to use the other party's admissions, offers of settlement, or expressed views or those of the mediator made during mediation as evidence in subsequent procedures, this would reduce the stability of the mediation procedure and hinder the fairness of the subsequent procedures.[91] Therefore, most of the new mediation rules stipulate that the 'without prejudice' principle prohibits the subsequent use of information generated in ISM. This is deemed necessary based on the difference between mediation and arbitration. Given the final, binding, and more enforceable awards and sufficient procedural safeguards of arbitration, the parties to an arbitration feel safe enough to disclose information. However, the safeguards, qualified counsel, and specific rules of evidence and procedure present in legal proceedings such as arbitration are absent in mediation.[92] Mediation is voluntary and non-binding; it is difficult to make a party comply with its outcome.[93] Although the Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) is poised to change the landscape in this respect,[94] a mediation agreement is not enforceable in the way that an arbitral award is. If the mediation process were required to be public, the parties to the dispute would risk not only the embarrassment of having wasted time and resources[95] without a successful settlement but also disadvantaging themselves in subsequent arbitration or litigation proceedings. Without the 'without prejudice' principle, if the mediation communications were not inadmissible in subsequent judicial actions, mediation could be used as a discovery device against legally naive persons.[96]

iii. Confidentiality is one of the essential institutional attractions of mediation

Confidentiality offers a significant incentive for parties to investor–state disputes to choose mediation.[97] Mediation has many oft-cited advantages over arbitration: it is cheaper and faster,[98] less formal, more flexible, and voluntary. The parties to mediation have control over both the process and outcome;[99] they can build trust and preserve their business relationship going forward.[100] The parties can consult with each other on economic matters

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91 Freedman and Prigoff (n 85) 37.

92 ibid.

93 Jack J Coe, 'Towards a Complementary Use of Conciliation in Investor–state Disputes – A Preliminary Sketch' (2005) 12 UC Davis Journal of International Law 7, 17.

94 Harold I Abramson, 'New Singapore Convention on Cross-Border Mediated Settlements: Key Choices' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019).

95 Coe (n 93) 17.

96 Freedman and Prigoff (n 85) 37.

97 ibid.

98 Thomas W Walde, 'Proactive Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zeo-Sum Litigation to Efficient Dispute Management' (2004) 5 Bus Law Int 99-101.

99 Coe (n 93) 17.

100 Nancy A Welsh and Andrea K Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 Harvard Negotiation Law Review 71, 77.

beyond legal interests during the mediation process and fully express their respective claims. All of these advantages and others, which are crucial to the successful application of mediation, are supported by confidentiality.[101] It is precisely because the mediation process is not open to the public that it can resolve disputes relatively in a quick and cheap manner, and provide its users with tailor-made solutions. In contrast, transparency entails excessive interference from media and public opinion, which may affect the parties' free will in ISM and run contrary to the objectives of flexibility and efficiency (including cost efficiency).

C. Tension between transparency and confidentiality in ISM

As previously stated, the many advantages of mediation are inseparable from the principle of confidentiality. A series of academic articles introducing ISM support the notion that confidentiality is essential to the survival of mediation.[102] The inclusion of confidentiality as part of the mediation process in the mediation rules mentioned above also demonstrates this. As Catharine Titi state, 'It is difficult to envisage mediation that would work without the guarantee of confidentiality.'[103] However, confidentiality has also generated doubt and drawn criticism.

Professor Jack J. Coe, Jr. states that:

some would find a shift to mediation to be retrogressive in terms of transparency. After all, mediation thrives on candour encouraged by strict confidentiality—a markedly different value than that fuelling the recent trend in investor–state arbitration in which hearings have sometimes been opened to the public, amicus participation has been allowed, and awards and other informative documents have been widely published.[104]

Himalaya Saha comments that mediation 'fails to solve the problem of transparency as the ADR processes are also confidential.'[105] Chester Brown and Phoebe Winch state that 'in light of its confidential nature, however, mediation use by parties to resolve their differences suffers from the same criticisms that can be levelled at arbitration: that it favours secrecy at the expense of transparency.'[106] Hafner-Burton, Puig, and Victor agree, stating, 'The major argument against settlement in ISDS is that it will be used to keep cases confidential and remove them from public scrutiny.'[107] 'If States and investors are allowed to channel certain disputes to mediation,' claims Coe, 'particularly irresponsible or culpable behaviour by one or both parties may escape detection—at least so goes the argument.'[108] Professor Catharine Titi comments that 'the confidentiality of the

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[101] Brown and Winch (n 29) 324.
[102] Titi (n 19) 36; Sussman (n 90) 6.
[103] Titi (n 19) 36.
[104] Coe (n 15) 349.
[105] Himalaya Saha, 'A Critical Analysis of the Commonly Recommended Reforms of the Investor–state Dispute Settlement (ISDS)' (2016) 4 Legal Issues J 4 47.
[106] Brown and Winch (n 29) 322.
[107] Ubilava and Nottage (n 18) 3.
[108] Coe (n 15) 349.

mediation process (sometimes discussed as an advantage of mediation,[109] at least in part because arbitration can have a negative reputational impact on both investor and host state)[110] jars with the new tendency for transparency in ISDS.'[111] 'Consequently,' states Sudborough, 'should sovereign debt disputes now be redirected from ISDS arbitration proceedings with enhanced transparency standards to less transparent mediation proceedings, there is a risk that this would detract from the legitimacy of any settlement agreement stemming therefrom and thus render the process less attractive.'[112] Ana Ubilava and Luke Nottage comment, 'Due to this characteristic it has commonly been believed that mediation was not suitable for ISDS because public awareness and transparency constitute a crucial component of a dispute settlement regime where one of the parties is a State. Stakeholders in ISDS have expressed growing concerns that mediation will be used to bypass transparency[113] and also have access to universal enforceability through the 2018 UN Convention on International Settlement Agreements.'[114]

This conversation raises the question of whether there should be a presumption of transparency in ISM.[115] Confidentiality is indeed one of the most attractive advantages of the mediation procedure, but when mediation is applied to investor–state disputes, confidentiality may not be entirely inherent to the process.[116] The hybrid nature of investment disputes calls for transparency, which results in the transparency requirements applicable to both ISA and ISM.[117] In other words, the use of mediation to resolve disputes between private investors and sovereign host states cannot avoid the public interest issues involved in such cases. There is a natural conflict between the confidentiality characteristics of the mediation mechanism and the need for transparency in investment disputes. This tension makes many scholars worry about two potential consequences of applying the mediation mechanism to ISDS. First, excessive violations of confidentiality may destroy the nature of mediation. Second, the excessive maintenance of confidentiality may leave public interest in the lurch, just as ISA has indeed experienced.[118] Furthermore, heightened expectations of confidentiality in mediation limit states' ability to disclose and explain mediated settlements publicly, which may provoke allegations of corruption over mediated settlement agreements.[119]

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[109] (ICSID), 'Proposals for Amendment of
the ICSID Rules' (2019) ICSID World Bank Group Working Paper 3 (hereinafter ICSID Working Paper 3) 205–19 <https://icsid.worldbank.org/sites/default/files/amendments/WP_3_VOLUME_1_ENGLISH.pdf> accessed 26 March 2022.

[110] Susan D Franck, 'Using Investor–state Mediation Rules to Promote Conflict Management: An Introductory Guide' (2014) 29(1) ICSID Review–Foreign Investment Law Journal 66, 78.

[111] Titi (n 19) 35.

[112] Calliope M Sudborough, 'Mediating Sovereign Debt Disputes' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 233.

[113] Emilie M Hafner-Burton, Sergio Puig and David G Victor, 'Against Secrecy: The Social Cost of International Dispute Settlement' (2017) 45 Yale Journal of International Law 2.

[114] Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19 Pepp Disp Resol LJ 1.

[115] Sussman (n 90) 6.

[116] Saha (n 105) 47.

[117] Sudborough states: 'Therefore, it is important that similar increased transparency standards also apply to sovereign debt mediation proceedings.' See Sudborough (n 112) 233.

[118] Ubilava and Nottage (n 18) 3.

[119] See Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C.

Balancing the competing interests of transparency and confidentiality is essential for the mediation of investor–state disputes to flourish. Although it is challenging to reconcile the confidentiality of mediation with the public attributes of the state subject and the public interests of the disputed object in the investment dispute, only in this way can the feasibility and legitimacy of the investment mediation mechanism be improved and the public's acceptance of and trust in the mediation operating system be secured.

IV. Consistencies and inconsistencies in transparency issues between ISA and ISM

There can be no identification without contrast. The role that transparency currently plays in ISM is best understood by comparing ISM with ISA. Thus, the consistencies and inconsistencies in transparency issues between ISA and ISM are identified and explained briefly below.

A. Consistencies in transparency issues between ISA and ISM

ISA and ISM are used to resolve the same type of disputes, those involving international investment. Transparency is one of the values of international investment dispute resolution. As discussed in Section 2, the public interest involved in ISDS and the hybrid nature of investor–state disputes are the leading causes of increasing transparency. All instruments of ISDS, whether arbitration, mediation, or local remedy, must acknowledge the need for transparency to resolve disputes. At this level, ISA and ISM face the same pressure to ensure transparency, producing a consistent requirement for transparency.

Both ISA and ISM seek a balance between transparency and confidentiality. Although public interest matters, securing a balance between private and public interests is the proper response to the hybrid nature of investment disputes. In other words, both ISA and ISM must seek a balance between transparency and confidentiality. Analysis of the specific rules of ISA and ISM reveals that they both follow a 'principle and exceptions' model. In terms of investor–state arbitration, ISA adopts a transparency principle with confidentiality exceptions. Article 7 of the UNCITRAL Transparency Rules details eight kinds of 'confidential or protected information' as exceptions to transparency.[120] Even the UNCITAL Transparency Rules, which have the highest transparency requirements for ISA, take confidentiality into account. Similarly, ICSID details 10 kinds of 'confidential or protected information' as transparency exceptions in its most recently revised set of arbitration rules, dated February 2020.[121] As for ISM, the current rules outline many confidential exception clauses while maintaining an overarching emphasis on confidentiality. The new ICSID Mediation Rules provide three exceptions to confidentiality: 'unless (a) the parties agree otherwise; (b) the information or document is independently available; or (c) disclosure is required by law.'[122] Compared with these, the confidentiality exception provisions in the IBA Mediation Rules are more detailed and illustrative.[123] In both ISA and ISM, the relationship between transparency and

[120] See UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 7.
[121] See ICSID Working Paper 4 (n 11) Rule 66.
[122] ibid Rule 10 (1). Similar regulations can be found in CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(1); IBA Rules for Investor-State Mediation (n 7) art 10(3).
[123] See IBA Rules for Investor-State Mediation (n 7) art 10(3).

confidentiality is carefully handled in the design of rules to achieve the right balance.

B. Different degrees of transparency between ISA and ISM

This section addresses whether arbitration and mediation, as different dispute resolution instruments, are entirely consistent in the degree of transparency in their dispute resolution procedures and results. In terms of procedural transparency, ISA and ISM display at least the following differences.

i. Public hearing or secrecy session

Under ISA rules, whether the UNCITRAL Transparency Rules or the ICSID Arbitration Rules, public hearings are provided for. Article 6 of the UNCITRAL Transparency Rules stipulates that 'hearings for the presentation of evidence or oral argument shall be public.' In the ICSID system, a 'tribunal shall allow persons in addition to the parties [...] to observe hearings, unless either party objects.'[124]

However, ISM is just the opposite, basically establishing the principle of 'private mediation sessions.' As the IBA Mediation Rules provide, 'unless the parties and the mediators otherwise agree, no person [...] shall be permitted to attend, hear or view any part of the mediation or any communications relating to the mediation.'[125]

ii. Disclosure or concealment of related documents

Since the recent transparency reform of ISA, the documents and information related to arbitration have gradually become public. Today, little confidentiality is left in investment arbitration.[126] The 2006 version of the ICSID Arbitration Rules requires that the publication of documents be based on the agreement of both parties, and the published documents are mainly procedural documents.[127] Nevertheless, the ICSID Secretariat has the right to quickly publish excerpts of the legal reasoning for the ruling.[128] The latest round of reformed arbitration rules promotes document disclosure more thoroughly. First, the new ICSID Arbitration Rules have added the notion of 'deemed consent,' meaning that consent to publish the documents is deemed to have been given if no party objects in writing to such publication within 60 days of the ruling.[129] Second, the publication of 'excerpts of the award' (broadening the previous wording 'excerpts of the legal reasoning

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[124] ICSID Working Paper 4 (n 11) 334, Rule 65. States take different positions on whether hearings should be public. Some think that hearings should not be open to the public without the consent of both parties. Many other states agree that the tribunal should make this decision after consulting with the parties. ICSID Working Paper 3 (n 109) Arbitration Rule 64 provided that 'the Tribunal shall determine whether to allow persons [...] to observe hearings, after consulting with the parties.' Nevertheless, this was changed in Working Paper 4 to add 'unless either party objects.' Proposed Arbitration Rule 65(2) reflects this concern and ties it to the definition of confidential and protected information in Rule 66.

[125] See IBA Rules for Investor-State Mediation (n 7) art 10.1. Similar rules can be found in Lo and others (n 77) art 15(4).

[126] Böckstiegel (n 51) 586.

[127] See ICSID Arbitration Rules (n 69) art 48(4).

[128] See ICSID Arbitration Rules (n 69).

[129] See ICSID Working Paper 4 (n 11) Arbitration Rule 62(3).

in the award'[130]) is now permitted if the parties do not have consent to publish the award.[131] The UNCITRAL Transparency rules provide that a comprehensive list of documents shall be made available to the public.[132] Furthermore, it establishes an institution called the 'repository of published information' to make all documents available promptly in the form and language in which it receives them.[133]

ISM rules, in contrast, generally stipulate that all information and documents generated during mediation should be kept confidential unless a confidentiality exception applies.[134] This duty of confidentiality stays in effect after the termination of the mediation unless otherwise specified in the agreement signed by the parties and the mediator. To prevent one party's compromise and confession made under mediation from being used by the opposing party in subsequent procedures, most ISM rules stipulate the 'without prejudice' principle.[135] If there were no such principle, then mediation could be reduced to a tool for obtaining compromising information.[136] The investor or the host state could initiate mediation without any actual intention to resolve the dispute, thereby obtaining evidence for use in subsequent arbitration or litigation proceedings.

iii. Amicus curiae participation

The current ISA rules generally allow a third party and a non-disputing party to a treaty to apply to file a written submission regarding matters within the scope of the dispute. When submitting materials, a third party must meet a series of substantive and procedural requirements, including language, description of themselves, duty to disclose any connection with any disputing party, third-party funding, the nature of the interest, and specific issues of fact or law.[137] The arbitral tribunal has the right to determine whether to allow such a submission after considering the listed factors.[138] The participation of third parties by amicus briefs can promote the disclosure of the arbitration process and results to a greater extent while also making disputes more likely to be resolved completely.[139]

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[130] Article 48(4) of the ICSID Arbitration Rules (2006) provides that 'The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.' See ICSID Arbitration Rules (n 69) art 48(4).

[131] See ICSID Working Paper 4 (n 11) Arbitration Rule 62(4). Although the 2006 rules propose publicizing excerpts of the legal reasoning in the award, the 2020 version changed the rules to require publicizing 'excerpts of the Award.' This reflects current practice, wherein parties are provided with a draft of a fully extracted award for comment rather than merely the award's legal reasoning. See ICSID Working Paper 3 (n 109) 348.

[132] UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 3.1.

[133] UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 8.

[134] See ICSID Working Paper 4 (n 11) Mediation Rules, Rule 10; CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(1); IBA Rules for Investor-State Mediation (n 7) art 10.1; Lo and others (n 77) art 15(1).

[135] See ICSID Working Paper 4 (n 11) Mediation Rules Rule 11; CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(4); IBA Rules for Investor-State Mediation (n 7) art 10.2; Lo and others (n 77) art 15(3).

[136] Freedman and Prigoff (n 85) ''37.

[137] See UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 4.2; ICSID Working Paper 4 (n 11) Arbitration Rules Rule 67, 68.

[138] See UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 4.3; ICSID Working Paper 4 (n 11) Arbitration Rules 67, 68.

[139] Barstow Magraw and Amerasinghe (n 22) 346.

Observing the current series of ISM rules, it is impossible to find regulations addressing the submission of amicus briefs by a third party. This is not difficult to understand. Due to the private nature of mediation meetings and the confidentiality of the information involved, a third-party lacks the opportunity to learn the substance of the dispute, let alone put forward a third-party submission on the substance of the dispute. As explained in other articles, 'maintaining strict confidentiality concerning amicus petitioners leads to lower quality contributions and may not serve to protect the public interest.'[140]

C. Summary

In the above analysis, both consistencies and differences are apparent in ISA and ISM treatment of transparency issues. The similarities in transparency between the two processes (as means to resolve the same kind of investment disputes) is reflected in many aspects, such as the need to maintain the public interest involved in the dispute, to respond to due process requirements, and to seek the best balance between confidentiality and transparency. Of course, as alternative methods of dispute resolution, there are also many differences between them, such as in the system and design of the procedures, including public hearings, disclosure of documents, and participation of third parties. Although both ISA and ISM must balance transparency and confidentiality, the specific content of their balancing models differs. ISA has adopted the model of a transparency principle with confidentiality exceptions. In contrast, the principle of the ISM is confidentiality, with transparency being exceptional.

The reasons for the difference in the pursuit of transparency between arbitration and mediation are mainly in the following two aspects. First, as mentioned, confidentiality can ensure the success of ISM, while transparency is a vital way to increase the legitimacy of ISA. Second, the nature of mediation is different from that of arbitration. That is, mediation is non-binding, non-adversarial, and non-enforceable. If the mediation procedure is required to be made public, parties may fail to settle their disputes and leak information in their own favour. However, due to its 'harder' characteristics of final arbitration, reliable arbitral awards, and enforcement, arbitration parties have no fear of disclosing information. Furthermore, even if there is disclosure, procedures are in place to safeguard their legitimate rights and interests.

V. Balance of confidentiality and transparency under ISM

A. Essential positioning: confidentiality as a principle

To improve the public's acceptance, or the perceived legitimacy, of the ISM system, it is necessary to establish the right balance between confidentiality and transparency.The principle of confidentiality should be adhered to, reserving disclosure as the exception. The ISM mechanism should be more confidential than investment arbitration, but it does not and should not reach the same level of transparency as commercial mediation.

As arbitration transparency standards gradually rise, maintaining the gap between mediation and arbitration transparency standards is necessary to maintain the advantages of the ISM system, including its greater likelihood of reaching settlements and its

[140] Barstow Magraw and Amerasinghe (n 22) 350.

attractiveness to disputing parties. ISM has a number of advantages over ISA. First, mediation is more time- and cost-effective. To avoid lengthy mediation procedures and facilitate the speedy resolution of disputes, many mediation rules specify shorter time limits for the designation, resignation, and replacement of mediators and for reaching mutually agreed-upon solutions.[141] Mediation also has significant advantages in terms of costs. For example, because of the limited role of lawyers in the mediation process, the parties often seek minimal to no legal consultation at all, saving can save significantly on attorney fees. by Second, mediation facilitates a more complete resolution of disputes. Mediation focuses not on legal rights and obligations or determining a moral right and wrong instead emphasizing its economic benefits. It allows parties to negotiate their extra-legal interests and fully express their respective claims during the mediation process. The parties themselves control the process and outcome of the dispute during the mediation, which also promotes the complete resolution of the dispute. Third, mediation is conducive to maintaining friendly relations between investors and the state. Investor- State disputes are characterised by lengthy time frames, large investment amounts, and slow output. In such disputes, maintaining friendly and cooperative relations between the two sides is as important as resolving the disputes. The 'no-harm' nature of the mediation mechanism is of great significance to both the state and the investor. For a foreign investor, it is important to reduce the risk of being forced to terminate business relationships due to a failure to resolve disputes; for the State, a 'softer' dispute resolution is less threatening to its sovereignty and helps to maintain its image in the international community as a friendly investment host. Compared to the traditional 'win–lose confrontation' model of ISA, ISM is an interest-oriented 'win–win' model that is genuinely required by both parties. This set of advantages is considered to be predicated on confidentiality. Costs and duration have become more prominent concerns in ISA.[142] Given the more substantial award amounts and proceedings costs that states (especially developing countries) must bear in ISAs, states may instead consider the confidentiality of ISM as an acceptable price to pay for the relative advantages of ISM.

The current state of their respective rules and practice indicates an underlying trend of ISM's being less transparent than ISA. In terms of rules, ISM is less transparent than ISA, as discussed above in Section 4. At the practical level, as there is insufficient publicly available data on ISM cases, we must compare the transparency of cases that were settled in the arbitration process with the transparency of final awards. According to an empirical study (conducted by Ana Ubilava) of all known and concluded treaty-based investor–state claims during 1990–2017, the confidentiality levels of (ICSID and other) arbitration cases that had been settled during the arbitral process but before the final arbitral award was higher than the levels of disclosure of final awards. In 43% of publicly available cases, the fact of the settlement, identity of the parties, and the settlement amounts that had been amicably agreed upon by the parties were made available. In 98% of completed, investor-

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[141] See CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 5(5); IBA Rules for Investor-State Mediation (n 7) arts 2(a), 4.

[142] For respondent states, the mean cost incurred in an ISDS proceeding is approximately US$4.7 million. For investors, the mean cost exceeds US$6.4 million. The mean length of ISA proceedings is 4.4 years. See Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (BIICL and Allen & Overy 2021).

won cases where the awarded amounts were made known, the confidentiality levels were much lower than in settled arbitration cases.[143]

Although confidentiality is important to an extent, due to the public interests involved in and the hybrid nature of investor–state disputes, the transparency of investment mediation should be greater than that of general commercial mediation. With the inclusion of broader confidentiality exceptions, ISM can effectively respond to the current transparency reform trend by maintaining a level of transparency somewhere between that of commercial mediation and that of investment arbitration.

B. Transparency in ISM

Recently, some IIAs and institution rules have made attempts to better optimize mediation transparency while still balancing transparency and confidentiality. Rules designed to maintain the essential characteristics of mediation confidentiality while allowing for some disclosure of information generally address private sessions [144] and confidential documents.[145]

i. Disclosing the fact of mediation

It seems permissible for parties to disclose the fact of mediation. The ECT mediation guidelines point out:

Governments increasingly face the request for more transparency and it may be politically difficult for governments to keep confidential the fact that mediation is taking place and even the terms of the settlement agreement. Some modern domestic legislation on transparency requires states to publish any agreement reached with foreign investors. Therefore, parties could agree to disclose the fact that the mediation is taking place and the main aspects of the settlement.[146]

Other institutional rules and international agreements applicable to mediation also appear to acknowledge that a strict confidentiality obligation should not extend to the fact that the parties have agreed to mediate, unless the parties agree otherwise in writing. Such rules include the IBA Rules for Investor–State Mediation, the ICSID's Working Paper 3, CETA's Mediation Rules, and the ECT's Guide on Investment Mediation.[147]

There are several advantages to disclosing the facts of the mediation in the ISM system. Disclosure would certainly alleviate some of the concerns about investment mediation's being used as a covert means of dispute resolution to bypass transparency reforms. Furthermore, disclosure is a prerequisite of greater transparency and public participation. If civil society stakeholders or affected third parties are not aware of the on-going mediation, they cannot participate in the dispute settlement, and remain unable to submit relevant materials and information, for example. Moreover, disclosing the fact of

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[143] Ubilava (n 107) 528–557.

[144] See Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C; IBA Rules for Investor-State Mediation (n 7) art 10; Lo and others (n 77) art 15(4).

[145] See ICSID Working Paper 3, 'Mediation Rules,' Rule 9(1); CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(1); IBA Rules for Investor-State Mediation (n 7) art 10(2); Lo and others (n 77) art 15(3).

[146] Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) art 10.C.

[147] See IBA Rules for Investor-State Mediation (n 7) art 10.3(a); ICSID Working Paper 3 (n 109)Mediation Rule 9(2); CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(1); EU-Vietnam Agreement (n 4) Annex 9: Mediation Mechanism art 7; Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C.

mediation helps to raise the profile of ISM among potential users (including investors) and promotes the likelihood that they will choose mediation to settle their own disputes.

However, the rules regarding whether mediation facts should be made public vary between versions of the ICSID working paper. Working Paper 3 of Proposals for Amendment of the ICSID Rules, Mediation Rules 9(2) states, 'The fact that the parties are mediating or have mediated shall not be confidential.' However, Working Paper 4, Mediation Rules 10(2) states, 'Unless the parties agree otherwise, the fact that they are mediating or have mediated shall be confidential.' This rule change is a result of comments by certain states that confidentiality could be a key consideration for parties in deciding whether to mediate. The disclosure of the fact of mediation was thus made subject to party agreement. This change is also consistent with the Administrative and Financial Regulations for Mediation, Regulation 3, which states that the publication of mediation registers by the ICSID requires the parties' consent.[148] The provision on confidentiality of mediation facts in Working Paper 4 has been carried over to the newly published Working Paper 6. The ICSID mediation rules appear to be more conservative than other rules (such as the ECT mediation guidelines and the IBA mediation rules) in terms of whether the facts of the mediation should be made public, and they show greater adherence to the principle of confidentiality.

Such a provision maintaining the confidentiality of mediation is not a sign of progress but the result of compromise. On the one hand, in the absence of the parties' agreement to disclose the facts of the mediation, it leaves non-disputing parties uninformed about the mediation and deprives them of any opportunity to participate in it, bringing investment mediation back into shadows.

On the other hand, it is better to establish general procedural rules and make them available through ICSID than to not. There are probably many instances of investors and states' involvement in conflict resolution processes with neutral third parties behind closed doors. There is no established registration system for such conflict resolution processes. Therefore, the information exchanged and agreements reached in such negotiations remain unknown, which amounts to complete confidentiality. In contrast, the mediation rules offered by the ICSID allow the international community to be informed of the fact of such disputes, even if the terms of the eventual mediation agreements are not automatically made public.

ii. Disclosing the settlement agreement resulting from mediation

It also seems permissible under some rules to disclose the settlement agreement resulting from mediation. For example, the IBA's rules state, 'The settlement agreement or part of its terms can be disclosed unless the two parties have agreed otherwise in writing.'[149] CETA's mediation rules similarly provide that 'any mutually agreed solutions shall be

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[148] 'The Secretary-General shall maintain a Register for each mediation containing all significant data concerning the institution, conduct and disposition of the mediation proceeding. The information in the Register shall not be published, unless the parties agree otherwise.' ICSID Working Paper 4 (n 11) Administrative and Financial Regulations for Mediation, Regulation 3.

[149] IBA Rules for Investor-State Mediation (n 7) art 10.3(b); Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C.

made publicly available.'[150] Disclosing the settlement agreement resulting from mediation strengthens the legitimacy of the mediation in the eyes of the general public and shields public officials from potential criticism regarding the appropriateness of concessions or payments to the other party. It also facilitates the rebuttal of potential allegations of the involvement of corruption in the settlement agreement.

Compared with these rules, the ICSID mediation rules are relatively cautious in terms of the disclosure of settlement agreements. Under ICSID's Rule 10, 'all documents generated in or obtained during the mediation shall be confidential' and 'the fact that they have mediated shall be confidential.'[151] This appears to be a compromise; the ICSID grants parties control over the disclosure of settlement agreements without restricting them by institutional rules. It is worth noting that if parties seek to enforce and invoke settlement agreements across borders through the Singapore Convention on Mediation, the settlement agreements may eventually become public regardless of an agreement as to disclosure.

iii. Establish limited exceptions to confidentiality

Institutional rules allow for an explicit listing of exceptions to the general principle of confidentiality. The ISM models offer insight into what these exceptions are, and these are discussed below. However, it is helpful to look at the exceptions to transparency offered in ISA guidelines and compare their rigor to those in ISM rules.

ISA provides exceptions to transparency, laid out in the UNCITRAL Transparency Convention [152] as well as the ICSID's newly crafted Arbitration Rules. [153] These transparency exceptions can be broadly divided into the following four categories.

(1) Information that is protected against being made available to the public under binding documents, including the applicable treaty, the law of the respondent state, orders and decisions of the tribunal, agreement of the parties, the applicable law or applicable rules, and orders and decisions of the tribunal agreement of the parties;

(2) confidential business information;

(3) information that is confidential for the sake of procedural benefits, including public disclosure would impede law enforcement, aggravate the dispute between the parties, or undermine the integrity of the arbitral process; and

(4) any public disclosure that would be contrary to a state party's vital security interests.

In terms of mediation, potential exceptions to confidentiality can be found in the existing ISM rules. For example, the ICSID's newly released ICSID Mediation Rules stipulate three confidentiality exceptions: '(a) the parties agree otherwise; (b) the information or document is independently available, or (c) disclosure is required by law.'[154] Affirmative disclosure requirements may be found, for example, in domestic legislation applicable to public and private partnerships (the World Bank's PPP Disclosure

[150] See CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 7(3).

[151] See ICSID, Proposed Regulations and Rules for ICSID Mediation Proceedings, available at <https://icsid.worldbank.org/sites/default/files/publications/rule_amendment_proposals_mediation.pdf> accessed on January 29, 2022.

[152] See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration art 7.

[153] See ICSID Working Paper 4 (n 11) Arbitration Rule 66.

[154] ibid Mediation Rule 10(1).

Framework illustrative of the objectives and scope of such disclosure regimes),[155] public financial management regulations, budget transparency legislation, or freedom of information legislation. Compared with their ICSID counterparts, the confidentiality exception provisions in the IBA Mediation Rules are more detailed and illustrative.[156] The IBA also requires that any disclosure made shall be in a manner that protects the confidentiality of information to the greatest extent feasible and permissible.

C. Additional considerations

When balancing the two value orientations of confidentiality and transparency in ISM, some additional considerations are needed, as there is no universal ideal form of transparency for ISM.[157] Rather, the proper balance depends on certain specific factors such as the circumstances surrounding the mediation, the internal legal conditions and political situations of state parties, the specific subject of the dispute, and the stages of the mediation. As is evident from the published compilations of comments to date in ICSID working papers, states and other commentators continue to hold varying positions on transparency in ISDS.[158] For example, the states that have joined the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) are likely to pursue a low level of transparency in mediation to prevent evidence of bribery issues in ISDS procedures and awards. The release of this information could cause parties to be sanctioned by the OECD Anti-Bribery Convention and face severe legal risks. Further, some host states are inclined to resolve disputes in secrecy out of concern for their reputation. When a host country is publicly accused of breaking the law or losing a lawsuit, it damages the credibility of the host states' investment environment and states' reputation, particularly in the eyes of potential investors.[159] However, parties in a case with long-lived investments tend to have a greater need for confidentiality than parties in a case with short-lived investments.[160] In long-term investment projects (such as power, mining, or transportation infrastructure construction), parties tend to try to avoid destroying their continuous cooperative relationship and instead strive to make compromises and concessions to achieve the expected benefits of sustainable operation of the asset. If such compromises and concessions were carried out through open procedures, achieving satisfactory results would be difficult. Moreover, the cost of transparency is often substantial. Running a high-transparency system may result in increased costs, unnecessary delay, and interference with proceedings and may expose uncertain information.[161] Thus, the transparency of ISM may need to be determined on a case-by-case basis; as cases differ, so do their disclosure requirements.

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[155] See World Bank Group, 'A Framework for Disclosure in Public-Private Partnerships (2016) <https://thedocs.worldbank.org/en/doc/773541448296707678-0100022015/original/DisclosureinPPPsFramework.pdf> accessed on 29 January 2022.

[156] See IBA Rules for Investor-State Mediation (n 7) art 10.3.

[157] Moffitt Michael, 'Casting Light on the Black Box of Mediation: Should Mediators Make their Conduct More Transparent?' (1997) 13 OHSDJR 49.

[158] See ICSID Working Paper 3 (n 109) 347.

[159] Titi (n 19) 35.

[160] Cases involving longer investments have a 12% greater probability of having a fully public award than cases involving short-lived investments do.

[161] Barstow Magraw and Amerasinghe (n 22) 353-56.

Although it is not possible to determine a uniform ideal level of transparency, the level of transparency is not unpredictable in all respects. Specific tasks, individual mediators' characteristics, and the degree of public supervision in a given case all affect transparency in ISM. Taking these elements into consideration, states can adjust their efforts accordingly and cooperate in their own interests. Host states can adjust their responsibility for transparency in the ISDS mechanism in the following ways.

(1) Reaching an agreement regarding the disclosure of information including the ISM settlement;

(2) stipulating 'transparency clauses' in bilateral investment treaties and multilateral investment agreements signed by the state;

(3) defining an internal monitoring mechanism that requires the state's representative in the mediation regularly to report to a group of officials with full access to the file about the progress of the discussions and any proposals made by the mediator;[162]

(4) making provisions for disclosure obligations in domestic legislation, such as the freedom of information legislation, public financial management regulations, and budget transparency legislation of some democratic states; and

(5) while emphasizing confidentiality, stipulating exceptions to it (as in the models mentioned above), leaving space to protect transparency.

In addition to the individual efforts of each state, parties can make transparency responsibilities more predictable by working together to promote the establishment of the amicus curiae system in the ISM mechanism. In ISA, the purpose of the amicus curiae system is to provide factual information of various types to the tribunal to help the tribunal better understand the case before it and reach the correct decision.[163] The submission of amicus curiae briefs also encourages public participation, which is closely related to transparency.[164] If amicus curiae can be adopted by the ISM mechanism, the participation of third parties may also provide new ways of thinking about and creative solutions to settlement negotiations, thereby promoting better decision-making.[165] Furthermore, the establishment of amicus participation can increase the transparency of ISM by allowing the stakeholders in the dispute to express their perspectives, thereby enhancing the credibility of the ISM.[166] An amicus curiae system integrated into ISM would grant opportunities to the public in voicing their perspectives on legal matters, raise legal arguments or facts in light of the public interest, and make amicus petitions without having to rise to the level of an intervener to the case.[167] Strict confidentiality would not enable amicus petitioners to make such quality contributions. Disclosing the fact of the dispute itself, as discussed above, may allow for the timely participation of amicus curiae, thus promoting the public interest.

Of course, the value of amicus participation depends on the individual case.[168] Such participation may have some disadvantages, including increased costs, unnecessary delays,

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[162] See Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) art 10.C.

[163] Joseph D Kearney and Thomas W Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148(3) Univ PA Law Rev 830.

[164] Joachim Delaney and Daniel Barstow Magraw, 'Procedural Transparency' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 778.

[165] Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009).

[166] Rauber (n 37).

[167] Barstow Magraw and Amerasinghe (n 22) 350.

[168] Rauber (n 37).

the politicization of conflicts, and the disclosure of highly confidential information.[169] The experience of the use of amicus curiae in ISA can be used for reference. The regulations of amicus curiae in ISA address these drawbacks by setting strict procedural safeguards and restrictions, such as tight deadlines, specific page limits, subject matter limits, a duty to explain the background and existence, and funding parties, to ensure that there is no interference with or unnecessary burden on the mediation process.

VI. Conclusion

The above analysis shows that due to the hybrid nature of investor–state disputes, it is necessary to maintain public interest and improve transparency for both ISA and ISM. However, due to their institutional differences, the two dispute settlement systems allow for different degrees of transparency. Through transparency reform efforts, ISA has adopted transparency as its principle and confidentiality as the exception, whereas the basic principle of ISM is still confidentiality, with reasonable exceptions of transparency. Although mediation is unworkable in some cases and therefore cannot replace arbitration, to offer an attractive complementary mechanism, ISM must successfully balance the requirements of transparency and confidentiality.

In light of public interest concerns, the ISM mechanism must be expanded to include more reasonable transparency exceptions while maintaining an appropriate level of confidentiality. Otherwise, it will lose its institutional advantages and value. Some international treaties and rule practices have made progress in this direction, but further optimisation will require countries to make choices based on their respective positions. The degree of transparency of mediation in a specific case should depend on the specific circumstances of the dispute, any transparency rules implicated in the dispute settlement clauses involved, and the level of public interest and other calls for transparency involved.

The ISM mechanism is quite flexible in terms of transparency, allowing for a balance of confidentiality and transparency to be struck by the parties involved. Transparency is an increasingly important determinant of the development of the investment mediation mechanism. It will also affect the trends of both diversified investment dispute resolution and investment governance modernisation.

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[169] Rauber (n 37).