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## CONTENTS

**Editors’ Note**  
*Muzhgan Wahaj and Abbas Ebrahim Al Abbas*  
.................  xv

**Leveraging International Legal and Human Rights Mechanisms: Efforts to End Forced Labour in Burma/Myanmar**  
*Rachel Fleming*  
................................................................. 15

**The Modern Shaping of “Minorities” in the Post-Ottoman Era: An Anachronism in Service of Sectarian Powers and Nation-States**  
*Stephanie Khouri*  
................................................................. 59

**Charanne v Spain and Eiser v Spain:**  
**Comparative Case Analysis on Legitimate Expectations and Fair and Equitable Standard**  
*Kudrat Dev*  
................................................................. 87

**Enforced Disappearances and the Application of International Humanitarian Law to the Conflict in the Southern Border Provinces of Thailand**  
*Jagoda Sekular*  
................................................................. 113

**A Critical Analysis and Evaluation of the Key Changes Introduced by the Criminal Finances Act 2017 and their likely Impact in Combatting Financial Crime and Terrorist Financing**  
*Huw Thomas*  
................................................................. 173
As human rights issues continue to become increasingly contentious and divisive in the 21st century, it is now more crucial than ever to promote transparency and accountability in discourse in international law. The atrophy of political regimes globally in their attempts to remedy the social, political, and economic situations in domestic and international contexts raises concerns on the future of international cooperation. While the willingness of developing countries with historically unstable political systems to adopt and incorporate international law mechanisms has demonstrated an upwards trajectory towards the unification of human rights standards, with some exceptions, the growing influence of international organisations in national legal affairs has fostered scepticism from states, with derogation from international standards seemingly being the preferred response; be it by stating prima facie that domestic provisions will take precedence where they conflict with international provisions, or through non-compliance with international law outright. Alongside looming waves of conservative opinions, this invites states to engage in blind nationalism and indulge the pitfalls of the inward-facing. From topics such as terrorist financing to forced labour and enforced disappearance, Volume V, Issue II of the SOAS Law Journal seeks to capture the plurality of human rights issues globally, and to speak from the experiences of authors on the likelihood of redemption.

As states continue to invest in building walls rather than bridges, the likelihood of attaining transparency in discourse at an international level to reach equitable solutions seem fitting as the precept of a dystopia. The work of Rachel Fleming promoting a steadfast and thorough examination of
the international legal and human rights mechanisms in their remedying of issues of forced labour in Burma/Myanmar, and of Jagoda Sekular on the application of international law to the growing epidemic of enforced disappearance in Thailand, seeks to highlight scholarly work and perspective as an ail to states’ collectively flawed approaches to such issues. Notably, discourse surrounding ethnic and religious minorities, their protections domestically and internationally, and their recognition by states which would otherwise prefer their omission, is expanding and understandings of the historical and legal developments of these identities are now expansive. Key to this is Stephanie Khouri’s article exploring the notion of minorities and institutionalisation of their oppression in the post-Ottoman era. As such, discerning the formation of power has manifested in the late 19th century to project a public acceptance of minorities despite the ethnic and religious tensions which have led to their continued maltreatment in private. Piercing the veil on such issues has proved immensely beneficial in and to the age of protectionism we inhabit.

Insofar as the choice to look outward is and has been effective, looking inward sheds light on the various mechanisms employed to regulate states’ domestic economic, political, and social systems to ensure a positive trajectory. With states readily employing programmes to accelerate and diversify their economies, for example, global initiatives to help states recuperate from generations of understandably unsustainable practices appear at the forefront of actualising necessary change. As the conversation surrounding anti-corruption measures has become crucial in addressing issues of money laundering and terrorist financing, Huw Thomas’ article on the United Kingdom’s Criminal Finances Act 2017 and the key changes introduced to its implementation sheds light on the development of legislation targeted at inhibiting
the use of the proceeds of crime in the modern era. With reform at the heart of the conversation surrounding state sovereignty, arbitral tribunals have effectively changed the game. Kudrat Dev’s foray into the conflict between arbitration and law relies on the cross-comparative analysis of the Charanne v Spain and Eiser v Spain cases, seminal cases on the changing salience of arbitration in legal spheres.

We are pleased to present to you these insights and opinions on what are both chronic and generational concerns of global significance – as has been the objective of the SOAS Law Journal since its inception. We are proud, now five years on, to have made significant strides in this regard by publishing articles which continually challenge the norm, and further, which through critical legal studies provide solutions. Our work has been made possible through the articulate and astute contributions of our authors, the determination and commitment of our editors, and the generosity and support of the SOAS School of Law.

As this note brings to an end our term leading this publication, we are proud that our final issue showcases writing and critical insight of the quality our authors and editors have offered here. We look forward to seeing the next generation of authors and editors at the helm of the SOAS Law Journal, navigating it through what undoubtedly promises to be an era of turbulence in law.

Muzhgan Wahaj and Abbas Ebrahim Al Abbas
Editors-in-Chief
Leveraging International Legal and Human Rights Mechanisms: Efforts to End Forced Labour in Burma/Myanmar

Rachel Fleming*

This Article explores the origins of the interrelated legal concepts of slavery and forced labour, with a particular focus on the unusual role played by the International Labour Organisation in the development of the right to freedom from forced labour. It sets out the pervasive use of state-ordered forced labour in Burma/Myanmar, and the inherent complexities surrounding ending this practice.

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1 Leaders of Chin, Kachin and Shan homelands agreed to join together with Burman leaders to found the Union of Burma in 1948, following independence from British colonial rule. In 1989 the military regime unilaterally changed the name of the country to Myanmar, which historically only referred to the majority Burman territory and had never included the other ethnic homelands. The change to Myanmar was recognised by the UN and is used in common parlance, but many human rights defenders from ethnic minority backgrounds continue to prefer the term Burma. To reflect this duality, this author will use Burma/Myanmar in reference to the country.
in a country where the military is beyond civilian control. In doing so, it foregrounds the role of local human rights organisations in documenting human rights violations and the myriad ways in which they have leveraged this evidence through international legal and human rights mechanisms and cooperation with the International Labour Organisation. This has led to partial success, but significant challenges remain to eradicate this practice in Burma/Myanmar and ensure accountability for perpetrators.

I. Introduction

There is abundant evidence before the Commission showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military for portering, the construction, maintenance and servicing of military camps, other work in support of the military, work on agriculture, logging and other production projects undertaken by the authorities or the military, sometimes for the profit of private individuals, the construction and maintenance of roads, railways and bridges, other infrastructure work and a range of other tasks... Forced labourers, including
those sick or injured, are frequently beaten or otherwise physically abused by soldiers, resulting in serious injuries; some are killed, and women performing compulsory labour are raped or otherwise sexually abused by soldiers... It is a story of gross denial of human rights to which the people of Myanmar have been subjected particularly since 1988 and from which they find no escape except fleeing from the country.²

The pervasive use of forced labour – legalised by colonial-era statutes³ – and the intersecting forms of human rights violations perpetrated by the Burma/Myanmar military and local authorities have been well-documented by local organisations since the early 1990s. Such reports prompted the establishment of an International Labour Organisation (ILO) Commission of Inquiry in 1998 into the alleged violations of the 1930 Forced Labour Convention, to which Burma/Myanmar is a State party.


³ Villages and Towns Acts 1907.
In addition to the observations highlighted above, the Commission of Inquiry concluded:

\[\text{A}ny\text{ person who violates the prohibition of recourse to forced labour under the Convention is guilty of an international crime that is also, if committed in a widespread or systematic manner, a crime against humanity.}^4\]

In spite of the gravity of such findings, the struggle to end the practice of forced labour in Burma/Myanmar, and ensure the State’s compliance with its obligations under the 1930 Forced Labour Convention has continued ever since.

In 2010/11, Burma/Myanmar agreed to participate in the first cycle of the Universal Periodic Review (UPR) under the UN Human Rights Council (HRC); at the time, it had only ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Burma/Myanmar apparently viewed this new international human rights mechanism\(^5\) as an opportunity to defend its abysmal human rights record to peer States within the HRC, after years of criticism about human rights violations in Burma/Myanmar from the CEDAW and CRC treaty bodies.

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4 Report of the Commission of Inquiry (n 3) [538].
5 Created under the UN Human Rights Council by a UN General Assembly resolution (3 April 2006), UN Doc A/RES/60/251.
and the UN Special Rapporteur on the situation of human rights in Myanmar. ⁶

Human rights organisations from Burma/Myanmar civil society were primarily based in exile at that time, as it was not possible for them to operate freely inside the country due to the considerable security risks. However, they maintained clandestine networks inside the country, via which they collected documentation of human rights violations. Organisations were already engaging with well-established mechanisms by providing briefings and shadow reports based on this documentation, and seized the opportunity to influence the new process. One such organisation was the Chin Human Rights Organisation (CHRO), established in 1995. CHRO made an individual submission to the process, which was strongly represented in the stakeholders’ report compiled by the Officer of the High Commissioner for Human Rights (OHCHR) as one of the three short reports forming the basis of the review, conducted via interactive dialogue at the HRC. ⁷ In the submission, forced labour is cited as a primary human rights concern and a root cause of

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⁶ The country-specific Special Rapporteur’s mandate was first created in 1992 by the Commission on Human Rights resolution E/CN.4/RES/1992/58, and has been extended every year since then.

⁷ The author of this paper worked as Advocacy Director at CHRO for six years and prepared the organisation’s UPR submissions based on analysis of human right documentation collected by fieldworkers. CHRO’s submission was cited 11 times in the stakeholders’ report, on a par with Human Rights Watch.
flight, contributing to the exodus of around 150,000 Chin to India and Malaysia:8

In Chin State the use of forced labour by the military and local authorities is widespread and systematic. Since 2006 more than 70 incidents of forced labour have been documented by CHRO, some involving orders to 40 villages at a time.9

This claim was strongly substantiated by a report published by the international NGO Physicians for Human Rights (PHR) in January 2011,10 shortly prior to the UPR interactive dialogue. The report was based on a quantitative survey of over 600 households in Chin State conducted in early 2010 (by CHRO fieldworkers and others at considerable personal risk), and covered violations which had taken place in the preceding twelve months. The key finding was that almost 92 percent of households had experienced forced labour during that timeframe, on average three times per household. Forced labour was exacted by the military and local authorities, and took similar forms to those outlined in CHRO’s submission.11 Such findings bore a striking similarity to those of the ILO’s Commission of Inquiry more than a decade earlier, and PHR

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11 Ibid, 11.
concluded that such violations may constitute a crime against humanity.\textsuperscript{12}

In a recalcitrant atate like Burma/Myanmar where impunity is constitutionally entrenched, the rule of law is lacking, there is no independent judiciary\textsuperscript{13}, and the State is not a party to the International Covenant on Civil and Political Rights (ICCPR) (Art. 8(3)(a) ‘No one shall be required to perform forced or compulsory labour’), the challenges in bringing an end to the practice of forced labour are immense. The military remains beyond civilian control as per the military-drafted 2008 Constitution, and is in charge of the three key Ministries of Defence, Home Affairs, and Border Affairs. The Constitution also provides for immunity from prosecution to all past and present military personnel and government officials for acts committed in the course of their duties, and guarantees the military control over its own judicial processes via an opaque court martial system, which is beyond civilian oversight.\textsuperscript{14} The Commander-in-Chief can effectively stage a coup if a state of emergency, threatening national unity, should arise; and the military holds a \textit{de facto} veto over constitutional change as 25 percent of parliamentary seats are reserved for military appointees, and

\begin{flushleft}
\textsuperscript{12} Ibid.
\textsuperscript{13} During his time as mandate-holder (2008-2014), UN Special Rapporteur Quintana consistently emphasised the importance of legal and judicial reform as core ‘human rights elements’ required in the country.
\end{flushleft}
constitutional change can only be enacted with a parliamentary majority of over 75 percent.\footnote{Constitution of Myanmar 2008, Art 20 (b), 40 (c), 436 (a).}

Part II of this Article traces the role of the ILO in the development of the right to freedom from forced labour. First, the origins of the interrelated legal concepts of slavery and forced labour as they appear in the relevant conventions (the Slavery Convention of 1926 and the ILO Forced Labour Convention of 1930) are briefly discussed. Second, the work of the Human Rights Committee in clarifying the scope of the right to freedom from forced labour and obligations of States under Art. 8 of ICCPR is critically examined. Third, developments in the ILO’s approach to the right to freedom from forced labour under the 1930 Forced Labour Convention are introduced.

Part III of this Article turns to the case of Burma/Myanmar, and highlights how documented evidence of human rights violations by local human rights groups has underpinned legal efforts to end the practice of state-ordered forced labour in the country. Taking Hopgood’s dichotomy of human rights/Human Rights as a frame of reference, with ‘human rights’ characterised as local activism and ‘Human Rights’ as a ‘global structure of laws, courts, norms’,\footnote{Stephen Hopgood, \textit{The Endtimes of Human Rights} (Cornell University Press 2013) ix.} this Article argues that in this case, rather than the global \textit{inevitably} structuring, disciplining, and colonising the local,\footnote{Ibid x.} the
dichotomy is not so clear-cut. It traces the role of local organisations in establishing the ILO Commission of Inquiry and the subsequent ILO individual complaints procedure, the only international human rights mechanism of its kind in operation in Burma/Myanmar. This Article argues that organisations like CHRO are deeply rooted in their communities, allowing them to document human rights violations and utilise that evidence as a vital resource to form strategic partnerships with international organisations, engage with international legal and human rights mechanisms, and ultimately garner institutional leverage to bring about positive changes – albeit limited – in practice.

II. The Role of the ILO in the Development of the Right to Freedom from Forced Labour

The fight against slavery is often described as the first human rights campaign. For example, Anti-Slavery International, founded in 1839, claims to be ‘the oldest human rights organisation in the world’ and works to end modern slavery,

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18 Burma/Myanmar has not acceded to the individual complaint mechanisms for CEDAW or CRC, or those for the more recently ratified Covenant on Economic, Social and Cultural Rights (ratified in 2017) and the Convention on the Rights of Persons with Disabilities (ratified in 2011).
characterized as taking a multitude of forms - including forced labour.\textsuperscript{21} Scholars such as McGeehan make the compelling argument that attempts to enumerate all the forms of a complex phenomenon like slavery risk quasi-legitimising new forms of slavery as they develop.\textsuperscript{22} Nonetheless, the legal concept of slavery has undergone fragmentation in international human rights law, resulting in legal obfuscation around interrelated concepts of slavery, servitude, human trafficking, and forced labour.\textsuperscript{23} The origins of this fragmentation pre-date the birth of international human rights law.

\textbf{i. The Origins of Slavery and Forced Labour under International Law}

The 1926 Slavery Convention’s definition of slavery remains the accepted definition under international law today: ‘[S]lavery is the status or condition [emphasis added] of a person over whom any or all of the powers attaching to the right of ownership are exercised.’\textsuperscript{24} The reference to condition as well as legal status arguably proscribes both \textit{de facto} and \textit{de jure} slavery.\textsuperscript{25} In spite of the fact that the Slavery Convention does not actually \textit{define} forced labour, it calls on States parties

\begin{flushleft}
\textsuperscript{21} Anti-Slavery International <https://www.antislavery.org>, accessed 1 June 2018.
\textsuperscript{22} Nicholas L. McGeehan, ‘Misunderstood and Neglected: the Marginalisation of Slavery in International Law’ (2012) 16(3) \textit{IJHR} 436, 455.
\textsuperscript{23} Stoyanova (n 21) 364.
\textsuperscript{24} Slavery Convention 1926, Art 1(1) 60 \textit{LNTS} 253.
\textsuperscript{25} McGeehan (n 23) 444.
\end{flushleft}
to ‘take all necessary measures to prevent forced or compulsory labour from developing into conditions analogous to slavery’ [emphasis added]. Herein lies the conceptual fragmentation between slavery and forced labour. The drafting of this Article was apparently the most contentious of the whole Slavery Convention. Delegates were keen to make a distinction between forced labour for public and private purposes, with public uses of forced labour being justified as necessary for the ‘development’ of colonised territories, ultimately reflected in the wording of the Slavery Convention. Recalling the abhorrent racist justifications for slavery, colonial-era forced labour was viewed as ‘an instrument of welfare’ to instil the so-called ‘dignity of labour’. This remained the prevalent view for many years.

26 Slavery Convention 1926, Art 5.
28 Ibid 122.
29 Slavery Convention 1926, Art 5(1) ‘Subject to the transitional provisions laid down in paragraph (2) below, compulsory or forced labour may only be exacted for public purposes [emphasis added]. 5(2) In territories in which compulsory or forced labour for other than public purposes still survives, the High Contracting Parties shall endeavour progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence. 5(3) In all cases, the responsibility for any recourse to compulsory or forced labour shall rest with the competent central authorities of the territory concerned [emphasis added].’
after the process of decolonisation began.\textsuperscript{30} Instances of forced labour imposed on colonial subjects were often brutal, resulting in the deaths of labourers, and would have arguably met the definition of \textit{de facto} slavery enshrined in the Slavery Convention.\textsuperscript{31}

In 1926, the Assembly of the League of Nations passed a Resolution requesting the ILO to address the issue of forced labour.\textsuperscript{32} The resulting 1930 Forced Labour Convention obliges States parties to ‘suppress’ the practice ‘within the shortest possible period’.\textsuperscript{33} Forced or compulsory labour itself is defined as, ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. The Convention also sets out exceptions in the form of compulsory military service, civic obligations or minor communal works, emergencies, and services exacted as a result of a conviction in a court of law.\textsuperscript{34} The vast majority of the Articles provided for the continuation of forced labour in


\textsuperscript{31} Examples of this include the treatment of workers in the Belgian Congo and during the Culture system in Java under Dutch colonial rule, Ibid. See also McGeehan (n 23) 445-48.

\textsuperscript{32} League of Nations, ‘Slavery Convention: Resolutions adopted by the Assembly at its meeting held on 25 September 1926’, Doc A.123.1926.VI.

\textsuperscript{33} 1930 Forced Labour Convention CO29, Art 1.

\textsuperscript{34} 1930 Forced Labour Convention, Art 2(1) and 2(2)(a-e).
Efforts to End Forced Labour in Burma/Myanmar

Colonial contexts for a transitional period. At the time, the Workers’ Group, under the tripartite structure of the ILO (comprised of workers, employers and government representatives), expressed misgivings about the primary purpose of the text, but ultimately supported it as a step forward. In short, the 1930 Forced Labour Convention needs to be viewed as a legal instrument of its time; a Foucauldian technology of rule for colonial powers ‘facilitative rather than proscriptive in character’.

ii. Slavery and Forced Labour under International Human Rights Law

The 1948 Universal Declaration of Human Rights marked the advent of international human rights law and stipulated that, ‘[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’ Although forced labour is not explicitly mentioned, the preparatory works indicate that it was considered to be a

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36 McGeehan (n 23) 447.
37 Ibid 445.
38 A more detailed discussion of the legal obfuscation around the interrelated concepts of slavery, servitude, human trafficking, and forced labour under international law is beyond the scope of this paper. Of particular note is the fact that under international criminal law, slavery is regarded as encompassing these interrelated concepts. For in-depth analysis of these concepts under both international human rights law and international criminal law, see Stoyanova (n 21) and McGeehan (n 23).
form of slavery. By contrast, Art. 8 of the legally binding ICCPR – which did not come into force until almost 30 years later — enumerates slavery, servitude, and forced labour separately, but does not define these concepts. The preparatory works for that particular article did not refer to the 1926 Slavery Convention or its definition of slavery. Instead, drafters appeared to focus on de jure rather than de facto slavery, viewing slavery as a ‘limited and technical notion’ involving the ‘destruction of the juridical personality’. Furthermore, drafters decided not to include the definition of forced labour enshrined in the 1930 Forced Labour Convention, on the basis that it was unsatisfactory when read in light of the exceptions.

The treaty body for the ICCPR – the Human Rights Committee (HRCtee) – clarifies both the scope of the rights protected and the obligations of States in the course of its work. Firstly, the HRCtee issues General Comments, which

41 International Covenant on Civil and Political Rights (ICCPR), Art 8 (1), (2), and (3)(a) 999 UNTS 171.
are directed at all States parties and interpret the substantive provisions of the treaty. Secondly, in response to State reports submitted in accordance with their reporting obligations, the HRCtee produces Concluding Observations, which clarify the duties of States. Lastly, where a State party has acceded to the Optional Protocol, the HRCtee issues quasi-judicial Views on individual cases brought under the complaints procedure, providing further clarification of the scope of the rights protected. Stoyanova’s analysis of Concluding Observations produced between 2014 and 2016 found that those which address Art. 8 are largely concerned with human trafficking, and overlook the concepts specifically enumerated in the Article. She argues that, ‘The overview reveals a tendency in favour of framing only traditional practices as slavery and servitude and a resistance to using these labels to contemporary forms of abuses.’ The right not to be held in slavery has never been the object of a View, and only one View deals with an interpretation of forced or compulsory labour.

The complainant in *Bernadette Faure v. Australia* maintained that she was subjected to forced or compulsory labour in violation of Art 8(3)(a) of the ICCPR (‘No one shall be required to perform forced or compulsory labour’) as she had to attend a work programme in order to receive benefits. In the View, the HRCtee noted that work forming part of

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45 Analysis of Concluding Observations issued 2014 – 2016; Stoyanova (n 21) 400-403.
46 Ibid 402-403.
normal civil obligations is permissible under ICCPR art.(8)(3)(c)(iv) (‘any work or service which forms part of normal civil obligations’), and therefore it did not fall within the scope of forced labour. The HRCtee made reference to ILO instruments but not to the definition of forced labour, maintaining that it fell to the Committee to ‘elaborate on the indicia of prohibited conduct.’ The HRCtee’s ratio for its View was largely based on ‘the absence of a degrading or dehumanising aspect of the specific labour performed’ thereby providing a rather narrow interpretation of forced labour in comparison with the definition provided under the 1930 Forced Labour Convention.

Although to date the HRCtee has issued 35 General Comments on most of the substantive provisions of the ICCPR, a notable exception is Art. 8. This perhaps reflects the challenges of consolidating its experience in interpreting a conceptually fragmented Article. However, the HRCtee’s narrow interpretation of Art.8 is arguably contrary to its own specified approach of progressive interpretation of the ICCPR as a living instrument applicable to contemporary situations. The HRCtee has ultimately failed to both effectively elaborate on the legal concepts enshrined in Art.8

48 Ibid.
of the ICCPR and bring them to life in light of new and evolving forms of human rights abuses.\textsuperscript{51}

iii. The ILO’s Approach to Forced Labour

Given the wholly inauspicious origins of the 1930 Forced Labour Convention, it is somewhat surprising that over the years the ILO has taken a more progressive approach to interpreting and clarifying the concept of forced labour, in line with the principle of effectiveness and the doctrine of dynamic interpretation of treaties.\textsuperscript{52} However, the unique tripartite structure of the ILO allows for the inclusion of non-state actors in its decision-making processes, which in turn shapes the approach of the organisation, alongside its supervisory mechanisms.\textsuperscript{53} Although it became the first specialised agency of the UN in 1946, it is not generally considered as part of the UN human rights system and is often overlooked in mainstream discourse and academic literature on human rights.\textsuperscript{54} Nonetheless, the organisation itself has long used the language of human rights in its approach to forced labour.

\textsuperscript{51} Stoyanova (n 21) 408.

\textsuperscript{52} For further discussion of these principles see Jonas Christoffersen, ‘Impact on General Principles of Treaty Interpretation’ in Menno Kammigna and Martin Sheinin (eds.) The Impact of Human Rights Law on General International Law (OUP 2009), 37-62.


\textsuperscript{54} Ibid.
In 1968, the ILO’s Committee of Experts (CoE) – a key component of the supervisory mechanisms, comprising 20 independent jurists – noted that forced labour was the first human rights issue dealt with in ILO standards, and subsequently referred to the 1930 Forced Labour Convention as a basic human rights instrument. The CoE issues detailed comments in response to ratifying States’ reports — submitted every two years — and employs General Surveys as a supervisory mechanism, providing interpretation of particular conventions and a detailed examination of their implementation by both ratifying and non-ratifying States.

In its 2007 General Survey on forced labour, the CoE affirmed that the so-called transitional period under the 1930 Forced Labour Convention which allowed for the continuation of forced labour ‘expired long ago’ and found that ‘[Articles 3 to 24] are therefore no longer applicable.’ Art. 7 of the 2014 Protocol to the 1930 Forced Labour Convention formally removes those provisions, and enjoyed widespread support at the time of its adoption.

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General Survey, the CoE referred to the prohibition of forced labour as ‘a peremptory norm of international law on human rights.’\textsuperscript{60}

In addition to paving the way for the removal of the facilitative provisions of the 1930 Forced Labour Convention, the CoE has provided dynamic interpretation of the three key elements of the definition of forced labour contained therein: namely voluntary offer, work or service, and menace of any penalty. Voluntary offer ‘refers to the freely given and informed consent of workers to enter into an employment relationship and to their freedom to leave their employment at any time’ while work or service ‘includes all types of work, service and employment, regardless of the industry or sector within which it is found, including the informal sector’ (barring the permissible exceptions).\textsuperscript{61} Particularly progressive – especially when contrasted with the interpretation of forced labour put forward by the HRCtee in \textit{Bernadette Faure v. Australia} – is that menace of any penalty ‘should be understood in a very broad sense: it covers penal sanctions, as well as various forms of coercion …[and]…might also take the form of a loss of rights or privileges’.\textsuperscript{62} It is also noteworthy that over the years, there appears to have been a convergence in the concepts of slavery and forced or compulsory labour within the ILO

\textsuperscript{60} ILO Committee of Experts \textit{General Survey: Giving Globalisation a Human Face} (2012) 103 [252].
\textsuperscript{61} Ibid 111 [271], 111 [269].
understanding.\textsuperscript{63} For example, Recommendation No. 190 lists forced labour as a practice similar to slavery.\textsuperscript{64}

Although Art.8 of the ICCPR confers the individual right to freedom from forced labour whilst the ILO 1930 Forced Labour Convention merely obliges States parties to ‘suppress’ the practice over time, the ILO has done much more than the HRCtee to clarify the scope of the right to freedom from forced labour. In practical terms, even if Burma/Myanmar were a State party to the ICCPR and to the Optional Protocol establishing an individual complaints mechanism, the HRCtee has limited naming and shaming measures at its disposal in cases of unsatisfactory implementation, which are largely ineffective when dealing with recalcitrant States.\textsuperscript{65} The ILO does have enforcement mechanisms at its disposal but has only used them once in ‘the most famous and fully litigated case in ILO legal history’,\textsuperscript{66} namely Burma/Myanmar.

Part III explores the role of local organisations in the Commission of Inquiry (CoI) in this case and the subsequent individual complaints procedure. As noted earlier, this is the

\footnotesize{\textsuperscript{63} Swepston (n 58) 13.
\textsuperscript{64} ILO General Conference, ‘Recommendation concerning the prohibition and immediate action for the elimination of the worst forms of child labour’ Recommendation 190 (17 June 1999).
\textsuperscript{65} Bantekas and Oette (n 45) 324.
only international human rights mechanism of its kind in operation in Burma/Myanmar, established after years of ILO negotiations. Part III then turns to the role of CHRO in engaging with the UPR mechanism over the timeframe of one complete cycle of the UPR, in order to increase leverage with the ILO in an effort to end forced labour in Chin State. Finally, Part III considers to what extent such efforts have been successful.

III. Leveraging International Legal and Human Rights Mechanisms to End Forced Labour in Burma/Myanmar: a Success Story?

According to Hopgood’s thesis, global organisations will not only attempt to structure and institutionalise the local, but that this becomes an inevitable process of colonisation.67 Hopgood argues that there is inherent tension between top-down authorities or ‘Human Rights’ as a global structure of laws and norms, and grassroots local human rights activism.68 This suggests a clear-cut dichotomy between the work of local human rights activists and global norms and institutions, which is not entirely evident in practice. In certain cases, local human rights activism can and does leverage global organisations and/or institutions for its own ends. This arguably reflects tremendous tenacity and commitment rather than a process of colonisation in the case

67 Hopgood (n 17) x, 172.
68 Ibid x.
of efforts to bring an end to the practice of forced labour in Burma/Myanmar.

i. The Role of Local Organisations: the ILO Commission of Inquiry

Most academic literature on the ILO’s CoI on forced labour in Burma/Myanmar tends to focus on the tripartite structure of the ILO – and in particular the role of the International Confederation of Free Trade Unions (ICFTU) in representing workers — as the most important factor in its establishment.69 This arguably sidelines the crucial role of grassroots organisations in producing the documentary evidence of forced labour and leveraging the ICFTU within the tripartite structure, obliging the ILO to act.

The Federation of Trade Unions Burma (FTUB) was established on the Thai-Burma/Myanmar border by leading trade unionists who had fled the country in 1988, following the brutal crackdown by the junta. They maintained a clandestine network of activists within Burma/Myanmar, who collected information about incidents of forced labour and smuggled it out of the country.70 The FTUB collected considerable evidence of portering exacted by the


70 Henry (n 20) 71.
Burma/Myanmar military, a practice which routinely involves civilians being compelled to carry weaponry, ammunition or other supplies for the military on foot in active conflict zones, often for days at a time, while being subjected to physical abuse. The FTUB first utilised their human rights documentation in 1991 by working in conjunction with the ICFTU, who submitted FTUB’s evidence of compulsory portering to the ILO Committee of Experts. This was followed by a formal representation by the ICFTU regarding Burma/Myanmar’s violations of the 1930 Forced Labour Convention under Art. 24 of the ILO Constitution in 1993, again based on evidence provided by the FTUB.

Finally, in 1996, the ICFTU filed a complaint regarding portering and forced labour on large-scale infrastructure projects based on information collected by the FTUB and other local human rights organisations, which resulted in the Governing Body establishing a Commission of Inquiry pursuant to Art. 26(3) of the Constitution.

Similarly, although the three independent experts on the CoI were subsequently denied entry to Burma/Myanmar, they reviewed some 6,000 pages of documentary information, much of which was provided by CHRO and other local organisations such as the Human Rights Foundation of Monland, the Shan Human Rights Foundation, and the Karen Human Rights Group. This included several hundred

71 Ibid 73 and Bollé (n 70) 396.
72 A representation can be made by either the employers’ group or the workers’ group under Art 24 of the ILO Constitution 1919, available at <www.ilo.org> accessed 3 June 2018.
73 Henry (n 20) 73.
Burma/Myanmar military orders issued to village leaders, requiring them to provide labourers. The experts on the CoI also travelled to border areas in India, Bangladesh and Thailand and took testimony from some 250 people who had been forced to flee as a result of their experiences of forced labour.\textsuperscript{74}

\textbf{ii. The Role of Local Organisations: Follow-up Mechanisms}

The CoI made three key recommendations, which continue to form the basis of ILO implementation monitoring today:

(1) that Myanmar National legislation be brought into line with Convention No. 29 without further delay…;

(2) that in actual practice no more forced or compulsory labour be imposed by the authorities, in particular the military;

(3) that the penalties which may be imposed for the exaction of forced labour be strictly enforced, with thorough investigation, prosecution and adequate punishment of those found guilty.\textsuperscript{75}

\textsuperscript{74} Report of the Commission of Inquiry (n 3) Appendices IV and V.

\textsuperscript{75} Key excerpts published in the International Labour Office Report to the Governing Body, ‘Follow-up to the resolution concerning remaining measures on the subject of Myanmar adopted by the Conference at its 102nd Session (2013) (5 November 2015) ILO Ref GB.325/INS/7(Rev.) 1 [4].
Although the regime could have appealed against these recommendations to the International Court of Justice (ICJ), it chose not to; but neither did it move forward with their implementation.\textsuperscript{76} This prompted the unprecedented threat of punitive measures (to be decided by individual ILO members) in a Resolution under Art. 33 of the ILO Constitution in 2000 — again proposed by the ICFTU, with the FTUB playing an instrumental role behind the scenes.\textsuperscript{77}

ILO progress in negotiating monitoring mechanisms for the implementation of the CoI recommendations via numerous High-Level Missions was stilted during this period and marred by setbacks. In 2002, a Memorandum of Understanding was signed, but the attempted assassination of Aung San Suu Kyi at Depayin the following year saw the adoption of some Art. 33 measures.\textsuperscript{78} In 2004, an informal complaints mechanism was established, but the regime prosecuted both complainants and their lawyers, alleging that these were ‘false complaints’ and insisting that the regime was within its sovereign right to prosecute. Two high profile cases around this time included the labour activist Su Su Nway and the lawyer Aye Myint.\textsuperscript{79} By 2006, the Workers Group secured support for a motion that the International Labour Conference should review possible action to be taken

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\textsuperscript{76} ILO Constitution (n 74) Art 29.

\textsuperscript{77} Henry (n 20) 72.

\textsuperscript{78} The US government adopted sanctions via the \textit{Burmese Freedom and Democracy Act} (28 July 2003), based, at least in part, on the ILO Resolution in favour of Art 33 measures. Maupain (n 70) 107.

by the ILO under its Constitution to ensure Burma/Myanmar’s compliance with the CoI recommendations, and prevent retaliatory action against complainants. It is noteworthy that by this time the FTUB was able to directly participate in ILO proceedings through accreditation from the ICFTU and its successor, the International Trade Union Confederation.

The ILO subsequently gave serious consideration to possible actions that could be taken under international law, including referral to the ICJ under Art. 37(1) of the ILO Constitution for either an advisory opinion, or a binding ruling regarding Burma/Myanmar’s conduct and its obligations under the 1930 Forced Labour Convention. The ILO’s guidance note also set out the various possibilities for international criminal prosecution of alleged perpetrators of forced labour — albeit rather remote, as Burma/Myanmar is not a State party to the Rome Statute of the International Criminal Court — given the findings of the 1998 Commission of Inquiry and subsequent reports of the ongoing pervasive use of forced labour by the military and other authorities in Burma/Myanmar, as documented by local human rights organisations and

80 International Labour Conference, ‘Additional agenda item: Review of further action that could be taken by the ILO in accordance with its Constitution in order to: (i) effectively secure Myanmar’s compliance with the recommendations of the Commission of Inquiry; and (ii) ensure that no action is taken against complainants or their representatives’, (Provisional Record Ninety-fifth Session Geneva 2006) ILO Doc ILC.95/PR/2, 21-24 and Appendix I.
81 Henry (n 20) 74.
included in reports by the UN Special Rapporteur.\textsuperscript{82} There were – and remain – considerable jurisdictional\textsuperscript{83} and political barriers to individual criminal prosecutions, particularly given that such legal action by the Prosecutor of the International Criminal Court is dependent on a referral by the UN Security Council. Overall, the possibility of ILO referral to the ICJ raised complex and untested legal questions, but ultimately provided the ILO with significant leverage.\textsuperscript{84} The regime was forced to make concessions, and finally, in 2007, the Supplementary Understanding (SU) was successfully negotiated, which provided for the formal establishment of an individual complaints mechanism.\textsuperscript{85}


\textsuperscript{83} Ibid 5-10 [14]-[32].


Under this mechanism, once a complaint has been investigated and upheld by the Liaison Officer, it is passed to the government’s Working Group for action. Victims are entitled either to compensation, an apology, or guarantee of non-recurrence, while the perpetrators may be punished. Although under the SU, ‘Complaints submitted under the present Understanding shall not be a ground for any form of judicial or retaliatory action against complainant(s)...’ in practice some reprisal prosecutions of complainants continue to date, particularly of human rights defenders. In spite of the risks, people have consistently utilised the complaints mechanism since 2007. This needs to be understood in the context of the absence of rule of law and the lack of an independent judiciary in the country; the ILO complaints mechanism – albeit flawed — is therefore the main avenue for redress for forced labour.

86 ILO forced labour complaints mechanism
87 Supplementary Understanding (n 86) 1 [9].
88 International Labour Office Report to the Governing Body, ‘Follow-up to the resolution concerning remaining measures on the subject of Myanmar adopted by the Conference at its 102nd Session (2013)’ (7 February 2018) ILO Doc GB.332/INS/8 4 [15].
iii. Engaging the UPR to Increase Leverage with the ILO: the Work of CHRO

As noted earlier, at the time of the first cycle of the Universal Periodic Review of Burma/Myanmar’s human rights record under the UN Human Rights Council in 2010/11, Burma/Myanmar was only a State party to CEDAW and CRC. At the time of writing, the ILO individual complaints procedure is the only human rights mechanism in the country. The 1930 Forced Labour Convention, the complaints mechanism, and forced labour were key issues raised during the interactive dialogue.90 The Convention, the 2002 Memorandum of Understanding (MoU), and 2007 Supplementary Understanding formed the legal basis for CHRO’s recommendations to Burma/Myanmar as part of the UPR. CHRO called on the regime to cooperate fully with the ILO to end the practice of forced labour; hold awareness-raising seminars in Chin State; and reproduce leaflets about the complaints mechanism in ethnic Chin languages.91

There were 35 documented incidents of forced labour in CHRO’s individual submission to the second cycle of the UPR in 2015, in comparison with 70 in the first submission, representing a fifty percent reduction in the number of documented incidents of forced labour in Chin State.92 It is

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91 CHRO (n 9) 5 [25].
92 CHRO, ‘Burma/Myanmar: Individual Submission to the UN Universal Periodic Review’ (March 2015) 5 [19].
difficult to assess to what extent the ILO complaints mechanism itself brought about this change, in part because the publicly available statistics about complaints are not disaggregated geographically. However, in line with CHRO’s UPR recommendations, an ILO focal point was appointed for Chin State to facilitate complaints – one of only four in the country – and leaflets distributed in some of the Chin languages.93

Perhaps more importantly, CHRO’s strategic partnership with PHR for research and advocacy purposes increased CHRO’s leverage both with the ILO and within the UPR process. PHR’s report, accompanied by photographs of forced labour provided by CHRO, received media coverage in at least 250 media outlets around the world. In Geneva CHRO representatives met with Kari Tapiola, Special Advisor to the ILO Director-General, as well as with dozens of diplomats from Permanent Missions to the UN in Geneva and lobbied for CHRO’s UPR recommendations on forced labour. Three recommendations on forced labour put forward by States during the Review were accepted by Burma/Myanmar.94 Although the recommendations are not

93 ILO ‘Report to the Governing Body’ (March 2012) ILO Doc GB.313/INS/6 7 [27].
legally binding, they do indicate political commitment on the part of the State under review. Implementation of the accepted recommendations also forms part of the monitoring process in subsequent rounds of the UPR. These recommendations therefore enhanced the ILO’s negotiating power on their High-Level Mission to the country the following month.95

A key commitment secured during that Mission was for a high-level joint Ministry of Labour-ILO awareness-raising seminar in Chin State; arguably a direct result of CHRO’s advocacy.96 The seminar – the first of its kind in Chin State – took place in May 2011, attended by 160 senior personnel including military officers and judges.97 This was particularly significant, because the seminar was held jointly with the Ministry of Labour and therefore any subsequent report of forced labour could be followed up directly under the original MoU, rather than relying on the individual complaints mechanism. CHRO took advantage of this avenue and some forced labour practices reported to the ILO in Burma/Myanmar were brought to an end soon after reporting. In one high-profile case involving the Chief Minister of the Chin State, CHRO fieldworkers affirmed that the violation stopped within two weeks of reporting it to the


95 Ibid 6 [33].
96 Ibid 4 [25].
ILO. As such, CHRO’s engagement with international legal and human rights mechanisms to end the practice of forced labour can be qualified as a *partial* success.

Both the Commission of Inquiry and the subsequent individual complaints mechanism would have arguably never been established without the documentary evidence of forced labour produced by CHRO and other local organisations. For CHRO in particular, the strategic partnership with PHR reinforced its leverage within the UPR process, which in turn worked in tandem with ILO mechanisms to bring about significant change in practice on the ground; a partial but nonetheless hard-won human rights success in a recalcitrant state like Burma/Myanmar.

iv. Assessing Progress against the Commission of Inquiry Key Recommendations

The same notion of partial success is evident to some degree in assessing progress against the implementation of the three key recommendations made by the CoI in 1998 over the time-frame of one cycle of the UPR. The first key recommendation called for legislative reform to bring Burma/Myanmar’s domestic law in line with its obligations under the 1930 Forced Labour Convention. Although Order 1/99 and its Supplementary Order in 2000 issued under the former military regime stipulated that illegal exaction of forced labour shall be punished as a penal offence, the colonial-era 1907 Towns and Villages Acts legally authorised the use of forced labour and remained on the statute books. The 2012
Ward and/or Village Tract Amendment Act does bring domestic legislation in line with the Convention, although significant challenges with accountability remain.98

The third key recommendation of the CoI clearly sets out that in order to meet its obligations under the 1930 Forced Labour Convention, Burma/Myanmar must pursue accountability for alleged perpetrators of forced labour. In practice there has arguably been very limited progress in this area, which is unsurprising given the constitutional constraints outlined above and the lack of rule of law in the country. As of November 2015, according to the ILO no person had been prosecuted under the forced labour provisions of the 2012 Ward and/or Village Tract Amendment Act.99 Since the 2007 Supplementary Understanding establishing the complaints mechanism, more than 275 prosecutions of military personnel had taken place by November 2015. However, these were conducted under the military’s court martial system, which lacks civilian oversight. The punishments ranged from formal reprimands, fines, demotion, and dishonourable discharge to imprisonment, 100 raising questions over whether this constitutes ‘adequate punishment of those found guilty’ as

98 ILO Report of the Governing Body, ‘Review of the situation in Myanmar on issues relating to ILO activities, including forced labour, freedom of association, and the impact of foreign investment on decent working conditions’ (5 March 2015) ILO Ref GB.323/INS/4, 4 [18(b)].
99 International Labour Office Governing Body ‘Follow-up to the resolution concerning remaining measures on the subject of Myanmar adopted by the Conference at its 102nd Session (2013)’ (5 November 2015) ILO Doc GB.325/INS/7(Rev.) 5 [27].
100 Ibid 5 [26].
required under the third key CoI recommendation, given the gravity of forced labour violations.101 Furthermore, the ILO noted reluctance on the part of the authorities to bring some cases of forced labour to final closure to the satisfaction of the complainants.102

With regard to the second and arguably most important recommendation, the ILO continued to receive reports and complaints of forced labour – including by the military – over the time-frame of the UPR cycle, although these have gradually reduced in number.103 In March 2015, the ILO observed that, ‘while considerable progress has been made, there remains a long way to go in respect of both the policy settings and the adaptation of behaviours required for their application.’104 A number of both positive and negative factors need to be taken into consideration in order to understand this piecemeal progress. In March 2012, President Thein Sein’s Burma/Myanmar government made a public commitment to eradicate forced labour by the end of 2015, and signed a new Memorandum of Understanding with the ILO to this effect, including a highly detailed plan of action.
for tackling different forms of forced labour. The Commission of Inquiry and subsequent follow-up mechanisms ensured that the ILO has a strong mandate in the country, and that the ILO has consistently pursued a strategy of sustained pressure and engagement whilst also providing essential technical assistance. However, political will on the part of the Burma/Myanmar government has ultimately proven to be limited in terms of pursuing prosecutions to end impunity for forced labour, and eradicating the practice altogether. The peace process initiated in 2012 is flawed, with renewed armed conflict breaking out in both ceasefire and non-ceasefire areas, and throughout 2015 the military continued to exact forced labour from the civilian population in active conflict zones.

At the time of writing, the complaints mechanism and the 2012 Memorandum of Understanding and detailed action plan have been extended until the end of 2018, but only after protracted and difficult negotiations with the government of


Burma/Myanmar.\textsuperscript{108} The ILO continues to receive complaints via the mechanism, but the authorities also persist in bringing reprisal cases against high-profile complainants in forced labour cases.\textsuperscript{109} Local human rights organisations continue to document cases of forced labour, especially in active conflict zones where demands for portering and other forms of forced labour by the Burma/Myanmar military are ongoing.\textsuperscript{110} Future strategies to eradicate forced labour and end impunity for this practice in Burma/Myanmar are mired in uncertainty, given that political will appears to be dwindling, the military is constitutionally beyond civilian control, and significant political hurdles remain to further recourse to international legal action.

\textsuperscript{108} International Labour Office Report to the Governing Body (7 February 2018) (n 89) 1 [1]-[2].
\textsuperscript{109} Ibid 4 [15]–[16].
IV. Conclusion

This Article has traced the origins of the interrelated legal concepts of slavery and forced labour, and critically analysed their interpretation under international human rights law. It has argued that in spite of the provisions of the colonial-era 1930 Forced Labour Convention that provided for the perpetuation of forced labour, over time the International Labour Organisation has adopted a progressive approach to interpreting and clarifying the concept of forced labour and developing the right to freedom from forced labour. This Article has sought to present a nuanced analysis of the significant challenges to ending this practice in the complex context of its pervasive use by the military and local authorities in Burma/Myanmar. In particular, it has foregrounded the paramount role of local human rights organisations in establishing both the 1998 ILO Commission of Inquiry, and its follow-up mechanisms. It has demonstrated that local engagement with international legal and human rights mechanisms can have a positive impact on the ground – albeit limited, in a recalcitrant state – in terms of changing practice. It has argued that rather than being colonised by global institutions, organisations, and mechanisms, local human rights organisations have successfully leveraged them. Although the challenges remain – particularly in terms of accountability, legal protection for complainants, and satisfactory resolution of complaints – local human rights organisations will undoubtedly continue to play a leading role in addressing these challenges over the long term.
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The Modern Shaping of “Minorities” in the Post-Ottoman Era: An Anachronism in Service of Sectarian Powers and Nation-States

Stephanie Khouri

As an innovative system of protection based on the identification of non-Muslim communities within the Ottoman Empire, the Millet system led to the institutionalisation of ‘minorities’ within post-Ottoman states of the Middle East. In a global historical context, labelling of the ‘minority’ referred to the process of identification of ‘the Other’ under a protective legal agenda. It echoes concern for ‘the ill-treatment of the Other’. This is precisely how Ottoman authorities introduced it in the late 19th in an attempt to foster a protective regime able to contain centrifuge forces threatening the empire by delegating power, control and prerogatives to local elites. This is also how, upon independence, national States readily advertised them, boasting sectarian equality or a protective legal formula for the minorities. Draped in the gratifying
costumes of political modernity and enlightened agenda, this discourse fails to acknowledge the ingrained ambiguities of a regime that kept religious and lay elites as the exclusive intermediaries between the governed population and the governing entity. Doing so, it belies the national interests at stakes in preserving religious or sectarian prerogatives up to this day and at the expenses of individual citizens.

I. Introduction

An enduring romanticised representation of the late Ottoman era depicts this era, together with its ‘millet’ system, as a peaceful model of religious coexistence. Restoration of Ottoman nostalgia as a beacon of tolerance especially re-awakened towards the end of the 20th century when the very idea of the nation-state came into crisis. These ‘nostalgic accounts’ and ‘fascinations’\(^1\) are at times premised on a failure by the state to impose national unity, as manifested by the recurrence of intra-national conflicts showcased in the wake of wars in Yugoslavia, Lebanon, and Iraq. Rehabilitated

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versions of the millet administration are seen as ‘beneficial’ solutions, or ‘useful examples’ to cure the weakness of the national ideal and the ‘disease of nationalism’. This powerful representation of the Ottoman ability to control and delegate control has been reflected in recent academia, the media, and the film industry, which has been copiously dwelling on the Empire’s glory days. In Turkey, television shows such as *The Magnificent Century*, and films like *Conquest 1453* – a retelling of the taking of Constantinople – are popular examples of this sentiment. They echo a political resurrection of the Ottoman Empire’s glorious past and reflect a tendency to reclaim Ottoman legacies within public spaces (museums, theme parks). Implicitly, they draw attention and, at times, outright publicize a progressive, enlightened and ground-breaking Turkish tolerance towards minorities. Another national case in point could be Lebanon, where a civil war and ensuing collapse of public infrastructures has profoundly discredited the state and triggered nostalgic accounts for an Ottoman period presumed to be characterized by peaceful coexistence, social order and prosperity.

Against the backdrop of states’ internal struggles and centrifuge forces, the very idea of minority communities

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received revived interest as a chief component of the state incapacity to protect and its inadequacy to conceptually and practically embrace various groups in this part of the world. The permanence of instability and violence contributed to a re-questioning of territorial modes of organization:

Decades of secessionist conflicts and (...) wars have laid bare the inadequacies of territorial autonomy as an ordering principle to keep states together and minorities content. (...) Interest in the millet system will only grow as academia and the policy worlds search for a way out of the current crisis of the nation state.4

At the same time, the conceptual rise of the ‘minority discourse’ came alongside a growing cultural reading of the region as an essentially fragmented space under an interventionist, protectionist agenda: minorities have taken a thriving share as a relevant category to conceptually capture reality in the Middle East (as opposed to other categories such as people, social or ethnic groups etc.). This tendency echoed a consistent pattern of international intervention in the name of minority protection.

The implicit imaginary yet belies the modernity of ‘minority’ as a political and legal concept introduced in the late 19th century and institutionalised throughout the 20th century.

Minorities – understood as legally recognized sectarian communities in post-Ottoman states – have been associated with the legacy of the millet. As a loosely institutionalized system, the millet has been deemed to be a ‘set of arrangements, largely local, with considerable variation over

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4 Barkey and Gavrilis (n 1) 25.
time and place.’\textsuperscript{5} As historical religious or ethno-religious communities, millets have been identified as the bedrock reality behind minorities, both as shaping identities and as protective legal regimes.\textsuperscript{6} Following the dismembering of the Ottoman Empire, European powers followed on from already forged local elites, and introduced or further institutionalized communal prerogatives within the modern legal system through different legal instruments such as the Lausanne Treaty, Mandate Treaties, the British Unilateral Declaration of Egyptian Independence, internal legislation, codified religious personal status laws in Lebanon and Syria, and the Lebanese Constitution, among others. Minorities were further institutionalised under the treaty-based regime that emerged in the interwar period under Western championing. Minority protection was then introduced in Eastern and Central European states as part of internationally supervised mechanisms which came together with the need to administer the fate of fallen Empires by leading processes of nation-building: ‘the great experiment of the minority treaty system, one of the important precursors of international human rights law, was animated by the idea of


Beyond the contemporary relevance of ‘minorities’ as a concept to capture enduring social realities, the modern legal shaping of minorities within post-Ottoman nation-states thus deeply interrogates the relationship between central states, religious or sectarian leaderships, and the individual they claim to represent or protect. The historical review, and contemporary fallouts, of a century-old collusion between States and local elites implies to review the Ottoman legacy and its constitution of social, political and legal institutions under an innovative model to administer differences within the Empire (considered in Part 1). Although informal in nature, these arrangements laid down the social, legal and political ground to be further institutionalized within post-independence nation-States, securing sectarian or minority prerogatives and powers all the while perpetuating fundamental ambiguities (considered in Part 2).

II. The ‘Millet Policy’

A New Model to Manage Differences

The millet idea of Ottoman gradual recognition of national and religious differences is symptomatic of a paradigmatic shift from religious Sunni supremacy toward the recognition of national, ethnic or non-Muslim spaces for self-governance. This is reflected in the idea that,

The gradual dissolution of the Ottoman Empire (…) could be described from another, entirely different

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standpoint: that of the progressive collapse of a cultural value system based on the predominance of the religious element, and its replacement by the principle of the nation-state.\(^8\)

As a way to sustain the Empire’s unity by delegating power, the millet system was a local response to the emerging idea of national autonomy: ‘national cultural autonomy model (...) was proposed in order to manage ethno-religious conflicts’.\(^9\)

As such, recognition of religious and national plurality, rather than assimilationist aspiration, was the rule within the Ottoman Empire, up to the emergence of pan-Islamism and pan-Turkism in the late 19th and early 20th century.

This system has been remembered as a famous formula for non-territorial autonomy and indirect rule as it was used by the Ottomans to manage pluralism within its conquered territory by creating communities and delegating power to intermediaries and leaders.

Contemporaries’ responses help explain the function of the millet system as an innovation towards managing differences within empires and a shared understanding that the millet system was a compromised formula to handle diversity and curb centrifuge forces and nationalist separatist leanings. European critics saw in it a form of ‘mongrel liberality and rampant fanaticism’\(^10\) unable to address the challenge of emerging nationalism threatening the empire. At the same time, some elements of the millet system were reproduced within the Austro-Hungarian and Russian empires as a means to manage religious diversity by granting non-

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8 Stamatopoulos (n 6) 253.
9 Barkey and Gavrilis (n 1) 29.
territorial autonomy.\textsuperscript{11}

As such, the millet system was surely meant to strike a compromise and prevent the emergence of opposition against the central Ottoman authority by investing local representatives as intermediaries with responsibility to create peace and order. It was also conceived to prevent the formation of alternative allegiances by grouping communities spread across vast and distant territories under one same millet. This resulted in the ‘overall effect of preventing the consolidation of large-scale territorial movements against the state.’\textsuperscript{12} Nationalist or other local movements were further prevented from emerging through practices of population transfer: the strategic implantation of Sunni populations amidst Christian areas in order to change demographic balances and restore Ottoman domination against possible local alliances. This practice foreshadowed latter Ottoman violence, such as the infamous Armenian massacres\textsuperscript{13}.

The ‘millet compromise’ represented mutually beneficial arrangements between the state and communities’ representatives: securing popular support towards the Porte by granting recognition and autonomy in religious, education and legal matters, outsourcing local conflicts to local leaders under the understanding that ‘The state gave up its control of the internal dynamics of the community in return for regular taxation and cohesive and obedient administration.’\textsuperscript{14}

\textsuperscript{11} Barkey and Gavrilis (n 1) 29.
\textsuperscript{12} Barkey and Gavrilis (n 1) 26.
\textsuperscript{13} Stamatopoulos (n 6) 267-268.
\textsuperscript{14} Barkey and Gavrilis (n 1) 24-26.
The Emergence of Lasting Social, Legal and Cultural Institutions

The shaping of institutions resulted from the Ottoman central authority’s allocation of local autonomy and power transfer: the distinctive community only appeared as it was created, distinguished and recognized by the central power, and whenever that local power came in a position to challenge central authority, the latter intervened to alter local dynamics, demographics and balances.

As such, three basic non-Muslim religious communities were to be gradually recognized during the ‘classical age’ of the Ottoman Empire between 1453 and 1566: that of the Greek Orthodox (‘Rum’, under the authority of the Orthodox Patriarchate of Constantinople in the Balkan and Asia Minor populations), the Armenian (Gregorian and other Christian groups such as the Copts of Egypt), and the Jewish (Romaniotes, Sephardic and Ashkenazis) which were, in the 19th century, the last to be recognized.

The guarantee of a ‘sense of localism’ was made possible through self-governing religious and political institutions that administered on restrained portions of the territories, respectful of particularisms and cultures, thus concurrently creating ‘religious universalism and local parochialism’.

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15 Stamatopoulos (n 6) 253.
16 Stamatopoulos (n 6) 253.
This translated into legal pluralism and the progressive development of a rights-based system through ad hoc agreements negotiated between the Porte and local leaders that allowed for the emergence of a local leadership. The millets were granted protection as well as organizational, administrative and cultural autonomy in exchange of the payment of a tax. This was therefore able to secure the Ottoman Empire’s stability, by granting leaders the ability to conduct religious practice along local particularism (specific rites, languages etc.).

Legal pluralism was produced by a dual legal system, where Sunni ‘qadi’ courts as a means of appeal coexisted alongside religious communities’ courts that were meant for ‘personal and community affairs and disputes’ ruled by specific personal status laws. This gave communities autonomy in managing grievances while ensuring that ‘the state was maintaining order and security’. Together with social and cultural autonomy, it enabled communities to preserve local diversity, maintain choice, and develop internal cohesion despite, or alongside, Ottoman rule, whose tutelage was fairly favourably seen by local urban elites, especially in comparison with latter European control.

The collective achievements that were obtained, and the institutions that resulted from them, were later taken on as legitimate ground for continued, institutionalised, recognition and state protection. Post-Ottoman political structuration within the Mandates and nation states followed

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18 Barkey and Gavrilis (n 1) 27.
19 Barkey and Gavrilis (n 1) 27.
20 Barkey and Gavrilis (n 1) 27.
on from such arrangements by further institutionalising them through domestic and international laws.

III. Minorities Within Nation-States

*From Millets to Minorities: The Continuity of Institutions*

The relationship between the state and minorities can be seen as reproducing the millet ‘dynamic of difference’ where the minority group is understood as the ‘primitive’ other. Minorities ought to be ruled over in order to secure the modern and universal state, which is meant to transcend traditions of the particular and the interests of minorities to become both the recipient of allegiance and the source of authority.\(^{22}\)

The Millet system in itself is a reflection of a broader Ottoman policy meant to spur political modernity – in that sense it foreshadows the replacement of a system based on religious dominance onto the idea of the nation-state. Its persistence within national institutions indicates that its laws and spirit were translated, included and institutionalized at the inception of nation-states. The memory of the empire in the forms of the millet system echoes persisting and strongly anchored modes of functioning. Especially in the field of personal status laws, legal pluralism and judicial autonomy was reproduced within nation-states. This reproduction of delegation of powers from the central states to communities finds explanation in the fact that ‘for centuries, groups and individuals had been accustomed to responding to state demands and exigencies within the protective shield of the

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\(^{22}\) Anghie (n 7) 205-6.
community’ as well as the reluctance of religious and laymen leadership to relinquish the privileges and powers obtained under Ottoman rule.

Millets-like communities were to be recognized, such as in Israel (14 communities), or in Lebanon (18) and enabled the continuity of local elites, which maintained their roles as intermediaries after the dismembering of the empire. In Israel, the state granted to the communities’ jurisdiction over personal status affairs. This has been interpreted as a tool for nation building, as evidence of the attempt to maintain formal separation between Jews and non-Jews and amongst non-Jewish communities between themselves, and to strengthen Jewish unity and identity as an indivisible whole. When independent legal status did not pre-existed, it was purposely created, such as the Druze. In Lebanon, a very similar legacy has given birth to a ‘sectarian’ system whereby religious and sectarian institutions and leaders are given constitutional jurisdiction and prerogatives over a series of field (education, political quotas, personal status). The system takes on after already existing Ottoman structures (courts, laws, schools, recognized local leaders), yet formally institutionalise them within modern legal system promulgated by the French (Article 9 and 10 of the 1926 Lebanese Constitution, successive decrees recognizing

23 Barkey and Gavrilis (n 1) 31.
communities) and upon independence (National Pact of 1943).

Both Israeli and Lebanese version of the millet system has proved unequal, exclusionary and has similarly left individual rights dependant to religious rule and deprived from civil laws pertaining to personal status. The system has thus blocked any secular advancement meant to promote individual and equal rights. Lebanese sectarianism, since its inception but especially also following the civil war, was widely criticized and identified as the root cause for instability and lack of national cohesion perpetuating corrupt practices, patronage, and preventing a secular state from emerging as a means to apply the principle of citizenship and grant equal civic rights.

In other national context, where religious domination of Sunni rule was to be taken as a national principle, such as in Egypt, it led to the recognition of national minorities. The state extended the Ottoman-initiated legal autonomy in personal status affairs to Coptic religious authorities and the Coptic clergy was maintained as an unchallenged intermediary between individual citizens and the State. This situation ‘gave little to no room for Copts to fight for more equal civil rights’ and further asserted religious domination over individuals.

All three national models highlight the continued complicity between local community leaders - which benefit from autonomy, funding, local power over their communities - and central states, at the expenses of individual national subjects. In 2007, the Coptic leadership’s allegiance to the regime, its backing to the inclusion of the Sharia within the Constitution, represented a suggestive example of the

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26 Barkey and Gavrilis (n 1) 32.
mechanism through which community-based arrangements allow for sectarian and state leaderships to mutually reinforce each other: in exchange of renewed assurance of the recognition of Christian communal legal system, clergy authorities were to support the state.

**Enduring ‘Millet Mindset’: The Turkish Minority Case**

In modern Turkey, a vast endeavour towards secularization had the millet and religious personal status laws officially abolished - and never seriously reconsidered after that. Unlike previous national exemples, the Turkish secular project interrupted the continuity of community laws and institutions, with the abolition of the Sharia, the end of separate religious personal status laws, and the adoption in 1926 of the Turkish civil code based on the Swiss one.

Yet as mentioned above, Turkish nostalgic representation of the empire carry, if anything, an illustration of the political culture, spirit and memory of the millet which outlived the end of the empire through the specificity of the relationship between the state and its ‘minorities’. Within Article 37 to 44 of the Lausanne Treaty (1923), non-Muslim millets are framed as ‘non-Moslem minorities’ to be granted an extensive set of political and cultural rights. This pivotal moment establishes the basis of the new state around a Turkish majority (represented by the State) versus non-Muslim minorities (represented by intermediaries). The three communities previously constituting the millet (Armenian, Jewish, Greek) continued to be represented by intermediaries and organized along the same internal organizational lines, while other officially unnamed and thus unrecognized minorities were disenfranchised in the process.

Historic accounts indicate that negotiations were marked by hostility from the Turks towards non-Muslims,
foreshadowing long-standing suspicion and wariness towards Christians and Jews. As such, shifting from millet to minority was indicative of a ‘status of being a Christian or a Jew in a Turkish Republic, never a true Turk’\(^{27}\). Physical or verbal threats targeting these communities later confirmed the unequal and secondary position these communities maintained despite the theoretical equalization of legal texts under the ‘citizenship regime’.

The persistence of a ‘millet mind-set’, the community-state relationship, as well as the communities’ own self-representations inherited from the millet, are to this day reflected within the political culture. They remain relevant factors to address contemporary politics and, as shown by the language of ‘tolerance’ used by the Justice and Development party (AK Parti), advancing minorities’ rights (reopening of theological school, return of properties etc.) constitutes one aspect of the endeavour to rehabilitate Ottoman memory.

**Built-in Ambiguities**

Re-built representations around the millet seek to dissimulate the Ottoman origin of the state’ ambiguous and mistrustful relationship towards minorities. Over the 1920s and 30s, hostile discourses on minorities crystalized just as millet communities were made durable within newly formed states. This moment contributed to the long-term labelling of these groups as threats to the nation and its unity\(^{28}\).

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\(^{27}\) Barkey and Gavrilis (n 1) 34.

Whether they have a protective design or carry hostility, discourses on minorities within nation-States fail to acknowledge how the very construction and inclusion of minorities within modern states carry some fundamental contradiction between the simultaneous promotion of the individual (citizen principle) and collective (minority community). These contradictions go back to the late 19th century inception of Ottoman modernist reforms, later reproduced within the state minority system, political will to respond to political and military challenges (rising nationalism...) translated to the introduction of secular, assimilationist, citizen-based and European-inspired reforms. The ‘tanzimat’30, proclaiming equality between all citizens (equal rights to life and property, head tax, military service for all), set about to shape political modernity. They indeed attempted to decrease the rights and privileges of the millets, yet heralded a new era where self-governed communities’ (education, personal status laws, courts’ system) outlived Ottomanism’s attempts at erasing local particularism and promoting equal citizenship. Such a contradiction was created by the coexistence between the millet - a separate, unequal group protection system which maintained legal pluralism – and a new policy of secular unification through modern individual citizenship.

Minority protection systems in post-Ottoman States recreated the ambiguity between equality in individual citizenship and separate system of group recognition and protection, whose

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29 Stamatopoulos (n 6) 257.
30 The European influenced reforms known as the ‘tanzimat’ started with the imperial decree of Hatt-I Serif (1839) and further expanded with the Imperial Rescript Hatt-I Humayun (1856) and the Ottoman Nationality Law (1869); R H Davison, *Reform in the Ottoman Empire, 1856–1876* (Princeton NJ Princeton University Press 1963); Stamatopoulos (n 11) 258-260.
collective modes of organization could not sustain the equality component comprised within the idea of citizenship. Today, representations of the millet and late-Ottoman era fail to account for the contemporary consequences for individuals who inherit from century-old arrangements, enduring legal pluralism, continued marginalization and inequalities.

IV. Conclusion

Minorities’ realities in post-Ottoman Middle Eastern states remain infused with the Ottoman model for managing religious, ethnic or national differences. The ‘millet policy’ shaped a legal system backed by social and political structures that were in essential contradictions with Western principles of citizenship, equality, and secularization. Even when a secular policy formally heralded the end of the millet, as in modern Turkey, the endurance of the ‘millet mind-set’ exemplified the solidity of its social and political anchoring.

Just as political modernity was introduced in the late Ottoman era, a fundamental contradiction was created in its territories that would endure throughout the 20th century and the unfolding of post-Ottoman states. The formal institutionalisation of minorities as legal entities embedded within the modern legal system took place at the onset of the mandate and independence era. It preserved traditional sectarian prerogatives through delegated control over personal status affairs, patrimonial and hereditary laws, education, and political representation. Communities and their leaders would continue to grant legitimacy and allegiance to the central authority – be it the Ottoman, mandatory, or post-independent states – while guaranteeing their own financial, material and political survival.
All three powers were endowed with a development mission to overcome minority particularism and spur modernization, centralization and equalization through unified education, language, laws, and economic integration. Their failure to unite under one nation, ethno-religious conflicts and minorities’ struggles, was to demonstrate how the state instead became the arena in which these groups conducted their battles\(^31\) - whereby seizure of prerogatives was a tool for domination. This system, based on mutual benefits, rival interests and balance of power, characterizes both minority and sectarian systems, and millet arrangements.

This collusion between community leaders and the state is often presented under the more appealing costume of ‘minority protection’, or ‘sectarian equality’. Such wording tends to obscure conceptual ambiguities and fundamentally unequal practices: the exclusion of the individual as a direct subject, its dismissal as a citizen, the authoritarian nature of non-elected representatives, exclusive religious control over community affairs, the arbitrary identification of ‘recognized’ minorities, or crushing inequalities between sects and between genders\(^32\). The demonstration of this filiation between (informal) millet arrangements and (institutionalized) minority or sectarian systems brings to the forefront the continued prevalence of ‘arcane religious institutions’\(^33\) over individuals of these states. In countries

\(^{31}\) Anghie (n7) 205-206.
\(^{33}\) Barkey and Gavrilis (n1) 31.
like Egypt\textsuperscript{34}, Lebanon\textsuperscript{35}, Turkey\textsuperscript{36}, Palestine or Israel\textsuperscript{37}, similar developments have arisen around an ‘equality discourse’, the emergence of civil society actors calling for an end to religious prerogatives, or calls for reforms maintaining a ‘legislative search towards equality’ notably around personal status laws\textsuperscript{38}. They are signs that a new shared understanding emerged that what might once have been designed to be progressive in nature is now running against the very population it is claiming to be protecting.

\textsuperscript{34} M Shams el Din, ‘The Right to Marriage and Divorce for Egypt’s Minorities: Tinkering with the Issue’ Madamosr (Cairo 16 February 2017).

\textsuperscript{35} J A Clark and B F Salloukh, ‘Elite Strategies, Civil Society, And Sectarian Identities in Post-war Lebanon’ (2013) 45(4) International Journal of Middle East Studies; G Assaf, ‘Reform from the bottom: How judiciary, civil society can loosen the sectarian grip from Lebanese citizens’ The Daily Star (Beirut 1 October 2009).


\textsuperscript{38} C Mallat, Introduction to Middle Eastern Law (Oxford University Press 2007) 366.
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Charanne v Spain and Eiser v Spain: Comparative Case Analysis on Legitimate Expectations and Fair and Equitable Standard

Kudrat Dev

The present Article analyses the two landmark decisions of Charanne v Spain and Eiser v Spain to analyse which arbitral tribunal had legitimate expectations under the Fair and Equitable Treatment Standard (FET) when dealing with sovereign changes in regulation and legislation. The present Article challenges the existing dominant view that both the tribunals gave a same holding but just under different fact patterns. On the contrary it concludes that the content of the FET standard, particularly interpretation of what constitutes legitimate expectation for breach of the FET is contradictory and incoherent as a result of the decisions of both the tribunals. Analysis of both the decisions is relevant for three primary reasons: investors have moved for enforcement of the awards last June and November outside the European Union as the European Commission disagrees with the Eiser Award, Spain considers challenging the award and many countries consider withdrawing from the Energy Charter Treaty.
Introduction

Spain adopted Renewable Energy Support Scheme (RESs) to incentivise investment in capital-expensive renewable energy sector in exchange of subsidies to investors.\(^1\) Spain’s experience regarding the RESs illustrates what is termed as ‘Obsolescing bargain cycle and the Price cycle’\(^2\). The former is when the Host State which had incentivised heavy investments by foreign investors decides to modify an obsolete bargain by removing or reducing the subsidies after the production, consumption and development targets for the sector are achieved.\(^3\) The latter is when the Hosts State

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3 Restrepo (n1) 104; Also see: Iuliana-Gabriela Iacob and Ramona-Elisabeta Cirlig, ‘The Energy Charter Treaty and Settlement of
decides to restructure an investments scheme because a sharp decrease in the production costs leads to disproportionate profits for the investors. The Spain’s decision based on such economic cycles may be a justified approach in economics but has to pass the Fair and Equitable Treatment standard (FET standard) under international investment law when dealing with foreign investors.

Thus, such foreign investors filed a number of claims as investor-State arbitration cases to resolve disputes arising under the Energy Charter Treaty, 1994 (ECT). As such, Charanne and Eiser awards have been subject matter of debates. The former was the first decision regarding alterations to economic support programmes in the renewable energy market holding Spain not liable for breach of FET standard, finding ‘no specific commitment’ by Spain directed towards the investor for creation of legitimate expectations that the regulatory environment will not change. The latter was the first decision holding Spain liable


4 Ibid.
7 Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain, ICSID Case No. ARB/13/36/2017.
9 Deyan Dragiev, ‘Legitimate Expectations in Renewable Energy Treaty Arbitrations: The Lessons So Far’ (Kluwer Arbitration
for breach of FET-standard\textsuperscript{10} finding ‘total and unreasonable’ change in the regulatory regime not taking into account ‘circumstances of existing investments made in reliance on the prior regime’.\textsuperscript{11}

Majority of the academic analysis on the awards with opposing outcomes justifies or at least mentions that different facts, counsels, and arguments before different tribunals will lead to different outcomes\textsuperscript{12} and there is no precedent in investor-state arbitrations under the International Centre for

\textsuperscript{10} Ibid; also see Restrepo (n 1)105.

\textsuperscript{11} Charanne B.V. and Construction (n 6) 363-365.

\textsuperscript{12} Restrepo (n 1)106; also See: Raul Pereira de Souza Fleury, ‘Eiser Infrastructure v. Spain: Could the tide be turning in favor of photovoltaic foreign investors in Spain?’ (Kluwer Arbitration Blog, 20 June 2017)

\textsuperscript{13} Daniel Behn, ‘Spain Wins First PV Solar Arbitration: A Word of Caution in Using this Case to Predict Outcome in the more than Three Dozen Cases to Come’ (UIO 27 January 2016)

Settlement of Investment Disputes (ICSID) Convention. This Article goes beyond such simplistic albeit true justifications and undertakes a comparative analysis of both the tribunals’ reasoning for their respective holdings and impact of the same on the stakeholders.

Part I of the Article attempts a layered comparative analysis of the outcomes by examining similarities and differences in: (i) how both tribunals define the FET standard in international law, particularly legitimate expectation, and (ii) which tool of interpretation is used for defining the FET standard and applied to the facts and (iii) how the meaning of the FET standard is incoherent and contradictory as an outcome of both the awards. Part I concludes that both the awards are not the same holding under different fact patterns as there are points of similarities and differences in construing the FET standard and application to the facts.

Part II examines potential justifications (other than the interpretation of law by the tribunals) for opposite outcomes in both the awards: (i) Similarity in the Charanne Tribunal’s approach and the Eiser Tribunal’s approach on legitimate expectation to the ‘proportionality doctrine’ and the ‘sole-effects doctrine’ of expropriation, respectively and (ii) timing and proximity in the Claimant’s position of reliance on the Host State’s representation.

Part III concludes that: (i) the content of the FET-standard is even more contradictory and incoherent after the Charanne

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award and Eiser award, (ii) there is a need to rethink questions on the future behaviour of States, investors, tribunals and the ICSID system being fit for purpose.

I. Comparative Analysis on Law and its Application

FET standard’s content is contentious and depends on the language used in investment treaties.\textsuperscript{14} It has been receiving meaning from Investment Tribunals only from the 2000’s.\textsuperscript{15} There are no two academicians who state the same list of elements for the content of the FET standard.\textsuperscript{16} Some criticise the FET standard for vagueness and others acknowledge that it is a broad principle but its specific elements can be identified through judicial practice.\textsuperscript{17} Some argue it is a standard from customary international law (the content of which is ambiguous)\textsuperscript{18} and some argue it is an autonomous standard of the rule of law in Host States.\textsuperscript{19} Arbitral tribunals/commentators generally agree that transparency, stability, non-discrimination, due process and investors’

\textsuperscript{15} Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (OUP 2008) 159.
\textsuperscript{17} Dolzer and Schreuer (n 15) 161.
\textsuperscript{18} Bonnitcha et al (n 16) 113.
\textsuperscript{19} Dolzer and Schreuer (n 15) 161; Also see: US Model BIT, 2012 and UNCTAD Series on Issues in International Investment Agreements II: Fair and Equitable Treatment, 2012.
legitimate expectations are all key ingredients in defining the FET standard.\textsuperscript{20}

The general nature of the concept of legitimate expectations makes it difficult to draw mechanical conclusions from it\textsuperscript{21} as some interpret it to further the rule of law for investor’s protection\textsuperscript{22} and others as disempowering the State measures in public interest.\textsuperscript{23} The two approaches to origination of legitimate expectation are that it originates: (i) only in specific commitments or (ii) in specific commitments and Host-State’s legislative background.\textsuperscript{24} There exists ‘significant opposition’ to the second approach in the case-law, whereas, the first approach’s application has been inconsistent in the investor-State arbitration jurisprudence.\textsuperscript{25} Furthermore, representations must create legitimate expectations on an objective and subjective basis and not in a vacuum.\textsuperscript{26} Whilst

\begin{itemize}
\item \textsuperscript{20} Felipe M. Téllez, ‘Conditions and Criteria for the Protection of Legitimate Expectations under International Investment Law’ (2012) 27(2) ICSID Review 432 <https://academic.oup.com/icsidreview/article/27/2/432/639346> date accessed; Also see: Simões (n 8) 176, Dolzer and Schreuer (n 15) at 168.
\item \textsuperscript{21} Supra note 15 at 148; Also see: Christopher Campbell, ‘House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law’ (2013) 30(4) Journal of International Arbitration in Kluwer Law International 361-379.
\item \textsuperscript{22} José E. Alvarez, The Public International Law Regime Governing International Investment (Brill-Nijhoff 2011) 248.
\item \textsuperscript{23} Stephan W. Schill, The Multilateralization of International Investment Law (CUP 2009) 333-38.
\item \textsuperscript{24} Restrepo (n 1) 116-117.
\item \textsuperscript{25} Ibid and Dolzer and Schreuer (n 15) 148.
\item \textsuperscript{26} Téllez (n 20) 433-34 and Suez and Ors v Argentina, ICSID Case No. ARB/03/17, 127.
\end{itemize}
the principle of legitimate expectations is inherent in the FET-standard and is in its essence, objective, its application will depend upon the expectations nurtured and fostered by the local laws as they stand specifically at the time of the investment.  

In this backdrop, FET-standard’s content is comparatively analysed with a focus on legitimate expectation as interpreted by the Charanne Tribunal and the Eiser Tribunal, consecutively applied to facts and the actual effect on the FET standard.

**Interpretation using VCLT**

The Eiser Tribunal heavily relied on Article 31 of the Vienna Convention on Law of Treaties (VCLT) to interpret the FET standard by noting that: (i) Article 10(1), ECT must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the ECT in its context and in the light of its object and purpose and (iii) hence, as per Article 2, ECT, its purpose is to provide legal framework for long term co-operation and mutual benefit and its precursor, the 1991 European Energy Charter points to legal stability and transparency as its aims. However, the Charanne Tribunal did not mention the VCLT in relation to FET standard although it did mention it on other issues.

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28 Luxembourg v Spain (n 7) 375-383; Also see Article 31(2) of the Vienna Convention on Law of Treaties, 1969 (came in force on 1980).
29 Ibid 378-89.
30 Investments S.a.r.l. v Spain (n 6).
**Stability requirement**

Both the Tribunals identify the ECT as the governing treaty, particularly Article 10(1) ‘each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area’.31

There is similarity in recognizing the obligation of stability under the ECT32 yet there is a difference. The Eiser Tribunal examined the issue of stability in depth by analysing ECT’s object and purpose to conclude that Article 10(1)’s obligation to accord fair and equitable treatment ‘necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long term investments’.33 On the other hand, the Charanne Tribunal limited itself from an in-depth investigation noting that only norms up to 2010 were being challenged by the Claimant34 and to analyse instability in the regulatory framework would require examination of all regulations passed till date.35 However, the Charanne Tribunal could have analysed the stability in the regulations up to 2010 and caveated its finding with such limitation.

31 Investments S.a.r.l. v Spain (n 6) 476 and Luxembourg v Spain (n 7) 374.
32 Investments S.a.r.l. v Spain (n 6) 484 and Luxembourg v Spain (n 7) 382, 383.
33 Luxembourg v Spain (n 7) 382, 383.
34 Investments S.a.r.l. v Spain (n 6) 374, 380.
35 Investments S.a.r.l. v Spain (n 6) 484.
State’s Right to Change the Regime and Specific Commitment

Both the Tribunals acknowledge the State’s reasonable right to change the legal/business/economic framework noting the same has to be predictable, fair/non-arbitrary/non-retroactive, proportional, and in public interest (tariff-deficit in Spain’s case). There is some similarity in noting the creation of legitimate expectations in specific commitments made personally by the State to the investor or an explicit undertaking/specific assurance or a stabilisation clause, at the time of investment.

Some interpret that both the Tribunals rejected the presence of specific commitments and as a consequence the legitimate expectations resulting from such commitments.

The Charanne Tribunal noted that there was no specific commitment to Investors as: (i) the 2008 regulations do not constitute specific commitment by the mere fact that it is for limited investors, moreover, such interpretation will be an excessive limitation on the State’s power to regulate the economy in public interest; (ii) the presentation documents inviting investments did not include any specific language to

36 Investments S.a.r.l. v Spain (n 6) 500-2 and Supra note 7 at 362, 387.
37 Ibid.
38 Investments S.a.r.l. v Spain (n 6) at 488.
39 Luxembourg v Spain (n 7) 362, 366.
40 Restrepo (n 1) 123; Investments S.a.r.l. v Spain (n 6) 490-493, 499; Luxembourg v Spain (n 7) 363.
41 Investments S.a.r.l. v Spain (n 6) 490-93.
reasonably infer that the regulated tariff would remain untouched for the duration of the plants’ lives.42

On a closer look, it is apparent that the Eiser Tribunal dilutes the requirement of specific commitment in two ways. Firstly, it does not give a clear finding on facts whether Spain made a specific commitment to Eiser or not and only mentions it in its analysis as a statement of law citing case-laws43. Interestingly, while summarising the facts of the case it did note the disagreement on the commitments as binding or being only factual information statements.44 Secondly, it shifts focus by questioning the extent to which the FET standard gives rise to the right to compensation when the State exercises its acknowledged right to regulate45 Thus, its approach is similar to the Charanne Tribunal’s dissent, which notes that the State has the right to regulate and change regulations even if there exists a stabilisation clause, although the investor has to be compensated.46 The Eiser Tribunal couched a strong statement in a subtle manner. The critique remains that such an understanding makes a stabilisation clause redundant.47 Hence, no clarity of finding by the Eiser Tribunal on the issue of Spain making a specific commitment has resulted in an annulment application by Spain before ICSID. One of the grounds urged by Spain is that the Tribunal has failed to state reasons coupled with manifest excess of power as the Tribunal had: (i) held that there was no specific commitment by Spain and (ii) acknowledged its right to amend legislations.48

42 Ibid at para 497.
43 Luxembourg v Spain (n 7) 362.
44 Luxembourg v Spain (n 7) 125, 126, 134, 347, 360.
45 Ibid.
46 Investments S.a.r.l. v Spain (n 6) 10-11 (Dissent).
47 Restrepo (n 1)124, 125.
48 Power and Baker (n 13).
Essential Features Retained

Some argue that both the awards are ‘complimentary and not contradictory’ as they note that the FET standard includes protection for investors from fundamental change of the regime they relied upon at the time of making the investment. The Charanne Tribunal held that the ECT/FET-standard was not breached as the essential feature of Feed-in-Tariff for 26 years was retained and the Eiser Tribunal held that the new regulations (particularly 2013 and 2014) ripped off the investors of the subsidy and investment amounting to ‘total’ change in the regime.

Non-retroactivity and Non-arbitrary

Both the Tribunals noted non-retroactivity and non-arbitrary nature of regulatory change as an element of the FET standard. The Charanne Tribunal noted that: (i) the Claimant’s argument on retroactivity attempts to thwart the acknowledged right of the State to modify the legal and regulatory framework benefitting the Claimant, (ii) the registration was an administrative requirement to sell electricity and not an acquired right to remuneration, and (iii) no principle of international law prohibits a State to take regulatory measures with immediate effect. The Eiser Tribunal noted that Spain retroactively applied new regulations with hypothetically developed standards, as ‘one size fits all’ to existing facilities that were previously financed.

49 Restrepo (n 1)124-5.
50 Investments S.a.r.l. v Spain (n 6) 518-20.
51 Luxembourg v Spain (n 7) 363, 370, 393.
52 Investments S.a.r.l. v Spain (n 6) paras 546-48; Supra note 7, 414.
53 Ibid.
and constructed on the very different 2007 regulatory regime. 54 2014 design choices on plants were imposed to hold the ones adopted in reliance of the 2007 regulations as ‘inefficient and undeserving of subsidy’. 55

**Due Diligence**

Both the Tribunals noted absence of due diligence and investor’s reasonably foreseeability as defences to legitimate expectations. 56 The Charanne Tribunal found that: (i) the adjustments to the regulatory framework in 2010 were easily foreseeable; (ii) the possibility of modification to the compensation scheme was left open by Spanish law; and (iii) such possibility was reinforced by the Spanish Supreme Court decisions in 2005-06 which are not binding but are relevant factual elements at the time of investment for a reasonable expectation. 57 The Eiser Tribunal took a different approach to due diligence which diluted the defence of not undertaking due diligence. It stated that the Claimants took the risk after due diligence with the legitimate and reasonable expectation that they would be entitled to fair compensation. 58 It further stated that the fact that the Spanish Supreme Court (after the investment) upheld the constitutionality of the regulations repealing the 2007 regulations is different from whether ECT obligation has been met. 59 Deference to the national authorities and courts

54 Luxembourg v Spain (n 7) 400-08.
55 Luxembourg v Spain (n 7) 400-414.
56 Investments S.a.r.l. v Spain (n 6) 505 and Supra note 7 at 371.
57 Investments S.a.r.l. v Spain (n 6) 505-08.
58 Luxembourg v Spain (n 7) 371; 364; ADC v Hungary, ICSID Case No. ARB/03/16, 424.
59 Luxembourg v Spain (n 7) 73.
might give more legitimacy to the tribunals' decisions but the Eiser Tribunal and Charanne Tribunal have taken different approaches justifiably because of the timing of the court’s decision being pre or post investment.

Thus, there is similarity in the interpretation of the law, that is the FET standard as both the Tribunals note the following as contents of and aspects related to the FET standard: (i) requirement of stability in the Host State as per Article 10(1) of the ECT. (ii) Acknowledgement of the State’s reasonable right to change the legal, business, economic framework in a predictable, fair, non-arbitrary, non-retroactive and proportional manner in public interest. (iii) Requirement of specific commitment for creation of a legitimate expectation, (iv) Protection from fundamental changes to essential features of the regulatory and legislative regime, and lastly (v) defences of due diligence and reasonable foreseeability by the investor.

However, the points of differences arise in the application of the law and content of FET-standard as: (i) the Charanne-Tribunal withdrew from examining stability of regulations in the Host State and the Eiser Tribunal carries and in-depth examination to find instability. (ii) The Eiser Tribunal emphasized on the Article 31 of the VCLT as a tool of interpretation of the ECT to find stability as an integral content of FET, whereas the Charanne Tribunal did not mention VCLT at all in its analysis on the FET-standard. (iii) The Eiser Tribunal despite noting the requirement for a specific commitment by the State to the investor on stability for creation of legitimate expectation, unlike the Charanne Tribunal did not give a clear finding or application of the same on facts and (iv) the Eiser Tribunal diluted the defence

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60 Restrepo (n 1) 133.
of due-diligence to legitimate expectation by identifying the Claimant’s risk as risk taken with legitimate expectation after conducting due diligence.

Moreover, the aforesaid analysis shows that what *prima facie* appears as the same holding on different fact patterns primarily because both the Tribunals note similar content of the FET standard, is actually different holdings which is evident from different approaches to: (i) application of the law as well as (ii) the meaning of the similarly identified elements of the FET standard. Thus, in such a manner, the Charanne Tribunal did not find, and the Eiser Tribunal did find legitimate expectations under the FET right when dealing with sovereign changes in regulation and legislation.

II. Potential Influences and Reconciliations

Having established that both tribunals had different approaches on meaning of the similarly identified elements of FET standard, the potential reasons for such different approaches may include influence of: (i) the doctrines of expropriation and (ii) record/evidence on timing of investor’s reliance and Claimant-investor’s proximity to the decision to invest and interaction with the Host State.

The ‘proportionality doctrine’ of expropriation states that ‘the investor’s property is not deemed to be expropriated if the measures were taken for public good, were reasonable and proportional’ and hence, precludes State’s liability.61 The

influence of the same exists on the question of legitimate expectation as the Charanne Tribunal did not get swayed by allegedly serious impact on the investor’s profitability and found that the essential measure of Feed-in-Tariff for 26 years was in place to meet the trade-deficit. On the other hand, the Eiser Tribunal appears to be influenced by the ‘sole-effects doctrine’ of expropriation i.e. sole focus on economic impact of the state measures as it framed its analysis as how to balancing between the investor’s right to compensation and the State’s acknowledged right to regulate. Arguably, it was swayed by the impact of the loss of the investor of being ripped of its major investment value for reverse engineering to hold breach of legitimate expectations and the FET standard. Interestingly, the Charanne-dissenting award, on this aspect appears not be swayed by the alleged or proven impact of loss to investor as oppose to the Eiser Tribunal, to find legitimate expectation and violation of the FET standard.

Scholars have noted that it seems that some tribunals give awards on the ground of justice, particularly the Eiser Tribunal, as there is no clear application of the criteria of a proportionality test reflecting balancing of diverse interests of consumers, tax payers, national and global economy, environment concerns and the impact on the State’s decision not to take pro-environment measures to avoid the risk of facing high-value claims or adverse decisions. Moreover, the dichotomy of views and standard of reviews in related

62 Investments S.a.r.l. v Spain (n 6) 462, 463.
63 Investments S.a.r.l. v Spain (n 6) 518-20, 533.
64 Bonnitcha et al (n 16).
65 Luxembourg v Spain (n 7) 362/first-line.
66 Luxembourg v Spain (n 7) 418.
67 Investments S.a.r.l. v Spain (n 6) 12-13 (Dissent).
68 Restrepo (n 1)127, 128.
concepts in international investment law, have side-effects on concepts such as the FET standard, as evident from the Charanne-Award and Eiser-Award.\textsuperscript{69}

The potential reconciliations include questions such as whether the record/evidence on timing of investor’s reliance and Claimant-investor’s proximity to the decision to invest and interaction with the Host-State are the reasons for different outcomes. Additionally, it is questionable whether if Spain provided more time to investors for compliance\textsuperscript{70}, it would make the regime change more reasonable. Another important aspect of the Charanne award concerns the relationship between investors’ expectations, which was of shareholding in 37 photovoltaic plants with lesser evidence on due diligence.\textsuperscript{71} In the Eiser case, claimants were direct investors in three major solar plants with extensive evidence of due diligence including correspondence with the State before and during the progress of the investment and restructuring of financing.

Thus, the Charanne-Tribunal’s and Eiser-Tribunal’s approach on legitimate expectation is similar to the ‘proportionality doctrine’ and the ‘sole-effects doctrine’ of expropriation, respectively. Furthermore, the timing of reliance and proximity in the Claimant’s position and degree of reliance recorded in documents are potential justifications for opposite outcomes.

\textsuperscript{69} Gumbis and Kaparavicius (n 61) 160-163.
\textsuperscript{70} Stibbe (n 5).
\textsuperscript{71} Simões (n 8) 179.
III. Conclusion

The content of FET standard, particularly interpretation of the requirement of legitimate expectation stands even more contradictory and incoherent by the Charanne Tribunal and the Eiser Tribunal. The former examined for legitimate expectation by questioning existence of specific commitments directly to the investor. Despite acknowledging the specific commitment requirement, the latter () examined for legitimate expectation and found its existence in the provisions of the treaty itself and focused on the extent of compensation when the State exercised the acknowledged right to regulate. On a dangerous note for States, the Eiser Tribunal by not specifically and explicitly applying the acknowledged requirement of specific commitment to the facts of the case has in effect strengthened the outlying view that ‘foreign investors have a legitimate expectation of a stable regulatory environment, even absent expectations based on specific commitments’.

Behaviour of States

The UNCTAD 2017 Reports recognize that ‘the wording of specific treaty provisions is a key factor in case outcomes’ and this equally applies to all communications by the State with the investors. Hence, States will place explicit-caveats providing for the alteration of the legislative framework at the time of the initial investments. The States may exhaustively state the elements of the FET standard in

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72 Luxembourg v Spain (n 7) para 381 mentioning Occidental Exploration and Production Company v The Republic of Ecuador, LCIA Case No. UN3467/2004.
73 Ibid.
treaties as done in Article 9 of the Canada-European Union Comprehensive Economic and Trade Agreement (legitimate expectation is not a free-standing-component)\textsuperscript{75} and may also expand narrow/non-existent ‘carve-outs’\textsuperscript{76} on measures such as subsidy schemes.

Importantly, in February 2018 in \textit{Novenergia v Spain} award\textsuperscript{77}, a broader approach to protect investors than the Eiser Tribunal was adopted to hold Spain liable for breach of FET standard.\textsuperscript{78} Hence, it may not be surprising news that Spain may join the ‘withdrawal-from-the-ECT-club’ with Italy\textsuperscript{79}.

\textbf{Behaviour of Investors}

The aforesaid State measures are unlikely to create the optimal environment for foreign investment.\textsuperscript{80} Investors have the lesson that documentation and recording of the reliance or basis for making an investment and its financing can be a critical piece of evidence for proving for breach of the FET standard.\textsuperscript{81} The European Commission that the investors in Spain did not have legitimate expectations as per EU law may create enforcement problems for the EU

\textsuperscript{75} Bonnitcha et al (n 16) 115.
\textsuperscript{76} Bonnitcha et al (n 16) 117-118.
\textsuperscript{77} Novenergia v Kingdom of Spain, SCC Case No. 063/2015.
\textsuperscript{79} Restrepo (n1) 10472, 80.
\textsuperscript{80} Power and Baker (n 13).
\textsuperscript{81} Power and Baker (n 13).
investors within the EU, hence, investors may opt for enforcement options outside the EU\textsuperscript{82}, like Eiser.\textsuperscript{83}

\textit{Behaviour of Tribunals}

Most FET clauses being ‘short and open-ended formulation provide broad interpretive discretion to investment tribunals’. \textsuperscript{84} Inconsistency flowing from lack of binding precedent will allow for a never-ending conflict between the State’s right to regulate and the investor’s protection under international investment agreements.\textsuperscript{85}

\begin{itemize}
  \item\textsuperscript{82} Supra note 78.
  \item\textsuperscript{84} Bonnitcha et al (n 16).
  \item\textsuperscript{85} Restrepo (n1) 107; Susan Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions” (2005) 27 Fordham Law Review 1545.
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Enforced Disappearances and the Application of International Humanitarian Law to the Conflict in the Southern Border Provinces of Thailand

Jagoda Sekular

This paper finds that Thailand has failed to uphold its positive obligations to prevent enforced disappearance and torture and argued that international humanitarian law (IHL) could be applied in southern border provinces (SBPs). However, this argument was countered by the Royal Thai Government’s (RTG) refusal to acknowledge that the situation in SBPs could be recognized as a non-international armed conflict. Thus, this paper found that it is not appropriate to utilise jus in bello and the specific provisions in IHL that prohibit enforced disappearance. It is argued that enforced disappearance could in some cases amount to a form of torture as the victim’s next of kin is subjected to mental torture. The RTG has failed to take legislative steps to ensure adequate redress and restitution for the next of kin. Additionally, the RTG has neither criminalised torture nor included enforced disappearance as an offence in its penal code, as required by the international human rights instrument it has ratified. It is concluded that the immunity
clauses in the special security laws in the SBPs exacerbate the risk of enforced disappearance and potentially mental torture of the next of kin. Thailand has disproportionately derogated from its obligations under international human rights law and should place a ‘strict proportionality test’ before re-imposing special security laws. Thailand is therefore currently not upholding international human rights standards.

I. Introduction

The purpose of this paper is to research how the Royal Thai Government is upholding international human rights standards, in regards to enforced disappearance, particularly in the Southern Border Provinces. This paper will draw upon the link between enforced disappearance and torture, to establish that there is a connection between the two acts and that enforced disappearance could constitute a form of torture. This will be done to crystallise the nature of Thailand’s non-derogable obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)\(^1\). The right to liberty and security, as guaranteed under the multilateral International

\(^1\) UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984.
Covenant on Civil and Political Rights (ICCPR)\(^2\) will be discussed in relation to enforced disappearance. The RTG has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance (CPED)\(^3\) and this paper will therefore instead draw on the state’s obligations under the above-mentioned international human rights instrument.

It will further be argued that the situation in SBPs could amount to a non-international armed conflict and therefore international humanitarian law (IHL) could be applied. Thailand has not ratified the Rome Statute, but it is a party to the four Geneva Conventions. Common Article 3 of the 1949 Geneva Conventions and Article 4.2 of the 1977 Additional Protocol II,\(^4\) which expressly prohibit the commitment of acts that result in a person’s disappearance, will thus be utilised in this paper to argue that RTG has a positive obligation under IHL to prevent enforced disappearance and torture. This paper argues that the RTG should amend its Criminal Procedure Code (CPC) and 2007 Constitution to include the crimes of enforced disappearance and torture. The failure of the RTG to establish these crimes as offence undermines its commitment to uphold international human rights standards and advocate accountability that would counter impunity, particularly in the SBPs. The three special security laws in the


\(^3\) International Convention for the Protection of All Persons from Enforced Disappearance 2006.

SBPs will be examined to discuss the RTG’s compliance with the international human rights mechanisms it has ratified.

It is vital to examine human rights violations in Thailand, such as enforced disappearance and torture, to distinguish how the RTG has failed to comply with international human rights standards. A specific focus has been given to the SBPs and enforced disappearance due to the fact that enforced disappearance is arguably one of the most inhumane crimes a state can commit. This paper will argue that the arbitrary deprivation of liberty by a state should be considered as a *jus cogens* norm as it leads to the torture of the indirect victim, the bereaved next of kin.

This paper will also argue that the position of the bereaved should be legally strengthened and there should be no legal obstacle to challenge the legality of the detention and file an effective writ of *habeus corpus*. Further, the rule of law and proper due process should be respected to pledge an unwavering commitment to protect rights, as stipulated in the ICCPR. This paper will begin with examining Thai Domestic Law and the applicable provisions in the CPC.

**II. Methodology**

This chapter will discuss how the research objective has been achieved and its methodological considerations.

Secondary research has been the principal recourse; one of the key tools in in the production of this paper was the use of shadow reports from civil society organizations (CSOs) and INGOs, such as Amnesty International (AI), for Thailand’s state review of the by the Committee against Torture (CAT) in April 2014. This paper also utilizes existing reports published by the National Human Rights Commission.
Enforced Disappearances [...] in Southern Thailand

(NHRC), the International Commission of Jurists (ICJ) as well as the Justice for Peace Foundation (JPF).

In relation to a theoretical aspect, primary law analysis is implemented to understand the interaction between Thai domestic law and international human rights law. A critical approach is taken to some extent to deconstruct and scrutinize the wording of international human rights instruments, CPC and the three special security laws in the SBPs. The critical approach in conjunction with the primary law analysis, allows the identification of vague legal jargon within the relevant provisions of the Thai domestic framework as detrimental. Broad wording also perpetuates impunity for perpetrators of enforced disappearance and torture in Thailand, in particular the SBPs. Thai domestic law, related to the research question, is thus carefully examined. The wording of international human rights instruments of enforced disappearance and torture is also reviewed.

Substantively, textual analysis has been utilised as this paper analyses legislations and international treaties. A few emblematic cases of enforced disappearance are shortly introduced, but due to spatial restrictions and time constraints, this paper does not adopt a case study approach. The textual analysis partially includes the ruling of specific cases, which could be indirectly and directly attributed to the research question of this paper.

There is arguably a lack of academic sources available on the impact the alarming phenomena of enforced disappearance in Thailand and SBPs has had on Thailand’s human rights record. The parameters of the argument of this paper have been constrained by international human rights treaties on the topic. To conclude, this chapter has strived to describe the
theoretical and substantive tools in the context of legal methodologies employed by this paper.

III. The Southern Border Conflict

3.1 The South – a Non-International Armed Conflict

The unrest, which is waged between separatist insurgents mainly compromising of ethnic Malay Muslims and Thai government forces, has claimed the lives of over 5000 people and injured over 10,201, as of June 2013. The Internal Security Operations Command (ISOC), a Thai military unit that is devoted to issues of national security, operates in the SBPs. The conflict arguably emanates from attempts by the Thai authorities to arbitrarily assimilate the Malay Muslims, irrespective of distinctive differences in language, culture, and religion between the two groups. The marginalisation of the Malay Muslims, who seek autonomy for the region, has led to violent insurgency movements such as the Barisan Revolusi Nasional (BRN) and Pattani United Liberation Organization (PULO), which target public figures, such as teachers, that symbolise the control of the RTG within the separatist region. According to a 2011 Amnesty report ‘insurgent groups are typically organized into cells, with leadership that is decentralized, loosely coordinated, and largely anonymous...BRN is likely the strongest and best organized of the many groups fighting since 2004.’

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According to the People’s Empowerment Foundation, from January 2004 to October 2011, 8000 cases were related to national security in the region. Furthermore, only 16% of those detained were charged. Despite the government’s implementation of the Strategic Plan for Development of Justice Process in the SBPs of Thailand 2010–2014, the violence continues to escalate.

This paper will argue that the situation in the SBPs could be classified as a non-international armed conflict and therefore IHL could indeed be applied, as suggested by a 2012 HRW report. This view is not shared by the RTG, which endorses a rhetoric that refers to the situation in the Southern Thailand as ‘insurgence’ and ‘organized crime’. In a response to the 2011 report by AI, the Thai Ministry of Foreign Affairs claimed, ‘the issue of the SBPs remains in the realm of Thailand’s domestic affairs and all criminal elements will be subjected to domestic criminal law.’

Common Article 3 and Article 1 of 1977 Additional Protocol II to the 1949 Geneva Conventions apply when conflicts take place within the territory of a single state, thus, to non-international armed conflicts. Common Article 3, which is binding on all parties involved in internal armed conflicts, provides that certain acts against ‘persons taking no active part in the hostilities … are and shall remain prohibited at

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7 Human Rights Watch World Report (n 5).
9 Amnesty International Report (n 6).
10 Geneva Conventions Additional Protocol (n 4).
any time and in any place whatsoever...’ 11 According to Jelena Pejic: ‘despite the lack of a legal definition, it is widely accepted that non-international armed conflicts governed by Common Article 3 are those waged between state armed forces and non-state armed groups or between such groups themselves’. 12

Despite the fact that there is no agreed upon definition of ‘armed conflict’ in international law, according to the International Criminal Tribunal for the Former Yugoslavia (ICTY) 13, two conditions must be met for an eruption of violence inside a state to ascend to constitute a non-international armed conflict; non-state armed groups must be organised and carry out hostilities in a prolonged manner. The duration of the conflict and organisational structure of insurgents in SBPs discredit the view that the situation would amount to an internal disturbance, rather than a non-international armed conflict. Following this rationale, this section argues that instead of being governed by domestic

law and regulated by international human rights law, the situation in the SBPs could be in fact governed by binding international humanitarian law.

A similar argument is echoed in AI’s call for ‘insurgents to immediately cease attacks deliberately targeting civilians, indiscriminate attacks, and other violations of international humanitarian law, many of which constitute war crimes.’\textsuperscript{14} The report further states ‘targeting persons taking no active part in hostilities violates one of the key rules of international humanitarian law, as it pertains to armed conflicts such as the one in southern Thailand, which is an internal or ‘non-international’ conflict.’\textsuperscript{15}

\textbf{3.2 Special Security Laws in SBPs}

The combination of the 1914 Martial Law Act, the 2005 Emergency Decree and the 2008 Internal Security Act, has allowed a noticeable weakening of legal and procedural safeguards. Under these three laws, legal guarantees are substantially reduced and additional powers are granted to state officials, particularly under the Emergency Decree and Martial Law. The CPC enshrines rights aimed at protecting alleged offenders. For instance, Section 107-119 guarantees the right to be released on bail, Section 134/1 secures the right to have legal counsel and Sections 78, 87 and 91 contain provisions in regards to right related to arrest, detention and search. Furthermore, Section 90 grants the right to request \textit{habeus corpus}. \textsuperscript{16}

\begin{footnotesize}
\textsuperscript{14} Amnesty International Report (n 6) 6.
\textsuperscript{15} Ibid 5.
\textsuperscript{16} Criminal Procedure Code of Thailand, BE2477 as Amended by BE 2551, 2008.
\end{footnotesize}
Despite the lack of regulation prohibiting access to lawyers, according to Amnesty International, lawyers are in practice not allowed to see detainees that are being held under the Emergency Decree or Martial Law.\(^{17}\) Lack of regular access to lawyers and medical personnel seriously undermines the fundamental rights of the detainee. Amnesty further argues that:

[...] torture and other ill-treatment have become systematic, in significant part due to provisions of Martial Law and the Emergency Decree in effect in SBPs. These provisions effectively facilitate the practice of torture by creating circumstances under which it can go virtually undetected by superior officers in the short term, and by codifying immunity from prosecution for officials who perpetrate, permit, or refuse to punish human rights violations, including torture and other ill-treatment.\(^{18}\)

Between mid-2007 and mid-2008, ‘reports of torture and other ill-treatment by individuals and their families in the south increased significantly’\(^{19}\). In 2005, Thailand was informed by the HRC; ‘detention without external safeguards beyond 48 hours should be prohibited’.\(^{20}\) This paper will also argue that the special laws are a direct violation of Article 9

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\(^{17}\) Amnesty International (Thailand), ‘Time to end human rights violations’, Submission to the UN Universal Periodic Review (October 2011) 8.


\(^{19}\) Ibid 5.

of ICCPR.\textsuperscript{21} The RTG has addressed the allegations of the 2011 AI report and claims that there is a ‘gradual discontinuation of the special security laws’ and ‘decrease in ISOC personnel.’\textsuperscript{22}

\textit{i) Martial Law Act 1914}

RTG invoked the Martial Law in January 2004, and re-imposed it via a coup d’état in September 2006, after a 14-month period during which it was not in effect. Martial Law was invoked for Narathiwat, Pattani, and Yala provinces, and for four districts of Songkhla province. Concerns have been expressed in relation to Section 15\textsuperscript{bis} of the Martial Law, which states that on the ground of suspicion, a person can be detained for interrogation for seven days without charge.\textsuperscript{23}

The application of the Act\textsuperscript{24} grants greater powers to Thai security forces in the region. For instance, Section 6 gives supreme power to the military over civil authority operating in the region and Section 8 grants the military full power of eviction, prohibition and compulsory requisition. Furthermore, the Act enables the prohibition of any types of political gatherings, and allows for the arbitrary arrest and detention of individuals without charge, which is a clear violation of procedural fairness, particularly without the possibility of judicial review of the arrest warrant. It was recommended by the 2011 UPR Working Group that Thailand ‘abolish provisions in the Martial Law Act...which

\begin{itemize}
\item\textsuperscript{21} ICCPR (n 2) Art 9.
\item\textsuperscript{22} Amnesty International Report (n 6) 53.
\item\textsuperscript{23} Martial Law BE 2457 (1914), Section 15\textsuperscript{bis} ‘On the ground of suspicion, a person can be detained for interrogation for seven days without charge’.
\item\textsuperscript{24} Ibid.
\end{itemize}
grant immunity for criminal and civil prosecution to State officials' and 'consider reviewing security laws to ensure their conformity with international human rights standards' by the 2011 UPR Working Group.25

**ii) Emergency Decree on Public Administration in Emergency 2005**

The Emergency Decree was issued on 19 July 2005, initially applicable to Narathiwat, Pattani, and Yala and with the purpose to temporarily replace Martial Law. Both laws however remain in effect. As previously mentioned, Section 17 limits accountability and provides legal immunity.

Section 17. 22

_A competent official and a person...shall not be subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act if such act was performed in good faith..._26

Section 17 arguably contradicts General Comment 2 of CAT, which states that,

States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging,

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acquiescing and in otherwise participating or being complicit in acts of torture defines in the Convention.27

Section 12 grants state, police, and military officers, referred to as ‘competent officials’, the authority to detain and arrest individuals for up to 30 days in the name of national security, and with no specific requirement to produce a detainee before a judge. ISOC Region 4 Regulation reaffirms that it is not necessary to bring a detainee before a judge, unless requested so by a court. The preventative measure, in combination with the Martial Law, allows for the lawful detention of a person for up to 37 days. Further, it also was recommended that Thailand repel ‘Section 17 of the Emergency Decree’ by the 2011 UPR Working Group.28

**iii) The Act on Internal Security (ISA) 2008**

ISA was passed on 20 December 2007 and came into force in February 200829. AI has expressed concern with regards to ‘the prospect of the ISA being substantively applied to ISOC’s counter-insurgency efforts in the south, for its language is sufficiently broad and vague as to potentially permit torture or other ill-treatment: ‘... ISOC shall have the following powers and duties: (1) to prevent, suppress, suspend, inhibit, and overcome or mitigate the situation.’30

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28 UN Human Rights Council (n 25) 20.
30 Ibid Section 16(1).
Further, the ISA preamble explicitly contains restrictions on various sections of the 2007 Constitution that provide the rights and liberties of persons, including Section 32, which prohibits the use of torture.\textsuperscript{31} One could also question whether ISA is necessary and applicable in the containment of insurgency in the SBPs as Section 15, which states,

\begin{quote}
In the event of an occurrence which affects internal security but which does not yet require the declaration of a state of emergency under the Act of Public Administration in an Emergency Situation…the Cabinet shall pass a resolution to have ISOC take responsibility for prevention, suppression, and eradication or mitigation or this occurrence which affects internal security.\textsuperscript{32}
\end{quote}

This emphasises the fact the 2005 imposition of the Emergency Decree has been neglected in the imposition of ISA in 2008.

\section*{Domestic Law and Human Rights}

\subsection*{4.1 Persisting Human Rights Violations and Issues}

This chapter will examine persisting human rights violations and issues in Thailand, a constitutional monarchy. The structural, judicial, and political challenges faced by Thailand

\footnotesize\textsuperscript{31} Ibid; Preamble, ‘This Act contains provisions which impose restrictions on the right and liberties of the people as allowable under Section 29 and Section 31 with Section 32, 33, 34, 36, 41 and 34 of the Constitution of the Kingdom of Thailand by virtue of the provision of the law.’

\footnotesize\textsuperscript{32} Ibid Section 15.
will be examined to identify how torture and the arbitrary deprivation of liberty by the state have manifested and how they are addressed by the state. Issues relating to the criminalisation of torture, the reduction of rights, and procedural safeguards in SBPs will be contemplated.

The Constitution of the Kingdom of Thailand of 2007\textsuperscript{33} incorporates equality without discrimination, human dignity as well as the liberties and rights of persons as stipulated in the Universal Declaration of Human Rights (UDHR). The provisions on Rights and Liberties in the Constitution can be directly invoked in case of human rights violations. Section 197 of the 2007 Constitution provides for an independent judiciary. Thailand has also developed multiple mechanisms for the protection of human rights\textsuperscript{34}, including independent bodies and decentralised mechanisms established under the administrative, judicial and legislative branches. Notable mechanisms include: the NHRC; the Ministry of Justice, the Rights and Liberties Protection Department and the Parliamentary Committee on Justice and Human Rights. Furthermore, Thailand was among the first 48 countries to endorse the UDHR on 10 December 1948.\textsuperscript{35} The country is also party to 7 core international human rights instruments, including ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and CAT. The RTG has also stated ‘the Government had been working to include a definition of torture in domestic law.’\textsuperscript{36}

\textsuperscript{33} Constitution of the Kingdom of Thailand (2007), Chapter III, Rights and Liberties of Thai People, Section 26, 27 and 28.
\textsuperscript{34} Human Rights Council, Working Group on the Universal Periodic Review, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5 (30 September 2011).
\textsuperscript{35} Ibid.
\textsuperscript{36} UN Human Rights Council (n 25) 9.
Despite Thailand’s relatively strong level of commitment to international human rights instruments, particularly in the Southeast Asian region, the question remains as to what extent the implementation successfully formulates on an executive, legislative, and judicial level. It is also vital to discuss the shortcomings that inhibit the full implementation of CAT. Thailand has not ratified CPED, despite signing it on 9 January 2012.

This chapter will partially draw from the Concluding Observations from CAT, in order to argue that Thailand is not upholding its obligations under CAT. CAT will be utilised to demonstrate that enforced disappearance and torture are interwoven phenomena and enforced disappearance could be considered as a form of torture. This will be discussed in more detail in a later chapter in this paper.

4.2 Torture

An in-depth review of the reports and the Observations of CAT revealed that torture remains a prevalent issue in Thailand. Between 2007 and 2013, the NHRC received a total of 134 complaints of torture, including 14 complaints in 2013. Over 75% of all torture complaints received by NHRC during that period originated from the SBPs, of which 71% concerned the practice of torture by the army.

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37 Amnesty International, Submission to the UN Committee on Torture (Submission to the Committee against Torture CAT, April 2014) 6.
In three different legal instruments, the Constitution of Thailand,\textsuperscript{38} the Criminal Procedure Code (CPC)\textsuperscript{39} and the Criminal Code,\textsuperscript{40} the term ‘torture’ is included. Furthermore, victims of torture have the right to seek compensation and redress under civil and criminal law, including the Damage for the Injured Person and Compensation and Expense for the Accused in Criminal Case Act of 2001.\textsuperscript{41} The use of evidence obtained through unlawful means is expressly prohibited in Section 226/1 of the CPC. Torture itself however is not considered a criminal offense in Thai domestic law. The lack of criminalisation of torture poses grave challenges, especially in regards to the liability of the state for torture committed by agents of the state and adequate prosecution. This paper argues that it is insufficient to try a perpetrator under an offence that is similar to torture. The act of torture must be clearly stipulated and defined so that the gravity of the offence can be addressed.

A draft law that would address torture as a distinctive crime and would be separate from the CPC and the Criminal Code, was proposed by CSOs in 2010.\textsuperscript{42} Despite efforts to create a separate legal instrument, the Law, Justice and Human Rights Committee instead proposed an Act to amend the CPC. Article 166/1 of the proposed act would however restrain the definition of torture to Section 297 and 276 of the

\begin{itemize}
\item \textsuperscript{38} Constitution of the Kingdom of Thailand (n 33) Section 32(2).
\item \textsuperscript{39} Criminal Code B.E 2499, Sections 296, 298, 289(5), 313(2), 340(4), 340 bis (5).
\item \textsuperscript{40} Criminal Procedure Code BE 2478, Section 135.
\item \textsuperscript{41} The Damages for the Injured Person and Compensation and Expense for the Accused in Criminal Case Act BE 2544 (2001).
\item \textsuperscript{42} The Draft of the Act of on Amendments of the Penal Code (No) BE and a Draft of the Act on Amendments of the Criminal Procedure Code (No) BE
\end{itemize}
Criminal Code, and subsequently would not be in line Article 1 of CAT.43

Section 297. Whoever, commits bodily harm, and thereby causing the victim to receive grievous bodily harm, shall be punished with imprisonment of six months to ten years. Grievous bodily harms are as follows:
1. Deprivation of the sight, deprivation of the hearing, cutting of the tongue or loss of the sense of smelling;
2. Loss of genital organs or reproductive ability;
3. Loss of an arm, leg, hand, foot, finger or any other organ;
4. Permanent disfiguration of face;
5. Abortion;
6. Permanent insanity;
7. Infirmity or chronic illness which may last throughout life;44

Furthermore, in General Comment 2, CAT interpreted that ‘discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity…’45 The proposed Act could also be deemed inadequate and insufficient as it limits the definition of the perpetrator46 and the possible purposes of torture47 and does not appear to adhere to the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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43 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (26 June 1987), Art 1.
44 Criminal Code (n 39) S297.
45 CAT General Comment 2 (n 27).
46 Proposed Act to Amend the Criminal Procedure Code (n 42) Draft Art 166/1 para 1.
known as the Istanbul Protocol.\textsuperscript{48} To ensure its conformity with international human rights standards, Thailand should incorporate a clear definition of torture in its domestic legislation, which would be aligned with the Convention and affirm the non-derogable nature of the prohibition of torture.

In its observations the Committee indeed stated:

\begin{quote}
[W]hile noting that Section 32, paragraph 2 of the Constitution of Thailand prohibits acts of torture, the Committee is concerned about the absence of a definition of torture and the absence of an offence of torture in accordance with the Convention in the State party’s legal system...the Committee is concerned that the draft penal code provision on torture (a) does not reflect the non-exhaustive list of purposes for which torture may be inflicted nor does it include discrimination as a purpose.\textsuperscript{49}
\end{quote}

Torture usually takes place during detention and it is therefore vital to discuss the legality of detention in the SBPs. Article 2, 11 and 16 of Section 7/1 of the CPC provide for legal and procedural safeguards. Section 7/1 of CPC is however severely undermined by ISA and Section 17 of the Emergency Decree. Thus, evidence points that counter-insurgency measures and the special laws in SBPs facilitate the violation of legal safeguards, and increase the risk of torture and enforced disappearances.


\textsuperscript{49} United Nations Committee against Torture (CAT), ‘Concluding observations on the initial report of Thailand’ (20 June 2014) UN Doc CAT/C/SR.1239, para 9.
4.3 Enforced Disappearances

Torture and enforced disappearances are most prevalent in SBPs in Thailand, where the state has struggled to contain the conflict and promote the rule of law and reconciliation. The National Reconciliation Commission in 2005 was informed of 23 cases of enforced disappearances in the conflict area between 2003 and 2005. 17 families received limited compensation and the Commission was later inexplicably dissolved.50

However, JPF recorded more than 90 cases throughout the country between 1991 and 2010.51 The Committee on the Elimination of Racial Discrimination (CERD), in its Observations on 15 November 2012, stated that the ‘Committee remains seriously concerned at the discriminatory impact of the application of the special laws in force in the southern border provinces…as well as reports of torture and enforced disappearance of Malayu Thais…’ CERD recommended that Thailand should ‘review the special laws with a view to meeting international human rights standards, particularly those in regard to the prevention of torture.’52

50 Pratubjit, Neelapaijit We Need the Truth: Enforced Disappearances in Democratic Countries: Enforced or involuntary disappearances in Thailand – Challenges and Hopes (Equipo de Estudios Comunitarios y Accion Piscosocial - ECAP 2009) 66.
51 Ibid 55.
52 UN Human Rights Council, ‘Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of over-incarceration and overcrowding’ (36th Session, 11-29 September 2017) UN Doc C/THA/CO/1-3, para 21.
With regards to legal remedies for the bereaved of the victims of enforced disappearance, according to Section 5(2) of the CPC:

*The following persons may act on behalf of the injured person: The ascendant of descendant, the husband or wife… in which the injured person is so injured that he died or is unable to act by himself.*  

The families of victims of enforced disappearance in Thailand can therefore not exercise their legal rights, in cases where the body of the disappeared has not been located and the death cannot be established. ‘The right of families to know the fate of their [disappeared] relative’ is established in Article 32 of the Protocol I to the Geneva Conventions.  

Additionally, close family members are presumed to be victims of torture or ill treatment where there is enforced disappearance in international law. The rationale for this is in the severe suffering caused to the family member of the disappeared. The ECtHR, in its judgment Kurt v. Turkey of 25 May 1998, stated ‘...having regard to the fact that the complainant was the mother of the victim of a human rights violation’, the Court found that she was 'herself the victim of the authorities’ complacency in the face of her anguish and distress...' and that the State was in breach of article 3 of ECHR.  It could therefore be argued that Section 5(2) of CPC perpetuates the torture and mental anguish subjected to by the family of the disappeared.

53 Criminal Procedure Code (n 39).
54 Geneva Conventions Additional Protocol (n 4) Art 32.
Thailand should also strengthen the position of the next of kin, the indirect victim, particularly in terms of habeus corpus proceedings on the victim’s behalf. Habeus corpus proceedings could prove to be an effective remedy for the indirect victim of enforced disappearance, if the position is indeed strengthened. This paper will now proceed to discuss the practice of enforced disappearances and deprivation of liberty by the state in international law.

IV. International Law

5.1 Relevant legal framework

The key international instrument that explicitly prohibits enforced disappearances is CPED, the first universally binding instrument regarding enforced disappearances. The Convention entered into force on 23 December 2010. To date, 93 states have signed CPED and 42 states have ratified the Convention. Lisa Ott notes that ‘within the UN system, enforced disappearance was first formally addressed in 1978, when the General Assembly adopted a specific resolution on ‘Disappeared Persons.’ The UN Commission on Human Rights in 1980 established the Working Group on Enforced Disappearances (WGEID). Applicable instruments, in the international context, are the Inter-American Convention on Forces Disappearances of Persons, the first legally binding instrument on enforces disappearances, and the UN Declaration for the Protection of all Persons from Enforces

57 Lisa Ott, Enforced Disappearances in International Law (Intersentia 2011) 90.
58 Ibid 7 See also: UNGA Res 33/173 (1978)
59 Ibid 12.
Enforced Disappearances.\textsuperscript{60} Both instruments however are of limited significance as the Inter-American Convention’s scope is restricted to the jurisdiction of the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights\textsuperscript{61} and the Declaration is a General Assembly Resolution and not an international treaty.

This paper draws mainly from CAT and ICCPR, as Thailand has not ratified CPED. Article 7 of ICCPR states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…’ CERD also clearly stipulates a duty to uphold the ‘right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution’.\textsuperscript{62} The prohibition of torture and enforced disappearance are inherently linked and therefore the applicability of ICCPR and CAT in regards to enforced disappearances is in line with the narrative and argument of this paper.

5.2 Practice of Enforced Disappearance – Deprivation of Liberty by State

This chapter will discuss the deprivation of liberty by the state – enforced or involuntary disappearance. By 2010 the WGEID had received 53,778 complaints of enforced

\textsuperscript{60} Declaration on the Protection of All Persons from Enforced Disappearances, UNGA Res 47/133 (1992) GAOR Supp 49, 207, UN Doc A/47/49.

\textsuperscript{61} Inter-American Convention on Forced Disappearances of Persons, (1994), Art XIII.

disappearances. An enforced disappearance takes place when a person is arbitrarily detained, abducted, or arrested or deprived of their liberty by the acquiescence of the state, whether directly or indirectly through the use of law enforcement officials. Lisa Ott argues that ‘in international law, the conception of enforced disappearance as a human rights violation and a crime committed directly or indirectly by State agents is agreed upon in principle.’ Most commonly, a refusal by the state to disclose the fate or location of the person deprived of their liberty will follow. The state will also most certainly refuse to acknowledge the deprivation of liberty, which subsequently places the disappeared outside the protection of the law. Typically, there will be no judicial procedure, no arrest warrant and the victim might be a target for political reasons.

As a consequence, the victim will not have access to legal remedies nor protection from other dire human rights violations. Enforced disappearance therefore amount to multiple violations, such as the right to be free from arbitrary detention, the right to humane conditions of detention, the

64 Lisa Ott (n 57) 26.
65 To be placed outside the protection of the law means ‘the deprivation of liberty or detention of the person (is) not covered by the rules relating to deprivation of liberty or detention, or that those rules were not in accordance with applicable international law.’
right to family life, the right to fair trial, the right to life, the right to security and dignity of a person, and the right not to be subjected to torture.\textsuperscript{67} In \textit{Velasquez Rodríguez v. Honduras}, the court noted that the forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties and obliged to respect and guarantee.\textsuperscript{68} Therefore, states must adhere to their positive obligation to effectively respond and prevent such violations.\textsuperscript{69} It should be noted that Thailand has not ratifies CPED.

According to article 1 of CPED:

\textit{Article 1:}
\begin{itemize}
\item 1. No one shall be subjected to enforced disappearance.
\item 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability
\end{itemize}

\textsuperscript{67} International Convention for the Protection of All Persons from Enforced Disappearance (CPED) (entered in to force 2006), Art 2.


\textsuperscript{69} \textit{Kurt v. Turkey} (n 55) paragraph 124; \textit{Velásquez Rodríguez} Case no (Inter-American Court of Human Rights (Ser. C), 26 June 1987) paragraphs 166, 176, 177; \textit{Juan Humberto Sanches v. Honduras}, no 99 (Inter-American Court of Human Rights (Ser. C), 7 June 2003), Ser. C, para 184.
or any other public emergency, may be invoked as a justification for enforced disappearance.\textsuperscript{70}

5.3 Enforced Disappearances as a form of torture

CPED however does not explicitly establish the principle universal jurisdiction, nor does it validate the notion that the prohibition of enforced disappearance could be considered as a \textit{jus cogens} norm and an \textit{erga omnes} obligation. Oette argues that the ‘practice of torture persist in many countries despite its absolute prohibition under international law’.\textsuperscript{71} One could however question whether an enforced disappearance constitutes a violation to the right to life, right to liberty and security and could therefore be considered as a form of torture in its own right.

There is a clear overlap in the dehumanising act of torture and enforced disappearance. As mentioned in the previous chapter, in the case of an enforced disappearance, torture is inflicted on the next of kin as a form of ‘severe mental suffering’, as it is on the victim. According to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power the term ‘victim’ also includes, where appropriate, the immediate family or dependents of the direct victim.\textsuperscript{72} Furthermore, in the case of \textit{Maria del Carmen Almeida de Quinteros v. Uruguay}, the HRC viewed that the mother’s right

\textsuperscript{70} CPED (n 67) Art 1.
\textsuperscript{71} Lutz Oette and Ilias Bantekas, \textit{International Human Rights Law and Practice} (CUP 2013) 326.
had also been violated, namely under article 7:73 ‘the Committee understands the anguish and stress caused to the mother by the disappearance of her daughter… these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, article 7’. Further, WGEID in a General Comment has emphasised that a State ‘cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives.’74

It is useful to note that torture of the victim of the disappearance cannot on most occasions be proven due to the physical absence of the person. Moreover, public authorities and law enforcement agents are often the perpetrators of both of these crimes and subsequently legal and procedural safeguards are not respected. According to the WGEID ‘the very fact of being detained as a disappeared person, isolated from one’s family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture.’75 The acknowledgment by WGEID that enforced disappearance itself constitutes

73 Human Rights Committee, María del Carmen Almeida de Quinteros et al v Uruguay (21 July 1983) UN Doc CCPR/C/19/D/107/1981 (Communication No 107/1981; See also: Art 7 ICCPR, ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.
torture and other prohibited ill treatment is crucial to the argument of this paper.

In the case of *El-Megreisi v. Libyan Arab Jamahiriya*, the CAT found that ‘...Mr. Mohammed Bashir El-Megreisi, by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment, in violation of Articles 7 and 10, paragraph 1, of the Covenant.’ In the above-mentioned case, the Committee described a case of disappearance as torture. According to a report by the Special Rapporteur of the Commission on Human Rights, ‘the working definition of ‘disappearance’ refers also to the refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty’.

5.4 *Jus in Bello - International humanitarian law*

This paper will attempt to argue that IHL could be applied to some extent to the SBPs, where the emergency laws are imposed. HRW argues ‘under the laws of armed conflict, which are applicable in the fighting between the insurgents and Thai government forces in southern Thailand, deliberate attacks on civilians are war crimes.’

As previously mentioned, enforced disappearance is a crime under international law. When committed as part of a widespread or systematic attack on a civilian population, the act amounts to a crime against humanity, as stipulated by

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76 CPED (n 67).
77 Ibid 2.
article 7(i) of the Rome Statute of the International Criminal Court (ICC)79.

Article 7:
For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(i) Enforced disappearance of persons

Furthermore, Thailand has not acceded to the Rome Statute80. According to Lisa Oette ‘it must be underlined that under the Convention, also isolated or few cases of enforced disappearances shall be subject to punishment. Thus, states have the duty to introduce liability for the act of enforced disappearances committed outside of a widespread of systematic practice.’81

The act of enforced disappearance violates Rule 98 of the International Committee of the Red Cross Rules of Customary International Humanitarian Law, though international humanitarian law treaties do not explicitly refer to the term ‘enforced disappearance’.82 Further, the Inter-American Convention on the Forced Disappearance of Persons requires state parties to define forced disappearance of persons as a crime in their domestic law, to impose an appropriate punishment and prohibits the act itself.

80 Ibid.
81 Lisa Ott (n 57) 204.
According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 16 December 2005, the right to remedy is guaranteed in IHL in, for instance, articles 68 and 75 of the Rome Statute, Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

With regards to IHL, the RTG has ratified all four Geneva Conventions to which it acceded on 29 December 1954. However, it could be noted that Peru’s Constitutional Court stated in the case of Gabriel Orlando Vera Navarrete case,

[B]oth Common Article 3 and Article 4.2 of [the 1977] Additional Protocol II expressly prohibit the commitment of acts that result in a person’s disappearance. Moreover, common Article 3 prohibits any attempt on the life and personal integrity of a person, particularly murder of all kinds, mutilations, cruel treatment, and torture. Depriving a person of legal remedies and guarantees and ordering or carrying out acts aimed at making a person disappear shall be considered a grave breach of IHL that the state must punish.  

5.5 State of Emergency

Article 4 of 1CCPR allows the derogation of obligations at time of ‘public emergency’. However, the measures taken

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83 Peru, Constitutional Court, Gabriel Orlando Vera Navarrete, Case No. 2798-04-HC/TC, Judgment of 9 December 2004, §16.
must be consistent with international law. In the 2005 Observations of the HRC, the Committee noted that it

[...] is concerned that the Emergency Decree...and on the basis of which a state of emergency was declared in three southern provinces, does not explicitly specify, or place sufficient limits, on the derogations from the rights protected by the Covenant...It is especially concerned that the Decree provides for officials enforcing the state of emergency to be exempt from legal and disciplinary actions, thus exacerbating the problem of impunity.84

It should be noted that Article 17 of the ACHR and Article 15 of the ECHR contain similar provisions as concerning Article 4 of ICCPR85. However, in General Comment 29 of the HRC on Article 4, the Committee states ‘Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment...)’86 The Committee further stated that:

[… measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency, which threatens

85 ICCPR (n 2) Art 4.
the life of the nation, and the State party must have officially proclaimed a state of emergency.87

One could also question the necessity of the state of emergency in the SBPs, as the prolonged over-use of the special laws could arguably permit the derogation of non-derogable rights that are guaranteed by ICCPR. Moreover, certain aspects of the right to liberty and security, such as the right to habeus corpus,88 are considered non-derogable at any time and permissible derogations subject to a strict proportionality test.89

Thus, this paper will side with the argument that the special laws in SBPs should be subject to a ‘strict proportionality test’, before their renewal, as the special laws limit the full enjoyment of rights and availability of domestic remedies. ‘Furthermore, the right to have recourse to domestic remedies such as the writ of habeas corpus may be suspended, so that, for instance, victims of arbitrary arrest and detention are left without legal protection, with devastating results.’90 The test should be administered to determine whether the situation in the south constitutes as a ‘threat to the life of the

87 Ibid Art 2.
89 Lutz Oette and Ilias Bantekas (n 71) 339.
nation’, as required by Article 4, and does not leave an individual without adequate legal protection. Thus, Thailand should recall its obligations and rights protected under article 4(2) on ICCPR.

In *Aksoy v Turkey*, Aksoy questioned ‘whether the situation...necessitated the holding of suspects for fourteen days or more without judicial supervision.’[^91] The ECHR was of the view, that although ‘the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention...’ Aksoy further ‘pointed out that long periods of unsupervised detention, together with the lack of safeguards provided for the protection of prisoners, facilitated the practice of torture...’ It could be argued that the Thai legal system also offers insufficient safeguards to detainees and the exigencies of the situation in the SBPs do not necessitate the re-imposition of special laws, as they blatantly violate legal safeguards. ECHR concluded, ‘there has been a violation of Article 5 paragraph 3 of the Convention.’[^92]

It should also be noted that the RTG has failed to inform the Human Rights Committee (HRC) about measures taken in the SBPs, in respect to Article 4 of ICCPR. In 2005, the HRC stated:

> [T]he State party should ensure that all the requirements of Article 4 of the Covenant are complied with...including the prohibition of derogation from the rights listed in its paragraph 2...the Committee draws the attention of the State party to its General Comment No. 29 and the

[^92]: Ibid para 87.
obligations imposed upon the State party to inform other States parties, as required by its paragraph 3.\textsuperscript{93}

This paper therefore argues that measures taken against the threat of insurgency in the SBPs should not include the imposition of special laws, the invocation of Article 4 of ICCPR and the subsequent violation of safeguards.

This paper also draws from the jurisprudence of \textit{Landenelli Silva v Uruguay}\textsuperscript{94}. Uruguay invoked article 4 of the Covenant on 10 July 1980. The HRC saw that the requirements stipulated in article 4 (1) of the Covenant had not been met. Further, HRC saw that ‘no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary…’ and therefore, the Committee was of the opinion that ‘a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant’. The Committee concluded ‘if the respondent Government does not furnish the required justification itself, as it is required to do under article 4 (2) of the Optional Protocol and article 4 (3) of the Covenant, the HRC cannot conclude that valid reasons exist to legitimise a departure from the normal legal regime prescribed by the Covenant’.\textsuperscript{95} One could argue that Thailand has also not addressed the nature and scope of derogations, in the SBPs

\footnotesize{\textsuperscript{93} UN Human Rights Committee, ‘Report of Human Rights Committee’ UN Doc (60\textsuperscript{th} Session, Supplement 40, 2004-5) A/60/40 Volume I, para 95(13), 2.}

\footnotesize{\textsuperscript{94} \textit{Jorge Landinelli Silva v. Uruguay} (1981) UN Doc Supp 40(A/36/40), Communication No R.8/34, at 130.}

\footnotesize{\textsuperscript{95} Ibid.}
and its departure from the normal legal regime cannot therefore be legitimised.

5.6 Regional Framework

It is also important to note that in the regional context, the role of the Association of Southeast Asian Nations (ASEAN) should be taken into account. ASEAN and its ten member states abide by a strict principle of non-interference as outlined in the 1967 Bangkok Declaration and can therefore not interfere in the internal matters of member states. However, one could argue that the principle of non-interference has been violated on numerous occasions, such as in the case of open critique of Myanmar, and by the accession to international conventions by member states of the ASEAN. By doing so, member states have opened themselves to critique in various forms, for instance, in the form of the UPR and the observations of respective Committees of treaties.

In 2009, ASEAN established the ASEAN Intergovernmental Commission on Human Rights (AICHR) to promote human rights. The Commission exists to protect and promote and protect human rights as well as regional co-operation on human rights, in the member states. The Commission drafted the ASEAN Human Rights Declaration in 2012, and it was adopted unanimously. The Declaration reaffirms the civil and political rights in UDHR. The Terms of Reference (TOR) of ASEAN are reviewed every five years and this paper

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argues that upon the next review, ASEAN should reconsider its principle of non-interference, particularly in regard allegations of torture and enforced disappearances even in cases that do not pose a threat to regional security, in order to adhere to international human rights standards. Indeed, Linjun Wu notes that ‘since late 1997, voices in the region have requested modification of non-intervention policy.’ Member states should, instead of refraining criticism, direct harsh verbal scrutiny against member states, such as Thailand, that have special laws in place which undermine fundamental human rights and cases of enforced disappearances.

However, it should be noted that torture and enforced disappearances, in particular against human rights defenders, is a regional problem, which in turn exacerbates the resolution of the issue from a regional association, such as ASEAN. Despite the recent adoption of the ASEAN Human Rights Declaration on 18 November 2014, there is a clear lack of an effective regional human rights system in Southeast Asia. This paper advocates for the approach of the African Charter on Human and Peoples’ Rights (ACHPR), which contains no derogation provisions. Indeed, in the view of the African Commission on Human and Peoples’ Rights, the Charter ‘does not allow for states parties to derogate from their treaty obligations during emergency situations.’

5.7 International Human Rights Law


UN Human Rights Committee (n 93) Chapter 17, 62.
Thailand is bound by international human rights law and ICCPR, to which Thailand acceded to on 29 October 1996.\textsuperscript{99} Furthermore, the right to liberty and security, directly violated by an enforced disappearance, is guaranteed under Article 9 of UDHR, Article 9 of ICCPR and Article 14 CRPD, all of which Thailand has ratified. Article 17(2)(f) of CPED, which is awaiting ratification, further states:

\begin{quote}
\textit{Article 17}

2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:

(f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person’s release if such deprivation of liberty is not lawful.
\end{quote}

The wording of the article, and in particular the phrase, ‘any persons with a legitimate interest’, contradicts Section 5(2) of CPC, as demonstrated in the previous chapter. International legal instruments and relevant provisions such as Article 7 of the ACHR, Article 7 of the ACHPR and Article 5 of the ECHR, discuss the right to liberty and security, which further validates the paramount importance of the right in the global sphere. Furthermore, failure to bring to justice perpetrators

\textsuperscript{99} ICCPR (n 2) Art 1(1), 6(5), 9(3) and 20.
and conduct a fair investigation of a grave human rights violation constitutes as a violation of ICCPR.  

The Special Rapporteur of the Commission on Human Rights further recommended, ‘provisions should give all detained persons the ability to challenge the lawfulness of the detention - e.g., through habeas corpus or amparo. Such procedures should function expeditiously. 101 The right to challenge the lawfulness of the detention and file a writ of habeas corpus in Thailand is enshrined in Section 90 of the CPC. Section 90 of the CPC and Section 32 of the Constitution apply when allegations are tortured are reported in detention. Section 32 also stipulates that remedies for the damage incurred by the victim could be determined by the court, similarly to the stipulation of General Comment 8 by the HRC.102

However, according to the MACF, no remedy has even been successfully granted and public officials often release a detainee prior to a hearing, when a petition under Section 90 is filed. Lack of the existence of the offence of an ‘enforced disappearance’ and ‘torture’ in Thai national legislation, as required by CPED and CAT, therefore greatly hampers the successful petition of a habeus corpus and challenge to the lawfulness of one’s detention.

102 UN Human Rights Committee, General Comment No 8: Article 9 Right to liberty and security of persons (30 June 1982).
V. Conclusion

Using evidence, this paper has attempted to consistently point out the discrepancies that exist in Thailand’s human rights record. This has been evident through the use of Observation from Committees such as CAT and CERD. Despite Thailand’s ratification of treaties, it is evident that the state has been unable to fulfill its obligations, namely under CAT. This paper has also attempted to pinpoint the strong link that exists between enforced disappearance and torture. This has been done partially through jurisprudence, General Comments and case law, which have highlighted how the family is also subjected to torture and ergo becomes an indirect victim. As enforced disappearances can amount to a form of torture, it could therefore be argued that Thailand is obligated under CAT and customary international law to assure that torture is not permitted, directly or indirectly. As a jus cogens norm, from which there can be no derogation, Thailand should take legislative steps to assure that torture does not occur. Therefore, Thailand should incorporate the definition of enforced disappearance and torture in its domestic legislation, as required by CAT and CPED. The lack of effective remedy needs to be addressed, and the family should be given the right to an effective remedy as stipulated in Article 2 of ICCPR.

In regards to SBPs, this paper will side with the argument that the situation in SBPs could be considered as an non-international armed conflict and therefore IHL applies and Thailand is obligated under IHL to adhere so specific standards and provision, that prohibit tortured and enforced disappearance, such as the Geneva Conventions. Thailand has imposed three special security laws, and by doing so has invoked Article 4 of ICCPR. The constant renewal of the laws in the SBPs is based on the very fact that the situation fills the
criteria of necessity and proportionality and allows for the re-
imposition of the laws. However, the state of emergency and
special laws grant a de facto state of impunity, which in turn
facilitates the lack of accountability, due process, and the rule
of law.

Furthermore, the derogation has not satisfied the criteria as
stipulated in Article 4(2). Thailand should therefore not be
able to deviate from ICCPR in any manner, particularly as the
special security laws have been imposed since 2004. The
Cabinet, which reviews the Emergency Decree every three
months, should therefore take into account the obligations of
the RTG under ICCPR.

Due to research constraints, this paper has not investigated
claims of enforced disappearance in the north of Thailand nor
central Thailand. The focus has been on the SBPs due to the
implementation of special laws, which arguably, advocate a
culture of impunity. This paper will conclude that Thailand
is not upholding international human rights standards,
particularly in regards to enforced disappearance. It could
not be said that a state is upholding international human
rights standards, if it is clear that the state is unable, and
potentially unwilling, to seriously address issues such as
torture and enforced disappearance. This is further evident
from the fact that the offence of torture has not been
incorporated into domestic legislation and the state has not
ratified CPED. The above-mentioned reasons in this chapter
are a testimonial of Thailand’s inadequate performance and
full implementation of international human rights
instruments, such as CAT and ICCPR.

It could be noted that there is a serious risk that ISOC
personnel, delegated under ISA, will not comply with the
safeguards guaranteed under CPC. Thailand should
therefore also comply with Article 9 of ICCPR, which applies to preventative and administrative detention. The requirement that a detainee should appear in a physical manner before a court, under international law, provides the detainee the opportunity to complain about having been potentially subjected to torture and provides the judge the opportunity to observe the physical condition of the detainee. The absence of a guarantee of that requirement increases the risk of enforced disappearance and thus, a form of torture. This paper also proposes that a stronger ASEAN human rights mechanism, that would not pertain a strict principle of non-interference, should therefore be formulated as strong regional pressure could directly impact on the amendment of the special security laws.
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A Critical Analysis and Evaluation of the Key Changes Introduced by the Criminal Finances Act 2017 and their likely Impact in Combatting Financial Crime and Terrorist Financing

Huw Thomas*

This essay critically analyses key legislative provisions introduced by the Criminal Finances Act 2017 aimed at recovering the proceeds of crime and preventing terrorist financing. In particular, it evaluates provisions implementing unexplained wealth orders, amendments to the Suspicious Activity Report regime, account freezing orders, unlawful conduct through human rights abuse outside the United Kingdom (“UK”) and the creation of corporate offences of failure to prevent facilitation of tax evasion. It considers the effect of the new measures on the UK’s ability to effectively combat financial crime and terrorist financing, highlighting the unsatisfactory state of the UK’s anti-money laundering (“AML”) and counter-terrorist financing (“CFT”) regime. Not only does this necessitate a holistic review of
the UK’s AML/CFT regime; it reinforces the requirement for a far more effective framework that penalises and deters money laundering and terrorist financing whilst simultaneously maintaining the integrity and viability of the UK’s financial system.

I. Introduction

The terror attacks in London\textsuperscript{1} and Manchester\textsuperscript{2} and the continued threats posed by Al-Qaeda and the Islamic State have once again ‘seen fresh emphasis placed by financial regulators around the world on countering terrorist financing and money laundering’.\textsuperscript{3} In light of this, the Financial Action Task Force has:

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\textsuperscript{3} David Miller, 'Financial Crime And Counter Terrorist Financing Updates' (Regtechfs.com, 4 March 2016)
 [...] highlighted the need to increase levels of communication and information sharing, to put in place legal frameworks to penalise and deter money laundering and terrorist financing and develop a detailed understanding of how technology and the evolution of financial services is changing how people can transfer and hide funds and launder money.4

The Home Office estimates that ‘amounts laundered globally are equivalent to 2.7% of global GDP, or US $1.6 trillion in 2009, while the National Crime Agency (NCA) assesses that billions of pounds of proceeds of international corruption are laundered into, or through the UK’.5 In 2017, ‘40% of terrorist plots in Europe are believed to be at least partly financed through crime, especially drug dealing, theft, robberies, the sale of counterfeit goods, loan fraud, and burglaries’.6 The Serious and Organised Crime Strategy 20137 and Strategic Defence and Security Review 20158 aim to collaborate with


4 Ibid.
5 Explanatory Notes to the Criminal Finances Act 2017.
8 'National Security Strategy And Strategic Defence And Security Review 2015' (Gov.uk, November 2015)
the private sector to increase the UK’s hostility towards those criminals seeking to launder the proceeds of crime or corruption.9 Proponents advocate that the Criminal Finances Act 2017 (“CFA”) (“the Act”)10 is key to achieving this objective.11

The Act,12 given stimulus following the revelations of the Panama Papers scandal,13 received Royal Assent on 27 April 2017. It symbolises the latest attempt to secure and uphold the integrity of the UK’s financial sector,14 representing the ‘largest overhaul of the UK’s anti-money laundering regime in more than a decade and the largest expansion of corporate criminal liability since the Bribery Act 2010’.15 The CFA16

9 Explanatory Notes to the Criminal Finances Act 2017 (n 5).
10 Criminal Finances Act 2017 (CFA 2017).
11 Explanatory Notes to the Criminal Finances Act 2017 (n 5).
12 CFA 2017 (n 10).
16 CFA 2017 (n 10).
comprises of four Parts, ‘all of which seek to strengthen the law on recovering the proceeds of crime, tackling money laundering and corruption, and countering terrorist financing’.17

This Article will critically analyse and evaluate the key changes introduced by the CFA18 and their likely impact in combatting financial crime and terrorist financing. In particular, it will assess provisions implementing unexplained wealth orders (“UWOs”), amendments to the Suspicious Activity Report (“SAR”) regime, account freezing orders, unlawful conduct through human rights abuse outside the UK, and the creation of corporate offences of failure to prevent facilitation of tax evasion. Such an examination will highlight the unsatisfactory state of the UK’s anti-money laundering (“AML”) and counter-terrorist financing (“CFT”) regime,19 supporting the conclusive theme of this Article: legislative changes introduced by the CFA20 have failed to enhance the UK’s ability to effectively combat financial crime and terrorist financing. Not only does this necessitate a holistic review of the UK’s AML/CFT regime,21 it reinforces the requirement for a far more effective framework that penalises and deters money laundering and terrorist financing whilst simultaneously maintaining the integrity and viability of the UK’s financial system.

18 CFA 2017 (n 10).
20 CFA 2017 (n 10).
21 Kebbell (n 19).
II. UWOs

From 31 January 2018, the CFA\(^{22}\) implemented UWOs as a new mechanism\(^{23}\) to recover property using the civil recovery proceedings under Part 5 of the Proceeds of Crime Act 2002 ("POCA").\(^{24}\) Laird advocates that UWOs establish the most important modification made to the POCA regime for many years.\(^{25}\)

Defined as ‘an order granted by the High Court at the application of an enforcement authority relating to specific property,’\(^{26}\) a UWO ‘requires the respondent to explain the nature and extent of their interest in the property and how they obtained the property.’\(^{27}\) Moreover, ‘UWOs may only be issued in respect of politically exposed persons’ ("PEPs") or ‘where the respondent is suspected to have been involved in serious crime (or is connected to someone who is).’\(^{28}\) Further, the High Court possesses the ability to issue interim freezing orders ("IFOs") in circumstances where ‘it believes that the respondent is uncooperative or might frustrate a subsequent recovery order.’\(^{29}\)

\(^{22}\) CFA 2017 (n 10).
\(^{23}\) A&O CFA (n 15).
\(^{24}\) Proceeds of Crime Act 2002 (PCA 2002).
\(^{27}\) Ibid.
\(^{28}\) Ibid.
\(^{29}\) Rivage (n 14).
2.1 How will UWOs be used?

It is evident that UWOs are likely to be primarily used for the purposes of exposing and recovering illicit wealth.\(^{30}\) However, Macdonald opines that ‘information obtained via a UWO may be used in “any legal proceedings,” with the only exception being that information obtained via a UWO cannot be used in criminal proceedings against the respondent (with limited exceptions in cases of perjury).’\(^{31}\) Consequently, information provided via this mechanism ‘may be kept for an indefinite period and shared with other enforcement agencies’.\(^{32}\) This demonstrates significant scope for UWOs to be utilised as a wider mechanism in relation to the investigation of cases involving money laundering and terrorist financing,\(^{33}\) providing weight to the notion that measures implemented by the CFA\(^ {34}\) have enhanced the UK’s ability to combat financial crime and terrorist financing.

However, a number of commentators\(^ {35}\) challenge this notion, pioneering the more appropriate view that ‘UWOs may run into trouble in the courts on the basis that the reversed burden of proof infringes human rights relating to privacy and property.’\(^ {36}\) Indeed, it is accepted that in straightforward

\(^{30}\) Macdonald (n 26).

\(^{31}\) Ibid.

\(^{32}\) Ibid.

\(^{33}\) A&O CFA (n 15).

\(^{34}\) CFA 2017 (n 10).


\(^{36}\) Ibid.
cases where ‘a Respondent has been linked to serious crime, the likelihood of an UWO application being rejected or struck down for these reasons appears remote’. However, in circumstances where the nexus to criminality is weaker, for example ‘where a UWO is sought simply because a Respondent is a politically exposed person and there is an unexplained disparity in their income and assets,’ such arguments could displace the imposition of a UWO, reinforcing the more appropriate view that the CFA has failed in its primary aim of strengthening the UK’s AML/CFT regime.

2.2 Extraterritorial Effect of UWOs

Macdonald emphasises that ‘the international reach of UWOs is striking’ due to the fact that ‘a Respondent does not need to reside in the UK’ and ‘their property does not need to be located in the UK (POCA applies to property located outside the UK)’. In circumstances where the respondent is a PEP, they must be located outside of the European Union (‘EU’) to be caught within the scope of the Act. Moreover, if the individual in question is connected to ‘serious crime,’ it is irrelevant where the crime occurred, provided it would amount to an offence in the UK.

37 Macdonald (n 35).
38 Ibid.
39 Ibid.
40 Ibid.
41 CFA 2017 (n 10).
42 Macdonald (n 35).
43 Ibid.
44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid.
On the other hand, commentators demonstrate that practical limits exist on the territorial scope of a UWO. Evidence supports this as ‘enforcement authorities are unlikely to expend resources seeking UWOs where neither the Respondent nor the property has a UK nexus’. Moreover, in circumstances where ‘a UK enforcement authority may seek assistance from foreign authorities to enforce a UWO (and an interim freezing order) (...) the willingness of foreign authorities to assist in enforcing this novel tool will be a key factor in UWOs’ practical geographical research’. Further, ‘state immunity for foreign officials may also blunt their impact in many jurisdictions,’ reinforcing the inability of the CFA to enhance the UK’s ability to combat financial crime and terrorist financing.

2.3 Commercial Implications

Issues concerning UWOs and IFOs are not just limited to their extraterritorial applicability. Macdonald pioneers the view that they will ‘pose new challenges for financial institutions’ compliance departments’ due to the disproportionate burden now placed upon firms. Although UWOs are designed to target individuals and not financial institutions, commentators assert that ‘regulators may act
against firms that fail to collect accurate source of wealth information or whose customers are subject to a disproportionate number of UWOs’. Consequently, firms operating within this sector will be required to maintain ‘robust know your customer (“KYC”) programmes,’ exemplifying the significance of legislative changes implemented by the CFA. However, commentators highlight that this is not an easy task given that ‘many countries lack centrally held property registers and the proliferation of assets held by shell companies, trusts and other anonymising vehicles makes compiling accurate beneficial ownership information difficult’. Additionally, ‘cultural stigma often prevents frontline employees from enquiring about their customers’ source of wealth’. Further, firms ‘wishing to retain foreign clients should make sure that their KYC procedures are robust enough to stand up to the heightened regulatory scrutiny,’ reinforcing the more appropriate view that changes made by the CFA place a disproportionate burden on financial institutions operating in the UK.

2.4 Comparative Analysis of UWOs

58 Ibid.
59 Rivage (n 14).
60 Ibid.
61 CFA 2017 (n 10).
62 Rivage (n 14).
63 Ibid.
64 Ibid.
65 Ibid.
66 CFA 2017 (n 10).
67 Kebbell (n 19).
Furthermore, the Impact Assessment\textsuperscript{68} that accompanies the CFA estimates that there will be 20 cases per year that will rely upon a UWO and that asset recovery will run into the millions of pounds.\textsuperscript{69} Laird asserts that such an estimate could prove ‘over-optimistic’.\textsuperscript{70} Indeed, a comparative analysis of jurisdictions that have adopted UWOs concluded that Ireland has had notable success in utilising them.\textsuperscript{71} The study attributes this success to both the Irish Criminal Asset Bureau, which is described as an ‘elite, well-resourced unit, with staff from not only the police and prosecutors, but also tax and social welfare agencies,’\textsuperscript{72} and the Irish High Court, who is ‘assisted by a special registrar, to work solely on confiscation cases for a period of at least two years’.\textsuperscript{73} Indeed, this combination ensures that Ireland has enjoyed significant success through the implementation its UWO regime.\textsuperscript{74} Consequently, Laird emphasises that ‘the success of UWOs in Ireland seems to be attributable not only to legislative developments, but also to the expertise and resources of the enforcement authority’.\textsuperscript{75} Therefore, UWOs cannot be viewed in isolation as a panacea; they must be accompanied by appropriate and effective means of enforcement.\textsuperscript{76} Given that


\textsuperscript{69} Ibid.

\textsuperscript{70} Laird (n 25) 916.

\textsuperscript{71} Ibid.

\textsuperscript{72} Ibid.

\textsuperscript{73} Ibid.

\textsuperscript{74} Ibid.

\textsuperscript{75} Ibid.

\textsuperscript{76} Ibid.
the Act\textsuperscript{77} is ‘not the first time a Government has taken steps to strengthen the provisions in POCA with a view to ensuring that those suspected of involvement in crime do not retain their ill-gotten gain,’\textsuperscript{78} it is highly doubtful that this latest amendment will prove successful in strengthening the UK’s AML/CFT regime.\textsuperscript{79}

III. Amendments to the SAR Regime

With effect from 31 October 2017, the CFA\textsuperscript{80} implemented legislative changes\textsuperscript{81} to the UK’s money laundering reporting regime which was previously outlined in POCA.\textsuperscript{82} Prior to the CFA,\textsuperscript{83} POCA\textsuperscript{84} ‘required firms operating in the regulated sector (including financial services firms) to disclose knowledge or suspicion of money laundering to the NCA’.\textsuperscript{85} Disclosures were made by way of SARs. Macdonald opines that two significant amendments have been made to the SAR regime under the Act.\textsuperscript{86}

3.1 Extended Moratorium Period

Under the previous reporting regime,
A firm that submitted a SAR to the NCA was deemed to have received the NCA’s consent to engage in activity relating to property that it suspected to constitute the proceeds of crime if: (a) after seven working days, the NCA did not notify the firm that consent had been refused, or (b) the NCA notified the firm within seven working days that it had refused consent, but had taken no further action in relation to the matter after a further 31 calendar days. This period of 31 days was known as the moratorium period.

During the drafting stage of the Criminal Finances Bill, there had been calls to end the consent-based regime relating to SARs, with proposals to ‘replace it with an “entity” rather than “transaction” based reporting system. Such a system would require SARs to be made in respect of organisations and individuals, as opposed to each transaction undertaken by them’. Despite this, the Government expressly reinforced their intention to retain the consent regime during the publication of the Criminal Finances Bill in 2016.

As a result, ‘the consent regime under POCA outlined above has survived and exists in the Criminal Finances Act’. Kebbell criticises this development as a wasted chance to tackle the uneven encumbrance placed upon those operating within the legal sector. Evidence supports this notion as the
UK failed to act ‘upon an alternative proposal set forth by the Law Society whereby a “tiered” reporting system could apply to the legal sector. Under this system, lawyers would simply “grade” the importance of the SARs they submit’. 94 The limitations of the legislative changes made by the CFA 95 are clear; reinforcing the notion that the CFA 96 has failed to enhance the UK’s AML/CFT regime.

However, commentators 97 challenge this view, arguing that the CFA 98 ‘makes the legislative changes necessary to give law enforcement agencies and partners new capabilities and powers to recover the proceeds of crime, and to tackle money laundering, corruption and terrorist financing’. 99 Evidence supports this notion as the CFA 100 enables enforcement authorities to ‘apply to the Crown Court extend the moratorium period for 31 days on up to six occasions’. 101 Fisher QC and Clifford opine that the rationale underpinning the new regime ‘is to give the NCA more time to consider a SAR and, where a matter might be more complex, sufficient space to conduct further investigations and gather the necessary evidence in support of property freezing’. 102 In doing so, the aim is that government agencies will be in a much stronger position to utilise information contained in a

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94 Ibid.
95 CFA 2017 (n 10).
96 Ibid.
97 Explanatory Notes (n 5).
98 CFA 2017 (n 10).
99 Explanatory Notes (n 5).
100 CFA 2017 (n 10).
101 A&O CFA (n 15) 20.
Indeed, ‘the case for giving enforcement authorities more time to properly consider them and act is strong’.  

### 3.1.1 Commercial Implications

Although it is accepted that the mechanism for submitting a SAR has not been modified, Macdonald emphasises that ‘a potential six-fold increase in the moratorium period for SARs should cause firms to pause and give careful thought as to whether the test for filing a SAR has been met,’ further exacerbating the disproportionate burden placed upon firms operating in the regulated financial services sector. Evidence supports this as ‘the ability of the NCA (or other authorities) to extend the moratorium periods may cause significant issues in relation to large and/or time-critical transactions’. Given that ‘95.78% of all SARs filed between October 2015 and March 2017 were filed by financial services firms,’ the ‘potential for a long moratorium period may mean that control functions are more routinely challenged by front line staff as to whether submitting a SAR is absolutely necessary in a given situation’. As ‘634,113 SARs were filed between October 2015 and March 2017,’ greater weight can be attached to the notion that the enactment of the CFA

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103 Ibid.
104 Ibid.
105 A&O CFA (n 15) 20.
106 Kebbell (n 19).
107 A&O CFA (n 15) 20.
110 Ibid 21.
111 Ibid.
112 CFA 2017 (n 10).
represents a wasted chance to tackle the ‘disproportionate burden’\textsuperscript{113} imposed on the UK’s financial system.\textsuperscript{114}

\section*{3.2 Information Sharing}

Heralded as a significant development,\textsuperscript{115} the CFA\textsuperscript{116} ‘allows for information sharing between firms where there is a suspicion of money laundering; either on the firms’ own initiative or at the request of the NCA’.\textsuperscript{117} Moreover, it outlines the requirements for such a request and ‘provides for a joint SAR to be submitted following information sharing that would fulfil both firms’ reporting obligations’.\textsuperscript{118} A notable advantage of this mechanism is that firms which collaborate and share information under these measures are additionally ‘protected from civil liability for breach of any confidentiality obligations or other disclosure restrictions, provided that any information shared is provided in good faith’.\textsuperscript{119}

Although well-placed and utilised in some circumstances,\textsuperscript{120} Burnett et al dispute the significance of this development given that ‘in reality there may be little appetite on the part of firms to share or request information relating to suspected money laundering from each other’.\textsuperscript{121} Despite the power proving theoretically useful where firms’ interests align,\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{113} Kebbell (n 19).
\item \textsuperscript{114} Ibid 741.
\item \textsuperscript{115} A&O CFA (n 15) 22.
\item \textsuperscript{116} CFA 2017 (n 10).
\item \textsuperscript{117} A&O CFA (n 15) 22.
\item \textsuperscript{118} Ibid.
\item \textsuperscript{119} Ibid.
\item \textsuperscript{120} Ibid.
\item \textsuperscript{121} Ibid.
\item \textsuperscript{122} Ibid.
\end{itemize}
firms ‘may wish to take different approaches to an issue and one firm may feel it is in practice obliged to submit a SAR simply because the other is intending to’. Another significant criticism that furthers the inadequacy of the power is that institutions are ‘likely to be reluctant to share client confidential information with each other, even if doing so will not attract the risk of civil liability for breaching confidentiality obligations’. The same rationale is applicable to ‘data that constitutes personal data for the purposes of the Data Protection Act 1998,’ reinforcing the inadequacy of legislative amendments introduced by the CFA to enhance the UK’s AML/CFT regime.

IV. Corporate Failure to Prevent Facilitation of Tax Evasion

Sahota emphasises that the UK Government has often reiterated its intention to combat those that facilitate tax evasion. For this reason, Part 3 of the CFA has inevitably attracted the most attention and commentary. Indeed, the creation of two new criminal offences of corporate failure to prevent a tax evasion facilitation offence – either domestic

123 Ibid.
124 Ibid.
125 Ibid.
126 CFA 2017 (n 10).
128 CFA 2017 (n 10).
129 A&O CFA (n 15) 6.
130 CFA 2017 (n 10) s 45.
or foreign\textsuperscript{131} - has been described as ‘one of the most significant elements’\textsuperscript{132} of the CFA.\textsuperscript{133} Further, ‘the foreign tax evasion carries a dual criminality requirement (i.e. the offence must also be a crime under English law) and ‘it is a defence to both offences to prove that a firm had in place “reasonable prevention procedures”).\textsuperscript{134}

However, commentators\textsuperscript{135} highlight that these new tax offences have received much scrutiny and criticism.\textsuperscript{136} This is because prior to the CFA,\textsuperscript{137} ‘to hold a company liable for the illegal acts of directors, employees or agents it was necessary to show that the individuals responsible represented its “directing mind or will”’.\textsuperscript{138} However, critics highlighted that this approach made it ‘too difficult to prosecute companies, particularly large or medium-sized ventures where the directors are some distance removed from the day-to-day actions of employees’.\textsuperscript{139}

Although the CFA\textsuperscript{140} aims to ameliorate this issue through the expansion of the scope of criminal liability for companies accused of facilitating tax evasion, opposing commentators\textsuperscript{141}

\textsuperscript{131} CFA 2017 (n 10) s 46.
\textsuperscript{133} CFA 2017 (n 10).
\textsuperscript{134} A&O CFA (n 15) 6.
\textsuperscript{135} Sahota (n 127).
\textsuperscript{136} Ibid.
\textsuperscript{137} CFA 2017 (n 10).
\textsuperscript{138} Sahota (n 127).
\textsuperscript{139} Ibid.
\textsuperscript{140} CFA 2017 (n 10).
\textsuperscript{141} Sahota (n 127).
assert that ‘the Government has swung the pendulum too far the other way’.\footnote{Ibid.} Instead of ‘focusing on attributing the criminal act to the company, the offences focus on and criminalise the company’s failure to prevent those who act for or on its behalf from facilitating tax evasion’.\footnote{Ibid.} Due to the broad drafting of the CFA, it is widely applicable and therefore possesses the potential ‘to criminalise inadvertent facilitation in cases where senior management were unaware of and uninvolved in any criminal conduct by employees’.\footnote{Ibid.} Additionally, Sahota asserts that ‘liability arises even where no benefit has accrued to the company,’\footnote{Ibid.} strengthening the argument that measures implemented by the CFA\footnote{CFA 2017 (n 10).} are wholly misplaced. Evidence supports this as the legislative changes add further to the disproportionate burden imposed on firms operating within the UK’s financial system\footnote{Kebbell (n 19).} and represents a ‘wasted opportunity’\footnote{Ibid 741.} to adequately strengthen the UK’s AML/CFT regime.\footnote{Ibid.}

V. Account Freezing Orders ("AFOs")
Although the CFA’s provision of UWOs and two new criminal offences of corporate failure to prevent a tax evasion facilitation offence have sparked significant debate, little focus has been given to what may prove to be its most significant legacy: AFOs.

The CFA inserts provisions into Part 5 of POCA. It provides that, ‘on an application by an “enforcement officer,” a magistrates’ court may make an AFO if it is satisfied that reasonable grounds exist for suspecting that money held with a bank or building society: (i) is recoverable property; or (ii) is intended by any person for use in unlawful conduct’. The effect of an AFO is that ‘funds held in a bank account can be frozen for an initial period of up to 6 months, that period extendable on a six-monthly basis up to a maximum of two years.’

Although the provisions appear robust, Nakhwal and Querée assert that the scheme ‘is objectionable in terms of the overarching principle of the scheme, and its practical application’. In an attempt to strengthen the UK’s AML/CFT regime, the UK Government has hastily

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150 CFA 2017 (n 10).
152 CFA 2017 (n 10) s 16.
153 PCA 2002 (n 24) pt 5.
154 CMS (n 13) 15.
155 Ibid.
implemented a highly confusing and questionable regime.\textsuperscript{157} Therefore, it is submitted that the CFA\textsuperscript{158} has failed to implement measures that enhance the UK’s ability to combat financial crime and terrorist financing.

VI. The Magnitsky Amendment

The Magnitsky amendment was inserted less than two months prior to the enactment of the CFA.\textsuperscript{159} In short, the amendment ‘expands the civil recovery powers for unlawful conduct under Part 5 of POCA to property obtained by or in connection with a gross human rights abuse’.\textsuperscript{160} Qureshi et al opine that ‘the amendment’s roots lie in news of the alleged torture and subsequent death in police custody in 2009 of the lawyer Sergei Magnitsky, who made a complaint of a $230m fraud against Russian public officials in 2007 only to be arrested himself on corruption-related charges’.\textsuperscript{161}

As the Criminal Finances Bill\textsuperscript{162} made its way through Parliament, ‘Dominic Raab MP tabled an amendment that would enable the Government and private parties to apply to the High Court to freeze assets within the UK that belong to those involved in or profiting from gross human rights abuses in any country’.\textsuperscript{163} The rationale underpinning the amendment was to ensure that ‘people with blood on their

\begin{footnotesize}
\begin{enumerate}
\item[Ibid.]
\item[CFA 2017 (n 10)].
\item[Ibid.]
\item[A&O CFA (n 15) 26.]
\item[CMS (n 13) 13.]
\item[Criminal Finances Bill (n 89).]
\item[FT, 'UK MPs Vote For Power To Freeze Assets Of Human Rights Abusers' (\textit{Financial Times}, 2017) <https://www.ft.com/content/a02a4c60-f85c-11e6-9516-2d969e0d3b65> accessed 6 April 2018.]
\end{enumerate}
\end{footnotesize}
hands for the worst human rights abuses should not be able to funnel their dirty money into the UK’. 164

The corresponding provisions can now be found in section 13 of the Act,165 which amends section 241 of POCA166 and inserts a new definition at section 241A.167 Although it is universally accepted that these provisions permit the ‘recovery of property that is obtained as a result of conduct which constitutes gross human rights abuses or violations,’168 commentators169 envisage the possibility of ‘a dispute arising as to whether the property that is sought to be recovered was obtained as a result of the conduct that is described below, even if it is established that the respondent is someone who has engaged in such conduct’.170 Laird furthers this notion, emphasising that ‘the evidential difficulty in establishing a causal link between the conduct and the property has the potential to undermine the effectiveness of these provisions,’171 adding weight to the argument that their impact is ‘more symbolic than substantive’.172 Further, ‘the Impact Assessment to the Criminal Finances Act 2017 provides no estimate of the assets expected to be recovered pursuant to these provisions,’173 which lends weight to the notion that the CFA174 fails to implement legislative changes

164 Ibid.
165 CFA 2017 (n 10) s 13.
166 PCA 2002 (n 24) s 241.
167 Ibid s 241A.
168 Laird (n 25) 929.
169 Ibid.
170 Ibid.
171 Ibid.
172 A&O CFA (n 15) 27.
173 Laird (n 25) 929.
174 CFA 2017 (n 10).
that enhance the ability of the UK to combat financial crime and terrorist financing.

As inserted by the CFA,\textsuperscript{175} the definition of ‘unlawful conduct’\textsuperscript{176} now incorporates conduct which: ‘i) occurs in a country or territory outside the UK; ii) constitutes, or is connected with, the commission of a gross human rights abuse or violation; and iii) if it occurred in a part of the UK, would be an offence triable on indictment only or is an either way offence’.\textsuperscript{177} Recovery proceedings can be commenced once these conditions are satisfied.\textsuperscript{178} Moreover, ‘there is no need for the conduct to be a criminal offence in the country in which it occurred, but it must be an offence in the UK’.\textsuperscript{179} Laird emphasises the significance of this as ‘generally speaking, property is only recoverable if the principle of dual criminality is satisfied’\textsuperscript{180} and ‘the amendments introduced by the CFA constitute an exception to this rule’.\textsuperscript{181} Indeed, the amendment aims to have a deterrent effect,\textsuperscript{182} demonstrating that the UK remains a hostile place for those criminals who undertake human rights violations abroad,\textsuperscript{183} reinforcing the viability of provisions implemented by the CFA\textsuperscript{184} in combatting financial crime and terrorist financing.

\textsuperscript{175} Ibid.
\textsuperscript{176} PCA 2002 (n 24) s 241A.
\textsuperscript{177} Laird (n 25) 929.
\textsuperscript{178} Ibid.
\textsuperscript{179} Ibid.
\textsuperscript{180} Ibid.
\textsuperscript{181} Ibid.
\textsuperscript{182} Ibid.
\textsuperscript{183} Ibid.
\textsuperscript{184} CFA 2017 (n 10).
6.1 What Constitutes the Commission of a Gross Human Rights Abuse or Violation?

Conduct constitutes the commission of a gross human rights abuse or violation if:

- the conduct constitutes the torture of a person who has sought: (i) to expose illegal activity carried out by a public official or a person acting in an official capacity; (ii) to obtain, exercise, defend or promote human rights and fundamental freedoms; or (iii) the conduct otherwise involves the cruel, inhuman or degrading treatment or punishment of such a person; the conduct is carried out in consequence of that person having sought to do anything in (i) or (ii) in the first condition (above); and the conduct is carried out by a public official, or a person acting in an official capacity, in the performance or purported performance of his or her official duties (or at their instigation or consent/acquiescence while acting in such capacity).\(^{185}\)

Although the legislation fails to define the term ‘torture’ with explicit reference to an international convention, Laird advocates that ‘conduct that involves the intentional infliction of severe pain or suffering on another person is conduct that constitutes torture for the purposes of s.241A(2)(a)’.\(^{188}\) Furthermore, it is irrelevant whether the

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\(^{185}\) CMS (n 13) 13.

\(^{186}\) PCA 2002 (n 24) s 241A(2)(a).

\(^{187}\) Laird (n 25) 930.

\(^{188}\) Ibid.
pain or suffering is either mental or physical or whether it is caused by an omission or an act.\textsuperscript{189} Proponents welcome the inclusion of mental suffering.\textsuperscript{190} Notwithstanding the fact that the terms ‘cruel, inhuman or degrading treatment’ are not defined, such conduct is prohibited by the European Convention on Human Rights.\textsuperscript{191} In light of this, ‘case law provides a useful interpretative aid if a dispute arises as to whether the conduct in question constitutes cruel, inhuman or degrading treatment’.\textsuperscript{192}

Furthermore, ‘the extent to which the provisions have retrospective effect depends upon the conduct it is alleged the respondent has engaged in’.\textsuperscript{193} If the action ‘constitutes or is connected with torture, then they apply irrespective of whether the conduct occurs before or after the coming into force of the provisions,’\textsuperscript{194} reinforcing the robust nature of the provisions implemented by the CFA\textsuperscript{195} in strengthening the UK’s AML/CFT regime.

However, commentators\textsuperscript{196} note that proceedings must be brought within a 20-year period of the torture occurring.\textsuperscript{197} Moreover, Laird asserts that ‘if the conduct involves, or is connected with the cruel, inhuman or degrading treatment or punishment of a person, then the new provisions only apply

\begin{flushleft}
\textsuperscript{189} Ibid.
\textsuperscript{190} Ibid.
\textsuperscript{192} Laird (n 25) 930.
\textsuperscript{193} Ibid.
\textsuperscript{194} Ibid.
\textsuperscript{195} CFA 2017 (n 10).
\textsuperscript{196} Laird (n 25) 930.
\textsuperscript{197} Ibid.
\end{flushleft}
if the conduct occurs after they come into force’. Crucially, authorities will be required to ‘pay particular attention to the relevant limitation period when invoking these new provisions,’ strengthening the argument that the success of these new provisions is dependent not only on legislative developments but also on the expertise and resources of the relevant authority. These provisions are therefore not a panacea and must be accompanied by effective enforcement.

6.2 Impact

With respect to the effectiveness of the provisions implemented by the Act, Wallace asserts that they will send ‘send a “major signal” around the world that the UK could not be used as a base to hide ill-gotten gains’. Further, Browder emphasises the ‘historic and ground-breaking’ nature of the provisions as they provide the UK Government with the ability to breathe ‘the fear of God into every torturer and murderer from dictatorships that all have houses in London’.

Although the provisions appear to be robust at first glance, their ‘potential effectiveness is undermined, however, by the fact that they only allow for the recovery of property that is obtained as a result of conduct which constitutes a gross

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198 Ibid.
199 Ibid.
200 Kebbell (n 19).
201 CFA 2017 (n 10).
202 FT (n 163).
203 Ibid.
204 Ibid.
human rights abuse or violation’. Laird furthers this notion, asserting that ‘proving the causal link could be very difficult’. Even in circumstances where the enforcement agency is able to demonstrate that an individual’s conduct constituted a gross human rights abuse or violation, ‘proving that the house they own in Belgravia was obtained as a result of that conduct could prove impossible’. Consequently, the provisions may be viewed merely as a ‘politically symbolic change,’ reinforcing the inadequacy of legislative changes implemented by the CFA in combatting financial crime and terrorist financing.

VII. Terrorist Financing

The Home Office emphasises that ‘countering terrorist finance is an important part of the Government’s response to terrorism and financial investigation is a key tool in the investigation of a number of terrorism offences’. Moreover, ‘the vulnerabilities in the financial sector which are at risk of being exploited are broadly the same as those for the proceeds of crime’. In light of this, the CFA extends the following powers to investigations undertaken under the Terrorist Act 2000 (“TACT”) in relation to terrorist

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206 Ibid.
207 Ibid.
208 A&O CFA (n 15) 27.
209 CFA 2017 (n 10).
210 Explanatory Notes (n 5) 10.
211 Ibid.
212 CFA 2017 (n 10).
property and financing,\textsuperscript{214} and ‘to the civil recovery of terrorist property under the [Anti-terrorism, Crime and Security Act 2001] (“ATCSA”), as well as POCA: i) disclosure orders; ii) information sharing; iii) the powers to enhance the SARs regime; and iv) seizure and forfeiture powers – for bank accounts and moveable stores of value’.\textsuperscript{215} The extension of such powers reinforces the view that the CFA\textsuperscript{216} implements changes to ensure government agencies are provided with the necessary investigatory powers to effectively tackle terrorist financing.\textsuperscript{217}

Furthermore, the CFA\textsuperscript{218} ‘provides the power to designate civilian staff employed by the police as Counter Terrorism Financial Investigators (“CTFIs”) and extends a number of investigatory powers under TACT and civil recovery powers under ATCSA, which are currently only available to constables, to CTFIs’.\textsuperscript{219} This is significant as indications show that the extension of these powers to CTFIs ‘will increase the capacity of the police to apply for the orders in question by over 50\%’.\textsuperscript{220} Lastly, the Act\textsuperscript{221} ‘amends TACT to create a power so that court orders made in one part of the UK, for the purposes of or in connection with the investigation of terrorist financing, can be enforced in another part,’\textsuperscript{222} meaning relevant court orders made in England can be enforced by courts in Scotland or Northern Ireland and vice

\begin{thebibliography}{9}
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  \bibitem{215} Explanatory Notes (n 5) 10; CFA 2017 (n 10) s 35-43; TA 2000 (n 213).
  \bibitem{216} CFA 2017 (n 10).
  \bibitem{217} Explanatory Notes (n 5) 5.
  \bibitem{218} CFA 2017 (n 10).
  \bibitem{219} Explanatory Notes (n 5) 10.
  \bibitem{220} Ibid.
  \bibitem{221} CFA 2017 (n 10).
  \bibitem{222} Explanatory Notes (n 5) 10.
\end{thebibliography}
versa, further strengthening the viability of measures implemented by the Act in respect of enhancing the UK’s CFT regime.

Clearly, the main focus of these amendments is to provide enforcement agencies with new capabilities to tackle terrorist financing. In this respect, it is difficult to see how the CFA adds materially to the inadequacies of the existing CFT regime. Indeed, during a period where combatting the financing of terrorism has risen to the forefront of the security agenda, even a superficial examination of the UK’s contemporary CFT regime reveals that ‘the Government is failing to harness the full potential that financial intelligence has to offer, necessitating an urgent reassessment of how precisely terrorist finance should be most effectively tackled’.

VIII. Conclusion

Proponents advocate that the CFA represents the ‘latest in a number of aggressive measures to fight tax evasion, money laundering, and terrorist financing, shifting the UK to the

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223 Ibid.
224 CFA 2017 (n 10).
225 Ibid.
227 Ibid.
228 Ibid.
229 CFA 2017 (n 10).
forefront in the fight against global financial crimes’. \(^\text{230}\) However, an evaluation of the substantive provisions of the Act\(^\text{231}\) reveals that the CFA\(^\text{232}\) fails to make the ‘the legislative changes necessary to give law enforcement agencies and partners new capabilities and powers to recover the proceeds of crime, and to tackle money laundering, corruption and terrorist financing’. \(^\text{233}\) Consequently, it is submitted that the CFA\(^\text{234}\) fails to add materially to the unsatisfactory state of the UK’s existing AML/CFT regime,\(^\text{235}\) necessitating an urgent review of how precisely financial crime and terrorist financing should be most effectively tackled. \(^\text{236}\) Nevertheless, it is advocated that a far more effective AML/CFT framework is required to penalise and deter money laundering and terrorist financing whilst simultaneously maintaining the integrity and viability of the UK’s financial system.


\(^{231}\) CFA 2017 (n 10).

\(^{232}\) Ibid.

\(^{233}\) Explanatory Notes (n 5) 5.

\(^{234}\) CFA 2017 (n 10).

\(^{235}\) Kebbell (n 19).

\(^{236}\) Keatinge (n 226).
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