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# IBA Interns' Newsletter

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## Encouraging an additional pathway to accountability: success of universal jurisdiction

**E**stablished in 2002, the International Criminal Court seeks to investigate and prosecute those responsible for genocide, crimes against humanity, war crimes and the crime of aggression.<sup>1</sup> Although the ICC has had successes, bringing 30 cases before the Court since its inception,<sup>2</sup> the ICC and its work is subject to significant criticisms, ranging from believing the Court has too little authority, making it inefficient and ineffective, to believing the Court has too much prosecutorial power, threatening state sovereignty and lacking checks against political bias.<sup>3</sup>

Additionally, the ICC is limited to bringing cases in states that have consented to ICC jurisdiction or in situations referred by the UN Security Council, which may be subject to veto.<sup>4</sup> Even when the ICC has jurisdiction, its resources are limited, and can only prosecute a small number of crimes.

Applying and encouraging states to utilise their universal jurisdiction (UJ) laws may provide an additional avenue where the ICC is unwilling or unable to proceed. UJ is the principle that permits a national court to prosecute individuals for serious crimes against international law, such as crimes against humanity, war crimes, genocide and torture.<sup>5</sup> UJ does not require a territorial or personal link, allowing proceedings irrespective of the location and the nationality of the perpetrator or victim.<sup>6</sup> This broad jurisdiction operates under the principle that some crimes are so harmful to international interests that states are entitled to bring proceedings.<sup>7</sup>

Given that UJ's legal power relies on a state granting their own courts UJ as a national decision, UJ is not uniformly applied. States may implement UJ broadly or narrowly. A narrow implementation enables the prosecution of a person accused of international crimes only when they are available for trial, where a broad

implementation may allow initiating proceedings *in absentia*.<sup>8</sup> Ultimately, however, UJ has the potential to fill a gap in the international criminal justice sphere, where an international criminal court does not have the jurisdiction or the resources.<sup>9</sup>

Although UJ has been in use since the 1961 prosecution of Adolf Eichmann by Israel,<sup>10</sup> UJ has recently found a renewed life. For example, Germany's recent use of UJ may be one of the most prolific. Since 2002, German prosecutors can exercise UJ under the Code for Crimes against International Law.<sup>11</sup> This allows prosecutors to initiate investigations and prosecutions into genocide, crimes against humanity and war crimes.<sup>12</sup>

Concerning Syria, in February 2021 under UJ, a court in Koblenz sentenced Eyad al-Gharib to four-and-a-half years in jail for complicity in crimes against humanity.<sup>13</sup> Al-Gharib was charged with arresting at least 30 protesters, who were later tortured and murdered at a Damascus prison.<sup>14</sup> Two other Syrians also remain on trial. Anwar Raslan is accused of being a high-ranking officer of the General Intelligence Directorate, suspected of being involved in the torture of at least 4,000 people and charged with 58 counts of murder, rape and sexual assault.<sup>15</sup> Alaa Mousa is accused of 18 counts of torturing people in military hospitals in Homs and Damascus, and faces charges of murder and allegations that he tried to make people infertile.<sup>16</sup>

A German court in Munich also made the first indictment of war crimes committed by Islamic State members against the Yazidi, sentencing IS member Jennifer Wenisch to ten years in prison after the death of a five-year-old enslaved Yazidi girl for a crime against humanity resulting in death, aiding and abetting attempted murder by omission and membership of a terrorist organization.<sup>17</sup> Wenisch's husband, Taha al-Jumailly, was later sentenced to life in prison after being found



guilty of genocide (intending to destroy the Yazidi), and crimes against humanity after enslaving and murdering the five year-old.<sup>18</sup>

Other countries currently employing UJ include Sweden (indicting the main owner and former chief executive of a Swedish oil and gas producer for being complicit in war crimes committed in Sudan under Omar al-Bashir)<sup>19</sup> and Switzerland (sentencing Aliou Kossiah to 20 years for war crimes committed in Liberia, including murder and rape).<sup>20</sup> These cases all show the power of UJ to ensure justice for victims seeking redress when their own countries, or the ICC, may be unwilling or unable to act.

With the election of a new ICC prosecutor, the ICC has the chance to build on its prior successes on its road to accountability.<sup>21</sup> However, as states bear the primary responsibility for investigating and prosecuting alleged perpetrators of serious international law violations, the role of UJ in global justice and accountability inherently must supplement the ICC, a court of last resort. While UJ and the ICC are subject to valid criticism and concerns, it is to the benefit of the international community to ensure the perpetrators of most serious crimes to be brought to justice, and UJ provides an additional and effective avenue to pursue these goals.

#### Notes

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- 5 Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 Int'l Rev. Red Cross 375, 377 (2006).

- 6 *Id.*
- 7 *Id.*
- 8 *Id.* at 379-380.
- 9 Douglass Cassel, *Universal Criminal Jurisdiction*, ABA (Jan. 1, 2004), [www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol31\\_2004/winter2004/irr\\_hr\\_winter04\\_universal/](http://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol31_2004/winter2004/irr_hr_winter04_universal/).
- 10 See Mark S. Ellis, *Adolf Eichmann is Convicted for His Role in the Final Solution*, ABA Journal (Nov. 1, 2013), [www.abajournal.com/magazine/article/adolf\\_eichmann\\_is\\_convicted\\_for\\_his\\_role\\_in\\_the\\_final\\_solution/#:~:text=Eichmann%20brought%20universal%20jurisdiction%20back%20to%20the%20international,in%20the%20SS%20who%20had%20primary%20responsibility%20](http://www.abajournal.com/magazine/article/adolf_eichmann_is_convicted_for_his_role_in_the_final_solution/#:~:text=Eichmann%20brought%20universal%20jurisdiction%20back%20to%20the%20international,in%20the%20SS%20who%20had%20primary%20responsibility%20).
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- 13 Syria Torture: *German Court Convicts Ex-Intelligence Officer*, BBC (Feb. 24, 2021), [www.bbc.com/news/world-europe-56160486](http://www.bbc.com/news/world-europe-56160486).
- 14 *Id.*
- 15 *Id.*
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## Third party funding in investor-state disputes: enhancing access to justice

**T**hird party funding is increasingly prevalent in the investor-state dispute settlement (ISDS) system. It most commonly occurs when an entity, with no prior legal interest in a dispute, finances a litigant's claim in exchange for an agreed return.<sup>1</sup> In this Article, I consider

the normative arguments underlying the use of funders in investment arbitration. First, I outline how funders can enhance access to justice for impecunious investors. Secondly, I rebuke commonly cited objections to the access to justice rationale.

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## The primary rationale: access to justice

Third party funding facilitates access to justice for foreign investors. Given the enormous costs involved in ISDS,<sup>2</sup> international investment arbitration has often been criticised for being commercially unviable.<sup>3</sup> For some investors, proceedings would simply be too expensive without external capital.<sup>4</sup> Third party funding is thus integral for impecunious investors who wish to seek redress but are unable to bring claims against ‘bad actor states’.<sup>5</sup>

## Objections

### *Access to justice no longer the primary motivation: choice vs necessity*

Critics argue that third party funding is not being used to finance disadvantaged claimants.<sup>6</sup> Funding is instead exploited for the sole purpose of ‘balance sheet management’,<sup>7</sup> with non-impecunious investors resorting to external capital out of choice, not necessity. Far from promoting access to justice, third party funders offer well-resourced claimants the ability to minimise the risk associated with filing a claim.<sup>8</sup> According to this view, the market for litigation finance is exclusively comprised of multi-national corporations seeking to pursue other business priorities, free up cash and reduce legal budgets.<sup>9</sup> Therefore, the access to justice rhetoric has been subverted to accommodate profit-driven ends.<sup>10</sup>

However, such a view incorrectly qualifies the ‘type’ of claimant appealing to third party funders. It assumes that *all* claimants are well-resourced, monolithic corporations acting out of choice, not necessity. In actuality, the recipients of third party funding can be positioned on a spectrum.<sup>11</sup> On one end, there is the impecunious investor who cannot bring forward a claim, perhaps due to a foreign government expropriating its investment.<sup>12</sup> In the middle, there are entities that are adequately capitalised, but face a difficult trade-off.<sup>13</sup> If the entity pursues arbitration, then it cannot continue core business operations, but if it does not resort to ISDS, then it foregoes a potential award in its favour.<sup>14</sup> On the other end, there is the well-resourced, large foreign investor.<sup>15</sup> Admittedly, given the limited public data on which claimants are funded, it is difficult to pinpoint the precise composition of this spectrum. Nonetheless, the ‘access to justice rationale’ is not entirely redundant; there is a

substantial category of ‘middle’ investors who *need* external capital to finance their claims.<sup>16</sup>

### *Financial impact of funding arrangements on states*

Some argue that the availability of third party funding to litigants, and the corresponding increase in ISDS claims,<sup>17</sup> can cause immense financial pressure on resource-constrained states.<sup>18</sup> On average, a state expends US\$8 million in defending against a claim.<sup>19</sup> This is particularly significant since the cost of arbitration is ultimately drawn from the public exchequer.<sup>20</sup> Garcia *et al* argue that third party funding effects a significant, uncompensated wealth transfer from citizens of respondent states to funders and the investors they represent, and that tax-payers of the host state are ‘residual risk-bearers’.<sup>21</sup>

This concern is compounded by the asymmetrical nature of claim initiation under existing investment treaties.<sup>22</sup> Barring the limited circumstances in which a respondent-state can bring a counter-claim, only the claimant-investor has the potential to be awarded compensation for breaches.<sup>23</sup> Financing a claimant-investor yields a greater upside or profit when compared to financing a respondent-state.<sup>24</sup> Although in theory, a private funder might decide to sponsor a respondent state, it is not commercially attractive for the funder to do so.<sup>25</sup> The economics of third party funding favours claimants, leaving a smaller portion of the funding pie to states.

However, this objection is not compelling for two primary reasons. First, if a claim has merit, and the host state has breached its international treaty obligations, then a party’s status as a state is immaterial. A foreign investor should be able to vindicate its rights, even if this might cause financial detriment to the respondent-state.<sup>26</sup> To suggest otherwise would defeat a core purpose of ISDS: ‘providing foreign investors with the right to access an international tribunal to resolve investment disputes’.<sup>27</sup>

Secondly, the objection overlooks the availability of third party funding to respondent states in the form of donations and grants.<sup>28</sup> Not-for-profit third party funding can be seen in *Philip Morris v Uruguay*, which concerned laws requiring the plain packaging of tobacco products.<sup>29</sup> Here, the Bloomberg Foundation issued the Uruguayan government with US\$200,000 to defend against the claim.<sup>30</sup> Arguably,





US\$200,000 is somewhat trivial, given that a state expends roughly US\$8 million per arbitration. Furthermore, third party funding of respondent states has been relatively rare, with only two documented examples of it.<sup>31</sup> Nevertheless, respondent states still stand to benefit from external financing.<sup>32</sup>

## Conclusion

In its modern incarnation, third party funding transforms a legal claim into a financial asset. It is integral if investment arbitration is to remain financially viable for investors. And without it, there is a real risk that foreign direct investment would be hampered.

### Notes

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- 4 Eric de Brabandere and Julia Lepeltak, 'Third Party Funding in International Investment Arbitration' (2012) 27(2) ICSID Review 379, 383.
- 5 Frank Garcia et al, *The Case Against Third-Party Funding in ISDS: Executive Summary* (Executive Summary Boston College Law School – PUC University of Chile Working Group on Trade & Investment Law Reform Third-Party Funding Task Force, 23rd of April 2018) 4.
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- 10 Ibid 3.
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- 16 Davies (n 13) 63.
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- 20 Garcia et al (n 5) 7.
- 21 Ibid.
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- 23 *ICCA-Queen Mary* (n 1) 223: see generally Alessandra Arcuri, 'The Great Asymmetry and the Rule of Law in Trade and Investment Agreements' in Lisa Sachs, Lise Johnson and Jesse Coleman (ed), *Yearbook on International Investment Law and Policy* (Oxford University Press, 2019 Forthcoming).
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- 25 Ibid.
- 26 Brabandere and Lepeltak (n 4) 386.
- 27 Australian Government, Department of Foreign Affairs and Trade, 'Investor-state dispute settlement (ISDS)', *About Foreign Investment* (Web page, n/a) <https://dfat.gov.au/trade/investment/Documents/isds-faqs.pdf>.
- 28 *ICCA-Queen Mary* (n 1) 24.
- 29 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) ('*Phillip Morris v Uruguay*').
- 30 *ICCA-Queen Mary* (n 1) 24.
- 31 *Phillip Morris v Uruguay* (n 29); *RSM Production Corporation v Grenada (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/14, 13 March 2009) ('*RSM Production v Grenada*').
- 32 *ICCA-Queen Mary* (n 1) 23-24.

# The Gambia v Myanmar: justice for the Rohingya?

In Myanmar, ethnic Rohingya Muslims have endured extensive atrocities, including rape, murder and arson at the hands of the military, the Tatmadaw. In August 2017, the military's ethnic cleansing policy drove more than 740,000 Rohingya to Bangladesh.<sup>1</sup> In November 2019, the Republic of The Gambia filed a case before the

International Court of Justice (ICJ) alleging violations of the Genocide Convention.<sup>2</sup> This article will examine the potential of these proceedings to bring justice to the Rohingya population and explore alternative avenues.

One might raise the question of why The Gambia, a state located more than 11,000 kilometres away from Myanmar, and not

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directly affected by the atrocities, has brought a case before the ICJ. Muslims constitute the vast majority of The Gambia's population, and 57 members of the Organisation of Islamic Cooperation have backed The Gambia in filing the case.<sup>3</sup> In its January 2020 order, the ICJ confirmed that The Gambia *prima facie* met the Court's jurisdictional standards on the basis that the obligations under the Genocide Convention are owed *erga omnes partes*, towards all the State Parties to the Convention.<sup>4</sup> It is conceivable that Myanmar will attempt to challenge The Gambia's jurisdiction later in the proceedings.

While many years will likely pass before the ICJ issues a final judgment,<sup>5</sup> The Gambia's suit constitutes the first major attempt to deliver justice to victims of the Myanmar Government's atrocities. There have already been tangible developments in the proceedings. In January 2020, the ICJ granted The Gambia's provisional measures request and ordered Myanmar to (i) prevent genocidal acts; (ii) ensure that military, police and other forces within its control do not commit genocidal acts; (iii) preserve all evidence of genocidal acts; and (iv) report regularly on compliance with these measures.<sup>6</sup>

### Myanmar's compliance with the ICJ order

Myanmar has filed three reports so far, with the fourth report due on 23 November 2021. However, the reports are filed confidentially, leading to the inability of the Rohingya and other observers to know and assess Myanmar's representations.<sup>7</sup> In June 2020, 30 Rohingya representative groups submitted a letter to the ICJ requesting publication of the reports,<sup>8</sup> but the Court has, to the author's knowledge, neither replied nor confirmed receipt of this appeal from the victims. This is problematic for several reasons, not least because the Rohingya are not parties to the case and only have access to publicly available documents. They could construe the Court's inaction as suggesting that the Court considers that the superficial and minimal measures known to the public suffice to adhere to the order.

The February 2021 overthrow and the subsequent military violence<sup>9</sup> against pro-democracy protesters show that the order has not served to discourage the military's unlawful behaviour. The Myanmar military, under the control of Senior General Min Aung Hlaing, was the principal author of the atrocities that took place during the 2016-2017 period and is now perpetrating

crimes against civilians in connection with the coup under the charge of the same Senior General. Moreover, since the Court issued the order, Rohingya human rights groups have stated that not only is Myanmar not taking adequate concrete steps to pre-empt genocide but there have also been reported human rights violations and crimes, indicating that the perpetration of genocide against the Rohingya continues.<sup>10</sup>

### A ruling in favour of The Gambia?

Myanmar is legally bound by the provisional measures order. However, its enforcement appears unlikely given the deadlock of the United Nations Security Council due, in part, to China's support of Myanmar's administration and its veto prerogative.<sup>11</sup> A question then arises as to the impact of a prospective ICJ judgment against Myanmar on the ground situation. Article 94 of the UN Charter stipulates that all Member States must comply with ICJ judgments in cases to which they are a party,<sup>12</sup> and in the event of non-compliance, the UN Security Council may 'decide upon measures to be taken to give effect to the judgement.'<sup>13</sup> The chances that the Rohingya will see justice delivered through the ICJ process thus seem low.

### Alternative routes to justice

There are other ways in which justice could be secured for the Rohingya, including through national courts in third party countries under the principle of universal jurisdiction and the International Criminal Court (ICC), given that domestic courts in Myanmar do not appear suitable for securing accountability.<sup>14</sup> This appearance is reinforced by the 2020 statement of the Independent International Fact-Finding Mission on Myanmar mandated by the UN Human Rights Council that accountability at the national level is 'currently unattainable' even with a degree of international participation.<sup>15</sup>

In relation to universal jurisdiction, in November 2019, the Burmese Rohingya Organisation UK brought a case in an Argentinian court, attempting to initiate criminal proceedings against senior Burmese officials for their involvement in the Rohingya genocide. In July 2021, a lower court dismissed the case on account of a continuing investigation before the ICC on the matter. The organisation appealed, arguing that the ICC focus is confined to crimes committed



partly or fully in Bangladesh, as Myanmar is not a party to the Rome Statute. The first appeal hearing occurred in August 2021.<sup>16</sup> The final appeal judgment has not yet been rendered and will likely set an important precedent on the existence or otherwise of a jurisdictional conflict. This trial appears to constitute a source of hope for numerous victims from Myanmar.<sup>17</sup>

Regarding the ICC, in November 2019, the Pre-Trial Chamber III authorised the Chief Prosecutor to initiate an investigation into the Myanmar situation.<sup>18</sup> Further, according to the East Asia Forum, in August 2020, Myanmar's opposition National Unity Government has submitted a declaration with the ICC Registry accepting the Court's jurisdictions with respect to all international crimes committed in Myanmar since 2002.<sup>19</sup> Hundreds of thousands of persons claiming to be victims have already submitted their views to the ICC.<sup>20</sup> However, whether the ICC will deliver justice to the Rohingya in the form of individual criminal responsibility remains to be seen.

#### Notes

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2. [www.icj-cij.org/public/files/case-related/178/178-20191111-PRE-01-00-EN.pdf](http://www.icj-cij.org/public/files/case-related/178/178-20191111-PRE-01-00-EN.pdf). The Convention on the Prevention and Punishment of the Crime of Genocide 1948.
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7. *Supra* note 3.
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11. *Supra* note 1. Russia has previously also advocated for non-interference; see [www.aa.com.tr/en/asia-pacific/un-security-council-deadlocked-on-myanmar/2166524](http://www.aa.com.tr/en/asia-pacific/un-security-council-deadlocked-on-myanmar/2166524).
12. Article 94(1) UN Charter.
13. Article 94(2) UN Charter.
14. That is, 'unwilling or unable to genuinely carry out the prosecution', in the words of article 17 of the Rome Statute.
15. [www.globalr2p.org/publications/myanmarqav2](http://www.globalr2p.org/publications/myanmarqav2).
16. <https://trialinternational.org/latest-post/universal-jurisdiction-case-in-argentina-an-important-decision-for-the-rohingyas>.
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18. [www.icc-cpi.int/Pages/item.aspx?name=pr1495](http://www.icc-cpi.int/Pages/item.aspx?name=pr1495).
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20. *Supra* note 18.

## The right to food: the key to food security?

### Introduction

Global hunger is a growing concern affecting 815 million people worldwide.<sup>1</sup> The recent Covid-19 pandemic has made the situation worse, as countries all over the world went into a lockdown to mitigate the outbreak of the pandemic, disrupting the world's food supply chains.<sup>2</sup> In view of the food crisis, discussions about justiciable ways to achieve food security comes to the forefront.

The 'right to food' or 'right to adequate food' (RTF) is present within a few international treaties and implied in the Sustainable Development Goals (SDGs),

specifically SDG number two ('Zero Hunger'). This essay notes that despite such applaudable instruments, there remain some key challenges to the realisation of RTF.

### International scope of RTF

RTF was first formulated under Article 25 of the UDHR, which provides that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food'.<sup>3</sup>

More referred to is Article 11 (1) & (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>4</sup>, which

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provides for ‘the right to adequate food’<sup>15</sup> and ‘the right to be free from hunger’<sup>16</sup> respectively. Subsequently, RTF gained international momentum through the adoption of the Optional Protocol to the ICESCR in 2013.<sup>7</sup> This meant that State Parties recognised the competence of the Committee on Economic, Social and Cultural Rights (CESCR) to receive complaints from individuals or groups who claimed that their rights under the ICESCR, including RTF, had been violated.<sup>8</sup> Hence, such instruments served to motivate many governments to formulate better policies that ensure adequate access to food.

Similarly, the SDGs also reflect the commitment of nations of the world to pursue adequate access to food. However, the SDGs do not hold the states accountable should they fail to do so, nor does it entail a minimum core obligation, like with Article 11 ICESCR and the Optional Protocol. In addition, SDG target 2.3 aims to ‘double agricultural productivity’ through measures that ensure ‘secure and equal access to land, other productive resources and input’. Yet, it is not accompanied by any detailed course of implementation. Hence, some argue that the SDGs are plagued by ‘fancy rhetoric’ and ‘policy incoherence’ that has ultimately failed to effectively reduce world hunger.<sup>9</sup>

### Challenges to the implementation of RTF

A major obstacle to the recognition of RTF is its categorisation as an economic, social and cultural right (ESC rights). Historically, the development of international human right norms through the International Bill of Rights saw the formulation of two catalogues of rights. These were the civil and political rights (CP rights), which are now encapsulated under the International Covenant on Civil and Political Rights (ICCPR),<sup>10</sup> and ESC rights are codified under the ICESCR.

Between these two categories of human rights, states have often relegated ESC rights as second place to CP rights.<sup>11</sup> It appears that states were more willing to uphold CP rights due to the fact that they entail negative obligations (the obligation to restrain from doing something), which are clearly identifiable. Arguably, CP rights can be upheld and remedied more easily.<sup>12</sup> On the other hand, the ESC rights entail positive obligations (the obligation to do something) and the extent of the obligation to uphold

ESC rights, including RTF, is often obscure. This lack of clarification about the scope of RTF often triggers states’ resistance to fully support RTF.<sup>13</sup>

Albeit, we find that ESC rights have been upheld and successfully implemented regardless of their obscure nature. The ESC rights, such as access to health, education and water, have found their way into the SDGs, with a commitment by the states to uphold them via mutual assistance.<sup>14</sup> Furthermore, it is difficult to comprehend why RTF has faced so much resistance, particularly since starving people will clearly be limited from the proper enjoyment of any other human rights, whether it be CP or ESC rights.<sup>15</sup>

Some may argue that the economic implications of realising RTF, such that the absolute commitment to RTF would cause immense strain on the limited financial resources of any government.<sup>16</sup> However, there is clear evidence to suggest that CP rights are also very expensive to uphold.<sup>17</sup> For example, in one such phone-hacking trial, the cost of maintaining other CP rights such as the ‘right to fair trial’ and the ‘right to privacy’ was about £100m.<sup>18</sup> Therefore, we should accept that maintaining any sort of human right is expensive one way or another.

### Case study: The ‘Right to Food’ in India

Arguably, the Indian government has made some of the best attempts to effectively realise RTF. The ‘right to life’ is enshrined under Article 21 of the Indian Constitution and in the case of *People’s Union for Civil Liberties v. Union of India and others*, the Supreme Court of India held that Article 21 also includes the ‘right to food’.<sup>19</sup>

The Supreme Court of India, while relying on Article 21, ordered the government to immediately distribute unallocated excess grain stock to the malnourished, the needy and the poor, in order to address the needs of a severely starving population.<sup>20</sup> This was an unprecedented development that went beyond even the standards established under Article 11 ICESCR, which did not directly create an obligation on states to freely dispense excess food.

In conclusion, the SDG number two campaign to end hunger and all forms of malnutrition reflects the attempt by states all around the world to address the challenge of global food security. Yet, this goal remains unenforceable, and it does little to achieve food security. RTF stands a better



chance to realise such goals if state parties ascribe ESC rights with the same level of importance accorded to CP rights. More state authorities should recognise and commit to implementing RTF regardless of the financial implications. There is much to learn from how RTF is seen as an enforceable right within the meaning of the ‘right to life’, as observed in India.

#### Notes

- 1 Klaus von Grebmer, Jill Bernstein, Nilam Prasai, Shazia Amin, Yisehac Yohannes, ‘Global Hunger Index: Getting to Zero Hunger’ (International Food Policy Research Institute 2016) <<https://reliefweb.int/sites/reliefweb.int/files/resources/130918.pdf>> assessed 9 November 2021
- 2 UN Policy Brief: The Impact of COVID-19 on Food Security and Nutrition (June 2020) <[www.tralac.org/documents/resources/covid-19/3813-the-impact-of-covid-19-on-food-security-and-nutrition-un-policy-brief-june-2020/file.html](http://www.tralac.org/documents/resources/covid-19/3813-the-impact-of-covid-19-on-food-security-and-nutrition-un-policy-brief-june-2020/file.html)> accessed 1 November 2021
- 3 UN General Assembly, Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III) (UNGA), art.25
- 4 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 2200A (XXI) (ICCPR), art. 11
- 5 art. 11(1) of ICESCR.
- 6 art. 11(2) of ICESCR.
- 7 UN Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008.
- 8 As of April 2021, the Optional Protocol to the ICESCR has 45 signatories and 25 state parties.
- 9 Jose Luis Vivero Pol, Claudio Schuftan, ‘No right to food and nutrition in the SDGs: mistake or success?’ (2016) *BMJ Global Health* 1
- 10 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 11
- 11 Ioana Cismas, ‘The Right to Food Beyond De-mythification: Time to Shed the Inferiority Complex of Socio-Economic Rights’ (2014) 5 (4) *Global Policy* 474
- 12 Ibid.
- 13 Ibid.
- 14 SDG 3 (Good Health and Wellbeing), SDG 4 (Quality education), SDG 6 (Clean Water and Sanitation), <[www.un.org/sustainabledevelopment/sustainable-development-goals](http://www.un.org/sustainabledevelopment/sustainable-development-goals)> assessed 4 November 2021
- 15 Ioana Cismas (n 11) 474.
- 16 Jose Luis Vivero Pol, Claudio Schuftan, ‘No right to food and nutrition in the SDGs: mistake or success?’ (2016) *BMJ Global Health* 1, 3
- 17 Ioana Cismas (n 11) 475.
- 18 The Guardian, “Phone-hacking trial: total legal costs approach £100m” (25 June 2014) <[www.theguardian.com/uk-news/2014/jun/25/phonr-hacking-trial-legal-costs-rebekah-brooks](http://www.theguardian.com/uk-news/2014/jun/25/phonr-hacking-trial-legal-costs-rebekah-brooks)> assessed 2 November 2021
- 19 *People’s Union for Civil Liberties v. Union of India and others*, Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No. 196/2001.
- 20 Ibid

## Silence or money? The conundrum following workplace harassment or discrimination

Grace Grant



### Introduction

Non-disclosure agreements (NDAs) are confidentiality agreements that prevent individuals from sharing sensitive information with any third party. They were created to ensure employees do not share their employer’s business secrets. However, a controversial use of NDAs has been uncovered – to handle workplace complaints. In resolving incidences of discrimination or harassment, employers are coupling settlement agreements with NDAs. The issue is the terms of the NDAs frequently stipulate it is a breach of contract to share the details of the incident with the police, future employers, therapists, friends or family. It is imperative to note, NDAs are like all contracts — bound by contractual principles, such as

duress<sup>1</sup> and illegality.<sup>2</sup> Recently, the UK media has publicised the use of NDAs by universities<sup>3</sup> and the Church of England,<sup>4</sup> regarding allegations of bullying and racism.

### To regulate or not?

Some lawyers are wary to overregulate NDAs, arguing each victim’s situation is different so flexibility is needed. Lawyers have highlighted that for employees who want to leave work following bullying or discrimination, settlements are key as they need financial support in the interim. However, without an NDA, ‘there is no incentive to settle before going to the tribunal [...] because it means [the company’s] reputation is protected’.<sup>5</sup>

Witnesses to a UK Parliamentary Committee testified that an employee may want a confidentiality clause as a way 'to continue their careers without being blacklisted [or] being cast as a troublemaker'.<sup>6</sup> Employees fear their reputation is in jeopardy after complaining, particularly the loss of a good reference. There is a lacuna in employment law as employers are not obligated to provide departing employees with a satisfactory reference. The witnesses asserted the only 'bargaining chip' for the employee is their confidentiality.<sup>7</sup>

On the other hand, employers silencing victims is dubious. From a contract law perspective, some NDAs are being signed in improper circumstances, for example under duress.<sup>8</sup> It is even more troubling (and a breach of the Solicitors Regulation Authority Code of Conduct<sup>9</sup>) that the solicitor drafting the agreement knows this. While duress vitiates the consent of a contract, the employee is unlikely to be legally educated to know this. The employer and lawyer are relying on the naivety and silence of the victim to protect the employer's reputation.

Secondly, NDAs with illegal obligations cannot be enforced.<sup>10</sup> NDAs cannot prevent someone from reporting or cooperating with the police, and any contract purporting to may be considered perverting the course of justice.<sup>11</sup> Additionally, the NDAs are being drafted to prevent employees from whistleblowing regardless of legislation that renders such clauses void.<sup>12</sup> Once again, this is preying on the weaker position of a victim.

Further, businesses should be aware that not adequately addressing workplace harassment and discrimination may be a failure of their soft law obligations under the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>13</sup>

### How have other jurisdictions weighed in?

Few jurisdictions, notably California and Ireland, have legislated on the matter. In keeping a European focus, Ireland has a draft bill in its early legislative stage.<sup>14</sup> So far, the Irish Bill renders void an NDA dealing with allegations of sexual harassment and/or discrimination, unless the victim specifically requests confidentiality. For such NDA to be valid, it must:

1. be following the receipt of independent legal advice, in writing, at the expense of the employer;

2. with no attempts of undue influence by the employer;
3. not adversely affect the future health or safety of a third party;
4. include the option for the employee to waive their confidentiality in the future; and
5. be for a finite duration.

The proposed law identifies that protected disclosures (whistleblowing) cannot be the subject of NDAs and lists a host of parties that the victim cannot be barred from sharing with (the police, legal and medical professionals, regulators, prospective employers, family and friends).

### Is regulation enough?

The Irish Bill does not solve the employee's problem of the trade-off between confidentiality and receiving compensation or a satisfactory reference. If employers are only incentivised by confidentiality to support ex-employees, they will now let an employment tribunal determine their responsibility. A new problem (legally and culturally) has arisen in trying to protect workers.

The legislation fails to even begin to dismantle the greater issue: the lack of support for victims of workplace abuse. Currently, a victim must first raise the problem internally before turning to the employment tribunal, or risk a deduction in compensation by the tribunal.<sup>15</sup> If an employer is not cooperative, the employee's only alternative is settling and leaving the company, or going to the tribunal where an award may be less than the settlement.<sup>16</sup> Once the employee begins their tribunal claim, the burden of proof lies with them.<sup>17</sup> The entire procedure places the onus on victims, with the expectation they will settle or risk their tribunal award.

If settlement is presently the best option for employees, but regulating NDAs disincentivises employers from offering a settlement, what recourse is left for victims? The tribunal system has an imbalance of power that must be rectified. Recommendations have been made that tribunal compensation guidelines should be increased, and employers should be required to pay a victim's costs if the employer loses the claim.<sup>18</sup> This would help incentivise businesses to take workplace harassment and discrimination seriously and help balance the inequality. Shifting the burden of proof standard to the employer may also be an option for governments to investigate.

## Conclusion

NDAs help facilitate commerce, but the issues in an employment context cannot be ignored. Institutions are failing to safeguard their employees, then are at the victim's expense, using NDAs to protect the company's reputation. The Irish Bill protects the employee from the emotional challenges of forced confidentiality, but it fails to rectify that corporations value their profit and reputation over people. There is a great cultural problem at the workplace, which requires changes to the employee complaint procedure and the tribunal system, plus the regulation of NDAs to trigger the necessary workplace-culture shift. Freedom of speech without financial means and a career will be worthless to many victims.

## Notes

- 1 Barton v Armstrong [1976] AC 104
- 2 Holman v Johnson (1775) 1 Cowp 341
- 3 Academics revealed upon complaining of bullying by colleagues, they were given a settlement in return for signing an NDA. For one academic, her bully followed her to her new workplace but now she is sworn to secrecy and unable to explain her concerns to her current employer. Rianna Croxford, 'UK universities face "gagging order" criticism', BBC News (17 April 2019)
- 4 The Church has used NDAs to manage complaints of systematic racism: 'Justin Welby tells Church of England to stop using NDAs amid racism claims', BBC News (20 April 2021)
- 5 Women's and Equalities Select Committee, The Use of Non-Disclosure Agreements in Discrimination Cases (HC 2017-2019, 1720 – II), [13]
- 6 Ibid [12]
- 7 Ibid [25]
- 8 University students shared they have been threatened with expulsion if they 'make a fuss': Rianna Croxford, 'Sexual assault claims "gagged" by UK universities', BBC News (12 February 2020); Zelda Perkins' harrowing account of how she signed her NDA with Harvey Weinstein included long hours of pressured negotiations without any break or outside contact: Emine Saner, 'Zelda Perkins: "There will always be men like Weinstein. All I can do is try to change the system that enables them"', The Guardian (23 December 2020)
- 9 Solicitors Regulation Authority Code of Conduct for Solicitors, RELs and RFLs Principle 1.2
- 10 Solicitors Regulation Authority: Warning Notice 'Use of Non-Disclosure Agreements' (12 November 2020) [www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas](http://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas) accessed 20 October 2021
- 11 Ibid n 6 [91]
- 12 Employment Rights Act 1996, s 43J
- 13 In upholding Principle 22, businesses must provide 'gender-transformative' remedies where they identify they may have contributed or caused adverse human rights impacts. This would include remedies for harassment that are responsive to the women's experiences: UN Working Group on Business and Human Rights 2017, 'Gender Dimensions of the Guiding Principles on Business and Human Rights' (22 November 2019), [www.ohchr.org/Documents/Issues/Business/BookletGenderDimensionsGuidingPrinciples.pdf](http://www.ohchr.org/Documents/Issues/Business/BookletGenderDimensionsGuidingPrinciples.pdf) accessed 15 November 2021.
- 14 The Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021
- 15 Tribunal may consider the claim vexatious if the settlement amount offered by the employer is equal to the tribunal award: Ibid n 6, [59-60]
- 16 Ibid [53-62]
- 17 Equality and Human rights Commission, 'Dealing with discrimination in employment' (17 February 2020), [www.equalityhumanrights.com/en/multipage-guide/dealing-discrimination-employment](http://www.equalityhumanrights.com/en/multipage-guide/dealing-discrimination-employment), accessed 15 November 2021
- 18 Ibid n 6 [66-67]

# China's five-year rule of law plan: implications for Hong Kong and beyond

**O**n 10 January 2021, the People's Republic of China's (PRC) enacted its first five-year plan for the construction of a rule of law (the "Plan"). Its objective is to shape a 'Chinese socialist rule of law' by 2025 and achieve a fully formed version by 2035. This ambitious plan is the first of its kind in many respects. It is the first publicly available document stating the principles, contents and procedures of a constitutional review by the all-powerful Standing Committee of the National People's

Congress.<sup>1</sup> It is also the first public document calling for the enactment of a unified Chinese Administrative Law.

The plan also reveals a deep commitment to 'accelerate the construction of a legal system applicable outside the jurisdiction of our country'.<sup>2</sup> This is a significant development in Chinese foreign policy, and largely under-reported and under-analysed in the West. Thus, the plan is of paramount importance to understanding the Communist Party of China's (CCP)

Scott Reid





future legal engagement with the rules-based international order. This article will offer a critical appraisal of the CCP's plan in relation to Hong Kong and the recent National Security Law (NSL) – concluding that the CCP's conception of a rule of law merely provides legal justification for Chinese exceptionalism.

## Hong Kong

A major priority for the plan is the governance and regulation of Hong Kong. It expressly seeks to 'promote the reunification of the motherland [...] adhere to the rule of law in Hong Kong [...] and uphold the Constitution and Basic Law'.<sup>3</sup> It also highlights the CCP's intention to 'prevent and oppose the interference of external forces in Hong Kong [...] and maintain the long-term prosperity and stability of Hong Kong'.<sup>4</sup> This strategically ambiguous phraseology marks the continuation and evolution of the CCP's existential 'legal' war on political dissent. In the name of the rule of law, the CCP has nullified Hong Kong's separation of powers, arbitrarily denied bail, conducted trials without juries and closed public galleries for cases involving 'state secrets or public order'.<sup>5</sup>

These features are predicated upon the Xi Jinping Thought on the rule of law,<sup>6</sup> which states: '[T]he practice of the rule of law in China and abroad shows that there is no rule of law beyond politics. Western countries claim the rule of law as "political neutrality" and the judiciary as "judges belong to no party", which is nothing more than a set of self-deception'.<sup>7</sup> For the CCP, Western constitutionalism and its conception of the rule of law amount to nothing more than a 'rhetorical trap'.<sup>8</sup>

The rule of law plan also ominously states its intention to 'strengthen law enforcement cooperation and judicial assistance between mainland and Hong Kong [...] to jointly crack down on cross-border illegal and criminal activities'.<sup>9</sup> Under the NSL, the CCP can choose specific judges to handle politically sensitive cases, and have the cases heard on the mainland. With serious backlogs in the Hong Kong courts due to the arrests of over 10,000 citizens during the 2019 pro-democracy protests, we can expect to see the CCP utilise its legal infrastructure (in accordance with the plan) to implement its political rule. In fact, the Director of the Office for Safeguarding National Security has explicitly stated that Hong Kong's judicial

system should 'reflect the will and interests of the Chinese nation'.<sup>10</sup>

As seen with Hong Kong, the CCP's conception of a rule of law is instrumental in maintaining the CCP's political supremacy. This can be seen with the NSL, which provides that 'any acts or activities' that the CCP considers endangering the PRC's national security may be criminalised. In June 2020, it became a criminal offence to insult the national anthem of the PRC, and earlier this year Hong Kong police made their first arrest under the law. The offense? A 40-year-old man booing the PRC's national anthem at a shopping centre during the Olympics.<sup>11</sup> This is reflective of the plan which states '[T]o build a rule of law in China, we must always regard the party's leadership as the most fundamental guarantee of the socialist rule of law'.<sup>12</sup> The effects of this for Hong Kong can now be seen with Article 1 of the Hong Kong Constitution, which provides: '[T]he defining feature of socialism with Chinese characteristics is the leadership of the CCP'.<sup>13</sup>

Furthermore, key judicial figures in Hong Kong are being targeted under Beijing's new rule of law. Paul Harris, Chair of the Hong Kong Bar Association, has been repeatedly lambasted by Chinese officials, state media and Hong Kong's leader Carrie Lam, for representing attendees of the 2019 pro-democracy protests.<sup>14</sup> The South China Morning Post labelled his position of chairman a 'poisoned chalice'.<sup>15</sup> Meanwhile, Barrister Martin Lee, considered Hong Kong's 'father of democracy', was arrested under the NSL and is no longer available for media interviews.<sup>16</sup>

Such orchestrated attacks upon the institutions of Hong Kong's vaunted common law system have been, and will continue to be, economically costly for all involved.<sup>17</sup> The Heritage Foundation's 27th edition of the Index of Economic Freedom no longer lists Hong Kong as a separate and autonomous legal system from the PRC,<sup>18</sup> lowering its ranking of the freest economy in the world<sup>19</sup> to 107th out of 178 countries examined. The human costs of such a warped conception of the rule of law, however, remain immeasurable.

## Conclusion

To Western eyes, the PRC's rule of law plan is deeply flawed and seems unlikely to evolve into an internationally respected rule of law. Without a strong separation of powers, 'law-



based governance’ can never be anything more than ‘law by CCP’. This is exemplified by the CCP’s attitudes towards the rule of law in Hong Kong. The egregious National Security Law has led many to question whether a rule of law is the PRC’s goal at all, or merely the promulgation of a doctrine that provides justification for carrying out its hegemonic ambitions. Readers will do well to remember Xi Jinping’s words, ‘east, west, south, north and centre; the party leads everything’.<sup>20</sup>

#### Notes

1. The NPC is the PRC’s national legislature. Its Standing Committee is the Congress’ permanent voting organ and has the greatest say in legislative and constitutional deliberations.
2. ‘Plan for the Construction of Rule of Law in China (2020-2025)’, *Central Committee of the Communist Party of China*, p.15.
3. Ibid, p.14.
4. Ibid.
5. [www.bbc.com/news/world-asia-china-57649442](http://www.bbc.com/news/world-asia-china-57649442)
6. ‘Xi Jinping Thought on the Rule of Law’ is the fundamental guideline to the CCP’s project of ‘law-based governance’. It is summarised in the plan as follows: ‘strengthening the CCP’s centralized and unified leadership, “scientific legislation”, strict law enforcement, fair trials, a law-abiding population’.
7. Fu Zitang, Cui Bo, ‘The Practical Requirements of Xi Jinping Thought on the Rule of Law’ (Southwest University of Political Science and Law) p.5
8. Ibid; <https://thediplomat.com/2019/02/xi-china-must-never-adopt-constitutionalism-separation-of-powers-or-judicial-independence>
9. Fu Zitang, Cui Bo, ‘The Practical Requirements of Xi Jinping Thought on the Rule of Law’ (Southwest University of Political Science and Law) p.14.
10. [www.theguardian.com/world/2021/jun/30/hong-kong-legal-system-should-reflect-china-will-says-official](http://www.theguardian.com/world/2021/jun/30/hong-kong-legal-system-should-reflect-china-will-says-official)
11. <https://hongkongfp.com/2021/07/31/olympic-celebration-sees-hong-kong-police-make-first-arrest-under-controversial-national-anthem-law>
12. ‘Plan for the Construction of Rule of Law in China (2020-2025)’, *Central Committee of the Communist Party of China*, p.16.
13. [www.basiclaw.gov.hk/en/constitution/chapter1.html](http://www.basiclaw.gov.hk/en/constitution/chapter1.html)
14. [www.theguardian.com/world/2021/apr/27/beijing-calls-hong-kong-bar-association-chief-an-anti-china-politician](http://www.theguardian.com/world/2021/apr/27/beijing-calls-hong-kong-bar-association-chief-an-anti-china-politician).
15. [www.scmp.com/news/hong-kong/politics/article/3131333/does-hong-kongs-bar-association-need-ditch-chairman-paul](http://www.scmp.com/news/hong-kong/politics/article/3131333/does-hong-kongs-bar-association-need-ditch-chairman-paul)
16. [www.wsj.com/articles/martin-lee-democracy-hong-kong-china-crackdown-11605460019](http://www.wsj.com/articles/martin-lee-democracy-hong-kong-china-crackdown-11605460019)
17. Research shows that an efficient rule of law directly correlates to higher economic growth – see Lisa Johnson, Terence Lau, ‘Business and the Legal and Ethical Environment (Centre for Open Education, University of Minnesota, 2012), section 1.4.
18. <https://hongkongfp.com/2021/03/04/hong-kong-axed-from-economic-freedom-index-after-years-at-top-spot-now-ranked-107th-as-part-of-china>
19. Since 1995.
20. <https://thediplomat.com/2017/10/the-ccp-vows-to-lead-everything-once-again>