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# IBA Interns' Newsletter

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# Espionage laws: has the balance tipped too far in favour of national security?

**A**t this very moment, anyone with an internet connection and the necessary hacking knowledge can access state secrets labeled ‘confidential’ from anywhere in the world. Thanks to technological progress, it has never been easier to access top secret information and leak it to the public. Long gone are the days when spies had to infiltrate their enemies’ headquarters, or when whistleblowers had to take documents out of heavily guarded offices, risking their livelihoods in the process. States, in protecting their secrets, have had to devise a legal system so complex and severe that would deter anyone from leaking information to foreign enemies, or worse, to the public.

Espionage statutes, by definition, criminalise the possession and divulgence of state secrets. It was during the 20th century, because of two World Wars and a Cold War, that countries turned to the law to protect their most heavily-guarded secrets. Doing so required governments to do some ‘soul searching’ and strike the balance they deemed appropriate between ‘national security’, a vague catchall concept encompassing state secrets, and protecting human rights, notably the freedom of information, freedom of speech and freedom of the press. Striking the right balance was all the more important in democratic states, where human rights are a sacrosanct part of governance and public life. In the United Kingdom, the Official Secrets Act of 1889 was the world’s first and, arguably, most influential espionage statute drafted. The United States Espionage Act of 1917 is, to this day, the most far-reaching espionage statute ever passed. In both cases, the balance was tipped too far in favour of national security at the expense of human rights. By disregarding the human rights of those accused of violating the acts, both the UK Official Secrets Act of 1889 and the US Espionage Act of 1917 undermine the core values on which their nations are built.

‘The general assumption that all documents are secret unless they are specifically declared to be public’<sup>1</sup> has become a silent convention among governments and administrations around the world, a self-evident truth and self-fulfilling prophecy. What should be the exception, to keep certain information guarded from the public, has become the rule. In a speech titled ‘Freedom of Information’, the following words were uttered: ‘there is no legal right to know... nor is there a legal duty on the government to inform. On the contrary secrecy is sanctified by the Official Secrets Act and the civil servant’s Oath of Office and Secrecy.’<sup>2</sup>

In the United States, the Supreme Court recognised the constitutional basis for governmental secrecy in *United States v Nixon* and extended that basis to two cases: assertions of executive privilege and classification of national security information.<sup>3</sup> These secrecy rights, the Court affirmed, cannot be absolute in a democratic state, where the government must be transparent and accountable in order to be legitimate.<sup>4</sup> Paradoxically, this is even more important when it comes to information that touches upon national security. In *United States v Morison*, the Court affirmed, ‘No decisions are more serious than those touching on peace and war; none are more certain to affect every member of society. Elections turn on the conduct of foreign affairs and strategies of national defense, and the dangers of secretive government have been well documented.’<sup>5</sup>

Despite this reasoning, both the Espionage Act and the Official Secrets Act treat the possession and divulgence of confidential information as serious crimes, exempting those prosecuted under them from basic legal protection. In the United Kingdom, any disclosure by members of the security and intelligence services is an ‘absolute’ offence and is therefore not covered by the ‘damage test’.<sup>6</sup> For these individuals, the only defense that can be brought is the lack

of knowledge of reasonable cause to believe that the information was related to security or intelligence.<sup>7</sup> In the United States, the First Amendment of the Constitution, which protects freedom of speech, has been found not to extend to government employees who leak national security information.<sup>8</sup> In *Garcetti v Ceballos*, the Court set the precedent that ‘the First Amendment does not protect public employee speech “that owes its existence to a public employee’s professional responsibilities.”’<sup>9</sup> This precedent has been held in all cases of government employees who have leaked national security information to the press.<sup>10</sup> In *United States v Kim*, the court found that ‘those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information.’<sup>11</sup>

Furthermore, both the Espionage Act and the Official Secrets Act prohibit leakers and whistleblowers from relying on a ‘public interest’ defense in court. The same is true for a misclassification defense.<sup>12</sup> In both countries, government employees who divulge state secrets are exempt from whistleblower protection. This has led various scholars to state that individuals prosecuted under espionage laws seem to have ‘absolutely zero protection’.<sup>13</sup>

The press, which has traditionally taken the role of fact checker, is particularly vulnerable to espionage statutes. As the ‘fourth branch of government’, the press plays a vital role in keeping democratic governments accountable to the public. Journalists and media workers do this by investigating and leaking secrets, as well as giving a platform to whistleblowers to leak their own. Both of these essential parts of journalism, when touching upon ‘national security’, are heavily criminalised in most parts of the world.

In the United Kingdom, the press ‘does not enjoy broad protection in the publication of leaked classified documents or matters related to national security.’<sup>14</sup> In the United States, the prosecution of leakers and journalists under the Espionage Act has taken a dizzying speed in the last decade: three times more leakers and journalists were prosecuted under the Espionage Act than in all previous US administrations combined.

The Espionage Act and the Official Secrets Act, as well as all other espionage statutes, criminalise both the possession and the divulgence of confidential information. By

doing so, these laws effectively undermine the constitutionally protected rights of freedom of information of those in possession of the confidential information, the freedom of expression of those who leak it to the press and the freedom of information, speech and press of the media that makes the information public. The human rights violation of espionage law is, at the minimum, threefold.

A look into espionage statutes teaches us one thing: in the English language, secrecy is antonymous to transparency; while in government, secrecy is the antithesis of accountability. Governments and public officials cannot be held accountable for decisions that they have not disclosed. Secrecy, protected by espionage statutes, therefore offers a blanket cover of impunity for all those under it. Transparency about measures of national security is therefore paramount for accountability. By weakening government accountability and limiting the importance of human rights, governments undermine the foundations upon which their democracies are built. Today, it is more important than ever to strengthen our democracies, and to do so, governments must ensure that the constitutionally protected human rights that extend to the public also extend to those who sacrifice their livelihoods, anonymity and future for the sake of truth.

#### Notes

1. Cohen, S. A. (1979). Freedom of Information and the Official Secrets Act. *McGill LJ*, 25, 99.
2. *Ibid.*
3. Wells, C. E. (2017). Restoring the Balance between Secrecy and Transparency: The Prosecution of National Security Leaks under the Espionage Act. *Advance*, 11, 143.
4. *Ibid.*
5. *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring).
6. Wells, C. E. (2017). Restoring the Balance between Secrecy and Transparency: The Prosecution of National Security Leaks under the Espionage Act. *Advance*, 11, 143.
7. *Ibid.*
8. Feuer, K. (2015). Protecting government secrets: A comparison of the Espionage Act and the Official Secrets Act. *BC Int'l & Comp. L. Rev.*, 38, 91.
9. *Ibid.*
10. *Ibid.*
11. Wells, C. E. (2017). Restoring the Balance between Secrecy and Transparency: The Prosecution of National Security Leaks under the Espionage Act. *Advance*, 11, 143.
12. *Ibid.*
13. Feuer, K. (2015). Protecting government secrets: A comparison of the Espionage Act and the Official Secrets Act. *BC Int'l & Comp. L. Rev.*, 38, 91.
14. *Ibid.*



## How do states comply, at the regional and international level, with their human rights obligations when they argue that they are facing a state of emergency?

**T**here is a set of tools available to states to legally and legitimately limit rights in some cases. This can be via the restrictions provided in the second paragraphs of qualified rights, such as public morals, public safety, national security, etc. Another important mean is the availability to use state of exception or state of emergency. In case of internal disturbances, riots, dangerous conflicts and also natural catastrophes, governments ‘pull the brakes’ on citizens’ rights stating that the situation has changed from normalcy to emergency and they need to limit some rights for the safety of the whole nation. This can only be done in situations resulting in public emergency that threaten the organised life of the community.<sup>1</sup> The concept itself is very dangerous as it can end up with authoritarianism and abuse of power.<sup>2</sup>

At an international level, states do it using derogation clauses provided by the treaties and conventions. In the ICCPR it is Article 4,<sup>3</sup> in the European Convention of Human Rights (ECHR) Article 15,<sup>4</sup> and Article 27 of the Inter-American Convention on Human Rights (IACHR).<sup>5</sup> The ACHPR does not have a derogation clause, but it is embedded in the language.<sup>6</sup> It must be stressed that when states decide to use this tool, they do not derogate from a total instrument, but a group of rights. This is because not all the rights of the treaties are derogable.

The analysis of Article 4 of the ICCPR shows the basic requirements for activation of the derogation clause under the instrument and the Committee in its General Comment No. 29 provided a basic roadmap and main principles for it. These requirements are:

- 1) Existence of a situation that threatens the life of nation. In General Comment No. 29, the Committee explained that there is no requirement that the whole area of a state must be in such an exceptional situation. The Partial geographical emergency is also acceptable.<sup>7</sup>
- 2) Principle of legality: it means that whenever a state decides to utilise a derogation mechanism, it must have domestic legislation in place that it can refer to. In words of Agamben, it is not a lawless situation, but anomie that is hard to be captured by law.<sup>8</sup> The principle has also an international dimension. Whenever a state uses national legislation and chooses to derogate from some rights of the international instrument, then it has to officially proclaim it via written communication to Secretary-General of the organisation, and also to other states party to the treaty. Otherwise, according to General Comment No. 29, the Committee will review the state as if it is in normalcy.<sup>9</sup> At a regional level, a verbal statement by a member of Parliamentary Assembly of the Council of Europe was accepted as a derogation notification. The same rules apply for the notification on termination of states of emergency.<sup>10</sup> Additionally, even if the State Party to the ECHR has not issued a notification to the Secretary-General, the European Court tends to take into consideration exceptional situations while assessing the case. The European Court cannot go on using a state of emergency issue on behalf of the state in question if it did not officially proclaim it. However, *Chechnya* cases showed that



it allowed the state a brief understanding that according to its rules, it should not be there.<sup>11</sup> Besides, states cannot argue for the retrospective application of derogation notifications. While in *Brogan case* the UK government did not officially proclaim it and the European Court found a violation,<sup>12</sup> in the *Brannigan case*, as the UK lodged it immediately afterwards, the European Court evaluated the case in those backgrounds of state of exception.<sup>13</sup>

- 3) Principle of consistency: Article 4 requires that when a state derogates from a set of rights, it has to also be in compliance with its other international obligations. For example, if a state decides to derogate from some rights alleging that there is a massive migrant flow and additionally, stops the asylum system, it is a violation of obligations under the 1951 Refugee Convention, so such a derogation is not acceptable.
- 4) Principle of proportionality: According to this principle, in case a state decides to refer to specific measures because of a state of emergency, such measures should be strictly required by the exigencies of the situation and proportional to them.
- 5) Principle of non-discrimination: States cannot apply measures and restrict rights based on race, sex, religion, language or social origin. Of course, states do not do it at a legislative level, but in practice as rightly observed by Pantazis and Pemberton government authorities target 'suspect communities'.<sup>14</sup>
- 6) Principle of non-exemption: It captures a set of rights that cannot be derogated. For instance, under the ECHR, right to life, prohibition of torture, prohibition of slavery and no punishment without law are non-derogable, while this list is longer in ICCPR with the addition of recognition before the law and freedom of thought, conscience and religion. However, it is worth mentioning that according to General Comment No. 29, only holding an opinion or belief and its practice is non-derogable. The manifestation aspect of the right can be restricted in times of emergency. In fact, close analysis of the instruments shows that states normally derogate from the right to liberty and security and right to fair trial, as all other articles provide themselves restrictions on some basis.
- 7) Temporariness: Although it is not shown in Article 4 of the ICCPR, in its General

Comment No. 29, the Committee stated that derogation from rights as a result of a state of emergency should be temporary as it is an extraordinary situation, and when the circumstances end, states should take its derogation back.<sup>15</sup> Under Article 15 of the ECHR, the language also embeds temporary elements of the derogation ('It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed'),<sup>16</sup> however, in its case-law the European Court never touched upon it. It can be because some states like the United Kingdom misused the tool, frequently exploiting it where the derogation notice popped up and then was revoked.

- 8) Provision of remedies: Again not written down in Article, but expressed by the Committee, states must afford judicial or other remedies available when there is a restriction on rights, and procedural guarantees must be in place.<sup>17</sup>

The state of exception/derogation comes with its own deficiencies. First of all, there is no established review process of the situation. Although at a national level, there are 'sunset clauses' which create a time period, if not renewed, where application of state of emergency laws stops, and there are internal mechanisms that check it (like Parliament or a specific commission),<sup>18</sup> at an international level there is no such machinery. The European Court avoids it by using a 'margin of appreciation doctrine'. First established in a case between Greece and the UK,<sup>19</sup> the European Court not only hesitates to check the grounds for the derogation stating that states are closer to the situation, therefore they know better whether such an emergency exists, but also it does not review the measures required by the exigencies, generating the second margin and maintaining that states have confidential information that they can better assess what measures are more suitable for application.<sup>20</sup> However, while doing so the European Court sometimes pays attention to the fact that the human rights record of states party to the ECHR vary. Therefore, for instance, while it consents that a few days detention without a trial is acceptable in the case of UK, it says it cannot agree to such detention in case of Turkey even though the number of days can be less. The Committee can review the derogation only when it has an individual complaint before it or a concerned

state is under Treaty Review Process. The second point is that international and regional mechanisms are not able to review the notices of derogation, it is a formal administrative procedure between the state concerned and the Secretary-General. Finally, and importantly, there is no competence of the bodies to examine the validity of the derogation at any stage (although in some circumstances, unlike the Committee and the European Court, the Inter-American Court of Human Rights did it).

The constant use of states of exception, especially after the ‘War on Terror’ had affected international law at a great level from many aspects. Rights concerning physical security, administration of justice, discrimination against minorities and freedom of speech were restricted. It paved the way to the alteration of international norms like those concerning administrative detentions, reconceptualisation of terrorism as an armed conflict, which means more restriction on rights than it should have been, violation of principle of non-discrimination where states target non-nationals or religious minorities, and weakening of *jus cogens*, for instance saying that ‘security torture’ or ‘enhanced interrogation technics’ are acceptable for the protection of general public, and more expansion of exclusion from refugee protection.<sup>21</sup> However, the Committee stressed in General Comment that even in armed conflicts, states cannot use a derogation clause for the violations of international humanitarian law or peremptory norms of international law.<sup>22</sup>

#### Notes

1. *Lawless v Ireland* App no 332/57 (ECtHR Judgment 1 July 1961) para 28.
2. Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 80.
3. International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 4.
4. The Convention for the Protection of Human Rights and Fundamental Freedoms, (European Convention on Human Rights, as amended) (3 September 1953), Article 15.
5. American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.
6. *Article 19 v Eritrea* App no 275/03 (ACmHPR 30 May 2007) para 87.
7. The Human Rights Committee, General Comment No. 29 (31 August 2001), UN Doc. CCPR/C/21/Rev.1/Add.11 para 4.
8. Giorgio Agamben, *State of Exception* (University of Chicago Press, 2003) 50.
9. The Human Rights Committee, General Comment No. 29 (31 August 2001), UN Doc. CCPR/C/21/Rev.1/Add.11 para 17.
10. *Ibid.*
11. *Isayeva, Yusupova and Bazayeva v Russia* App nos 57947/00, 57948/00 and 57949/00 (ECtHR, 06 July 2005).
12. *Brogan and others v UK* App nos 11209/84, 11234/84, 11266/84 and 11386/85 (ECtHR, 29 November 1988).
13. *Brannigan and McBride v UK* App nos 14553/89 and 14554/89 (ECtHR, 25 May 1993).
14. Christina Pantazis and Simon Pemberton, ‘From the ‘Old’ to the ‘New’ Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation’ (2009) 49 BRIT J CRIMINOL 646.
15. General Comment No. 29 (n 9) para 1.
16. ECHR (n 4) Article 15.
17. General Comment No. 29 (n 9) paras 14-15.
18. Antonios Kouroutakis and Sofia Ranchordas, ‘Snoozing Democracy: Sunset Clauses, De-Jurisdiction, and Emergencies’ (2016) 25 Minnesota J INTL L 29, 33.
19. *Kingdom of Greece v United Kingdom* App no 299/57 (ECtHR 8 July 1959).
20. *A and Others v. The United Kingdom* App. no. 3455/05 (19 February 2009) para 173.
21. Joan Fitzpatrick, ‘Speaking Law to Power: The War Against Terrorism and Human Rights’ (2003) 14 EUR J INTL L 241-264.
22. General Comment No. 29 (n 9) para 11.



Agnes Rydberg



# Improperly obtained evidence and the exclusionary rule under the European Convention on Human Rights

**A**rticle 6 of the European Convention on Human Rights (Convention),<sup>1</sup> encompasses a variety of guarantees in civil and criminal proceedings. One facet of particular importance in criminal proceedings is the exclusionary rule.<sup>1</sup> This rule principally entails an obligation to exclude from criminal proceedings all evidence obtained from coercive measures. However, the Convention does not per se lay down any rules on admission of evidence, which primarily lies within the domain of domestic courts.<sup>2</sup> In addition, the approach of the European Court of Human Rights (Court) has been criticised for promoting a *laissez faire* attitude to the exclusionary rule, setting ambivalent standards for states and leaving the exact concept of the notion of fair trial imprecise.<sup>3</sup> This short article assesses the scope in criminal proceedings of the exclusionary rule under the Convention. It is limited to evidence obtained from ill-treatment reaching the *de minimis* threshold of Article 3 of the Convention, and does not extend to evidence obtained in violation of Article 8 of the Convention.

## Evidence obtained from torture

The admittance of evidence in criminal proceedings obtained from acts of torture is perhaps the most straightforward issue relating to the exclusionary rule under the Convention. In *Jalloh*, the Court stated that incriminating evidence, regardless in the form of a confession or real evidence, obtained as a result of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value.<sup>4</sup> In *Levința v Moldova*, the applicants had signed self-incriminatory statements admitting murder and attempt to murder because of being

subjected to a method known as 'swallow', which resembles Palestinian hanging. The Court, firstly having established that the applicants had been subjected to torture,<sup>5</sup> stated that the relevant self-incriminatory statements fell 'within the category of statements which should never be admissible in criminal proceedings since use of such evidence would make such proceedings unfair as a whole, *regardless of whether the courts also relied on other evidence*'.<sup>6</sup>

## Evidence obtained from inhuman and degrading treatment

### Statements

Statements obtained from ill-treatment are generally viewed as the 'direct' fruit of the ill-treatment and should in principle be excluded from the proceedings. For instance, in *Söylemez v Turkey*, the applicant was injured while in custody on suspicion of murder. The Court concluded that the treatment he had endured violated the substantive limb of Article 3,<sup>7</sup> and recognised that statements obtained from the applicant as a *direct* result of this treatment formed the basis for his conviction. Thus, the Court held that a declaration made in violation of Article 3 is intrinsically devoid of reliability, and the inclusion of the applicant's statement to secure his conviction rendered his trial as a whole unfair, in violation of Article 6.<sup>8</sup>

In a more recent case of *Hajnal v Serbia*, the Court concluded that the applicant was abused and coerced into giving a confession during the police's criminal investigation, and the Court classified this as inhuman and degrading treatment.<sup>9</sup> The applicant complained under Article 6 that his subsequent conviction was based on his coercive statement procured as a result of the ill-treatment. In this aspect, the Court stated that 'the admission of *statements* obtained as



a result of torture or of *other ill-treatment* in breach of Article 3 as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair, irrespective of the probative value of the statements and irrespective of whether their use is decisive in securing a conviction'.<sup>10</sup> Thus, irrespective of the impact the applicant's confession had on the outcome of his criminal proceedings, the use of this confession impaired the essence of his Article 6 rights.<sup>11</sup>

One exception to the above appeared in *Alchagin v Russia*, where reliance on a confession statement extracted as a consequence of inhuman and degrading treatment against the applicant in his criminal proceedings did not automatically nullify his right to a fair trial.<sup>12</sup> The Court stated that '[t]he securing of a criminal conviction may not be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice those values and discredit the administration of justice'.<sup>13</sup> Despite this statement, the Court declined to find a violation of Article 6. This was because: (i) the applicant had at the moment of his confession statement enjoyed the benefit of legal advice by defence counsel of his own choice;<sup>14</sup> (ii) the applicant had pleaded guilty during the jury trial and the tainted statement had been cumulative to other extensive evidence;<sup>15</sup> and (iii) the applicant's defence rights were respected throughout the trial as a whole.<sup>16</sup>

*Prima facie*, this analysis seems to be in stark contrast to *Hajnal*. However, the confession used in *Alchagin* was not, contrary to *Hajnal*, used as evidence to establish the relevant facts in the applicant's criminal proceedings. Although the applicant's incriminating statement at pre-trial stage was admitted to the proceedings, he continued to maintain his confession and guilt during the trial itself, and it follows that the necessary condition for exclusion of confession evidence as established in *Hajnal* was not met. Hence, also in this aspect of verbal information acquired through inhuman or degrading treatment does the Court's case-law seem to satisfy the demands of clarity and consistency; the use of any statement collected as a result of ill-treatment contrary to Article 3 as evidence to establish the relevant facts in a criminal case renders the proceedings as a whole unfair.

### *Real evidence*

First out of the Court's two most prominent cases in this aspect is *Jalloh v Germany*. The applicant complained that the removal of drugs from his stomach by forcible administration of emetics violated Article 3, and that the subsequent use in criminal proceedings of the drugs violated his right to a fair trial. Concerning the administration of emetics, the Court found that it constituted inhuman treatment.<sup>17</sup> Under Article 6, the Court observed at the outset that the evidence was not obtained in violation of domestic law. However, it also noted that it was obtained as a direct result of a violation of Article 3. As such, it could not be ruled out that the 'use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial'. Since the evidence formed a decisive element in securing his conviction, and the public interest in securing the applicant's conviction as a small-scale drug dealer could not justify recourse to such a grave interference with his physical integrity, Article 6 had been violated.<sup>18</sup>

The second case, perhaps presenting a more delicate and controversial issue, accompanied by a vast amount of literature,<sup>19</sup> is *Gäfgen v Germany*.<sup>20</sup> The issue arose concerning the admission of physical derivative evidence into criminal proceedings which had become known to the authorities because of a confession extracted by inflicting inhuman treatment.<sup>21</sup> In 2002, Gäfgen kidnapped and suffocated an 11-year-old boy. Acting in the presumption that the boy was still alive, the German police threatened Gäfgen with 'considerable pain' if he did not disclose the boy's whereabouts. Accordingly, Gäfgen confessed to having killed the boy, and showed the police the place where the corpse was buried. The confession was confirmed by the applicant during subsequent questioning, and he was not informed before his questioning that his earlier statements made as a result of the threat were inadmissible. During the criminal proceedings, his self-incriminating statements were excluded, whereas some physical evidence, such as the corpse and tyre tracks matching Gäfgen's car, procured as a consequence of the original (inadmissible)



statements were admitted. Eventually, Gäfgen was sentenced to life-imprisonment.

By a hesitant majority, the Court found no violation of Article 6, but considered it ‘decisive that there is a causal link between the applicant’s interrogation in breach of Article 3 and the real evidence secured by the authorities as a result of the applicant’s indications’.<sup>22</sup> This included the corpse, the autopsy report thereon, the tyre tracks left by the applicant’s car, the boy’s backpack, and the applicant’s typewriter. It is significant that the Court explicitly stated that this impugned real evidence was secured as a *direct* result of his interrogation by the police that *breached Article 3*.<sup>23</sup> Since the national courts had not admitted the confession statements made by the applicant as a result of ill-treatment, the Court examined the impact the admission of the real derivative evidence had on the fairness of the proceedings.

In this regard, the Court stated that ‘the admission of evidence obtained by conduct absolutely prohibited by Article 3 might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition. The repression of, and the effective protection of individuals from, the use of investigation methods that breach Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3’. However, the Court considered that ‘both a criminal trial’s fairness and the effective protection of the absolute prohibition under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant’.<sup>24</sup> In this vein, the Court noted that the domestic court had relied on a repeated confession by the applicant to secure his conviction. Additional real evidence was not used to prove guilt, but only to verify the authenticity of the applicant’s repeated confession. The domestic court had also referred to untainted corroborative evidence secured independently of the first confession. Thus, the Court held that the tainted evidence was not decisive to prove his guilt, wherefore there had been a break in the causal chain ‘leading from the prohibited methods of investigation to the applicant’s conviction and sentence in respect of the impugned real evidence’.<sup>25</sup>

## Conclusion

Notwithstanding some inconsistencies in case-law, the Convention standard seemingly requires states to automatically exclude all confessions obtained from all treatment contrary to Article 3. Physical evidence obtained from torture is also covered by the exclusionary rule, whereas the admissibility of real evidence gathered as a consequence of inhuman or degrading treatment is left for the judge given the particular circumstances of each case. Seeking to draw a precise line between what might be sustained as admissible evidence and what might not be is perhaps a too discretionary and instinctive task, which serves to disadvantage the principle that unlike cases be treated unlike.

However, to agree with the articulate dissenting opinion of some judges in *Gäfgen*, it is regrettable that the Court failed to clarify that a trial’s fairness presupposes respect for the rule of law and requires the automatic exclusion of *all* evidence, even derivative, obtained in breach of Article 3.<sup>26</sup> For the dissenters, there was no doubt that the real evidence made known as a result of the inadmissible confession was relied upon by the domestic court.<sup>27</sup> Furthermore, the majority disregarded the fact that the applicant’s repeated confession was made right after his failed attempt to exclude the tainted evidence. Arguably, he could therefore have been aware that the domestic court would have recourse to the compelling real evidence he had pointed out himself.<sup>28</sup>

In effect, what the Court did was to rule that real evidence procured by inflicting inhuman treatment may be admitted to a trial without rendering it unfair,<sup>29</sup> which seriously erodes the principal rationales underlying the exclusionary rule. Admission of evidence obtained in violation of an absolute human right undermines and jeopardises the integrity of the judicial process, and state officials are not sufficiently deterred from inflicting ill-treatment, hence risking the routinely and ongoing violation of Article 3.<sup>30</sup> In fact, if it is perfectly allowed to admit evidence in criminal proceedings obtained from inhumane or degrading treatment, this would lead to a scenario where ‘indirect’ exceptions to an absolute right are recognised. Thus, if the rights protected by Article 3 are to have any practical value for individuals, the exclusion of evidence obtained in violation thereof must be viewed as a necessary corollary of this right.

## Notes

1. (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (Convention).
2. *Saunders v UK* App no 19187/91 (ECHR, 17 December 1996) [GC] para 68.
3. *Schenk v Switzerland* App no 10862/84 (ECHR, 12 July 1988) para 46; *Ivan Stoyanov Vasilev v Bulgaria* App no 7963/05 (ECHR, 4 June 2013) para 30.
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Alexander Chan



# The right to privacy under siege: state surveillance, digital contact tracing and the Covid-19 pandemic

## Introduction

Since the World Health Organization (WHO) declared Covid-19 a global pandemic on 11 March 2020, governments worldwide have implemented a wide variety of contact tracing initiatives in an effort to stem the spread of the virus. Widely recognised as a crucial pillar in any nation's fight against Covid-19, contact tracing is defined by the WHO as 'the process of identifying, assessing, and managing people who have been exposed to a disease to prevent onward transmission', and this process plays a key role in identifying those who may have been exposed to the virus and stemming its spread.<sup>1</sup>

In order to increase the scale, scope and efficiency of the contact tracing process, many regional and national governments have introduced mobile contact tracing apps to monitor and track users' social interactions, subsequently notifying any users who may have been exposed to Covid-19. The rapid digitisation of the contact tracing process in response to the pandemic has resulted in the proliferation of diverse tracing technologies around the world, each with its own unique manner of operation, code of conduct and efficacy.

Despite the numerous advantages of digitising and streamlining the contact tracing process, the rapid proliferation of mobile contact tracing apps has raised a host of data security and privacy concerns, most concerningly, the rise of mass state surveillance. Ultimately, it is only through an analysis of each jurisdiction's data collection, processing and storage practices, as well as an understanding of their national context, that governments and individual users can work to balance the competing demands for efficacy and privacy in the operation of mobile contact tracing apps, and ensure that new technologies maintain the integrity of their tracing functionalities, all while addressing and mitigating concerns over user privacy and state surveillance.

## What's at stake?

Concerns over mobile contact tracing apps stem chiefly from their collection, processing and storage of sensitive personal data. While mobile apps that run on the Google/Apple Application Programming Interface (API) rely solely on anonymised Bluetooth data, the large-scale collection of



geolocation, or non-anonymised Bluetooth data raises serious concerns with regards to nationally and internationally-protected human rights, particularly the right to privacy articulated in Article 12 of the Universal Declaration of Human Rights, and Article 17 of the ICCPR, which states that, '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.'<sup>2</sup>

By allowing for the collection of individuals' real-time location data, government or public health officials may be able to recreate an individual's 'social graph', revealing everyone with whom someone has met physically within a specified amount of time.

The real-time surveillance and social graphing of individuals' movements can have especially worrisome implications for vulnerable segments of a population, including journalists, political dissidents, or ethnic, religious and racial minorities. For example, in an investigation conducted by Amnesty International on the operation of 11 different contact tracing apps, a technical analysis of Bahrain's national contact tracing app 'BeAware Bahrain', and Kuwait's 'Shlonik' revealed that both apps upload GPS co-ordinates to a central server in real, or near real-time.<sup>3</sup> This is in contrast to contact tracing apps in France, Iceland and the UAE, which similarly operate a centralised system, but upload user information to a central server only after the individual has been diagnosed with Covid-19. Real-time tracking of this sort raises serious concerns regarding the ability of governments to track down political dissidents or other perceived political threats. This fear is exacerbated by the poor human rights records of many Gulf states, and the lack of a supra-national regulatory body capable of providing meaningful oversight of Covid-19-related emergency measures.

Similar to the operation of contact tracing apps in the Gulf States, health and government officials in Israel have relied on the use of mobile geolocation data to track and notify individuals who have been in close contact with an infected individual. This programme was made possible due to a partnership between the Ministry of Health and Shin Bet, Israel's internal security service, and was widely criticised because it lacked transparency and unnecessarily infringed on the right to privacy.<sup>4</sup> Of particular concern

to organisations calling for the programme's termination was the surveillance of Israel's Arab minority, and the endangerment of political dissidents and journalists' sources. A decision on 26 April by the nation's High Court temporarily called for an end to the programme, stating that its tracking 'severely violates the constitutional right to privacy', however, the programme has since been reinstated.<sup>5</sup> Currently, journalists may request that their details not be shared with Shin Bet.

### **Privacy concerns and contact tracing efficacy**

Individuals' fears over surveillance and government tracking can have serious negative consequences on the effectiveness of contact tracing schemes and other public emergency measures. Fears of tracking may result in fewer individuals coming forward to self-report symptoms or their potential exposure to the virus, thus hindering and complicating the contact tracing process. For example, following an outbreak on 7 May 2020, linked to LGBTQI+ nightclubs in Seoul's Itaewon district, South Korean public health officials faced difficulties in identifying more than 3,000 people who may have been exposed to the virus, many of whom may have been unwilling to come forward out of fear of discrimination and stigmatisation.<sup>6</sup>

Similar concerns over public trust have been raised regarding the participation of African American communities in the US, where there exists a 'longstanding distrust' of public health authorities.<sup>7</sup> Decades of targeted surveillance and government action against racial justice activism have resulted in a distrust not only of law enforcement, but also public health and other government agencies.<sup>8</sup> In a study conducted in 2014 on racial differences in health care system distrust, 28 per cent of African Americans surveyed expressed a 'high distrust' in the health care system, as opposed to 19.8 per cent of white Americans.<sup>9</sup>

In response to concerns over the privacy of a potential American contact tracing app, Jennifer Daskal, the Faculty Director of the Tech, Law and Security Program at American University in Washington, DC, said: 'the fears over surveillance could ultimately lead to a decrease in testing at precisely the time that we want people to trust public health authorities and go and get tested when the tests become widely available'.<sup>10</sup> Ultimately, these examples highlight the importance

of building trust between individuals and public health authorities, removing obstacles to increased public participation in contact tracing schemes and protecting the right to privacy for all communities.

### How should governments address surveillance and privacy concerns?

In response to the recent proliferation of mobile contact tracing apps and attendant data security and privacy concerns, a wide variety of advocacy groups and international organisations including the UN Office of the High Commissioner on Human Rights and the European Commission have published guidelines and frameworks for ensuring best practices in the development and operation of contact tracing apps. These guidelines include recommendations that both governments and app administrators adhere to principles of compliance, voluntariness, transparency, data minimisation and accountability among others, and illustrate the importance of adopting a ‘privacy by design’ approach to developing contact tracing strategies.<sup>11</sup>

Furthermore, data security regulations such as the EU’s GDPR, California’s CCPA, and India’s PDPB present an opportunity to reinforce the right to privacy in the digital age, and ought to serve as exemplars for the introduction of new regulatory regimes around the world. For example, federal lawmakers in the US introduced the Exposure Notification Privacy Act (ENPA), mirroring many of the data protections afforded by the GDPR, and complementing the existing HIPAA.<sup>12</sup> Ultimately, it is critical that all nations regulate the collection and processing of personal data prior to the launch of a mobile contact tracing app, thus ensuring that apps are built and operate in a manner that upholds the principle of legality, and safeguards user privacy.

### Conclusion

A failure to adhere to best practices with respect to privacy and user data security can unnecessarily heighten fears regarding an app’s use, sowing distrust of government measures and public health authorities. In order to overcome these obstacles, governments must work to build mutual trust between individual users and app operators and ensure that an app’s sole purpose remains the identification of users’

exposure to Covid-19. This responsibility will only grow in importance as nations enter the next phases of re-opening, rollout new mobile contact tracing apps, and begin to phase out some public emergency measures. Ultimately, the onus will remain on governments to address user concerns of mass surveillance and privacy, and ensure that mobile contact tracing apps operate in a way that upholds principles of legality, necessity, proportionality, and non-discrimination, thus encouraging the use of digital contact tracing, and strengthening broader Covid-19 management strategies.

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# North Korean detention facilities and its violations on crimes against humanity

Talitha Adnet Lima



**T**he IBA's War Crimes Committee, together with the Committee for Human Rights in North Korea (HRNK), is writing a Special Report on crimes against humanity in North Korean detention facilities, which have been occurring since the Kim family assumed power over 70 years ago according to the 2014 United Nations Commission of Inquiry on human rights violations in North Korea.<sup>1</sup>

According to Article 7 of the Rome Statute of the International Criminal Court,<sup>2</sup> crimes against humanity are any of the enumerated 11 crimes committed as part of a widespread or systematic attack directed against a civilian population (contextual element) with knowledge of the attack (mental element).

The 11 crimes enumerated in Article 7 are as follows:

- 1) Murder;
- 2) Extermination;
- 3) Enslavement;
- 4) Deportation or forcible transfer of population;
- 5) Imprisonment or other severe deprivation of physical liberty;
- 6) Torture;
- 7) Rape or any other form of sexual violence of comparable gravity;
- 8) Persecution;
- 9) Enforced disappearance of persons;
- 10) Apartheid; and
- 11) Other inhumane acts causing great suffering or serious injury to body or mental or physical health.

The contextual element involves either a large-scale violence (widespread), or a methodical type of violence (systematic), excluding random, accidental or isolated acts of violence. Additionally, such crimes must be committed in furtherance of a state or organisational policy to commit an attack.

The mental element means that the perpetrator must act with knowledge of the attack against the civilian population and that the action must be part of such attack.

From IBA's 2017 Inquiry on Crimes Against Humanity in North Korean Political Prisons,

three international judges – Navi Pillay, Thomas Buergenthal and Mark Harmon – concluded that ten of the 11 crimes against humanity enumerated in the Rome Statute had been committed by North Korean authorities. Such crimes included torture, murder, sexual violence, starvation, slave labour and persecution of religious minorities (Christians). The only crime considered inapplicable by the judges was the crime of apartheid.

The current Inquiry, different to the one from 2017, will address abuses in short-term detention centres. Due to the fact that more survivors of detention centres have managed to escape, the IBA and HRNK could obtain testimony from more than 50 escapees/defectors from such horrible places to share the daily abuses they were subjected to. With their testimony, they confirmed the deplorable acts of torture and sexual violence conducted by prison guards and other officials in detention centres with the objective of seeking forced confessions.

Three renowned international criminal justice judges will participate in the Inquiry: Navi Pillay (chair), Dame Sylvia Cartwright and Wolfgang Schomburg. Also, a pro bono Law Firm (Debevoise & Plimpton LLP) will present a legal brief to the judges as well as presenting evidence of crimes against humanity at a potential hearing in Seoul.

In addition to the defector/escapee interviews, this Inquiry will also use satellite imagery in an effort to identify the location of some detention centers in North Korea, as well as produce a 15-20 minute film and, potentially, a public Town Hall with the three judges to provide a forum for a range of defectors/escapees in any questions about previous efforts to pursue accountability of such crimes.

With the Inquiry on Crimes Against Humanity in North Korean detention centres, we expect to prove which crimes against humanity are identifiable and who will be held accountable for committing or ordering the execution of such crimes. But also, as

another legal document to acknowledge such hideous crimes to the international community.

Finally, in regards to my participation with this Inquiry, since November of 2019, I have been assisting, for the most part of my time as a legal intern, the IBA's and HRNK's team by conducting research and drafting

affidavits of escapees/defectors' testimony in order to find strong evidence of which crimes against humanity and potential human rights violations can be found in those testimonies.

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Victoria Riello



## US approaches to international justice: a turn for the worse

*The current United States administration has been marred by disregard for international institutions and an increasingly isolationist foreign policy. Its latest move? Directly targeting anyone who cooperates with the International Criminal Court (ICC). On 11 June, the presidency announced a new Executive Order authorising the State Department to impose economic sanctions on persons found to provide 'material assistance' to the Court, marking an unprecedented escalation of US hostility towards the ICC. Despite the US's long-standing reservations on the ICC's framework, past administrations have differed in approach.*

*This article provides a brief overview of US approaches to international criminal justice. First, we trace the history of US engagement with accountability for international crimes. Then, we analyse the differing stances of past administrations concerning the ICC. Finally, we discuss the context of the new Executive Order and its possible repercussions.*

### US prominence in accountability for atrocities

*'There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.'*

(Benjamin Ferencz, International Military Tribunal Prosecutor)

Having emerged victorious from the Second World War, the United States and its allies took the revolutionary step of establishing a war crimes tribunal at Nuremberg to bring Nazi leadership to trial for war crimes, crimes against peace and crimes against humanity. In the Far East, US General Douglas MacArthur issued a special

proclamation establishing an analogous tribunal, tasked with trying the Japanese.

During the Cold War, support for trying perpetrators of mass atrocities waned. The establishment of a new war crimes tribunal depended on the antagonistic wills of the US and the USSR, who also held veto powers within the United Nations Security Council (UNSC). With the end of the Cold War in the early 1990s, the plight of international justice gained new momentum. The war in Yugoslavia and the Rwandan genocide set the stage for the establishment by the UNSC of two ad hoc criminal tribunals in 1993 and 1994.

The Clinton administration strongly favoured the creation of the ad hoc tribunals, contributing with human and financial resources. In 1997, Secretary of State Madeleine Albright created the Office of War Crimes Issues (OWCI) with the aim of furthering accountability for international crimes and strengthening atrocity prevention. Under Clinton, the United States participated in the negotiations of the ICC's founding treaty, the Rome Statute.

After 9/11, the 'war on terror' set the tone for US interventionism abroad, markedly in Iraq and Afghanistan. During the Bush years, the OWCI Ambassadors-at-Large pushed towards the establishment of special criminal courts to try atrocity perpetrators in the DR Congo, Sierra Leone and Sudan. Further, the administration set up rewards for information on key-persons linked to the Rwandan genocide. The genocide in Darfur, however, marked a change in the administration's rhetoric towards the ICC, including the public endorsement of Omar Al-Bashir's prosecution for genocide.



The Obama administration transitioned into conscious engagement with the ICC. That notwithstanding, it was still responsible for military strikes in various countries, for example Afghanistan, Libya and Yemen. The OWCI continued to support domestic prosecutions of atrocities, engaging with the trial of Ríos Montt in Guatemala and with transitional justice in Sri Lanka. Moreover, President Obama created an inter-agency board committed to the prevention of mass atrocities, integrating the work of intelligence services, USAID and law enforcement.

Lastly, as President Trump came into office in 2017, there was speculation that the OCWI would be shut down in its entirety, which did not materialise.<sup>1</sup> Nevertheless, a sharp turn took place with respect to the administration's relationship with the ICC.

### **An ever-changing relationship?**

US involvement with the Court started already during the negotiations stage. The US delegation to the Rome Conference advanced a proposal in which the UNSC would have control over situations referred to the ICC, which was ultimately dismissed. At the end of the Rome Conference, the US was one of only seven states to reject the treaty. President Bill Clinton signed the final treaty nonetheless, arguing that with this signature the US could be involved in the ICC and influence the evolution of the Court – that is, without the commitments and jurisdiction that came with ratification.

In 2002, the Bush administration withdrew the signature, commencing an era of stringent opposition to the Court. The fact that Art. 12(2) of the Statute allowed for prosecutions of nationals of non-States Parties generated fear that US soldiers could face charges before the ICC.<sup>2</sup> For this reason, the US pressured the UNSC into granting nationals of non-States Parties an exemption from prosecution, while also concluding a series of Art. 98 bilateral agreements with aid-needing countries that assured US nationals in those states could not face prosecution by the ICC.<sup>3</sup> That same year, the US congress enacted the American Service member's Protection Act (ASPA, infamously known as 'The Hague Invasion Act'), prohibiting US cooperation with the ICC and binding all branches of the administration. It also barred military aid to ICC States Parties which refused to sign Art. 98 agreements. However, in 2004, the crisis in Darfur became an

important item in the US and UNSC agenda. Even though the US did not want to legitimise the Court, the government did not veto the resolution referring the Situation in Darfur to the Office of the Prosecutor (OTP), and opened doors for constructive engagement.

During the Obama years, the ICC saw an approximation with the US government. In 2009, the US sent its first delegation to the Assembly of State Parties (ASP) in observer capacity. In 2010, the US participated in the Kampala Review Conference, which codified the crime of aggression – with major implications to US interests, since jurisdiction over this crime is restricted to nationals of States Parties. The UNSC referred the Situation in Libya to the OTP in February 2011, marking the first time the US voted in favour of a referral to the Court. In the following years, the US arrested individuals charged before the ICC and expanded its War Crimes Rewards Program to include ICC suspects, such as Joseph Kony and Dominic Ongwen. In 2016, US officials praised the ICC's progress in the Central-African Republic and Mali.<sup>4</sup>

The Trump administration shifted the US approach to the ICC once again, moving away from the Court and increasingly obstructing its work.

In November 2017, ICC Prosecutor Mrs Fatou Bensouda formally requested a pre-trial chamber (PTC) for authorisation to commence investigations on the Situation in Afghanistan, which directly implicated US nationals. The request stated there were reasonable grounds to believe that members of the US armed forces and the CIA committed war crimes in that country. In March 2018, another situation was brought to the ICC's attention, as Palestine – a State Party to the Rome Statute – officially referred to the OTP crimes happening in its territory from 13 June 2014 onwards. Since these investigations would implicate Israeli armed forces and nationals, the US fiercely opposed any sort of investigation.

In March 2019, as a consequence of these developments, President Trump issued visa bans on all ICC personnel, including Dr Bensouda. Just a month later, PTC III denied the Prosecutor authorisation to investigate crimes allegedly committed in Afghanistan, a State Party since 2003. However, the decision was later reversed on appeal. Secretary of State Michael Pompeo subsequently gave a statement calling the ICC a 'nakedly political body' and identifying members of the OTP



as ‘putting Americans at risk’.<sup>5</sup> The remarks were met with great disapproval by civil society.<sup>6</sup> One commentator brought to the public’s attention that Sec. Pompeo might have a personal stake in the Afghanistan investigation, considering the he served as CIA director from January 2017 until April 2018.<sup>7</sup>

### Escalating tensions: Executive Order 13928 and its potential effects

On 11 June 2020, the US government announced further measures against ICC staff, which now included economic sanctions against persons deemed to be in direct involvement with ICC investigations implicating US personnel, as well as its major allies. Executive Order 13928 (EO 13928) declared the ICC an unusual and extraordinary threat and instituted a national emergency, while also giving the Secretary of State the power to freeze assets of *any* person who ‘materially assisted’ efforts to bring to trial US personnel, and automatically suspending entry visas of any foreigner considered to be an agent or employee of the Court.<sup>8</sup> The order was followed by aggressive statements from multiple officials, including Secretary Pompeo, who stated that the ICC was on an ‘ideological crusade against American service-members’; called the Court a ‘mockery of due process’, a ‘kangaroo court’, ‘grossly ineffective and corrupt’; and, finally, accused the OTP of high-level corruption and misconduct, ‘botched prosecutions’ and doubted its ability to ‘function at the most basic level’.<sup>9</sup> Although not the first time the administration expressed opposition to the Court, this episode marked its most forceful attack against international justice and was duly received with discontent among civil society and States Parties alike.

First and foremost, it is noteworthy that the US sanctions regime has historically targeted terrorist organisations, human rights abusers and ‘rogue States’, serving as a human rights compliance tool. In this sense, ICC President Judge Chile Eboe-Osuji has reiterated that the measures against the Court were of a coercive nature, not properly sanctioning.<sup>10</sup> Secondly, EO 13928 is not self-executing – it authorises the State Department to impose sanctions, which can only happen once specific individuals or organisations have been officially designated. This means that, for the time being, none of these measures apply.

Thirdly, the order sets out economic sanctions – the most used by the US government – which entail asset seizure and blocking. This includes any financial transactions in dollars, even if outside US territory.

Further, the executive order targets persons found to ‘materially assist’ the Court. The concept of material assistance is broad and subject to administrative discretion; in this sense, it is unlikely that domestic courts would challenge the order, since the judiciary tends to give great deference to the executive branch in exercising its powers (for example, in conducting foreign policy). Such assistance impacts differently on US nationals or legal persons and foreigners: foreigners are subject to asset blocking and seizures, while US citizens and US-based entities cannot operate with the designated person, regardless of whether the services provided to that person are linked to the activity that got them designated. US organisations and persons are liable to civil and criminal charges if they violate this provision.

Finally, this order creates a ‘chilling effect’ with respect to US interactions with the ICC – that is, the lack of guidance on how sanctions might be imposed or enforced pushes US persons further away from the Court, in an attempt to scale down possible risks.<sup>11</sup> Therefore, the complexity of dealing with sanctioned persons is enough to deter engagement with the ICC. In addition, the breadth of sanctions is such that might effectively impede the Court from functioning at the most basic level, since its staff and contractors are paid in US dollars. For US citizens working in international criminal justice, it poses a risk of facing domestic prosecutions, or even of bringing down their careers entirely.

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# Whether a finality of an arbitration award stipulated by law is an obstacle for arbitration appeal

Nurbek Sabirov



## Introduction

It is well known that the finality of arbitral awards is one of the advantages of arbitration, but it is not regarded as an absolute advantage. It is possible to review the arbitration award by a consent of the parties via an arbitration appeal. The idea is that the parties may agree on the possibility of appealing arbitral awards by a different arbitrator or arbitral tribunal.<sup>1</sup>

There are many articles written by Western authors with respect to the appeal of arbitration award.<sup>2</sup> I have conducted research on procedures and mechanisms of appeals with a purpose of implementing it in my country, Kyrgyz Republic (the 'KR'). While researching this topic, I have focused partly on the legal issues surrounding the finality of arbitral awards. In particular, the Arbitration Act of the KR of 30 July 2002 No. 135 (the 'Arbitration Act') provides that arbitral awards are final, and not subject to appeal (on the merits).<sup>3</sup>

The purpose of this article is to review whether finality and non-reviewability of arbitral awards might be an obstacle for implementation of arbitration appeal in the KR. The risk is that the state court might interpret the Arbitration Act as forbidding appeals of arbitral awards in the KR despite the mutual agreement of the parties of the arbitration to do so.

## Finality and non-reviewability of arbitral awards

The core issue is whether the principle of finality and non-reviewability of arbitral awards was introduced by the Kyrgyz legislature in order to preclude arbitral appeals or to perform a completely different function (to preclude appeals to the state court on the merits). To answer this question, I first analysed the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law'), which constitutes a sound basis for the desired harmonisation and improvement of national laws<sup>4</sup> and may be applied not only in international but also in domestic arbitration.<sup>5</sup>

Article 34 of the UNCITRAL Model Law states that recourse to a court after the issuance of an arbitral award may be made only by an application to set aside the award on certain grounds. However, does this mean that arbitration appeal is precluded and an arbitral award may be appealed only to the court? The Explanatory Note to the UNCITRAL Model Law provides important guidance with respect to this very question:<sup>6</sup>

*'Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is **not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).**' [emphasis added]*

Thus, the drafters of the UNCITRAL Model Law contemplated arbitration appeals and

clearly believed this should remain an option available to the parties so long as they both agree to do so.

In the KR, appeals of an award in state court are not permitted. Instead, the only remedy that can be sought in state court is that of enforcement where a party refuses to abide by the arbitral award. Therefore, there is a norm in the Arbitration Act providing for the finality and non-reviewability of arbitral awards. Thus, when a party applies for an application for the issuance of writ of execution, the court may not review the arbitral award on the merits.<sup>7</sup>

The fact that the arbitral award is not subject to appeal is directly related to and depends on the finality of awards. If the arbitral award is not final, it means that it may be appealed. But case law on the UNCITRAL Model Law in various jurisdictions provides that the principle of finality of awards is established for state courts and is not violated if the parties choose the mechanism of arbitration appeal as a means of reviewing the arbitral award. For example:

*'Courts have regularly emphasized that the finality of awards was one of the main purposes of the Model Law and the relevant national legislation based on it, so that awards should not be set aside easily. Thus, the appropriate standard of review of arbitral awards under article 34 was considered to be one that sought to preserve the autonomy of the arbitral procedure and to minimize judicial intervention.'*<sup>8</sup>

We can conclude that the finality of the arbitral award was established for the state court to minimize judicial intervention in arbitral awards on the merits. It is also confirmed by the following case law on UNCITRAL Model Law:

*'The finality of awards and the principle of res judicata are considered to form part of public policy. It was held that where the parties have agreed to re-arbitrate a dispute in order to involve a third party in the proceedings, it would not violate public policy and the principle of finality in arbitration to enforce the arbitral award issued in the second proceedings, since the party who won the first arbitration had waived any rights derived from the first award by submitting the dispute to a second arbitration.'*<sup>9</sup>

Thus, the norm on the finality and non-reviewability of arbitral awards:

- precludes appeals to a state court, but not to an arbitration tribunal, and if the parties choose an arbitration appeal, this will not violate the principle of finality of the arbitral award; and

- does not regulate arbitral proceedings but determines the status of the arbitral award for state courts in terms of judicial control; in turn, arbitral proceedings and stages thereof can be determined by agreement of the parties, which is confirmed by numerous provisions of the Arbitration Act.<sup>10</sup>

## Conclusion

In my opinion, the parties should be able to agree to a procedure whereby the arbitral award might be reconsidered by an arbitration appeal, and there are no obstacles to this in the current Arbitration Act. The purpose of the rules that the arbitral award is final and not subject to appeal (on the merits) is to limit intervention of the state courts into arbitration, but not to limit the autonomy of the parties of the arbitration. The parties are free to mutually agree to appeal an arbitral award and it is unreasonable to limit their right to do that, especially since a central feature and advantage of arbitration is that the parties are able to exercise much greater control over the proceedings than they would in a government run court.

## Notes

1. There are arbitration institutions which have developed and adopted their own appellate arbitration rules (European Court of Arbitration in 1997, International Institute for Conflict Prevention & Resolution in 1999, Judicial Arbitration and Mediation Services in 2003, American Arbitration Association in 2013, Arbitration Chamber of Paris)
2. Irene M. Ten Cate, *International arbitration and the ends of appellate review*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2136463](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2136463), William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531 (2000) Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of?* <https://digitalcommons.pepperdine.edu/drlj/vol7/iss2/5/>.
3. Article 28 of the Arbitration Act.
4. The UN General Assembly, in its resolution 40/72 of 11 December 1985, recommended 'that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice'.
5. While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have. (Para 10 of the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006).
6. Para 45 of the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International

Commercial Arbitration as amended in 2006.

7. Article 420.4 of the Civil Procedure Code of the KR.
8. UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, 2012, pp. 139-140, para 24.
9. UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, 2012, p. 184, para 56.
10. Article 4 of the Arbitration Act: '1. *The procedure for formation and operation of an ad hoc arbitration tribunal shall be determined by agreement of the parties, or where it is not regulated by agreement of the parties, by this Act.*  
2. *The activities of permanent arbitration tribunals shall be regulated by the applicable rules, or where they are not regulated by the applicable rules, by the legislation of the Kyrgyz Republic.'*

*Article 6 of the Arbitration Act: 'The arbitral tribunal shall conduct proceedings in accordance with the rules specified in the arbitration agreement, and in the absence of such rules, in accordance with the rules chosen or established by the arbitral tribunal itself.'* Article 16 of the Arbitration Act: '1. *In case of an ad-hoc arbitration, the parties may, at their own discretion, determine the procedure of arbitration. If the parties have not determined this procedure, the arbitral tribunal shall independently determine it in accordance with this Act.*  
2. *The procedure of arbitration by a permanent arbitration tribunal shall be carried out in accordance with the applicable rules of this arbitration tribunal, unless otherwise provided by agreement of the parties.'*

# The two-finger test: how sexual assault victims are re-traumatised

Trigger warning: graphic description of sexual assault

## Introduction

In many countries around the world, victims of rape who are seeking justice are subjected to testing to verify whether an erect penis could have passed through their vagina. These tests give findings of whether the victim is sexually active, and the conclusion is then used to discredit them in court. Medical examiners focus on the distensibility of the vaginal orifice in the form of whether one, two or more fingers can be admitted into the vagina. This is known as the two-finger test or the PV (per vagina) test.<sup>1</sup> The rationale behind the test is that if two or more fingers can pass through the vagina, an erect penis could have passed through it at an earlier point in time.

## Evolution of the test

The two-finger test was devised in 1898 by the french medical Jurist L. Thoinot, who used it to differentiate between 'true' and 'false virgins', the latter possessing elastic hymens that allow penetration without tear.<sup>2</sup> This was seen as a necessity in colonial times due to the prevailing belief of the 'untrustworthy native', and especially the lying 'raped woman', leading to rape complaints being dismissed based on caste and class considerations, previous sexual history, delays in filing

complaints and demands for evidence of violent resistance and physical injury, and therefore an enhanced role for doctors and experts.<sup>3</sup> In fact, virginity testing was carried out by the British Foreign Office throughout the 1970s on fiancées coming to England to marry but suspected of lying about their reasons for travel.<sup>4</sup> Despite being a colonial relic used by French and British jurisdictions<sup>5</sup>, the test is still promoted blindly by medical textbooks.

## Problems with the test

The most glaring problem with the test is that it is used to establish consent, which cannot possibly be established by medical procedures and is a solely legal question. It also allows the defence to bring into question the past sexual history of the victim, which is used to discredit the victim's testimony and infer her consent. In particular, being sexually active is seen as insulting, attracting stigma and ostracisation, because women are meant not to have sexual expression outside the bounds of marriage (within marriage, rape is often not criminalised, such as in India).<sup>6</sup> Perhaps this very anxiety leads to the conclusion that if two fingers can be inserted, that *must* mean frequent *consensual, heterosexual* sex. The sexualized body of the woman is read as an archive of her past.

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The test has been referred to as inhuman and degrading<sup>7</sup>; it constitutes nothing short of state-sanctioned penetrative assault<sup>8</sup>. The only difference between sexual violence and the test is of consent. Such consent must be informed, wherein the victim is explained the nature and implications of the test. However, many victims are oblivious to the use of the test, the nature of information being collected and the manner in which it is used in the courts. This cannot be informed consent for the purpose of law. On the other hand, denial of consent leads to the presumption that the woman is a liar and no rape has actually occurred<sup>9</sup>.

Further, the test provides mixed results, allowing judges to apply it according to their prejudices and own experiences. It also violates the right to privacy of the victim by sharing her private information as a patient. Finally, it reduces the offence of rape to penetration of the vagina.<sup>10</sup>

### International law

In October 2018, a joint statement by UN Human Rights, UN Women and the WHO stated that virginity testing must end, as it constitutes violence against women, and is traumatic and humiliating. Further, it lacks medical utility and scientific veracity in establishing any sexual activity.<sup>11</sup> International standards on prosecuting sexual violence also state that the victim's past sexual experience or character cannot be considered; for instance, the Rules of Procedure and Evidence of the International Criminal Court state that, 'credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness', and 'a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness'.<sup>12</sup>

Additionally, the two-finger test is a clear violation of victims' rights to privacy and physical and sexual integrity, right to the highest attainable standard of health, right to be protected from discrimination based on sex, right to be free from torture or cruel, inhuman or degrading treatment or punishment, the rights of the child (when the victim is a child), equality before courts and tribunals, and equal protection of the law (Articles 2, 3, 7, 14, 17 and 26 of the International Covenant on Civil and Political Rights<sup>13</sup>).

### National legislative changes

In 2018, five years after six national human rights organisations in Bangladesh petitioned to ban the practice, the High Court of Bangladesh recognised the lack of scientific and legal merit in the two-finger test. The Court ordered medical personnel not to perform the test, and ruled that the test results not be given any weight in court.<sup>14</sup>

Similarly, in 2013, the Supreme Court of India<sup>15</sup> held the test to be unconstitutional, observing that, 'rape survivors are entitled to legal recourse that does not retraumatise them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The state is under an obligation to make such services available ... in view of the above, undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity.' Eight months later, the Ministry of Health and Family Welfare released national guidelines, which stated that the two-finger test is unscientific and should not be performed.<sup>16</sup> However, the test continues to play a decisive role in rape adjudication. Doctors, especially in rural areas, routinely use this test as they are not aware of recent legal developments. Victims are often forced to comply, for instance, with the threat of a slap. Of ten rape victims in a tier-2 city in India (five of whom were minors), all had undergone the two-finger test; doctors across three hospitals in the city confirmed off the record that the test is still routinely conducted.<sup>17</sup> Similarly, in a study of 200 group-rape trials in India, the test was used in 80 per cent of them.<sup>18</sup>

While legislative changes can be a useful first step toward the eradication of this practice, more countries need to develop guidelines to prohibit the two-finger test, and such guidelines and policies must be followed up with sound implementation and enforcement. The aim must be to protect victims from re-traumatisation so that they are able to truly access justice.

### Notes

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## South Africa's shadow pandemic: violence against women

Emma Franklin



Picture the scene: early on a Saturday afternoon in August 2019, a nineteen-year-old University of Cape Town student named Uyinene Mrwetyana went to the post office in the busy Southern Suburbs of Cape Town, South Africa. The post office worker behind the counter told her that due to an electricity outage, the credit-card machine was not working, so he would not be able to process her payment at that time. He said she should return a bit later, and he would be able to help her then. She did so, shortly after 2 pm, by which time all the other office workers had gone home. What emerged some weeks later in a confession about how the afternoon unfolded is truly shocking, but tragically not unusual in South Africa. He locked the door behind Uyinene, beat her with a set of post-office scales, raped and killed her. He put her body in the trunk of his car, burnt it and dumped it in Khayelitsha township.

This incident sparked a wave of nationwide demonstrations and the Am I Next? movement, which saw thousands of women take to the streets in protest, demanding something be done. Some even called for the reintroduction of the death penalty. The clear sentiment was the citizens of South Africa will no longer tolerate living in the kind of society where a young woman can be brutally assaulted and murdered in broad daylight, mere minutes from her university campus. Despite the widespread media attention that this story garnered, it must be understood as being just one example of the scourge of Gender Based Violence (GBV) that pervades South Africa. President Cyril Ramaphosa has declared femicide a national crisis, and it is not difficult to see why. According to the most recent statistics released by the South African Police Service, a woman is murdered every three hours in South Africa.<sup>1</sup> 137 sexual offences are committed every day, and the

country has one of the highest rates of rape in the world. According to the most recent data from the World Health Organization, it ranks fourth out of a 183 countries when it comes to femicide.<sup>2</sup> The Director of the University of Cape Town's Children Institute, Professor Shanaaz Matthews, says that 'in South Africa... what we know is that intimate femicide is the leading cause of female homicide. In fact, what the work of the South African Medical Research Council has shown us is that it is double the global homicide rate'.<sup>3</sup>

Distressingly, the situation has in recent months got worse. Phumzile Mlambo-Ngcuka, Executive Director of UN Women, despaired that despite it being a protective measure, the lockdown to protect against the spread of Covid-19 has brought with it another deadly danger: a growing shadow pandemic of violence against women.<sup>4</sup> The world over, sexual and physical violence against women has increased as people are confined to small spaces in trying circumstances, but with the kind of GBV figures that South Africa was dealing with before this, it is no surprise that the number of violations is comparatively alarmingly high.

In light of these shocking statistics and after hearing some of the harrowing individual stories behind them, glaring questions remain. What is being done about this? What tangible steps has the government taken? Many think that the answer to these questions is: not enough. August is Women's Month in South Africa and the commemoration programme for 2020 was arranged under the theme of 'Realising Women's Rights for an Equal Future'. The focus was on a call to action to champion women's rights and gender equality, and to respond to a number of issues raised during the presidential summit against GBV and femicide held in 2018 in respect of the criminal justice system. As part of this response, two Bills dealing with GBV were approved by Cabinet for tabling in Parliament. The 2020 Criminal Law (Sexual Offences & Related Matters) Amendment Bill will broaden the scope of the national register of sex offenders to include the details of those convicted of preying on any vulnerable group, not only children and mentally disabled persons, as was previously the case. Anyone on this register will be compelled to disclose this information when they submit applications to work with these groups. This new law will also enable law enforcement agencies responding to reports of alleged sexual crimes to proceed

as necessary without warrants of arrest. The Domestic Violence Amendment Bill includes provisions aimed at facilitating the process of obtaining a protection order against acts of domestic violence via electronic means, and will oblige the Departments of Social Development and Health to provide certain services to victims of domestic violence.

There is no doubt that action such as this is a necessary step, and demonstrates a government effort towards ending the problem. The passing of new legislation also helps to send the message that the current state of GBV cannot and will not be tolerated. However, the response to these measures has not been all positive, and commentators say that this not enough, nor the most effective way to deal with an issue that is a symptom of more foundational societal concerns which must be tackled at the source. Professor Matthews believes that for genuine change to take place, the problem must be dealt with holistically, by considering how to prevent femicide early. She credits the social environment and cultural background in South Africa with providing the space for tolerance of men's violence towards women.<sup>5</sup> The deeply patriarchal culture that exists in South Africa means that men are raised to believe that women 'belong' to them, and rape is not traditionally seen as violence.

Additionally, the newly-appointed UN Special Rapporteur on Health Rights, Dr Tlaleng Mofokeng, is of the belief that the lack of funding for organisations fighting gender-based violence is the main factor undermining efforts to end the scourge in South Africa.<sup>6</sup> Mofokeng said: 'For all the years from 2012 to 2019, we have been saying South Africa needs a well-co-ordinated, victim-centred response by all affected departments and civil society. You can have all the plans, but you have to put money ahead if you are to fight this disease.' Like Matthews, Mofokeng thinks that the solution lies beyond changes in the law. She said there must be social and judicial consequences for perpetrators of violence. The way for this to happen is if everyone with a stake in facilitating change worked together in a coordinated way, and adequate funding was made available. She specifically pointed out that National Treasury must stop cutting the budget to civil society organisations that are set up to deal with GBV.

The GBV statistics are particularly horrendous in South Africa, and they are part of a global trend of violence against women,

which has unfortunately been exacerbated by the recent lockdowns necessitated by the Covid-19 pandemic. GBV is the most extreme manifestation of a persistent culture marred by violence and a disrespect for women and their bodies. The recent passing of laws like the ones discussed are no doubt essential, but it is the social background and culture that needs to change in order to address this problem most effectively. It can no longer be the case that women are fearful for their lives and their safety in situations as ordinary as visiting a post office in the middle of the day. As South Africa begins to rebuild itself from the ravages of the Covid-19 pandemic and the effects that lockdown has had, it should look urgently to address the other pandemic that continues to devastate the country.

#### Notes

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## The turn to criminal justice in human rights law

### Introduction: the trend of the turn to criminal justice

From the mid-1970s through to the late 1980s, the human rights movement primarily concerned itself with the protection of individual civil and political rights, with attention directed at state's criminalisation of political activity and abuses of penal systems. It can be seen that in this period, human rights campaigns and movements focused more on state's obligations to protect the human rights of its own citizens instead of punishing the individual for human rights abuses. There were also no international criminal courts or tribunals to try individual perpetrators.

Significant momentum for the establishment of an international criminal court grew instead in the mid-1990s. As recently as 1991, it is still implausible to many human rights advocates and large-scale domestic criminal adjudication that the establishment of international criminal court to try individual perpetrators can enforce

human rights standards,<sup>1</sup> however, events in Rwanda and the former Yugoslavia generated broad-based support for international prosecutions of war crimes. In 1993 and 1994, the United Nations Security Council established the ad hoc tribunals for the Rwanda and former Yugoslavia, paving the way for the 1998 Rome Conference that adopted the treaty establishing the International Criminal Court. The rapid growth of international criminal tribunals came as a result of political compromise: on the one hand, states were still unable to agree on military intervention; on the other, events in Rwanda is such an example of the incapacity of the United Nations to deal with atrocities. With the rise of neoliberalism that accompanied the end of the Cold War, the Security Council's choice corresponded with the neoliberal call for a strong punitive state and the exported US model which favoured retributive justice.

In addition to the developments in international criminal law, the focus and

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approach of the human rights movement also began to change in ways that coincided with the increased faith in criminal justice systems in the 1990s, which can be reflected in Amnesty International's 1991 policy statement on impunity: 'Impunity, literally the exemption from punishment, has serious implications for the proper administration of justice . . . International standards clearly require states to undertake proper investigations into human rights violations and to ensure that those responsible are brought to justice.'<sup>2</sup> In this quotation, impunity is not simply a failure to remedy human rights violations, but also the very cause of them.

### **Criticisms of the trend towards criminal justice**

Many have thought the correspondence between anti-impunity, criminal law and human rights as a positive development. However, to build criminal institutions requires significant time and resources, and it is disputable how the existence of international criminal institutions, and the possibility of domestic prosecutions, have helped shape and limit human rights aspirations.<sup>3</sup>

To begin with, the criminal law lens reveals a rather naive picture of a world with bad actors, and convinces us that if we remove the bad actors, the evil can also be eliminated.<sup>4</sup> Such lens affected the human rights movement's understanding of the world as well as its strategies and ability to attend to underlying structural causes of human rights violations. However, in obscuring state responsibility and emphasising individual responsibility instead, the view misses the ways in which bureaucracy functions to perpetrate human rights violations, and that even well-meaning people can act criminally inside state structures to produce and reproduce injustice. Without concern for the cause of the conflict and its ideological content, decontextualisation treats states in a political vacuum. Thus, domestic and international attention often turns to questions of how to make war more humane instead of how to prevent it.

The turn to criminal law also overlooks the conceptions of economic harm and remedy, which have been pushed by advocates of economic and social rights for years. It perpetuates biases against economic restructuring already inherent in the

human rights framework, and furthermore, in the criminal justice context, economic reparations were seen as an alternative or supplement to criminal justice, and they generally depend upon a finding of guilt. Such grants are relatively arbitrary given the selectivity of criminal prosecutions.

As a third point, when local human rights NGOs spend time and resources promoting prosecutions, they often align themselves with the state, depending on the very police, prosecutorial and even adjudicatory apparatuses of which they have long been suspicious. In this way, human rights advocates tend to become the participant in the governance of the state which overreach in their investigations, prosecutions and punishments, causing more human rights violations sometimes.<sup>5</sup>

The 2016 Colombian Agreement and its implications for the turn to criminal justice

Against the background of the turn to criminal justice of human rights law, the 2016 peace agreement in Colombia between the government and the main guerrilla group, the FARC-EP can be used as example for critical analysis.

The Colombian agreement aimed to put an end to over half a century of conflict in 1948 to 1953 when sustained violent clashes between the conservative party and their liberal and communist opponents led to 200,000 deaths, followed by formation of various guerrilla groups in the 1950s to 1970s.<sup>6</sup> Severe and systematic violations of human rights have been committed by guerrillas, paramilitaries and their successors and state forces, which led to around 220,000 deaths with millions more becoming victims of displacement or other abuses.

The negotiations for the peace agreement started in 2012, when the FARC-EP were militarily diminished but not defeated. The negotiated agreement used a criminal law-individual responsibility model, and it also provided for the imposition of alternative non-custodial sentences for violations during the conflict as to serve as a restorative and reparative function in relation to the harm caused. To some, the 2016 Colombian Agreement is a paragon solution combining retributive elements as well as restorative elements, despite the criticism that it can neither serve the aim of criminal law nor human rights law.<sup>7</sup>

The first line of criticism is that the sentencing provisions of the agreement created impunity and effaces significant



achievements pertaining to women. Thus, it fails to meet the standard of International Criminal Law. However, the standards of international criminal law should be balanced with encouraging demobilisation, and continuing the conflict has negative human rights implications, including for women. Furthermore, the alternative sanctions do not necessarily create impunity because of their non-custodial nature, because reparative actions can demonstrate tangible benefits flowing from the justice system as well as allowing perpetrators to see the negative impacts of the harm done.

There are also concerns on the appropriateness of individual prosecution. Although the individual responsibility mode for criminal law has the problem of oversimplification of accountability, it does not preclude the necessity of making certain conduct as particularly egregious, even in the context in which it arose. The narrative that fully avoids the issue of individual responsibility is also problematic, because social wounds will be deepened by a lack of punishment for perpetrators.<sup>8</sup>

## Conclusion

The recent turn to criminal justice in human rights law shouldn't be understood in the opposition between the two fields, and the absolutism of prioritising a stringent view of International Criminal Law is problematic. A balance should be achieved between the interests of 'creativity, conviction, and a nuanced understanding of justice, rights, prevention, victims' and the reality of local constraints. A nuanced view permitting a richer understanding of how criminal law can fit into a wider international human rights law agenda should be taken by the human rights field.

## Notes

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