ABA Section of International Law
Middle East Committee

Middle East Review

A PUBLICATION OF THE MIDDLE EAST COMMITTEE
OF THE AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW

Issue No. 3 | November 2019

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From the Co-Chairs

Dear Colleagues, Members, and Friends of the Middle East Committee:

This Issue of the Middle East Review, our Committee's regular publication of legal news and developments from the Middle East and North Africa (MENA) region, is the third since the 2016-17 American Bar Association bar year. Since that time, and under the leadership of the Committee's past co-chairs, Hon. Delissa Ridgway, Jennifer Ismat, and Hdeel Abdelhady, the Middle East Review has become a publication of record for news and ideas about rule of law, human rights, and commercial and business law developments in the region. In that spirit, the Middle East Committee humbly publishes this Issue 3, for your reading pleasure. The issue contains intellectually stimulating and informative articles on the Middle East by academics and practitioners in, and on, the MENA region.

The Middle East Review (MER) is a regular publication with articles from students, academics and practitioners on legal developments in the Middle East and North Africa (MENA) region. The contributors have written intellectually stimulating and informative articles, and we are grateful for their patience with us in the extended process of getting Issue 3 to publication.

The Committee is currently soliciting articles for a further issue of the Middle East Review for the 2019-2020 ABA bar year, which will be Middle East Review Issue No. 4. We encourage anyone who is thinking of writing on legal developments in the region to submit their article for this publication. We also invite anyone interested in getting more involved in the activities of the Middle East Committee to contact us at kurzcooper@att.net (Daniel Cooper) and drhurwitz22@gmail.com (Deena Hurwitz), and to join our monthly Committee conference calls, held on the second Wednesday of each month at 11am Eastern. (Reach out if you need assistance finding the dial-in details.)

Again, we want to express our deep gratitude to the contributors to this issue and to the editorial team for their hard work and dedication in making this issue of the MER a reality, and want to especially appreciate the immediate past Committee co-chairs, Lisa Ridgway and Jennifer Ismat, for their guidance and support in making this such a worthwhile publication.

-Daniel R. Cooper & Deena R. Hurwitz

From the Editor

Welcome to this, the third issue of Middle East Review ("MER") a publication of the Middle East Committee of the American Bar Association Section of International Law. We are pleased to share with Committee members and friends this excellent, if somewhat belated, edition of the MER.

The content of this issue reflects the diversity of our members and the countries, developments, and issues within the broad geographic and substantive scope of the Middle East Committee. The issue's articles are wide-ranging, academic, consequential and thought-provoking in every regard.

We invite Committee members and other readers to submit feedback on this issue of the MER, as well as articles and suggestions for future issues to the Middle East Committee's co-Chair, Daniel Cooper, at kurzcooper@att.net, and the Committee's Vice Chair for Publications, Kelly Blount, at kellyblount85@gmail.com.

We hope you enjoy this issue of the MER. Please note that the views and opinions expressed in the articles herein are those of the authors and do not necessarily reflect the opinions, policies or positions of the American Bar Association or any of its constituent entities, including the Middle East Committee.

-Daniel R. Cooper, Editor in Chief (Issue No. 3)

About the Middle East Committee

The Middle East Committee is part of the American Bar Association's Section of International Law. Members of the Committee have a professional and/or personal interest in law and events concerning the Middle East and North Africa. The geographic scope encompasses Algeria, Egypt, Libya, Morocco, Tunisia, Qatar, United Arab Emirates, Bahrain, Oman, Afghanistan, Iran, Iraq, Israel, Jordan, Lebanon, Pakistan, Palestine, Sudan, Syria, Turkey, and Yemen.

The Committee conducts regular substantive conference calls with members, maintains an active email list with news and updates, and organizes panels for Section events. It has also helped organize and support various Rule of Law/judicial reform initiatives, including for Afghanistan, Iraq, Morocco, and Tunisia. Recent teleconferences have addressed the refugee crisis and Responsibility to Protect in Syria and Lebanon, political and security developments in Egypt and Libya, application of US employment law in the Middle East, and US and international sanctions, among other issues.

HUMANITARIAN LAW

Need for a New Convention on Non-International Armed Conflict: The Agreement on Detainees Between Warring Parties in Yemen

Mohammed Alshuwaiter, LLM[1]

Since the conflict violently erupted in Yemen in 2014, the warring parties finally came together to reach the Stockholm Agreement on December 14, 2018. The Agreement marks the first success after several unsuccessful rounds of negotiations. This United Nations (UN) brokered agreement tackles three central issues: first, under the supervision of the UN, the warring parties withdraw their troops to outside a number of port cities: the cities of Hodeidah, Salif, and Ras Issa; second, an agreement on the exchange of prisoners, detainees, missing persons, arbitrarily detained and forcibly disappeared persons, and those under house arrest, which I will refer to as the "detainees," and; finally, a statement of understanding on Taiz, where a joint committee will be formed for further negotiations on the city, which still remains under siege by the Houthis.

Still, the war in Yemen is entering its fifth year. It has been described by a September 2018 UN statement as the world's worst humanitarian crisis. The UN posits that there are "22.2 million in need of assistance, 8.4 million people severely food insecure, and a further 10 million that could fall under the same category by the end of the year." [2] According to a report by an internationally-recognized non-governmental organization, all parties to the conflict have violated international humanitarian law (IHL) and committed war crimes. [3] Those violations include indiscriminate targeting of civilians and civilians' objects, recruiting children, carrying out summary executions and arbitrary detention, and practicing torture. Since the start of the conflict, there is a massive number of detainees living in critical conditions in Yemen. This has compelled national, multilateral, and international human rights organizations, including the United Nations High Commissioner for Human Rights (OHCHR), and the International Committee of the Red Cross (ICRC) to respond.

The conflict in Yemen has shed a light on the urgent need for an updated international convention to address modern non-international armed conflict (NIAC) situations. The conflict in Yemen is an illustration of how current warfare operates, intertwining both domestic and international parties. The disconnect in regulating most current domestic conflicts arises because they are considered NIACs, however, they are still governed by the four Geneva Conventions, which mainly focus on IACs.

In 1949 when the Geneva Convention was initially adopted, it was intended mainly to regulate international armed conflict (IAC), as a result of World War II. In 1977 two additional protocols were adopted, *Additional Protocol I* (API), relating to the protection of victims of international armed conflicts

[1] Mohammed Al-Shuwaiter is a legal consultant who has provided consulting services to a number of international organizations, including the World Bank. He is an LLM graduate in international law from American University's Washington College of Law.
[2] UN News. "Yemen: Tackling the world's largest humanitarian crisis." September 24, 2018. <https://news.un.org/en/story/2018/09/1020232>
[3] Hum. Rights. Watch, "Yemen: Events of 2017." (Jan. 7, 2019) <https://www.hrw.org/world-report/2018/country-chapters/yemen>

and *Additional Protocol II* (APII), relating to the protection of victims of non-international armed conflicts. However, these additional protocols do not address the legal status of the detainees in NIAC. [4] This disconnect with modern conflict creates a void in regulating the detention and exchange of prisoners in NIAC and leaves these groups at the mercy of the most violent aspects of warfare.

Although reaching the Stockholm Agreement is an achievement, there remain serious humanitarian law lacunae regarding detention in NIAC. First, the authority of internment in NIAC is very controversial because of the absence of rules under the four Geneva Conventions and the Additional Protocols. However, the ICRC adopted the opinion that internment, or deprivation of liberty, is an inherent power in customary IHL, meaning the non-state actor is authorized to detain in NIAC.[5] Second, the term "prisoners" in the Stockholm Agreement leads to confusion, the term of "prisoner of war" (POW) is only used in IAC. The POWs have the privilege to not be prosecuted for taking a direct part in hostilities. As the UN identifies the Yemeni Conflict as "NIAC," it should use the term "internees" or "detainees" instead of "prisoners," to avoid confusion with the status of POW's. The APII, which deals with NIAC only, did not use the term "prisoners," it used the formulation "deprived of their liberty, interned or detained." [6] Further, the Stockholm Agreement deals with both foreign Yemeni combatants as well as civilians, adding to the complexity and precariousness of the applicable law in wartime.

The Stockholm Agreement also leaves certain questions open. These include, what will become of the Yemeni detainees reported by the UN in foreign countries, for example in Saudi Arabia and in the UAE detention centers, foreign detainees in Aden; or mercenaries of other nationalities fighting alongside with Houthis? The lack of clear categories of the status of detainees is also a reflection of the confusion in the conflict's characterization. To avoid dispute over its legitimacy, the Stockholm Agreement appears to have purposely not identified which party represents the *de jure* "government" and which represents the *de facto* "authority." However, UNSCR 20451 endorses the Stockholm Agreement as between the State, the Yemeni government, versus the non-state Houthis. [7]

The legal status of detainees in the Stockholm Agreement is unclear as to whether they are POWs or NIAC detainees. This ambiguity is partly attributable to the non-updated international conventions on NIAC that concern detainees. This paper will adopt the UN terms of reference and use the term the "Yemeni Government" to refer to President Abd Rabbuh Mansur Hadi's government, and "Houthis' authority" to refer to the Houthis. To illustrate this complexity, the ICRC stated: "Identifying the legal framework governing internment becomes particularly complicated in NIACs with an extraterritorial element, i.e. those in which the armed forces of one or more State, or of an international or regional

[4] The APII did include how the detainees should be treated, but it did not clarify the legality of being detained.
[5] International Committee of the Red Cross (ICRC). "Internment in Armed Conflict: Basic Rules and Challenges." Opinion Paper, November 2014, 7, (Feb. 25, 2019) <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>
[6] Additional Protocol II art.5, Jun. 8 1977, 1125 U.N.T.S. 609.
[7] Houthis is a Yemen Zaydi-Shia religious group, established early 1990, named after a family call (al-Houthi) claiming they are descendants of the Prophet Mohammed, which gives them the right to rule. 2004 was the first time of armed confrontation between Houthis militias and the Sunni Yemeni government. What is the Houthi Movement? <https://archive.org/about/ https://web.archive.org/web/20141006141708/http://tonyblairfaithfoundation.org/religion-geopolitics/commentaries/backgrounder/what-houthi-movement>

organization, fight alongside the armed forces of a host State, in its territory, against one or more organized non-State armed groups." [8]

This article reviews the legal basis of the agreement from the both the IHL and the IHRL perspectives as they are referred to in the Stockholm Agreement's preamble and supported by the UN and the ICRC. To review the agreement, a brief introduction of the conflict is needed to understand the context and clarify the laws governing the exchange of detainees.

Background

Yemen's modern history has been marked by several conflicts. However, the current conflict might be the most devastating. This conflict began on September 21, 2014, when the Houthis (*Ansarullah*) [9] took over the capital of Yemen, Sana'a.[10] Later, in February, 2015 the President of Yemen, Abd Rabbuh Mansur Hadi, who had been placed under house-arrest by the Houthis, fled to the former capital of southern Yemen, Aden. [11] From Aden, Hadi withdrew his resignation and reclaimed his presidency saying: the resignation occurred under the Houthis pressure. Hadi also declared Aden as a temporary capital.[12] The Houthis pursued Hadi to Aden, attempting to extend their control over southern Yemen. The Houthis' warplanes bombed the Presidential Residency in Aden and took over the city.[13] Hadi then fled to Saudi Arabia seeking its support. On March 26, 2015, a coalition led by Saudi Arabia launched a military campaign to restore President Hadi to power.[14]

The Houthis' alliance with the former President, Ali Abdullah Saleh, formed a *de facto* authority in Sana'a, which today controls most of northern Yemen. Saleh, who compared ruling Yemen to "dancing on the Heads of Snakes," tried to use the Houthis to retaliate against those who had removed him from power and help him take it back.[15] For the Houthis, on the other hand, Saleh was the enemy of their enemies. So, they allied with him to benefit from his strong connection with the military commanders and tribal leaders that would assist them to march on Sana'a and take over the capital. And that is initially what happened. However ultimately, the alliance did not last, and the Houthis assassinated Saleh on December 4, 2017. Hadi came to power after the 2011 political crisis as a result of a political settlement reached by the Gulf Cooperation Council (GCC) Initiative, sponsored by a group of ten countries including the five members of the Security Council, and the GCC. The political settlement

[8] Internment in Armed Conflict: Basic Rules and Challenges International Committee of the Red Cross (ICRC) Opinion Paper, November 2014, 7. <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>
[9] Several Islamic groups have used the name of *Ansarullah for their movement, including the Houthis. Ansarullah is an Arabic-Islamic terms means the Supporters of God. Quranic (3:52)*
[10] Peter Salisbury, "Yemen: Stemming the Rise of a Chaos State." Chatham House, 21 (2016). <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-05-25-yemen-stemming-rise-of-chaos-state-salisbury.pdf>
[11] Mohamed Ghobari and Mohammed Mukhashaf. "Yemen's Hadi flees to Aden and says he is still president." Reuters, February 21, 2016. <https://www.reuters.com/article/us-yemen-security/yemens-hadi-flees-to-aden-and-says-he-is-still-president-idUSKBN0LP08F20150221>
[12] MEE and agencies. "Yemen's Hadi withdraws resignation, as UN pushes for dialogue." Middle East Eye, February 24, 2015. <https://www.middleeasteye.net/news/yemens-hadi-withdraws-resignation-un-pushes-dialogue>
[13] *Id.* at 25.
[14] *Id.*
[15] Zachary Laub. "Yemen in Crisis." Council on Foreign Relations, April 19, 2016. <https://www.cfr.org/backgrounder/yemen-crisis>

stipulated that it should be followed by a public referendum, which occurred on February 21, 2012.[16] Hadi continues to be seen as the recognized President of Yemen, although he has limited control on the ground and is exiled in Saudi Arabia. Further, the Houthis' *de facto* authority failed to obtain international recognition though they have control over the capital Sana'a and other governorates.[17]

The Yemeni government has been operating in exile, based in Saudi Arabia, and has general control over some of the "liberated" parts in northern and southern Yemen. Because of the instability in Aden, the Yemeni government has been back and forth between Riyadh and Aden, but in October 2018 the Yemeni government began to operate out of Aden, while President Hadi is still in Riyadh. An additional layer of complexity comes into play as regional powers (Iran, Saudi Arabia, and the United Arab Emirates - UAE) use the Houthis, Yemeni government, and other forces to fight a proxy war at the expense of the Yemeni population, causing a humanitarian disaster.

Characterization of the Yemeni Conflict

It is important, before defining the Yemeni conflict to clarify that the right to war, *jus ad bellum*, is separate from the law of war (*jus in bello*). Meaning that having the right to wage a war under the UN Charter does not allow any warring party to violate IHL. The characterization of the conflict determines the applicable laws and conventions. However, it is more complicated to characterize modern conflicts by the IHL standards that have been established by the four Geneva Conventions in 1949. IHL recognizes only two types of conflicts. The first one occurs between states and is qualified as an "international armed conflict" (IAC), and the second occurs within a state, between the state and non-state actors (NIAC) and is categorized as a "non-international armed conflict." Common Article 2 to the four Geneva Conventions defines an international armed conflict as combat occurring between two or more high contracting parties, which refer to States that are party to the Conventions.[18] Common Article 3 to the four Geneva Conventions describes a non-international armed conflict, as a one that happens "in the territory of one of the High Contracting Parties." [19] Accordingly, the parties to the conflict and the concept of statehood constitute the core of the characterization of the conflict.[20] The four Geneva Conventions in 1949 were mainly concerned with inter-state conflict, as a result of World War II. Therefore, they did not elaborate much on non-international armed conflicts. However, in post-WWII, most conflicts have been non-international.[21] Seeking to fill this gap, the Additional Protocols of the four Geneva Conventions were adopted. The Additional Protocol II relates to the Protection of Victims of Non-International Armed Conflicts.[22]

[16] Salisbury, *supra* note 9, at 14.
[17] S.C. Res. 2216 (April 14, 2015).
[18] Geneva Convention IV art. 2, Aug. 12, 1949, 75 U.N.T.S. 286, 288.
[19] *Id*. at 3.
[20] Int'l Comm. of Red Cross. "Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field." August 12, 1949: Commentary of 2016: Article 2: Application of the Convention, §221 (2016). Article 2: Application of the Convention (Feb. 25, 2019). <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#15>
[21] Lawrence Hill-Cawthorne, Detention in Non-International Armed Conflict 19 (Paola Gaeta & Salvatore Zappala eds., 2016).
[22] *Id*. at 20.

With that in mind, under what definition does the Yemeni conflict fit? Foreign intervention in Yemen's conflict makes it hard to characterize it from an IHL perspective. The coalition led by Saudi Arabia and the UAE supporting the Yemeni government, and Iranian logistical support smuggling weapons to the Houthis authority, can be seen as a trigger of IAC.

Turning now to the UN and the international committee, how do they characterize the Yemeni conflict? According to UN Security Council Resolution 2216 (2015) on Yemen, the intervention of the coalition led by Saudi Arabia, at the moment, does not trigger the threshold of what is defined as an international armed conflict; rather it is considered support on the side of Yemen's legitimate government against non-state actors, the Houthis/Saleh forces. The recognition of President Hadi by the UN allows his government, under Article 51 of the Charter of the UN, to request foreign military aid.[23] Furthermore, Article 2(4) of the UN Charter exceptionally authorizes states to use force, in particular in the case of self or collective defense, or when the use of force is authorized by the Security Council, or by the request of another state.[24] Currently, the UN continues to identify the conflict in Yemen as "NIAC" between "pro-government forces" against the "de facto authority" Houthi forces.[25] However the UN panel of experts, in its legal framework, underlines that viewing the Yemeni conflict as a "binary conflict only between the Government and the Houthis" leads to a misunderstanding of the nature of the conflict.[26] The UAE has the overall control of the Security Forces and other troops in South Yemen. The UAE also supports the Southern Transitional Council, which became a challenge for the Government declaring a state of emergency in Aden and clashed heavily with government forces. [27] This additional layer of intervening forces and outside actors will further impact and complicate the conflict. Moreover, the latest UNSCR 2451 (2018) continues to describe the conflict in Yemen as a NIAC, between the State (the government), and a non-State (Houthis).[28]

Laws Governing Detention in the Yemeni Conflict

The Stockholm Agreement indicates that its legal sources and references are: Islamic Law, IHL, IHRL, and the domestic law of Yemen.

I. IHL

Characterizing the Yemeni Conflict as a NIAC means that the conflict is governed by two main provisions, Common Article 3 of the four Geneva Conventions 1949, and Additional Protocol II (APII) of 1977.[29] According to the Geneva Convention (IV), relative to the Protection of Civilian Persons in

[23] Geneva Academy, Non-international armed conflicts in Yemen, <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse1accord>
[24] John Cerone, *Misplaced Reliance on the "Law of War,"* 14 NEW ENG. J. of Int'l and Comp. L. 57, 59 (Fall 2007).
[25]. U.N. General Assembly. "Situation of Human Rights in Yemen: Rep. of United Nations High Commissioner." ¶5, U.N. Doc. A/HRC/39/43 (August 17, 2018).
<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23479&LangID=E>
[26] Id. at ¶23.
[27] U.N. General Assembly, Situation of Human Rights in Yemen: Rep. of United Nations High Commissioner, ¶5,15, and 23, U.N. Doc. A/HRC/39/43 (August 17, 2018).
<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23479&LangID=E>
[28] U.N. Security Council. "The Situation in the Middle East." S/RES/2451 (2018). <http://unscr.com/en/resolutions/2451>
[29] Sylvain Vite, Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations, 91 Int'l Rev. of the Red Cross 69, 83 (2009) (Jan. 5, 2019), <https://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf>

Time of War, unlawful confinement is a grave breach.[30] Also, the APII governs deprivation of liberty in NIAC and indicates fundamental rights for those not participating in hostilities. However, the concept of *detention* in NIAC is one of the most urgent issues that requires updating IHL. IHL distinguishes between two categories of people during armed conflicts. First, *combatants*, who take direct part in hostilities, also referred to as fighters. Those combatants either belong to an official armed group or belong to organized non-state actors that take part in the armed conflict. The second group of people is civilians which are defined negatively; they do not take part in hostilities. This group is entitled to protection, as long as they do not take direct part in military operations. However, the IHL allows the detention of civilians during the armed conflict based on a very strict legal standard: "imperative reasons of security."[31] For example, the "internment may not be resorted to for the sole purpose of interrogation or intelligence gathering, unless the person in question is otherwise deemed to represent a serious security threat. Similarly, internment may not be resorted to in order to punish a person for past activity, or to act as a general deterrent to the future activity of another person."[32]

II. IHRL

IHRL provides protections of individuals' liberty in cases where IHL safeguards are insufficient; these treaties offer important guarantees protecting civilians from arbitrary detention. Yemen is a state party to the International Covenant on Civil and Political Rights (ICCPR).[33] Yemen and all the countries participating in the coalition are parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[34] Article 9 of the ICCPR protects individuals from arbitrary detention.[35] The Human Rights Committee has expressed that the IHRL rules, such as ICCPR, apply along with the IHL rules during wartime. The International Court of Justice (ICJ) has confirmed this position, stressing that: "the protection of the International Covenant on Civil and Political Rights does not cease in times of war."[36] This means that both IHL and IHRL apply to the conflict in Yemen.

III. The domestic law of Yemen

IHRL, as a matter of sovereignty, does not intervene with states' rights regulating domestic laws. This rule is supported by the ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect to Kosovo.[37] However, this rule is not absolute. IHRL specifies certain legal standards and minimum guarantees that states should respect and consider when enacting their laws. In addition, the ICJ held that IHL regulates state detention activity.[38] In non-international armed conflict, states have no

[30] Geneva Convention IV art. 147, Aug. 12, 1949, 75 U.N.T.S. 286, 288.
[31] Basic Rules and Challenges (ICRC) *supra* note 4, 9.
[32] *Id.*
[33] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984. <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en>
[34] *Id.*
[35] G. A. Res. 217 (III) A, Universal Declaration of Human Rights art. 9 (Dec. 10, 1948).
[36] International Commission of Jurists, Legal Commentary on the right to challenge the lawfulness of detention in armed conflict 3, (Jul. 31, 2017) <https://www.icj.org/wp-content/uploads/2015/09/Universal-Commentary-WGAD-PrincGuideArmedConflict-Advocacy-2015-ENG.pdf>
[37] Jelena Pejic, Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence, 87 Int'l Rev. of the Red Cross 375, 442 (2005) (Jul. 28, 2017) <https://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf>
[38] *Id.*

right to establish laws on specific conduct that contradict expressly prohibited acts by international customary law, like arbitrary detention.[39] Therefore, states should comply with the rules of IHRL and IHL when detaining any person in times of war. As a general rule, domestic law also offers an important legal framework for detention in non-international armed conflict.[40] The Yemeni Constitution's Article 48 guarantees all citizens personal freedom and prohibits arrest of individuals, unless such action is undertaken as part of a criminal case, which should be issued by a Prosecutor's order.[41] Moreover, the Yemeni Constitution assures that "No person may be imprisoned or detained in places other than those designated as such and governed by the law of prisons."[42] The Constitution prohibits the administrative authority from holding a person in custody over 24 hours without presenting him before the court.[43] The prohibition of arbitrary detention is also established in the Yemeni Penal Code of 1994. Article 246 outlaws arbitrary arrest without legal grounds and punishes any person who orders or participates in such practice with five years of imprisonment and has no statute of limitations.[44]

Detention During the Conflict

The question now is, how can this body of laws—both international and domestic—be applied in the absence of a capable and legitimate governmental authority in Yemen? Already, the judiciary system in Yemen had become largely defunct.[45] An investigation by the Group of Experts, under the United Nations Commission on Human Rights (OHCHR), has found that both warring parties have violated IHL and committed war crimes throughout the country, including arbitrary detentions, enforced disappearances, torture, and ill treatment. The Governments of Yemen, the United Arab Emirates, and Saudi Arabia are responsible for hundreds of individuals been detained for perceived opposition to the Government of Yemen or the UAE. [46] The UAE also has detention facilities and secret prisons out of the Yemeni government's control. SAM, a Yemeni human right organization based in Geneva, has "documented 232 informal prisons, 180 operated by Houthis group, 25 by UAE-funded forces, 15 by fighting groups affiliated to the legitimate government, and 11 by the government forces." [47]

Exchanging Prisoners

It is not the first time that the Yemeni government and Houthis authority have swapped prisoners; both sides have done so via local mediators. However, this is the first time it has been carried out in such large-scale numbers, under UN and ICRS supervision. This agreement and these exchanges represent a step forward towards a peace agreement. Nevertheless, this important step should not prevent the reviewing of the legal framework of the Stockholm Agreement, and consideration of how it can be improved to better protect the detainees' rights from further abuse and violence.

Mixing Civilians with Combatants

[39] *Id.*
[40] Legal Commentary of the Right to Challenge the lawfulness of Detention, *supra* note 39, 17.
[41] Yemen [Constitution] 2001, Section 2, art. 48.
[42] *Id.*
[43] *Id.*
[44] Yemen Pen. Code. bk. 9, ch. 2, art. 246.
[45] *Supra* 24 Note ¶68 <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23479&LangID=E>
[46] *Id*, art. 65 -73.
[47] SAM, Second Report on Human Rights Situation in Yemen during 2017 <http://www.samrl.org> (2017) (Des. 30, 2018) <https://www.samrl.org/sam-launches-its-second-report-on-human-rights-situation-in-yemen-during-2017/>

Several reports and witnesses have confirmed that the majority of the detainees are civilians. According to *SAM*, there are 3966 civilians in these prisons, including 3258 in Houthi prisons, 583 in UAE-backed security forces facilities, and 86 by armed groups affiliated to the legitimate government. [48] The Houthis have employed the tactic of detention as a tool to suppress civilians who oppose their governmental control.[49] According to the OHCHR, it has "received reports indicating that at least 124 people, many believed to be civilians, were detained by the Popular Committees between 3 and 21 November 2014 in unrecognized places of detention, including the Amran Sport Stadium and in private homes throughout the Amran Governorate. The circumstances of detention are not known, given that OHCHR was denied access to the detainees."[50] Human Rights Watch (HRW) reported that Houthis authority in Yemen have been practicing arbitrary detention and enforced disappearance in the capital, Sana'a.[51] Mwatana, another Yemeni human rights organization, has asserted that arbitrary detention is systematically conducted by the Houthis. *Mwatana* reported 53 cases of arbitrary detention, including ten journalists, since the Houthis have taken over the capital Sana'a.[52] A report by the Associated Press (AP) mentioned, according to the Abductees' Mothers Union, that the Houthis have detained over 18,000 civilians since 2014. [53]

The Stockholm Agreement does not address the issue of foreigners in the conflict; Yemeni officials have said there are Iranians, Somalians, and other mercenaries fighting alongside the Houthis. There are also other troops fighting on the side of the Yemeni government from Saudi Arabia, the UAE, Sudan, and other nations. How can the Stockholm Agreement deal with the multitude of nationalities in this conflict and are they all qualified as POW? And how does the UN still consider this conflict to be a NIAC?

Another problem is that the Stockholm Agreement does not include the Yemeni detainees who are being held in the UAE's "black sites." The Yemeni Government, according to the UN Panel of Experts, has no control over the secret prisons conducted by the UAE military forces. Further, the Stockholm Agreement does not include the Yemeni detainees in Saudi Arabia. Not to mention that the Saudi forces routinely arrest Yemeni fishermen and move them to detention centers in Saudi Arabia, 18 of them are still missing.[54]

Very importantly, the Stockholm Agreement did not provide any guarantees against "re-detaining" detainees after they are finally released. And it does not provide any protections to stop the

[48] *Id.*
[49] *Id.*
[50] U.N. High Comm'r for Human Rights., Situation of Human Rights in Yemen: Rep., ¶ 55, U.N. Doc. A/HRC/30/31 (Sep. 7, 2015) (Jul. 28, 2017). <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/_layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_31_AEV.docx&action=default&DefaultItemOpen=1>
[51] Hum. Rts. Watch, 'Yemen: Arbitrarily Held by the Houthis' www.hrw.org (Jul. 28, 2017) <https://www.hrw.org/news/2016/01/10/yemen-arbitrarily-held-houthis>
[52] Mwatana, They Are Not Here, www.mwatatna.org 25 (2016) (Jul. 28, 2017) <http://www.mwatana.org/sites/default/files/pdf/They%20are%20not%20here%20E.pdf>
[53] Michael, Maggie. 'Ex-inmates: Torture rife in prisons run by Yemen rebels.' December 7, 2018. <https://www.apnews.com/e32442a4c8c24acd9d362c433d5cd10e>
[54] U.N. General Assembly, Situation of Human Rights in Yemen: Rep. of United Nations High Commissioner, ¶5,15, and 23, U.N. Doc. A/HRC/39/43 (August 17, 2018) (Des. 29, 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23479&LangID=E>

continued practice of arbitrary detentions. The central accomplishment of the Stockholm Agreement is to treat the detainees as a *card* to prove the good will between the warring parties. However, it ignores the fundamental guarantees for justice; it does not provide any accountability of the perpetrators' actions or offer any compensation to the victims nor guarantees that they will remain free.

Conclusion

From a legal perspective, how does the Stockholm Agreement acquiesce to the idea that civilians are used for exchange with combatants, and mixing all detainees, foreigners, and locals under one new category that does not exist in the four Geneva Conventions? The Yemeni conflict, among other conflicts, reflects a truth in modern armed conflicts that there is a deep-seated need to update international conventions on prisoners of war, detainees, and civilians that are imprisoned. Further, the conventions should also establish an international mechanism of enforcement. This means that international legal bodies must address that modern conflicts no longer identify as clearly as international armed conflict, or non-international armed conflict. The waters of modern conflict are muddy. This murky status directly impacts those at the front lines of war, namely the combatants, but also those who get drawn into armed conflicts, the civilians, and both are detainees in need of protection under international humanitarian law.

ARBITRATION LAW

The UAE's New Arbitration Law
Another step towards becoming a hub for dispute resolution

Ghalib Muqbil Mahmoud[55]

Background

The United Arab Emirates (UAE) is recognized as a regional commercial and financial hub and a preferred location for international arbitration in a Middle East that continues to undergo rapid socio-economic developments. The country's two most politically and economically dominant emirates, Abu Dhabi and Dubai, have established so-called "offshore" courts in the Abu Dhabi Global Market (ADGM) and the Dubai International Financial Centre (DIFC), respectively, in their endeavors to further attract international investors seeking an internationally familiar environment.

The ADGM[56] and DIFC courts practice common law, similar to a number of western jurisdictions, while the rest of the UAE operates under a civil law system where judicial precedents may be persuasive but are not binding on the court.[57] As financial centers, both the ADGM and the DIFC have welcomed representative offices of internationally recognized arbitration centers, the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC). The DIFC established the DIFC-LCIA Arbitration Centre in 2008[58] and the ADGM recently followed suit by welcoming the first representative office of the ICC in the Middle East in October 2018.[59] In 1994, Dubai also set up the Dubai International Arbitration Center (DIAC) and in 1993 Abu Dhabi formed the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) evidencing a long standing practice of resolving disputes by parties seeking arbitral remedies in the UAE.[60]

While the UAE has opened its doors to well-known arbitral bodies for the benefit of regional and foreign investors, the UAE's onshore courts have been adapting their approach toward arbitration in recent years. Since their establishment, the ADGM and the DIFC have been chosen as the legal seat in numerous arbitration clauses, partly in an endeavor to minimize perceived ratification challenges in the UAE onshore courts. Parties that ratified their awards through the UAE onshore courts have encountered additional

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[56] ADGM Courts Legislative Framework, <https://www.adgm.com/doing-business/adgm-courts/adgm-legal-framework/adgm-courts-legal-framework/> (last accessed 20 February 2019).

[57] Chief Justice Michael Hwang, "The Courts of the Dubai International Finance Centre — A Common Law island in a Civil Law ocean" <https://www.difccourts.ae/2008/11/01/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/> (last accessed 20 February 2019).

[58] DIFC-LCIA Arbitration Centre, <http://www.difc-lcia.org/why-was-the-difc-lcia-established.aspx> (last accessed 20 December 2018).

[59] ADGM Arbitration Centre, <https://www.adgm.com/doing-business/adgm-courts/arbitration/adgm-arbitration-centre/> (last accessed 20 December 2018)

[60] Dubai International Arbitration Centre, <http://www.diac.ae/idias/aboutus/> (last accessed 20 December 2018).

periods of post-arbitration litigation before being able to execute their awards. Parties that wished to use the DIFC or ADGM as a conduit court for ratification of their awards would apply for an order seeking enforcement in the onshore courts from the DIFC or ADGM and pursuant to such order, file execution proceedings in the UAE onshore courts for enforcement purposes only.

The UAE acknowledged that its arbitration laws must further develop in order for the UAE to become a recognized center for arbitration.[61] After much anticipation, on May 15, 2018, the UAE published Federal Law No. 6 of 2018 (the "Arbitration Law").[62] The Arbitration Law repealed certain outdated provisions on arbitration as set out in the UAE Civil Procedures Law, Federal Law No. 11 of 1992[63] (the "Civil Procedures Law") and adopted the Arbitration Law as the primary guide to arbitrations conducted and ratified in the UAE.[64]

Previous Laws on Ratifying and Nullifying Arbitration Awards

The UAE ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (the "New York Convention") in 2006 but in the absence of strict procedural guidelines the UAE was often not as effective, in practice, as certain other international fora.[65] For decades, the Civil Procedures Law was the governing legal source relating to arbitral awards. Following enactment of the Arbitration Law, Articles 203 to 218 of the Civil Procedures Law, regarding arbitration, have been repealed.[66] Article 236 states that,

> The provisions of the foregoing article[67] shall apply to the awards of arbitrators made in a foreign country; the award of the arbitrators must have been made on an issue which is arbitrable under the law of the UAE, and capable of enforcement in the country in which it was issued.[68]

The failure to repeal this article creates a level of potential uncertainty as to its current purpose and utility.[69] One may argue that the failure to repeal Article 236 is intended to maintain the position that under UAE law the court may find grounds to nullify an award outside those grounds found in the Arbitration Law and the New York Convention. Article 238 of the Civil Procedures Law provides that, inter alia, Article 236 is without prejudice to provisions of international treaties to which the UAE is a party.[70] Therefore, while the Arbitration Law has seemingly not addressed foreign arbitral awards, legislators have indicated that they do not wish to circumvent treaties, such as the New York Convention. The UAE courts will now also be provided a further opportunity to clarify the treatment of foreign arbitral

[61] Khaleej Times, "UAE on track to become a global arbitration centre," <https://www.khaleejtimes.com/business/local/uae-on-track-to-become-a-global-arbitration-centre> (last accessed 20 December 2018).
[62] Federal Law No. 6 of 2018 concerning Arbitration.
[63] Federal Law No. 11 of 1992, Civil Procedures Law.
[64] *Supra* note 7.
[65] Federal Decree No. 43 of 2006 regarding the United Arab Emirates Joining the Convention of New York on Recognition and Enforcement of Foreign Arbitral Awards available at <http://www.newyorkconvention.org/implementing+act+-+united+arab+emirates> (last accessed 20 February 2019).
[66] *Supra* note 7.
[67] Article 235 of the Civil Procedures Law referenced the enforcement of foreign judgments and orders in the UAE.
[68] *Supra* note 8.
[69] Adrian Chadwick and Wesley Wood, *The New Arbitration Law*, available at <http://www.hadefpartners.com/News/335/The-New-Arbitration-Law> (last accessed 20 December 2018).
[70] *Supra* note 8.

awards in light of Cabinet Resolution No. 57 of 2018, concerning the Executive Regulations for the Civil Procedures Law (the "Regulations"), addressed below, which took effect on February 16, 2019. Prior to the Arbitration Law and the Regulations, under the Civil Procedures Law a ratifying party would first have to file its claim for ratification before the relevant UAE Court of First Instance and then face possible appeal of any decision made by that court.[71] The appeal would be heard *de novo* by the Court of Appeal.[72] Should a party seek to appeal the decision made by the relevant UAE Court of Appeal, the Court of Cassation could then be requested by a party to review the matter for errors of law.[73] All parties in the UAE have an almost automatic right of appeal to all three tiers of the court system, i.e. First Instance, Appeal, and Cassation.[74] A majority of litigants fully utilize the three-tiered appellate process, meaning that ratifying an arbitration award, prior to the Arbitration Law, could take a number of years from the date the parties received the arbitral award, before the prevailing party was able to file execution proceedings and realize any benefits.

The Arbitration Law – Ratification and Nullification

Under the new Arbitration Law, the circumstances have significantly changed. The Arbitration Law has incorporated the principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law and has attempted to adopt aspects from other civil jurisdictions of the Arab World. The Arbitration Law provides for procedures that govern ad hoc arbitrations with a legal seat in the UAE and outlines new procedures for ratification, nullification and execution of arbitration awards. Since taking effect, the Arbitration Law has been applied by legal practitioners in relation to the ratification, nullification, and execution of arbitration awards.

Article 2 of the Arbitration Law provides that the law is to apply to (1) arbitrations conducted within the UAE, unless the parties have agreed to a different governing law that does not conflict with the public order or morality laws of the UAE; (2) an international arbitration conducted outside the UAE where the parties sought to have the dispute governed under UAE law; and (3) arbitrations arising from a dispute in respect of a legal relationship, contractual or otherwise, that is governed by UAE law, except as otherwise indicated by a specific provision.[75] As noted above, Article 2 of the Arbitration Law does not include foreign arbitral awards.

Under Article 55 of the Arbitration Law, a party wishing to ratify and execute an arbitral award must submit an application to the Head of the Court of Appeal, together with an original or certified copy of the award and a copy of the arbitration agreement, and certified Arabic translations of both documents.[76] Under Article 55(2) of the Arbitration Law, the Head of the Court of Appeal must then either ratify and order the execution of the award or deny ratification within sixty days from the date the application was submitted.[77] The application for ratification is made ex parte, and after the award is ratified, the Court serves the opposing party with the ratified award.[78] The opposing party then has the right to file a grievance

[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* Certain limitations exist to appealing a decision to the Court of Appeal and/or Court of Cassation, based on the value of the original claim before the court.
[75] *Supra* note 7.
[76] *Supra* note 7.
[77] *Id.*
[78] *Id.*

or objection to the ratification of the award within thirty days following notification.[79] It is unclear whether a grievance or objection is to be heard by the same judge who ratified the award. However any decision made by the Court of Appeal on the grievance or objection is then appealable to the Court of Cassation.[80]

Since the Arbitration Law came into effect the courts have taken a "ratification-friendly" approach and the Head of the Court of Appeal has tended to ratify awards that have been presented within the allocated time under the law. However, in some circumstances, where parallel nullification proceedings have been filed by the opposing party the Head of the Court of Appeal has instead chosen to wait until nullification proceedings are completed at the Court of Cassation, before ratifying the award.

Within thirty days of the date of service of the award, a party may file an application for nullification of an arbitral award.[81] As discussed above, "the arbitral award may also be challenged at the time the Court of Appeal is considering an application for ratification."[82] Article 53 of the Arbitration Law states that the grounds for nullification include: that the arbitration is unenforceable; that a party lacked capacity to enter into the relevant arbitration agreement; and that the arbitral panel exceeded its jurisdiction.[83] The Court of Appeal's judgment on nullification may be appealed to the Court of Cassation, which is only permitted to review the matter for errors of law. "In addition, if the subject matter of the dispute is non-arbitral or if the award contravenes public order or the public morality of the UAE, then the [Court of] Appeal may of its own accord determine that the award is null and void." [84]

Unless the nullity of an award is based on the non-existence, lapse, invalidity or unenforceability of the arbitration agreement, the arbitration agreement remains valid and enforceable. If the court does not nullify the award, the arbitration agreement remains valid."[85] It is therefore possible to recommence new arbitration proceedings, in certain circumstances, where the court finds grounds for nullification.[86] Under the Civil Procedures Law, it was unclear whether the arbitration agreement itself remained valid where an award was made and then nullified. Additionally, under the Civil Procedures Law, claims for nullification and ratification are commenced at the Court of First Instance rather than the Court of Appeal.[87]

The New Regulations and Foreign Arbitral Awards

Article 3 of the New York Conventions states that, "There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."[88] In an attempt to seemingly overhaul and clarify several provisions of the Civil Procedures Law including the ratification of foreign arbitral awards, the UAE Ministerial Cabinet issued the Regulations which took effect on February 16, 2019.[89] The Regulations go beyond mere clarifications of existing laws but have in fact amended and repealed certain provisions of the Civil Procedures Law. Article 86 of the Regulations

[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Supra* note 13.
[83] *Id.*
[84] *Supra* note 13.
[85] *Id.*
[86] *Supra* note 13.
[87] *Supra* note 8.
[88] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), available at http://www.newyorkconvention.org/english (last accessed 26 January 2019).
[89] Cabinet Resolution No. 57 of 2018, concerning the Executive Regulations for Federal Law No. 11 of 1992.

specifically addresses the ratification of foreign arbitral awards. The Regulations state that the preceding Article 85, as it relates to enforcement of foreign judgments, "applies to arbitration awards rendered in a foreign state, provided that the award made by the arbitrators is with respect to an issue that is arbitrable in accordance with the law of the State [UAE] and capable of being executed (enforced) in the state where it was issued."[90]

The ratification of a foreign award, under the Regulations, must now proceed by way of an ex parte petition to the execution judge who must then issue an order within three days from the petition's filing date.[91] The execution judge must make a decision to either ratify the award or deny the petition. The opposing party shall then be served with the judgment ratifying the award and shall have the opportunity to appeal the judgment in accordance with the rules set forth in the Civil Procedures Law.[92] As the Regulations have recently come into effect,[93] legal practitioners have yet to see the practical implications of the Regulations before the courts. While practitioners await further interpretation by the courts and legislators, in reading the Regulations it is perceived that overturning the ratified award on appeal will be limited to specific grounds set forth in Article 85 of the Regulations. These grounds include that UAE Courts have exclusive jurisdiction, the correct governing law was applied, proper service was effectuated, the opposing party was provided an opportunity to be represented, the award or judgment does not conflict with an existing UAE judgment, and the award does not violate public policy.[94] The Regulations do not provide the power to nullify the foreign award to the UAE Courts thus leaving the nullification process to the courts of the seat of the arbitration. This presumably remains in line with the New York Convention that expressly delegates the nullification of awards to the "competent court of the country which, or under the law of which, that award was made."[95]

Nonetheless, the addition of Article 86, months after the release of the Arbitration Law, may be an indication that legislators intended to emphasize the UAE's intention to facilitate the ratification of foreign arbitral awards and not impose additional hurdles –in line with Article 3 of the New York Convention.[96] However, the Regulations largely remain untested and practitioners remain unclear as to several procedural faculties for the implementation of several articles in the Regulations and the courts adaptation and interpretation to the recent changes.

The Arbitration Law in Practice

While the risk of nullification proceedings being filed by an opposing party is another potential challenge for prevailing parties, under the Arbitration Law UAE courts appear to appreciate the frustration of prevailing parties. Since the implementation of the Arbitration Law the courts have generally applied a "no-nonsense policy." Nullification proceedings before the Court of Appeal have taken about one month from the date of service of nullification proceedings to the date the Court of Appeal renders its decision. Moreover, the Court of Appeal has taken a conservative approach to nullifying an arbitration award and

[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] At the time of writing this publication the Regulations were in effect for several days. Due to its temporal nature, the interpretation of the Regulations, and its practical implementation, is subject to change as specific cases and arguments are heard and appear before the respective courts; therefore some interpretations set forth in this publication, with respect to the Regulations, may be subject to change.
[94] *Id.*
[95] *Supra* note 34.
[96] *Id.*

has placed a heavy burden on the party seeking to nullify the award to prove its grounds for nullification. While the Court of Cassation appeal process may take a few months, submissions are limited to only one reply and one rejoinder and no new documents may be submitted.[97]

During the appeal period, the courts have also taken steps to protect the rights of the prevailing party in arbitration by granting orders for precautionary attachments against the opposing party's assets, pursuant to Article 254 of the Civil Procedures Law.[98] The precautionary attachment is presented to the Court of Summary Proceedings which enables a prevailing party to immediately attach assets of the opposing party pending adjudication of any underlying nullification proceedings and its respective appeals.[99] The precautionary attachment is intended to ensure that an opposing party does not dissipate its assets or take actions to protect itself against judgment during the ratification and/or nullification proceedings.

Further Steps to Becoming an Arbitration Hub

In furtherance of the UAE's goal of becoming a recognized hub for international arbitration, legislators have also repealed potential criminal liability of arbitrators under the UAE Penal Code. Pursuant to Article 257 of the UAE Penal Code, as amended in 2016, arbitrators and party appointed experts were potentially criminally liable should their decisions or opinions be found to lack "neutrality and integrity."[100] On October 8, 2018, Federal Decree No. 24 of 2018 came into force to amend Article 257 to specifically exclude criminal liability on arbitrators and party appointed experts.[101] This carve out has lifted a significant concern of arbitrators and experts, commonly appointed by claimants and respondents in the course of an arbitration. Arbitrators and experts previously had concerns regarding potential criminal prosecution during arbitral proceedings or after the completion of an arbitration held in the UAE, should a disgruntled party decide to pursue a criminal complaint.[102] Meanwhile, the UAE Minister of Economy has stated that he shall coordinate with the arbitration institutions in the UAE with a view to issuing a code of professional conduct for arbitrators.[103]

Given that the Arbitration Law is relatively new and therefore not fully tested, the courts and legal practitioners are treading gently and developing insights as to the effectiveness and implementation of the law. While parties previously favored the DIFC as a conduit court to ratify foreign arbitral awards, the introduction by the Government of Dubai of a Joint Judicial Committee[104] has diverted a number of cases to the onshore Dubai courts on jurisdictional grounds, leaving affected parties with a dilemma regarding

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[97] *Supra* note 8.
[98] *Id.*
[99] *Id.* (see also *Supra* note 34).
[100] Federal Law No. 7 of 2016, amended Article 257 of Federal Law No. 3 of 1987, the UAE Penal Code.
[101] Federal Decree No. 24 of 2018.
[102] Courtney Rothery and Robyn Waller, *Imprisonment Fears Have Been Allayed for Arbitrators and Party-Appointed Experts Involved in UAE-Seated Arbitrations Following the Latest Amendment to Article 257 of the UAE Penal Code*, <http://www.mondaq.com/x/765042/Arbitration+Dispute+Resolution/Imprisonment+fears+have+been+allayed+for+arbitrators+and+partyappointed+experts+involved+in+UAEseated+arbitrations+following+the+latest+amendments+to+Article+257+of+the+UAE+Penal+Code> (last accessed 20 December 2018).
[103] *Supra* note 4.
[104] The Joint Judicial Committee was established by the Government of Dubai by Dubai Decree No. 19 of 2016. The Committee is made up of seven members consisting of four judges from the on-shore Dubai Courts and three judges from the DIFC Courts. The Committee's mandate is to review and resolve "conflicts of jurisdiction" as they are raised by parties, between the DIFC Courts and the Dubai Courts.

how to proceed with awards.[105] The ADGM is a younger court and parties and practitioners are yet to see how the ADGM and onshore Abu Dhabi courts address jurisdictional challenges. The Arbitration Law has to some extent, directed control of the arbitral process by providing that action must be commenced at the Court of Appeal and providing strict deadlines for judges and parties to take action. However, given the new fast paced procedures, parties and tribunals must ensure that all procedural measures are properly taken over the course of the arbitration, especially prior to the rendering of awards by tribunals.

During the coming period as more arbitral awards come before the UAE onshore courts for ratification and/or nullification, the business and legal community will gain insight as to the effectiveness of the Arbitration Law. The debate will undoubtedly continue as to choice of arbitration clause, forum, and legal seat. It may well be that the UAE legislators will decide that further clarifications are required in the future.

105 Tessa Dignam, *Show me the money! Enforcing arbitral awards in the UAE* <http://arbitrationblog.practicallaw.com/show-me-the-money-enforcing-arbitral-awards-in-the-uae/> (accessed last 25 December 2018).

PUBLIC INTERNATIONAL LAW

Special Protections under International Law:

Implications of Diplomatic Immunity in the Khashoggi Case

Hannah Jung[106]

In October 2018, the Washington Post journalist and outspoken critic of the Saudi royal family, Jamal Khashoggi, entered the Saudi consulate in Turkey to retrieve documents for his planned marriage.[107] What the security cameras caught of his appearance moments before entering the building was the last to be seen of him. As the disturbing details of his murder have unfolded in the following weeks and months, the international community has faced the shocking prospect of a state-sanctioned killing of a citizen who was knowledgeable and perhaps wary of a plot but who could not have possibly imagined what was to befall him in those minutes upon entering the premises.

While there are many questions still waiting to be answered, there is one looming question that raises important legal considerations: how was this possible in the first place? The disconcerting fact behind the Khashoggi murder is not only that the Saudi leadership seems to have played a role in carrying it out, but that it was possible due to a historical privilege under international law – diplomatic immunity. The Khashoggi case thus provides an opportunity to look into this legal device and debate its merits and limitations.

Purpose

The concept of diplomatic immunity is a unique one. Dating back to ancient times, the practice of providing protection for foreign envoys was recognized as necessary for the maintenance of amicable relations among states and pursuance of mutual interests.[108] With the end of World War I and World War II, and a surge in international institutions and diplomatic activities, diplomatic immunity was further refined and embodied in official treaties, specifically in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. The privileges granted to diplomats and official national representatives include protection from prosecution by the receiving state and exemption from certain required obligations such as paying taxes.[109]

These provisions therefore accommodate foreign envoys in an effort to ensure that they can perform their role without prejudice or imposed obstacles in the receiving state. Both the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations have a significant

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[107] The Washington Post expressed concerns over the safety of its contributor in an article shortly after he was deemed to be missing. *Post Contributor and Prominent Saudi Critic Jamal Khashoggi Feared Missing in Turkey*, Washington Post, October 2, 2018, available at https://www.washingtonpost.com/news/global-opinions/wp/2018/10/02/post-contributor-and-prominent-saudi-critic-jamal-khashoggi-feared-missing-in-turkey/?utm_term=.0fdd7767005e (last visited on October 23, 2018).
[108] *See* B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 1-7 (2d ed. 1979)
[109] *See* Vienna Convention on Diplomatic Relations art. 23, *United Nations Treaty Collection*. United Nations. Available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf

number of state parties, 192 and 179 respectively, and including most if not all state parties from the Middle East.[110]

Limitations

The question as to whether diplomatic immunity ultimately made Khashoggi's murder possible or at least easier to accomplish has no clear answer. On one hand, it is true that consulates cannot be searched or entered without permission from the sending country.[111] While this was the main concern behind investigation efforts into the case, the Saudi consulate itself is not in fact considered to be Saudi territory. Being located on Turkish territory, Turkey holds jurisdiction over the case, at least in theory.[112] In practical terms, however, Turkish investigators could not demand inspection of the consulate or the Saudi suspects. The situation reflects the fragile balance of interests between sending and receiving states upon which diplomatic immunity and cooperative relations depend. Diplomatic immunity is effective due to mutual obligations that is expected of countries, and because treatment of diplomats is mutually enforced.

The apparent possibility for abuse of diplomatic immunity is addressed in parts of the convention. Article 55 of the Convention on Consular Relations, for example, emphasizes the implied obligations of all persons who qualify for immunity to adhere to the laws of the country where they are placed, and it is expressly stated that the consulate should not be used to violate the sole purposes of the consulate.[113] Notably, exceptions are made for annexes to the building that houses the consulate, in case these additional offices in the building are not for such consular functions.[114] The murder of Khashoggi on the Saudi consular premises are therefore seen to have violated the terms of paragraphs 1 and 2 of that article, while paragraph 3 is irrelevant.

When a consular person acts in such a way that violates the provisions of the convention, the receiving state may also declare that person as *persona non grata* and wait for the sending state to take

[110] The following Arab states are members of the Vienna Convention on Diplomatic Relations: Afghanistan, Algeria, Bahrain, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, State of Palestine, Syria, United Arab Emirates, Yemen. (Saudi Arabia, Bahrain, Kuwait, Libya, Qatar, and Yemen expressed reservations about Article 27 concerning treatment of the diplomatic bag.)
The following Arab states are members of the Vienna Convention on Consular Relations: Algeria, Bahrain, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, State of Palestine, Syria, United Arab Emirates, Yemen.
See id.; *see also* Vienna Convention on Consular Relations, *United Nations Treaty Collection*. United Nations. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf
[111] *See* Vienna Convention on Diplomatic Relations art. 22; *see also* Vienna Convention on Consular Relations art. 31
[112] *See* 1 Oppenheim's International Law 1077 n.15 (Robert Jennings & Arthur Watts eds., 9th ed. 1992)
[113] Article 55 of the Vienna Convention on Consular Relations states "1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the State. 2. The consular premises shall not be used in any manner incompatible with the exercise of consular functions. 3. The provisions of paragraph 2 of this article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building… provided that the premises assigned to them are separate from those used by the consular post…"
[114] *See id.*

the necessary responsive measures.[115] For the Khashoggi case, there are two reasons why these provisions lack substance or applicability. First, the 15 suspects potentially involved in the incident are not embassy officials or diplomats as defined by and subject to either convention. "Members of the staff of the mission" or "members of the diplomatic staff" are defined as members having diplomatic rank,[116] and a "consular employee" is defined as "any person employed in the administrative or technical service" of a "consular post",[117] or "any consulate-general, consulate, vice-consulate or consular agency."[118] While it is now evident that the Saudi state was to some extent culpable and may even be complicit in the crime, it is not clear in what capacity the perpetrators were acting and if they will ever be returned to Turkey for further investigation.

Second, this uncertainty is largely a product of the language of the conventions and international treaties in general, in that countries cannot be forced to turn in suspects or evidence. Even the most strongly worded terms contain language that merely suggests how receiving states can act in response to violations of a provision, indicating that the state *may* notify the sending state of unacceptable officers and moreover that the sending state *may* recall or terminate the person's functions with the assigned consular post.

Such a lack of enforcement mechanism is characteristic of international instruments that find basis in voluntary cooperation and reluctance in forceful measures against a country's sovereignty. There is no mention of sanctions for failure to cooperate, but this is much the norm. In sum, while Turkey may have the available option of terminating diplomatic immunity of the Saudi individuals or even shutting down the consulate with no consideration for Saudi consent, there is simply no incentive to for any country to take such drastic measures at the risk of losing diplomatic opportunities.

Future implications

What does the Khashoggi case present for the future of diplomatic immunity? One possible "solution" to the lack of sanctions and enforcement measures in the conventions is supplementation with more concise provisions or setting clearer grounds for waiver of immunity. According to Article 40 of the Vienna Convention on the Law of Treatise (1969), treaty provisions may undergo amendment but must either meet specific requirements for adoption or attain unanimous support.[119] However, amending international treaties, especially in dealing with sensitive notions of respect for state sovereignty or punitive actions, is extremely unlikely to be backed by such support, even in light of dramatic and disturbing incidents such as the Khashoggi case.

Other suggested methods to prevent abuse of diplomatic immunity include isolating nations which abuse the Vienna Convention provisions, creating a fund to compensate victims of foreign diplomats, requiring prosecution of the diplomat in the sending state, and a more restrictive interpretation

[115] Article 23 states "1. The receiving State may at any time notify the sending State that a consular officer is persona non grata or that any other member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consular post." *Id.*
[116] *See* Vienna Convention on Diplomatic Relations, art. 1
[117] *See* Vienna Convention on Consular Relations, art. 1
[118] *See id.*
[119] Vienna Convention on the Law of Treaties art. 40, *United Nations Treaty Collection*. United Nations. Available at https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf

of the provisions.[120] However, any of these potential solutions seem infeasible because they face practical challenges either in terms of expenses or a high level of international cooperation that is unlikely to be achieved.

Ironically, that reality is closely related to the need for diplomatic immunity and the strong desire to uphold a system which would be most effective with unquestionable recognition of these special privileges. The long-term implications of terminating diplomatic immunity are damaging to the system as a whole, as it creates a doorway for other countries to follow suit when it is in their advantage to do so. Ultimately, the way international mechanisms work depends largely on genuine trust and good will of countries, which may have to be sustained at times at the cost of incidental abuse and as Khashoggi's death demonstrated, unfortunate sacrifice.

Conclusion

The horrific murder of Khashoggi at the hands of the Saudis in the Saudi consulate on foreign land is an example of how compromise between the implementation of a necessary and widely followed practice and clarity can result in human rights abuse without adequate means for redress. The case provides an opportunity for closer observation of the privileges that are granted to diplomats and important questions regarding the need for clarification in preventing abuse of such privilege.

At the same time, it presents a challenge which is not easily overcome in a system where protections and the smooth functioning of consular functions is intricately and delicately tied to expectations of good faith. It is unlikely that countries will willingly restrict diplomatic immunity to prevent another similar incident that might or might not happen in the future. Only time will tell whether violations for political motivations will be grave enough to require more stringent and binding standards in order to prevent protections under diplomatic immunity from being used as a tool for injustice.

[120] *See* Leslie Shirin Farhangi, *Insuring Against Abuse of Diplomatic Immunity*, 38 Stan. L. Rev. 1517, 1522 (1986)

CORRUPTION IN THE MIDDLE EAST AS A LONG-LASTING EFFECT OF THE U.S. PRIMARY AND SECONDARY BOYCOTTS AGAINST THE ISLAMIC REPUBLIC OF IRAN

SEYED MOHSEN ROWHANI[121]

INTRODUCTION

On September 28, 2015, Iranian President Hassan Rouhani declared, "a new chapter has started in Iran's relations with the world."[122] This development emerged from the conclusion of over a year of intensive negotiating efforts concerning the Islamic Republic of Iran's nuclear program with the P5+1, which resulted in the Joint Comprehensive Plan of Action ("JCPOA").[123] Within the United States, the terms and details of the JCPOA have been controversial.[124]

For the Obama Administration, which purportedly sought to halt Iran's nuclear program in a way that would avoid another US war in the Middle East, the JCPOA was envisioned as bringing "extraordinary benefits to US national security and the peace and security of the world."[125] Vis-à-vis the traditional US ally, Israel, the JCPOA consisted of a "very bad deal," representing a victory for "death, tyranny and the pursuit of Jihad."[126] On May 8, 2018, President Trump reminded the US of its commitment to its allies in the Middle East, Saudi Arabia and Israel[127], and declared that the US would no longer engage in the JCPOA[128] and that all U.S. secondary boycotts would be re-imposed in a highest "wind-down period" of 180 days.[129] Once that period expired on November 5, 2018, all U.S. sanctions,

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[121] J.S.D. Candidate, International Trade Law, Cardozo Law School; LL.M., International Law and Justice, 2018, Fordham Law School.

[122] President Hassan Rouhani, Statement by the President at the General Debate of the General Assembly of the United Nations (Sept. 28, 2015), *available at* http://gadebate.un.org/sites/default/files/gastatements/70/70_Iran_en.pdf (last visited on February 21, 2019).

[123] The P5+1 refers to the five permanent members of the United Nations Security Council—the United States, Russia, China, Great Britain, and France—as well as Germany. In European parlance, the P5+1 is alternatively called the EU+3. *See* Joshua Keating, *You Say P5+1, I Say E3+3*, FOREIGN POL'Y (Sept. 30, 2009), *available at* http://foreignpolicy.com/2009/09/30/you-say-p51-i-say-e33/(last visited on February 21, 2019).

[124] Daniel R. DePetris, *A Frustrating Iran Deal for Republicans*, THE HILL (Sept. 24, 2015), *available at* http://thehill.com/blogs/pundits-blog/international/254756-a-frustrating-iran-deal-for-republications (last visited, Feb. 21, 2019).

[125] President Barack Obama, Statement by the President on the Adaption of the Joint Comprehensive Plan of Action at American University (Oct. 18, 2015), *available at* https://www.whitehouse.gov/the-press-office/2015/10/18/statement-president-adoption-joint-comprehensive-plan-action (last visited on February 21, 2019).

[126] Christopher Beall, *The Emerging Investment Landscape of Post-Sanctions Iran: Opportunities, Risks, and Implications on US Foreign Policy*, 39 Fordham Int'l L.J. 839 (2016)).

[127] President Donald Trump, Statement by the President on Standing with Saudi Arabia at the White House (Nov. 20, 2018), *available at* https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-standing-saudi-arabia/ (last visited, Feb. 21, 2019).

[128] President Donald Trump, *US Will No Longer Abide By Iran Deal – As It Happened*, THE GUARDIAN (Aug. 8, 2018), *available at* https://www.theguardian.com/world/live/2018/may/08/iran-nuclear-deal-donald-trump-latest-live-updates (last visited, Feb. 21, 2019).

[129] Exec. Order No. 13846, 83 C.F.R. 38939 (Aug. 6, 2018), *available at* https://www.federalregister.gov/documents/2018/08/07/2018-17068/reimposing-certain-sanctions-with-respect-to-iran

including those on energy or banking transactions with Iran, went back into force.[130] In response, President Hassan Rouhani said: "If we achieve the deal's goals in cooperation with other members[131] of the deal, it will remain in place."[132]

To persuade the Iranian leadership to abide by the JCPOA, Europe has a three-prong action plan that consists of guaranteeing European Investment Bank (EIB) services to Iran. Activating the "blocking statute"[133] to safeguard European firms dealing with Iran against U.S. secondary boycotts that authorize the imposition of sanctions against non-U.S. persons for doing business with Iran.[134] Additionally, blocking statues help secure direct credit transfers to Iran's Central Bank by bypassing the U.S. financial system.[135]

The gradual demise of the nuclear deal appears more and more likely if Europe, Russia, and China fail to neutralize the crippling U.S. sanctions against Iran. While it might not lead directly to war, this scenario would substantially escalate regional tensions and further destabilize the Middle East.[136]

After forty years of scrimmaging with economic sanctions, the Iranian government has established some measures to circumvent them, but they are reluctant to discuss these measures openly so as not to compromise them. The majority of these measures are unofficial, and the most likely consequence of an unofficial action is a lack of accountability and predictable corruption. Examples include currency swaps with other countries and even cryptocurrency trading.[137] It should be noted that Iran borders seven states by land: Pakistan, Afghanistan, Turkmenistan, Azerbaijan, Armenia, Turkey, and Iraq, Iran also shares maritime borders with Russia, Kuwait, Saudi Arabia, Qatar, Bahrain, UAE, and Oman. Therefore, as eight of these countries are Middle Eastern Countries, we are discussing a disaster in the Middle East.[138]

SANCTIONS, CORRUPTION, AND THE VIOLATION OF HUMAN RIGHTS

[130] Maysam Behravesh, *As US Sanctions Loom, Can Iran Nuclear Deal Still be Saved*, REUTERS, (Jul. 23, 2018), *available at* https://www.reuters.com/article/us-behravesh-iran-commentary/commentary-as-u-s-sanctions-loom-can-iran-nuclear-deal-still-be-saved-idUSKBN1KD2C5 (last visited, Feb. 21, 2019).
[131] All members except the US, *supra*, note 3.
[132] Hassan Rouhani, *Iran to Negotiate with World Powers to Keep Nuclear Deal in Place*, AL JAZEERA (May 8, 2018), *available at* https://www.aljazeera.com/news/2018/05/iran-negotiate-world-powers-nuclear-deal-place-180508190536432.html (last visited Feb. 21, 2019).
[133] A blocking statute is a law of one jurisdiction intended to hinder the application of a law of a foreign jurisdiction. A blocking statute was proposed by the European Union in 1996 to nullify a US trade embargo on Cuba and sanctions related to Iran and Libya which affected countries that were trading with the US and with the named countries. *See* Blocking statute, https://en.wikipedia.org/w/index.php?title=Blocking_statute&oldid=879549456 (last visited Feb. 23, 2019).

[134] W. Clark McFadden II & Henry Clark (Orrick, Herrington & Suttcliffe), *United States Extends and Tightens Iran Sanctions*, LEXOLOGY (Aug. 13, 2012), *available at* https://www.lexology.com/library/detail.aspx?g=5cfbc81d-eae3-4aad-b00d-45572783597c (last visited Feb. 21, 2019).
[135] *Supra*, note 10.
[136] *Id.*
[137] Ted Regencia, *How Can Iran Bypass US Sanctions*, AL JAZEERA (Now. 5, 2018), *available at* https://www.aljazeera.com/news/2018/11/iran-bypass-sanctions-181105052751998.html (last visited, Feb. 21, 2019).
[138] Geography of Iran, https://en.wikipedia.org/w/index.php?title=Geography_of_Iran&oldid=883402470 (last visited Feb. 21, 2019).

One of the significant consequences of sanctions is potential violations of human rights. Crippling sanctions[139] may deprive people of some of their basic human rights, including the right to work, the right to an adequate standard of living, the right to social security and for those who are denied access to foreign medical treatment and medicine, the right to life. Additionally, and to that effect, the inflation caused by the sanctions make it exponentially more difficult for patients to afford necessary medical treatment.[140] Furthermore, sanctions have an immediate, definite and long-lasting effect on the trade, banking and financial sectors of a country by expanding and deepening corruption and money-laundering schemes.

Although sanctions are sometimes seen as a non-violent way of achieving a political or economic goal, to some, they may not bring about the outcome desired. The history of sanctions against Cuba which lasted for more than five decades achieved none of Washington's policy objectives.[141] The sanctions imposed on Russia in 2014 during the crisis over Ukraine have contributed to a surge in Putin's popularity and the growth of Russian patriotism and nationalism.[142] And a government like Syria that is fighting for preservation will always have bigger problems than sanctions guiding its choices.[143]

Sanctions may not achieve the goals of its imposer but, will decrease the ability of the target government to fight against corruption and money-laundering, and even worse, forcing the government to raise or help the individuals to bypass the boycotts will unavoidably lead to public corruption. For instance, in a state like Russia, sanctions have likely contributed to the many problems for which it was previously criticized.[144] It is predictable that there is no significant difference between long-term and short-term sanctions regarding generating corruption in sanctioned countries. Using a sample of 73 sanctioned and 60 non-sanctioned countries, as well as corruption data spanning the years 1995 to 2012, suggests that countries that have undergone economic sanctions appear to be more corrupt than non-sanctioned countries. Also, the study shows that comprehensive economic sanctions tend to generate more corruption than partial sanctions. Even though there was a reasonable expectation that countries undergoing longer-term economic coercion would be more likely to craft illegal tools to evade sanctions, resulting in greater corruption, the findings did not verify that assumption.[145]

UN CONCERNS BY SANCTIONED COUNTRIES' CORRUPTIONS

[139] Gregg Re, *John Bolton warns Iran "there will be hell to pay" if aggression continues: "We will come after you,"* FOX NEWS, (Sep. 25, 2018), *available at* https://www.foxnews.com/politics/john-bolton-warns-iran-there-will-be-hell-to-pay-if-aggression-continues-we-will-come-after-you (last visited Feb. 21, 2019).
[140] Nilo Tabrizi, *Iranian Fear Medicine Shortage as U.S. Tightens Sanctions*, N.Y. TIMES (Nov. 11, 2018), *available at* https://www.nytimes.com/2018/11/11/world/middleeast/iran-sanctions.html (last visited Feb. 21, 2019).
[141] Doug Bandow, *End U.S. Embargo After Fidel Castro's death: Continued Sanctions Won't free Cuba*, FORBES (Nov. 30, 2016), *available at* https://www.forbes.com/sites/dougbandow/2016/11/30/end-u-s-embargo-after-fidel-castros-death-continued-sanctions-wont-free-cuba/#170f9cca32fe (last visited Feb. 21, 2019).
[142] Dmitri Trenin, *How effective are economic sanctions?*, WEFORUM (Feb. 26, 2015), *available at* https://www.weforum.org/agenda/2015/02/how-effective-are-economic-sanctions/ (last visited Feb. 21, 2019).
[143] Ian Bremmer, *How U.S. Sanctions Are Working (or Not) in 5 Countries*, TIME (Jul. 31, 2017), *available at* http://time.com/4875370/sanctions-russia-north-korea-iran-donald-trump/ (last visited Feb. 21, 2019).
[144] Bryan R. Early, *Economic Sanctions Aren't Just Ineffective -They Lead to Corruption and Organized Crime*, QUARTZ (May 1, 2015), *available at* https://qz.com/394607/economic-sanctions-arent-just-ineffective-they-lead-to-corruption-and-organized-crime/ (last visited Feb. 21, 2019).
[145] Kamali, T., Mashayekh, M., & Jandaghi, G., *The Impact of Economic Sanctions on Corruption in Target Countries: A Cross Country Study*, WORLD SCIENTIFIC NEWS, 276-291 (2016), *available at* http://www.worldscientificnews.com/wp-content/uploads/2015/10/WSN-452-2016-276-291.pdf (last visited Feb. 21, 2019).

The latest findings from Transparency International's Global Corruption Barometer Series shows that in the Middle East and North Africa, on average, elected representatives, tax officials and government officials were thought to be highly corrupt by 45 percent of the population.[146] The forms of this kind of political corruption include bribery, cronyism, extortion, nepotism, parochialism, patronage, influence peddling, and embezzlement.[147] A general lack of accountability will enable criminal enterprise such as drug trafficking, money laundering, and human trafficking to move easier within a sanctioned country and its border countries.

Therefore, it's no wonder that measuring corruption is at the heart of the United Nations sustainable development goals. United Nations General Assembly has repeatedly expressed apprehensions about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.[148]Additionally, no one can doubt that the consequences of corruption adversely affect all human rights; civil, political, economic, social and cultural.[149] Furthermore, the World Summit on Sustainable Development has declared public corruption "a threat to the sustainable development of people".[150]

Kofi Annan described corruption as an "insidious plague" with many corrosive effects on societies: "It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crimes, terrorism and other threats to human security to flourish."[151] He rightly believed that corruption typically diverts funds from state budgets that should be dedicated to the advancement of human rights. It therefore, undermines a state's human rights obligation to maximize available resources for the progressive realization of rights recognized in Article 2 of the International Covenant on Economic, Social and Cultural Rights. Corruption is one of the elements in economic underperformance and a pivotal hurdle to development and poverty alleviation. It diminishes the government's ability to plan and deliver services, including health, education, and welfare, all of which are indispensable to the promotion of economic, social and cultural rights. Civil and political rights are also negatively affected. Corruption diminishes public support for democratic institutions and discourages people from demanding respect for their civil and political rights and from exercising such rights.[152]

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[146] 50 Million People in the Middle East and North Africa Paid Bribes Last Year, for more details *see* https://www.transparency.org/news/feature/50_million_people_in_the_middle_east_and_north_africa_paid_bribes_last_year (last visited Feb. 21, 2019).
[147] Walter Sandosam, *who's to blame for the cesspool of corruption?* THE STAR (Oct. 9, 2018), *available at* https://www.thestar.com.my/opinion/letters/2018/10/09/whos-to-blame-for-the-cesspool-of-corruption/ (last visited Feb. 21, 2019).
[148] UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422, *available at* https://www.refworld.org/docid/4374b9524.html (last visited Feb. 21, 2019).
[149] UN Office of the High Commissioner for Human Rights (OHCHR), *The Human Rights Case Against Corruption*, (Mar. 27, 2013), *available at* https://www.ohchr.org/EN/NewsEvents/Pages/HRCaseAgainstCorruption.aspx (last visited Feb. 21, 2019).
[150] Johannesburg Declaration, https://en.wikipedia.org/w/index.php?title=Johannesburg_Declaration&oldid=882582332 (last visited Feb. 21, 2019).

[151] Kofi Annan, Statement on the United Nations Convention Against Corruption, (Oct. 31, 2003), *available at* https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html (last visited Feb. 21, 2019).
[152] United Nations Convention Against Corruption (UNCAC), Article 14(1)(a), *available at* https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

It is worth noting that many developing countries have repeatedly expressed their concerns over the disastrous consequences that economic sanctions may have on the ability of the sanctioned country to prevent and combat corruption and transnational organized crimes. On several occasions, the Group of 77 and China[153] called upon all UN member states as well as other relevant regional and international organizations to avoid unilateral actions and sanctions that might weaken the international cooperation framework and member's ability to police financial crimes.[154]

SANCTIONS FACILITATE CORRUPTION AND MONEY-LAUNDERING

As mentioned above, corruption destabilizes the political order in any society and decreases people's enjoyment of civil and political rights. Links between corruption and other forms of crimes, in particular, organized crimes and economic crimes, including money-laundering, are evident and indisputable. The parties to UNCAC, a total of 186 states[155] have agreed that "corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it, is essential."[156] Under UNCAC, states are obligated to prevent and combat corruption and money-laundering within their territory. However, as elaborated in UNCAC, corruption is not a local matter and, therefore, the obligation to prevent and combat corruption and money-laundering is not limited to a countries' borders. In addition to a nation's territorial obligations, under chapter IV of UNCAC, state parties are obliged to assist one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Cooperation takes the form of extradition, mutual legal assistance, and law enforcement cooperation.

Economic sanctions can directly and negatively impact a country's overall economy, ultimately increasing poverty, inflation, unemployment. But economic sanctions also have indirect, long-term consequences that may be less visible. The unobserved repercussions of economic sanctions include weakening or destroying the abilities of relevant authorities in the sanctioned country to supervise, monitor and control monetary transactions and financial processes. Certain conditions promote corruption and financial crimes more than others, and insufficient transparency and oversight are the chiefs among them.

In this regard, Article XIV of UNCAC requires each state party to institute a comprehensive regulatory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transactions of money or value within its competence.[157] To that end, such regulatory and supervisory regimes shall ensure that the authorities dedicated to policing money-laundering can cooperate and exchange information at the national and international levels.

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[153] The Group of 77 (G77) at the United Nations is a coalition of 134 developing nations, designed to promote its members' collective economic interests and create an enhanced joint negotiating capacity in the United Nations. *See generally* http://www.g77.org/doc/index.html#aim (last visited Feb. 21, 2019).
[154] Evandro De Sampaio Didonet, Statement of the G-77 and China during the 13th UN Congress on Crime Prevention and Criminal Justice delivered by the permanent representative of Brazil, Qatar, (Apr. 12-19, 2015) http://www.g77.org/vienna/13thUNCC.htm.
[155] *Supra*, note 32.
[156] Preamble, *supra* note 32, p.5, *available at* https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf
[157] Article 14(1), *supra* note 32.

UNCAC requires state parties to implement feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the flow of authorized capital.[158] Additionally, states are required to implement appropriate and feasible measures to require financial institutions, including money remittance bodies to indicate accurate and meaningful information on the originator of the money in electronic transfer forms. UNCAC also requires states to maintain such information throughout the payment chain; and to apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator."[159]

These provisions can be impossible tasks for a country is under economic sanctions. In a boycott situation, where all transboundary transfers are done through hidden channels, these provisions will be useless. When normal channels of money transferring are blocked, all the legitimate and reasonable needs must inevitably be addressed through alternative channels. This phenomenon is called sanction circumvention, and these alternative channels, by definition, are meticulously tailored to be covert and difficult to trace, lest they fall into the net of sanctions. In such situation, methods like money transferring through currency exchange offices instead of banks or in cash, and other ways of payment and value transfer which leave no trace and record in relevant authorities gradually become the norm.

Efforts to evade sanctions usually include registering multiple companies and creating a sophisticated network of proxy companies to make it difficult for regulators to exercise their job of detecting transactions that attempt to circumvent sanctions. Simultaneously, they make it difficult for internal and national authorities of the sanctioned country to regulate, monitor and supervise the trends and transactions. Inspection and auditing such multi-layered networks of financial companies can be close to impossible. These are the ideal conditions for corruption and money-laundering.

In a situation in which the abnormal becomes normal, the irregular becomes regular, what was once transparency transforms to obscurity. In sanctioned countries, this defective financial cycle is recognized as the primary way to evade sanctions and meet the legitimate needs of citizens. No room remains for monitoring and transparency. When such behavior gradually crystallizes into stable norms and reaches epidemic proportions, it will be an extremely challenging task to restore things to normal, even after the sanctions are lifted and the channels are opened. A corrupt and non-transparent economic structure will resist all efforts aimed at preventing and combating financial crimes. [160]

CORRUPTION IN IRAN: RESULTS OF THE ECONOMIC SANCTIONS

The United States fully re-imposed the sanctions[161] on Iran that had been lifted or waived under the JCPOA. The sanctions have targeted critical sectors of Iran's economy, including energy, trade, shipbuilding, and finance.[162] Additionally, it has banned purchases of U.S. dollars by Iran and prevented the trade of gold, metals, and automobiles. Its mere prospect has fueled a record crash in the value of the

[158] Article 14(2), *supra* note 32.
[159] Article 14(3), *supra* note 32.
[160] Behzad Sabri, Comment, *Sanctions Crippling Human Rights*, ODVV, Iran (2018)
[161] *Supra* note 9.
[162] *Id.*

Iranian Rial (down seventy percent since May 2018).[163] The government's attempts to stabilize the currency by pegging it at a set rate to the dollar backfired and ended up accelerating its decline.

Over the past few months, record temperatures, power outages, and water shortages, along with a fifty percent rise in the price of some food items, have triggered scattered protests. Iran's economic crisis has left ordinary citizens enduring soaring living costs, but prosecutors allege that wayward entrepreneurs have turned it into a moneymaking opportunity.[164] In one case, the name of a dead person was used to import 10,500 mobile phones using foreign currency issued at Iran's favorable official rate.[165] In another case, an unskilled worker thought to be someone else's proxy, managed to buy 38,000 gold coins from the Iranian Central Bank at below-market rates.[166]

Many of the failing institutions sank their money into speculative investments during a real estate bubble, lent money to well-connected friends or charged usurious interest rates to desperate borrowers. Now, regulators have quietly steered many of the companies into mergers with larger banks to try to absorb their losses, but that has created a worsening problem of bad loans and overvalued assets throughout the banking system.[167] Following this financial crisis, Iran's supreme leader, Ayatollah Khamenei declared, "I have acknowledged responsibility for the growing number of victims of corrupt financial institutions. These appeals must be dealt with and heard out. I am responsible; all of us must follow this approach."[168]

IRAN'S MEASURES TO CIRCUMVENT THE ECONOMIC SANCTIONS

The Supreme Council of Economic Coordination, chaired by President Hassan Rouhani, authorized the Central Bank of Iran to facilitate the trade of foreign currencies in the Secondary Market, where Iranian petrochemicals, steel, and other exporters authorized to sell their earned dollars to importers at negotiable price, not at the price set by the Central Bank. It also allowed the Central Bank to conduct an open market operation. It will encourage foreign investment and attract foreign currency resources, like dual-nationals' capital, by the methods mentioned below.

In late October 2018, the council announced that offering oil for sale will be possible via the stock exchange. Just minutes after the opening bell as much as 280,000 barrels and at the end of the first day of trading, a total of one million barrels of crude oil were sold. In turn, the buyers can sell this small amount—as opposed to governmental oil cargos—of the crude oil to the world market with less traceability. The inevitable consequence of the sale of oil by this way is exporting to the countries

[163] Ladan Naseri, Golnar Motevalli, Arsalan Shahla, *After Sanctions, Iran's Economy Is Nearing a Crisis*, BBG (Aug. 9, 2018), *available at* https://www.bloomberg.com/news/articles/2018-08-09/as-sanctions-hit-iran-s-on-the-verge-of-economic-breakdown (last visited Feb. 21, 2019).
[164] Mahdi Mahdavi Azad, Special Court of Corruption, BBC PERSIAN (Aug. 25, 2018), *available at* http://www.bbc.com/persian/blog-viewpoints-45307079 (last visited Feb. 21, 2019).
[165] *Id.*
[166] Najmeh Bozorgmehr, *Iranian Anger at Elite Corruption Grows as Sanctions Bite*, FINANCIAL TIMES (Aug. 27, 2018), *available at* https://www.ft.com/content/80aebcce-a772-11e8-8ecf-a7ae1beff35b (last visited Feb. 21, 2019).
[167] Thomas Erdbrink, David D. Kirkpatrick, Nilo Tabrizy, *How Corruption and Cronyism in Banking Fueled Iran's Protests*, N.Y.TIMES (Jan. 20, 2018), *available at* https://www.nytimes.com/2018/01/20/world/middleeast/iran-protests-corruption-banks.html (last visited Feb. 21, 2019).
[168] *Id.*

bordering Iran. It means they have the 6000 km[169] (almost two times bigger than Mexico and The U.S. borderline) to sell their legitimate oil that is an obvious measure for circumventing the US Sanctions. The payment method of these types of deals is in cash to decrease the traceability.[170] The danger of corruption in the Middle East becomes clear.

Additionally, the Cabinet of Iran, chaired by President Hassan Rouhani, has enacted a new resolution to authorize currency exchange offices to commence importing foreign bills in cash.[171] The goal is to stop the inflation of the Iranian Rial. The pertinent part of that resolution states:

> "The entry of foreign currency into banknotes and gold to the country, in regard to the rules for combating money-laundering, is permitted without any restriction. Gold imported is immune to any taxes, legal fees and value-added tax following the provisions of the Central Bank of the Islamic Republic of Iran."[172] This resolution makes Iran the most attractive country in the region for money-laundering by a foreigner and Iranian citizens who want to own gold and foreign currency without paying taxes. The council also declared that foreign nationals who invest $250,000 in Iran could obtain a five-year residency permit.[173]

Furthermore, Iran's partners, namely Russia and China, would not be willing to talk about the alternatives, such as making a new deal with the United States regarding Iran's nuclear activities. Russia, which has not been included in the US waiver,[174] has denounced the sanctions, declaring them "illegal". There have been indications that Moscow would help Tehran bypass the sanctions by buying Iranian oil, then reselling it in refined form to Europe.[175]

Moreover, in August 2018, the European Union updated its Blocking Statute thereby shielding European companies from the U.S. sanctions while allowing them to continue operating in Iran and allowing them to recover damages arising from punitive sanctions. The law also will enable EU persons to avoid complying with the sanctions by protecting them from US penalties which cannot be applied unless exceptionally authorized by the European Commission. While it could work for small businesses with no links to the US, the statute could have limited use in Iran, particularly among major European companies with global operations. Those companies are automatically exposed to possible US penalties in the event they do deal with Iran.[176]

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[169] *Supra* note 18.
[170] Arman Aramesh, *Offering Oil for Sale Via Stock Exchange; Can the Private Sector Circumvent the US Sanction?* BBC PERSIAN (Nov. 3, 2018), *available at* http://www.bbc.com/persian/iran-features-46025139(last visited Feb. 21, 2019).
[171] Resolution of August 9, 2018 (Resolution for Foreign Exchange Affairs) (Iran). *available at* http://yon.ir/F7eMW
[172] Clause 9, *supra*, note 51.
[173] Resolution of October 2, 2018 (Resolution for 5-year Residence to Foreign Investors) (Iran) *available at* https://en.mehrnews.com/news/138295/Iran-to-give-5-year-residence-to-foreign-investors.
[174] Washington has pledged to eventually halt all purchases of crude oil from Iran globally, but for eight countries - China, India, South Korea, Japan, Italy, Greece, Taiwan, and Turkey - can continue imports without penalty. *See* Humeira Pamuk, Timothy Gardner, *U.S. Renews Iran Sanctions, grants Oil Waivers to China, Seven Others*, REUTERS (Nov. 5, 2018), https://www.reuters.com/article/us-usa-iran-sanctions-oil/u-s-renews-iran-sanctions-grants-oil-waivers-to-china-seven-others-idUSKCN1NA0O8 (last visited Feb. 21, 2019).
[175] *Supra*, note 17.
[176] *Supra*, note 10.

CONCLUSION

Under ordinary circumstances, if a government has the will to fight corruption and money-laundering, it is essential to adopt measures aimed at maximizing transparency and monitoring all transfers of money and value. Sanctions only make these goals impossible. Sanctions cause corruption and destroy transparency and control over funds and value transfers. This constitutes a breach of the international obligations of the sanctioning states under UNCAC and a violation of international human rights law.

In the case of Iran, the new U.S. administration's policy of imposing sanctions would face more complexities now compared with the time of the last administration. President Donald Trump wants to force Iran's leaders to negotiate a new deal. On the other hand, Ayatollah Khamenei emphasizes the benefits of the sanctions in making the Iranian people and government independent.[177] Additionally, Iran's Minister of Foreign Affairs, Javad Zarif, started a new path to expand the relations with European countries, thereby exerting pressure on the US to save the Nuclear Deal.

In the meantime, people are suffering due to lack of access to food and medicine from abroad, and the corruption caused by money-laundering, the illegitimate sell of oil, and untraceable transactions will likely linger on in the Middle East for decades to come.If the US does not establish an influential group of supporters for its policy, the sanctions will fail. This would serve as an opportunity for the European countries, with support from Russia and China, to erect legitimate means of circumventing future US sanctions. The consequence would be a weakening of the structure of economic sanctions and their diminished effectiveness as political tools. It is not surprising that on February 16, 2019, the US Democratic National Committee adopted a motion solidifying the party's position that the US should rejoin the JCPOA: a sign that this is gearing up to be a corner stone issue of the upcoming 2020 US presidential elections.[178]

[177] Ayatollah Khamenei addressing Basij Forces, *Iran Will Overcome Sanctions, Slap US in Face Again*, Leader Official Website (Oct. 6, 2018), http://www.leader.ir/en/content/22204/Ayatollah-Khamenei-addressing-Basij-forces (last visited Feb. 21, 2019).

[178] Charles Bybelezer, *Democratic Party Passes Resolution Calling for US to Re-inter Iran Nuclear Deal*, THE MEDIA LINE (Feb. 21, 2019) https://themedialine.org/mideast-daily-news/democratic-party-passes-resolution-calling-for-u-s-to-re-enter-iran-nuclear-deal/ (last visited Feb. 21, 2019).

Religious Persecution and the Destabilization of Algeria:

The Case of Ahmadi Muslims

Farrah Qazi[179]

On December 11, 2018, the Court of First Instance in Ain Mila, Algeria, sentenced Karim Hadjaze, a thirty seven year old doctor and member of the minority Muslim sect, Ahmadiyyat, to one year in prison and 20,000 dinar fine (US$175), on charges of collecting donations without a license and conducting worship in unauthorized places. In the same case, ten other co-defendants received sentences ranging from three to six months in prison.[180]

In January, 2019, eight more Defendants faced expedited trials on charges ranging from unauthorized practice of religion, worship in public places and other crimes prescribed in Article 144 of Algeria's Penal Code.[181] Human Rights Watch has reported that in December, 2017, alone, there were at least eight new trials in Algeria involving at least fifty Ahmadi defendants. Since June, 2016, more than 265 Ahmadi Muslims have faced criminal charges, some of them in more than one trial.[182] This is significant because Article 144 of the penal code, Articles 1 and 8 which regulate obtaining donations without a license, Article 46 of the Associations Law which punishes those who worship in unauthorized places, and a myriad of other laws, allows for Ahmadi Muslims to face separate trials on multiple charges.

Who are Ahmadi Muslims and why are they being so unjustly targeted?
The Ahmadiyyat Movement of Islam was founded in India in 1889 by Mirza Ghulam Ahmad. It is a revivalist movement that strives to adhere to the original teachings of the Prophet Muhammad and believes Ahmad is its Messiah. Ahmadi Muslims consider themselves to be Muslims and behave and

[179] Farrah Qazi is the founding attorney and owner of Qazi Law Offices in Illinois. She has a BA from Loyola University Chicago and a JD from DePaul University School of Law. She has handled cases involving human trafficking, estate planning and represents clients in business law, immigration and other matters. Farrah is the co-Vice Chair for Publications of the Middle East Committee for the 2019-2020 bar year.

[180] Human Rights Watch, *Algeria: Stop Persecuting a Minority*, available at,https://www.hrw.org/news/2017/09/04/algeria-stop-persecuting-religious-minority(last visited February 26, 2019).

[181] Offences related to religion include article 144 (2) of the penal code, which provides that any individual who insults the Prophet Mohammed or denigrates the creed or prophets of Islam through writing, drawing, declaration, or any other means, will receive three to five years in prison, and/or be subject to a fine of between 50,000 and 100,000 Algerian dinars (between about US$450 and US$900). In addition, although Algeria permits religious organizations to participate in humanitarian work, it makes proselytizing by non-Muslims an offence punishable by a fine and up to five years imprisonment for anyone "who incites, constrains, or utilizes means of seduction tending to convert a Muslim to another religion; or by using to this end establishments of teaching, education, health, social, culture, training . . . or any financial means". Global Legal Research Directorate, *Algeria,' Laws Criminalizing Apostasy*, Library of Congress, *available at* http://www.loc.gov/law/help/apostasy/#_ftn11 (last visited February 26, 2019).

[182] Id; Human Rights Watch, *New Trials Shake Ahmadi Minority*, *available at* https://www.hrw.org/news/2018/01/22/algeria-new-trials-shake-ahmadi-minority (last visited February 26, 2019).

believe as other Muslims do. However, they are widely regarded as heretical and are persecuted across the Middle East as such.[183] It is estimated that there are 2,000 Ahmadi Muslims in Algeria.[184]

The alarming rate of Ahmadi Muslim persecution in Algeria is troubling for several reasons. First, it underscores a growing rise of religious fundamentalism in a nation that is strategically positioned to help the West combat global terrorism. As a matter of fact, since the events of September 11, 2001, Algeria and the U.S. have entered into an uncomfortable alliance. While Algeria was the first Middle Eastern country to condemn the heinous acts of September 11, and has since worked with the United States counter-terrorism efforts, tensions have arisen because it will not allow US to operate unmanned aerial vehicles in its airspace.[185] The suspicion and mistrust that tempers an uneasy alliance with the West, coupled with Algeria's strategic, geographic position and increasing religious fundamentalism could result in serious breaches in global security.

It is important to note that when a government persecutes its minorities; this often becomes a stepping stone for increased instability and terrorism within that region. Therefore, the seemingly disconnected arrests and trials of Ahmadi Muslims can have significant backlash to any efforts to eradicate terrorism from the Middle East.

Second, Algeria's treatment of minorities defies numerous international laws, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), which Algeria has signed and ratified. Among other things, the Covenant requires that governments ensure the right to freedom of religion to everyone. However, the Algerian Constitution guarantees freedom of religion with a caveat; it states: "This freedom must be exercised in respect of the law."[186]

Herein lies the problem: while the Constitution purports to provide freedom of religion for all persons, it also explicitly declares Islam to be its state religion.[187] Additionally, the Constitution prohibits institutions from behaving in any manner that does not comport with Islamic morality. But who is supposed to judge Islamic morality and who will enforce it?

As discussed, Algeria's Constitution does not fully guarantee freedom of religion and has specific rules of worship for non-Muslims. Algeria's government also declares any religious minority practice to be a criminal offence and bans conversion and blasphemy.[188] Such blasphemy laws make proselytizing and public expression of the Ahmadi Muslim beliefs, as well as Christian/Jewish faiths, dangerous. Even casual conversations between friends and family members regarding faith can be grounds for blasphemy

[183] *What is Ahmadiyyat?*, available at https://www.alislam.org/library/book/what-is-ahmadiyyat/ (last visited February 26, 2019).
[184] Human Rights Watch, *supra*, note 1.
[185] Boulter, Emily. *An Awkward Alliance-US-Algeria Security Cooperation*, Global Risk Insights 2016, *available at* https://globalriskinsights.com/2015/09/an-awkward-alliance-us-algeria-security-cooperation/ (last visited February 26, 2019).
[186] See Algerian Constitution, *available at* https://freethoughtreport.com/countries/africa-northern-africa/algeria/ (last visited February 26, 2019).
[187] United States Department of State Report on International Religious Freedom-Algeria, August 15, 2017.
[188] Amnesty International, June 2017 Report, *available at* https://www.amnesty.org/en/latest/news/2017/06/algeria-wave-of-arrests-and-prosecutions-of-hundreds-of-ahmadis/ (last visited February 26, 2019).

charges.[189] This leaves the regulation of religious practice to local Islamic clerics and provincial government bodies.

Other laws and regulations provide Muslims and non-Muslims the freedom to practice their religion as long as they respect public order, morality, and the rights and basic freedoms of others.[190] Again, it is not clear what constitutes public order or morality. Such breaches of various laws are punished with one to three years of imprisonment, and fines between 100,000 to 300,000 Algerian dinars (about 900 to 2,700 US dollars). [191]

Religious intolerance and hostility has spread to such a point that minorities have become wary of their neighbors. As a result, Algerian Jews, Christians and Ahmadi Muslims have tried to keep a low profile. Violent extremists have also used these laws as a means to justify the killing of religious minorities.[192]

According to Open Doors, an advocacy group that aims to raise awareness of Christian persecution throughout the world, Christians in Algeria are facing increasing societal discrimination when it comes to renting homes, finding jobs and securing land or property to use as a place of worship.[193] In fact, Christian churches have been ordered to stop all religious activities. In July 2016, Slimane Bouhafs, a Christian, was arrested for insulting Islam and received the maximum sentence of five years. It was only after increased foreign pressure, that the president issued a pardon and Bouhafs served 18 months instead.[194]

Therefore, while the Algerian Constitution provides religious freedom for all on its face, the reality reflects much to the contrary. There is no attempt by the government to curb protect the religious practice or expression of minorities. Similarly, Algeria's own political leaders have little regard for political correctness. In 2016, the Minister of Religious Affairs, Mohamed Aissa, declared that the government had brought criminal charges against Ahmadis to "stop deviation from religious precepts".[195] Meanwhile, Ahmed Ouyahia, then Chief of Cabinet to President Abdelaziz Bouteflika, claimed that Ahmadis enjoyed neither human rights nor freedom of religion because Algeria had been a "Muslim country for 14 centuries."[196]

When a state fails to protect its religious minorities, it equates to the passive acceptance of their persecution; it tacitly encourages and inevitably emboldens religious fundamentalism and extremism. Furthermore, it will come as no surprise that nations that encourage religious or ideological extremism are inclined to political instability of the most infectious kind. Therefore, it is prudent that we recognize the problem and make valiant attempts to curb its potentially widespread consequences.

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[189] Id.
[190] Id.
[191] Id.
[192] U.S Report on Religious Freedom in Middle East, Wilson Center, *available at* https://www.wilsoncenter.org/article/us-report-religious-freedom-middle-east (last visited February 26, 2019).
[193] Ahmad, Usman, Persecution of Ahmadis, *available at* https://thewire.in/external-affairs/persecution-ahmadis-evidence-growing-religious-intolerance-algeria (last visited February 26, 2019).
[194] Country Report on Algeria, *available at* https://www.opendoorsusa.org/christian-persecution/world-watch-list/algeria/ (last visited February 26, 2019).
[195] Id.
[196] *Supra* note 14.

The Arab Human Rights System: Achievements and Challenges

Armis Sadri[197]

I. Introduction

It comes as no surprise that people in the Arab world and beyond largely view the Arab League, formally the League of Arab States (LAS), as a futile and ineffective organization serving the interest of governments than addressing human rights concerns.[198] LAS is a regional organization of Arab states in and around North Africa, the Horn of Africa and Arabia.[199] It was formed in Cairo on March 22, 1945, and according to its charter[200], the founding members of the Arab League (Egypt, Syria, Transjordan, Iraq, Saudi Arabia, Lebanon, and Yemen) agreed to seek "close cooperation" on matters of economics, communication, culture, nationality, social welfare, and health.[201]

Currently, the League has 22 members, but Syria's participation has been suspended since November 2011, as a consequence of government's repression during the Syrian Civil War.[202] The League's main goal is to "draw closer the relations between the Member States and co-ordinate collaboration between them, to safeguard their independence and sovereignty, and to consider in a general way the affairs and interests of the Arab countries."[203] Since its creation in 1945, the LAS has made little effort to discuss the dire human rights situation in the Arab world, one of the triggers of the Arab uprising, much less improve it.[204]

LAS' impotence is partly due to the absence of meaningful direct links between the LAS, victims of human rights violations and civil society organizations.[205] Unlike similar organizations, the LAS grants civil society organizations observer status only and even then, only a few organizations are allowed this access on the basis of very restrictive criteria.[206] The LAS has the potential to play a larger role in the protection of human rights. This is why, over the last 20 years, human rights, humanitarian and development organizations have engaged with various bodies of LAS. Although such efforts resulted

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[198] Open Society Foundations (2015), *Can the Arab League Be a Driving Force for Human Rights in the Region?,* available at: www.opensocietyfoundations.org/voices/can-arab-league-be-civil-society-s-partner-human-rights

[199] The League of Arab States Official Portal, Available at: http://www.lasportal.org/ar/Pages/default.aspx

[200] International Relations and Security Network, *1945 Charter of the League of Arab States*, available at: https://www.files.ethz.ch/isn/125350/8005_arableaguecharter.pdf

[201] Council on Foreign Relations (2014), *The Arab League*, Available at: https://www.cfr.org/backgrounder/arab-league

[202] The League of Arab States Official Portal, Available at: http://www.lasportal.org/ar/Pages/default.aspx

6. Brunel University London (2015), *The League of Arab States and the Protection of Human Rights: a Legal Analysis,* Rawa Ghazy Almakky Available at: https://bura.brunel.ac.uk/bitstream/2438/11067/1/FulltextThesis.pdf

[204] *Id.*

[205] Social Media Exchange (2014), *A Regional Arab Human Rights Framework: More Elusive than Justice Itself?,*SMEX: Channeling Advocacy, Available at: smex.org/wds4/

[206] *Id.*

mostly in limited success, some had an impact.[207] Understating the LAS, and its standards and mechanisms are essential for civil society organizations to identify future opportunities to influence it. This requires a coherent and strategic approach. The change may be slow, but persistence and informed vision will enable the civil society organizations and Member States to contribute to the reform of the LAS and push it to be driving force for the protection and promotion of human rights in the Arab world.[208] This is a study about the efforts taken by the LAS to improve the protection of human rights among its Member States.

This article identifies the major regional human rights protection systems, i.e. the African, the Inter-American and the European human rights systems as potential and established models to be considered by the LAS in moving forward with the creation of the Arab human rights system. The article examines the achievements and flaws of the current system and makes recommendations about effective change in the modality of LAS's relationship with civil society organizations by setting forth mechanisms and unambiguous criteria based on transparency to ensure a permanent relationship across all its bodies.

III. A Brief History

Compared to a global trend towards promoting and protecting human rights by regional organizations, the LAS[209] is a latecomer in prescribing and promoting governance standards in its Member States, and its efforts are more limited and weaker than in many other regional organizations.[210] The LAS focuses on human rights as compared to democracy, the rule of law, or good governance. However, the latest catalog of human rights that was adopted in 2004 falls short of international standards.[211] The revised Arab Charter on Humans Rights, as the cornerstone of a regional human rights regime, ratified and entered into force in 2008,[212] much later than its American, European, and African counterparts.

From the creation of the Arab Permanent Committee on Human Rights (PACHR) in 1968[213] to the adoption of the revised Arab Charter on Human Rights in 2004[214] and its subsequent ratification, there has not been a significant change in the democratic quality[215] of its Member States that could account for the LAS' increasing efforts in promoting and protecting human rights. Measuring the quality

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[207] *Id.*

[208] Open Society Foundations (2015), *Can the Arab League Be a Driving Force for Human Rights in the Region?*, Available at: www.opensocietyfoundations.org/voices/can-arab-league-be-civil-society-s-partner-human-rights

[209] Council on Foreign Relations (2014), *The Arab League*, Available at: https://www.cfr.org/backgrounder/arab-league

[210] *Id.*

[211] International Legal Materials, vol. 41, no. 4, 1 July 2002, pp. 1000–1001, *League of Arab States: The Beirut Declaration.* Available at: http://www.cihrs.org/wp-content/uploads/2015/12/league-arab-states-manual-en-20151125.pdf

[212] *Id.*

[213] International Foundation for Human Rights (2013), *The Arab League and Human Rights: Challenges Ahead Regional Seminar held in Cairo on 16-17 February,*, Available at: https://www.fidh.org/IMG/pdf/rapport_lea_uk-lddouble.pdf

[214] University of Minnesota, University of Minnesota Human Rights Library, *2004 Arab Charter on Human Rights*, Available at: hrlibrary.umn.edu/instree/loas2005.html, http://hrlibrary.umn.edu/instree/loas2005.html

[215] US National Library of Medicine National Institutes of Health (2010), , *Democratic Quality in Stable Democracies*, Arend Lijphart, Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3003825/,

of democracy requires making sure, in terms of institutional characteristics, a country is sufficiently democratic, and at a minimum, has universal suffrage and an uninterrupted democracy for a minimum number of years. To an important extent, higher democratic quality can be attributed to institutional characteristics of consensus democracy, especially proportional representation.[216]

A. Inter-American Human Rights System

The Inter-American system for the promotion and protection of human rights was formed after World War II through the adoption of the American Declaration of the Rights and Duties of Man in 1948.[217] The system lies on four main pillars: (1) human rights treaties, including the American Convention on Human Rights; (2) institutions, namely the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, independent entities from both states and NGOs, established respectively in 1959 and 1979;[218] (3) states, the creators of the system and who bear the responsibility of complying with the decisions of the Commission and the Court; and (4) civil society, which provides the engine behind the functioning of the system, as advancement in the protection of human rights only occurs when civil society exerts pressure.[219]

Notably, when the Inter-American human rights system was established most of the states in the region were dictatorships. Civil society organizations, having to defend themselves in hard times, played a major role in pushing for an independent system to protect human rights.[220] The Inter-American Commission on Human Rights (IACHR) is mandated to grant protective measures, a very critical and important aspect of its role in defending human rights.[221] Previous Commission decisions have proved protective measures are effective, when granted. However, the States party to the regional system have harshly criticized protective measures, especially targeting the DC-based IACHR, which produced what was euphemistically called the "Process of Strengthening of the Inter-American System for the Protection of Human Rights."[222] Challenges remain despite the IACHR issuing a document on March 2013 addressing these topics and amending its rules of procedure to conform with the results of the process.[223]

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[216] *Id.*

[217] Human Rights Quarterly, vol. 31, no. 4, 2009, pp. 856–887., doi:10.1353/hrq.0.0108, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, Goldman, Robert K, Available at: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1027&context=facsch_lawrev

[218] *Id.*

[219] Universität Leiden (2015), *NGO Participation in Regional Human Rights Systems, A Comparison of Europe and the Americas*, M.F. Rietveld, Available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/33629/Rietveld-Myrinne-s1580868-MA%20Thesis-2015.pdf?sequence=1

[220] *Id.*

[221] International Justice Resource Center (2017), *Inter-American Human Rights System,* Available at: www.ijrcenter.org/regional/inter-american-system/, http://www.ijrcenter.org/regional/inter-american-system/

[222] Harvard International Law Journal (2013), *Challenges to the Inter-American Human Rights System*, Available at: www.harvardilj.org/2013/12/challenges-to-the-inter-american-human-rights-system/.

[223] *Id.*

The continued relevance of the Commission and the Inter-American system depends on the ability of the Member States to meet the following challenges. First, at the "conclusion" of the review States kept the strengthening process open, which poses a threat to the political independence of the IACHR.[224] Second, the IACHR urgently needs a bigger budget.[225] Without more resources, the IACHR may be unable to manage its workload, risking discredit.[226] Third, and probably the most difficult, is the IACHR's legitimacy deficit regarding the universality of the system, due to the fact that the most powerful country in the region, the US, has never ratified the American Convention on Human Rights.[227]

B. African Human Rights System

The African Commission for Human and People's Rights (ACHPR) demonstrates the potential strength of a human rights system that improves with significant influence from civil society and non-governmental organizations. The African Charter on Human and Peoples' Rights was adopted in 1981 by the Conference of the Heads of State and Governments of the Organization of African Unity (OAU).[228] The African Union (AU), which replaced the OAU in 2000, established the rights which are guaranteed under the African Charter as principles and objectives in its Constitutive Act. [229] The AU rights include rights to fair trial, equality before the law, equal protection of the law, and recognizing Member States' duty to guarantee the independence of courts and promote human rights.[230]

Opening a new era of human rights protection in Africa, the Charter was drafted considering the legal texts of international and regional human rights protection systems as well as the legal traditions of the continent; hence the inclusion of peoples' rights and civil, political, economic and social rights. The Charter's mechanism for monitoring its implementation started in 1987.[231] The mechanism has a dual promotion and protection mandate under Article 45 of the Charter.[232] The promotional functions of the

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[224] Freedom House (2013), Defending Regional Human Rights Protection Mechanisms: The Inter-American Commission on Human Rights Under Attack, available at: https://freedomhouse.org/sites/default/files/IACHR%20Policy%20Brief.pdf

[225] *Id.*

[226] *Id.*

[227] Directorate-General For External Policies, Policy Department (2010) *The Role Of Regional Human Rights Mechanisms, European Parliament*, Available at: , http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf

[228] *Id.*

[229] *Id.*

[230] The Raul Wallenberg Institute Human Rights Library (2001), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. MoÌˇLler*, Alfredsson, Gudmundur, Martinus Nijhoff Publishers PP. 330 -332;, . ..*African courts and the African Commission on Human and Peoples' Rights*, Michelo Hansungule, PP 233-241, Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.490.6079&rep=rep1&type=pdf

[231] African Commission on Human and Peoples' Rights, *African Charter on Human and Peoples' Rights*, Available at:, www.achpr.org/instruments/achpr/.

[232] The Raul Wallenberg Institute Human Rights Library (2001), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. MoÌˇLler*, Alfredsson, Gudmundur, Martinus Nijhoff Publishers PP. 330 -332

Commission include the collection of documents and conducting research on African problems in the field of human rights; organizing seminars, symposia and conferences, disseminating information; making recommendations to governments and sending missions to gather information on the human rights situation in a State party.[233]

The Commission has jurisdiction to interpret provisions of the African Charter at the request of a State party, an AU institution, or African non-governmental organizations (NGOs).[234] However, the ACHPR has often been seen by observers as a "Sleeping Beauty in the Woods,"[235] because it faces many challenges, including a lack of political will to ensure the system is effectively implemented and enhanced.[236] However, African and international NGOs have taken a key role in the work of the Commission (notably through the presence of over 100 NGO representatives at each ACHPR session). They tried to push the Commission over the last decade towards greater independence,[237] which makes it more inclusive of civil society, independent experts and unbiased and impartial decisions. This has led ACHPR to enhance its structure with the creation of special rapporteurs and working groups on special human rights issues, and secure funding to strengthen its human rights promotion and protection mandate.[238]

IV. Challenges Facing the Progress of the Arab Human Rights System

A. The 1994 Arab Charter on Human Rights

On September 15, 1994, the Council[239] of LAS adopted the first Arab Charter on Human Rights,[240] a significant milestone for its 50th anniversary.[241] The adoption of the Charter symbolized that LAS members recognized human rights and the importance of respecting human rights in the Arab World. The Preamble speaks of the principles of religions recognizing the right to a life with dignity based on freedom, justice, and peace.[242] The Preamble reaffirmed the principles of the Charter of the United Nations and the Universal Declaration of Human Rights (UDHR), as well as the provisions of the International Covenants on Civil and Political Rights, Economic, Social and Cultural Rights, and the Cairo Declaration on Human Rights in Islam.[243] This is due to preambles of international instruments playing an important role in law, policy-making, and interpretations. Therefore, reaffirming the globally

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[233] *Id.*

[234] University of South Africa, Faculty of Law (2010), *The African Human Rights System: Challenges and Prospects*, Ingange-Wa-Ingange Jean Désiré, Available at: https://www.peacepalacelibrary.nl/ebooks/files/382582535.pdf

[235] *Id.*

[236] *The African Human Rights System*, Cecilia M. Bailliet, Available at: http://www.uio.no/studier/emner/jus/humanrights/HUMR5140/h12/undervisningsmateriale/lecture-7-africa.pdf

[237] *Id.*

[238] *The African Human Rights System: A Critical Evaluation*, Makau Mutua, Available at: http://hdr.undp.org/sites/default/files/mutua.pdf

[239] Carnegie Endowment for International Peace (2012), *The Arab Charter on Human Rights* , carnegieendowment.org/sada/?fa=23951*1994 Arab Charter on Human Rights*, Available at: http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf

[240] *Id.*

[241] The Arab Center for International Humanitarian Law and Human Rights Education (2010), *The League of Arab States and the Arab Charter on Human Rights*, Verot, Colin, Available at: www.acihl.org/articles.htm?article_id=6

[242] *Id.*

[243] Carnegie Endowment for International Peace (2009), *The Arab Charter on Human Rights*, Merwat Rishmawi, , Available at: carnegieendowment.org/sada/?fa=23951.

recognized of UDHR and ICCPR and ICESCR is a matter of importance.[244] However, there is significant tension between the Cairo Declaration[245] and the UDHR concerning the concepts of universality and cultural-religious relativism with many, including Islamic jurists, calling into question the compatibility of the two instruments.[246]

The Cairo Declaration conflicts with international human rights.[247] The document provides only a subordinated status to religious minorities and prohibits conversion from Islam. It also presents glaring evidence of discrimination against women, providing the right to freedom of movement or marriage only to men.[248] These shortcomings render the Declaration useless at best and at worst harmful for human rights. Not surprisingly, the only people who take the document seriously are critics of Islam who invoke it to argue the religion's incompatibility with human rights.[249]

Following the passage of the Charter, there were increasing criticisms of deficiencies by experts, NGOs, academics, and others asserting the 1994 Arab Charter is primitive because of the extremely limited system of monitoring states' compliance with the Charter's provisions and the lack of representation of civil society organizations and independent experts.[250] The sole monitoring mechanism consisted of presenting reports to an expert Committee, with no system of individual or state petitions to this Committee for significant violations of an article of this Charter by a state party.[251] Numerous meetings and conferences were organized by civil society organizations in Europe and in the Arab World to push the Arab governments to modify the Charter.[252]

B. LAS Human Rights Monitoring Bodies

B-1. The Arab Permanent Committee on Human Rights (PACHR)

The PACHR is responsible for establishing the rules of cooperation among the Member States in the field of human rights. Established in 1968 as a technical committee, it consists of one representative from each Member State who serves as a political representative.[253] The Permanent Committee meets twice a year in Cairo, usually around January or February and June.[254] The issues it considers during these meetings are limited to topics referred by the LAS Council, the Secretary-General, or the Member

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[244] Oxford Public International Law (2017), *Preamble*, Available at: opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456.

[245] Quilliam International, Human Rights: The Universal Declaration vs The Cairo Declaration., Promoting Pluralism & Inspiring Change, Admin, Quilliam., Available at: www.quilliaminternational.com/human-rights-the-universal-declaration-vs-the-cairo-declaration/.

[246] *Id.*

[247] The Brookings (2016), It's Time to Revise the Cairo Declaration of Human Rights in Islam, Kayaoğlu, Turan. Available at: brookings.edu/opinions/its-time-to-revise-the-cairo-declaration-of-human-rights-in-islam/.

[248] *Id.*

[249] *Id.*

[250] Cairo Institute for Human Rights Studies (2013), *The League of Arab States in the Wake of the Arab Spring*, Mervat Rishmawi, Available at: http://www.cihrs.org/wp-content/uploads/2013/09/Arab-Leage.pdf

[251] *Id.*

[252] International Foundation for Human Rights (2013), *The Arab League and Human Rights: Challenges Ahead Regional Seminar held in Cairo on 16-17 February,*, Available at: https://www.fidh.org/IMG/pdf/rapport_lea_uk-lddouble.pdf

[253] Council on Foreign Relations (2014), *The Arab League*, Available at: https://www.cfr.org/backgrounder/arab-league

[254] *Id.*

States.[255] The recommendations produced by these meetings are included in the reports of the Council of Ministers of Foreign Affairs.[256] In 2007, the Permanent Committee's responsibilities were outlined in Resolution 6826, Regular Session 1285 of the Council of Ministers of Foreign Affairs. The Permanent Committee does not have the ability to accept individual complaints or conduct country inquiries by request of CSOs, nor does it have any special procedures.

B-2. The Arab Human Rights Committee

The Arab Charter on Human Rights established the Arab Human Rights Committee (the Committee) as a treaty body with seven members, to be elected by secret ballot by the states parties every four years for a maximum of two terms. Only one of the members was a woman.[257] The Committee does not have the authority to receive individual complaints regarding human rights violations committed by member states.[258] The Committee represents an extremely weak mechanism for supervising and enforcing member states' compliance with the Charter by international standards.[259] Except for the fight against corruption, in the Arab League's logic part of its internal security agenda, the commitments made in Tunis in 2004 with regard to democracy, the rule of law, and good governance have not been translated into regional action.[260]

B-3. The Arab Commission for Human Rights & The 2004 Revised Arab Charter on Human Rights

The Arab Commission for Human Rights (ACHR) is an independent non-governmental organization dedicated to the protection of human rights and fundamental freedoms throughout the Arab world.[261] Without any political affiliation, the Arab Commission for Human Rights is guided in its work by the principles established in, most notably, the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESC), the International Covenant on Civil and Political Rights (ICCPR) and all other international human rights instruments.[262]The draft of 2004 revised Arab Charter on Human Rights was prepared by ACHR, which has acted as a facilitator inviting the Arab states to present observations and proposals to improve the Charter. The ACHR does not have any affiliation with the LAS or the Arab Human Rights Committee that is a body of LAS.

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[255] *Id.*

[256] *Id.*

[257] German Institute for Human Rights, *The Arab Human Rights System Annex to the ABC of Human Rights for Development Cooperation, Available at: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/E-Info-Tool/e-info-tool_abc_of_hr_for_dev_coop_the_arab_hr-system.pdf*

[258] Governance Transfer by Regional Organizations: Patching Together a Global Script (2015), Börzel, T. and van Hüllen, V. (2015), *Just Leave Us Alone: The Arab League and Human Rights*, Houndmills, Basingstoke: Palgrave Macmillan.

[259] *Id.*

[260] Amnesty International Report (2008), *Middle East and North Africa The Arab Human Rights Committee: Elections of Members and Criteria of Membership*, Available at: https://www.amnesty.org/download/Documents/56000/ior650012008eng.pdf

[261] The Arab Center for International Humanitarian Law and Human Rights Education (2010), *The League of Arab States and the Arab Charter on Human Rights,* Verot, Colin, Available at: www.acihl.org/articles.htm?article_id=6

64 Mykolas Romeris University (2010), *The Arab Charter on Human Rights: The Naissance of New Regional Human Rights System or A Challenge to The Universality of Human Rights?* Dalia Vitkauskaite-Meurice , Available at: https://www.mruni.eu/upload/iblock/fe3/10meurice.pdf

The 2004 Revised Arab Charter on Human Rights

A resolution passed on January 10, 2003, by the Arab Commission for Human Rights invited the Arab states to present observations and proposals to improve the Charter, with a promise to Arab states that the Commission would examine the Charter again in January 2004.[263] On a parallel track, the High Commissioner for Human Rights invited many Arab independent human rights experts for a meeting in Cairo in December 2003 to also present some observations and proposals to improve the Charter.[264] Finally, on May 23, 2004, a new version of the Charter was presented to the Arab Summit in Tunisia. The 2004 Arab Charter on Human Rights contains 53 articles after the Preamble.[265]

The Preamble is the same as the first version, despite the significant criticisms about the incompatibility of the Cairo Declaration with the Universal Declaration of Human Rights.[266] Article 2 of the Charter is very similar to the second article in the International Covenants of 1966 concerning the rights of people (the Arab people) to self-determination, to control their natural wealth and resources, to freely determine the form of their political structure, and to freely pursue their economic, social, and cultural development.[267] Article 3 importantly includes confirmation of equality between men and women in the Arab World.[268] The revised Charter also protects children's rights (Article 3 & 34) and the rights of persons with handicaps (Article 40).[269]

The main complaint with the 1994 Arab Charter on Human Rights remains despite the 2004 efforts to improve the Charter; there is no effective enforcement mechanism. Although, Article 33 of the Charter specifically mentions the status of women by stating "the State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children,"[270] at the same time, the Charter does not prohibit cruel, inhuman, or

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[263] Open Society Foundations, Arab Regional Office (2015), *The League of Arab States, Human Rights Standards and Mechanisms, Towards Further Civil Society Engagement, A Manual for Practitioners*, Mervat Rishmawi, Available at:https://www.opensocietyfoundations.org/sites/default/files/league-arab-states-manual-20151125.pdf; *Arab Charter On Human Rights 2004*, Translation by Dr. Mohammed Amin Al-Midani and Mathilde Cabanettes Revised by Professor Susan M. Akram, Available at: http://www.eods.eu/library LAS_Arab%20Charter%20on%20Human%20Rights_2004_EN.pdf

[264] *Id.*

[265] University of Minnesota Human Rights Library (2005), available at: hrlibrary.umn.edu/instree/loas2005.html, http://hrlibrary.umn.edu/instree/loas2005.html

[266] The Arab Center for International Humanitarian Law and Human Rights Education (2010), *The League of Arab States and the Arab Charter on Human Rights*, Verot, Colin, Available at: www.acihl.org/articles.htm?article_id=6

[267] The Arab Center for International Humanitarian Law and Human Rights Education (2010), *The Enforcement Mechanisms of the Arab Charter on Human Rights and the Need for an Arab Court of Human Rights*, Verot, Colin. Available at: https://www.acihl.org/articles.htm?article_id=22

[268] *Id.*

[269] *Id.*

[270] The Arab Center for International Humanitarian Law and Human Rights Education (2010), *The League of Arab States and the Arab Charter on Human Rights*, Verot, Colin, Available at: www.acihl.org/articles.htm?article_id=6

degrading punishments, nor does it extend rights to non-citizens in many areas.[271] It also allows for the imposition of restrictions on the exercise of freedom of thought, conscience, and religion far beyond international human rights law, which allows for restrictions only on the manifestations of a religion or belief, but not on the freedom to hold a religion or belief.[272] Moreover, the Charter leaves many important rights to national legislation. For example, it allows for the imposition of the death penalty against children if national law allows it.[273] It also leaves the regulation of rights and responsibilities of men and women in marriage and divorce to national law.[274] Thus, the Charter mirrors to a large degree the areas of acceptance and reservations regarding the international human rights treaties signed by the Member States of the LAS.

Article 43 of the Charter states "nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the states parties have adopted or ratified, including the rights of women, the rights of children and the rights of minorities."[275] Although, Article 43 addresses the interaction between the Arab Charter on Human Rights and the domestic laws of Arab states, as well as the relationship between the Charter and international law, in analyzing these interactions, the interpretation of the rights stipulated in the Charter should not be impaired by domestic laws restricting such rights.[276] Many Arab, regional, and international organizations take the position they will not lobby actively for the ratification of the Charter because it conflicts with international law in many fundamental areas.[277] States ratifying the Charter undertake changing their laws and policies in accordance with its provisions, but none have actually done so thus far.[278]

In the end, the success of the Charter will depend on how seriously the Arab states and Arab human rights organizations decide to take it. Aside from the obvious question of whether Arab states will follow through in making actual changes in law and practices to conform with the Charter, there is the question of whether the Arab civil society organizations will engage in the process in the same way they do with other regional and international systems.[279] For the Charter to succeed in furthering human rights, Arab governments would have to be willing to re-open the debate on some provisions that clearly contradict international standards. Another measure of the significance of the Charter will be whether,

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[271] Carnegie Endowment for International Peace (2012), *The Arab Charter on Human Rights*, carnegieendowment.org/sada/?fa=23951

[272] *Id.*

[273] *Id.*

[274] The Arab Center for International Humanitarian Law and Human Rights Education (2010), *The League of Arab States and the Arab Charter on Human Rights*, Verot, Colin, Available at: www.acihl.org/articles.htm?article_id=6

[275] Mykolas Romeris University (2010), *The Arab Charter on Human Rights: The Naissance of New Regional Human Rights System or A Challenge to The Universality of Human Rights?* Dalia Vitkauskaite-Meurice, Available at: https://www.mruni.eu/upload/iblock/fe3/10meurice.pdf

[276] *Id.*

[277] *Id.*

[278] SCRIBD (2009), *Analytical Framework of The Protection of Human Right Under The Arab Charter on Human Rights (2004), the paper is a part the book on Comparative Study of the Bill of Rights in Post-Cold War Period*, Prof. Dr. Vijay N. Ghormade

[279] *Id.*

once states submit their reports on the measures they have taken to conform to the Charter, serious debates on human rights start to take place within the walls of the LAS.[280]

B. NGO's Participation

Responsibility for the protection and promotion of human rights within inter-governmental organizations is often shared by several organs within the same organization. For example, in the UN system the General Assembly, the Human Rights Council and the High Commissioner for Human Rights share a mandate to promote human rights among the Member States. In contrast, the LAS's system delegates this power to one political organ, the Arab Human Rights Committee. Officially, the Committee can only receive reports and information from NGOs registered in their countries of origin.[281] Therefore, this excludes a large number of human rights organizations in the region that are refused official recognition due to the repressive measures applied to associations in their country. Envisioning a process of exchange with civil society is rarely part of the master plan designed for inter-governmental bodies.

The integration of civil society into formal proceedings is not only due to NGO efforts, but also the result of treaty bodies seeing the benefits of promoting and strengthening civil society's position and giving its observations more far-reaching and sustainable effect.[282] Regular meetings between the International Federation for Human Rights (FIDH),[283] Cairo Institute for Human Rights Studies (CIHRS),[284] the Arab Organization for Human Rights (AOHR),[285] and others, including the Arab Human Rights Committee's Secretariat, and efforts to improve interaction between the Committee and its member organizations, have made it possible for some NGOs in Algeria and Jordan to submit alternative reports prior to the examination of their respective country's State report.[286] This is despite the fact that not all of these partner organizations are officially registered. Thus, the information received by the Committee from unrecognized NGOs cannot be published on the Committee's website and the experts will not expressly refer to them in their conclusions. The information provided by unrecognizable NGOs may be used in the preparatory stages of the examination; however, this information does not effectively examine the human rights records of the Member States, nor effectively engage in resolving human rights issues.[287]

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[280] *Id.*

[281] Leiden University (2015), *NGO Participation in Regional Human Rights Systems, A Comparison of Europe and the Americas*, M.F. Rietveld, Available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/33629/Rietveld-Myrinne-s1580868-MA%20Thesis-2015.pdf?sequence=1

[282] *Id.*

[283] *Worldwide Movement for Human Rights*, Available at: www.fidh.org/en/,

[284] *Cairo Institution for Human Rights*, Available at: http://www.cihrs.org/?lang=en

[285] *Arab Organization for Human Rights*, Available at: http://aohr.net/portal/?2015

[286] International Foundation for Human Rights (2013), *The Arab League and Human Rights: Challenges Ahead Regional Seminar held in Cairo on 16-17 February,*, Available at: https://www.fidh.org/IMG/pdf/rapport_lea_uk-lddouble.pdf

[287] Open Society Foundations, Arab Regional Office (2015), *The League of Arab States, Human Rights Standards and Mechanisms, Towards Further Civil Society Engagement, A Manual for Practitioners*, Mervat Rishmawi, Available at:https://www.opensocietyfoundations.org/sites/default/files/league-arab-states-manual-20151125.pdf

According to Article 45 of the Charter,[288] the Arab Human Rights Committee shall establish its own rules of procedure and shall meet at the LAS headquarters in Cairo.[289] The Charter contains no further details about the Committee and the Committee's relationship with other organs of the LAS. Soon after its establishment, the Committee's experts decided it should remain independent from the LAS General-Secretariat, including the human rights department.[290] The Committee has thus managed to raise its own funding from the State parties.[291] The Arab Human Rights Committee performed its first examination of State reports in 2012, starting with Jordan in March, Algeria in October, and Bahrain in February 2013.[292] The concluding remarks of the Committee are now published on its website in Arabic.[293]

After the entry into force of the revised Arab charter in 2008, FIDH and partners followed and accompanied the establishment of the Arab Human Committee by submitting information and recommendations (especially on the necessity to have an independent body, composed of independent experts) to the human rights department then to the Committee itself. FIDH organized, together with Amnesty International the first meeting between the members of the committee and regional and international organizations in 2009.[294]

The Arab Human Rights Committee's experts agreed on the principle of wider collaboration with NGOs but seemed to move slowly at first. The Committee consulted regional and international NGOs on the implementation of their internal rules and then organized interaction with local NGOs, including an agreement to receive shadow reports.[295] This makes it even more important that clear criteria and objectives are deemed to grant observer or consultative status to NGOs.

In March 2011, the LAS Council adopted a resolution calling upon the General-Secretariat to set forth suggestions on an effective review of the role of both the PACHR and its affiliate sub-committee of experts.[296] However, it would be ineffectual and unproductive to strengthen the PACHR's mandate on human rights promotion and protection without properly amending the Arab Charter on Human Rights. Thus, simultaneous reform is needed in these two areas; improving the charter and strengthening the organs of the Arab Human Rights system.[297]

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[288] Carnegie Endowment for International Peace (2012), *The Arab Charter on Human Rights* , carnegieendowment.org/sada/?fa=23951

[289] *Id.*

[290] International Foundation for Human Rights (2013), *The Arab League and Human Rights: Challenges Ahead Regional Seminar held in Cairo on 16-17 February,*, Available at: https://www.fidh.org/IMG/pdf/rapport_lea_uk-lddouble.pdf

[291] Open Society Foundations, Arab Regional Office (2015), *The League of Arab States, Human Rights Standards and Mechanisms, Towards Further Civil Society Engagement, A Manual for Practitioners*, Mervat Rishmawi, Available at:https://www.opensocietyfoundations.org/sites/default/files/league-arab-states-manual-20151125.pdf

[292] *Id.*

[293] International Foundation for Human Rights (2013), *The Arab League and Human Rights: Challenges Ahead Regional Seminar held in Cairo on 16-17 February,*, Available at: https://www.fidh.org/IMG/pdf/rapport_lea_uk-lddouble.pdf

[294] *Id.*

[295] Just Leave Us Alone: The Arab League and Human Rights." Governance Transfer by Regional Organizations, 2015, Hallen, Vera Van, PP. 125–140

[296] *Id.*

[297] International Foundation for Human Rights (2013), *The Arab League and Human Rights: Challenges Ahead Regional Seminar held in Cairo on 16-17 February,*, Available at: https://www.fidh.org/IMG/pdf/rapport_lea_uk-lddouble.pdf

Strengthening the organs of the Arab Human Rights system could be achieved through the use of investigative missions and effective reporting, as well as providing the LAS with an opportunity to publicly qualify situations by reference to international standards and decide on interim measures on a given situation, whilst also providing redress for victims.[298] Nevertheless, it is highly unlikely the victims of human rights violations would bring cases before special procedures belonging to a system which the perpetrating states are political representatives.[299] The only means of securing a stronger and more effective system of human rights protection, therefore, is to rely on the strengthening of the Arab Human Rights Committee as an independent treaty body attached to the Arab Charter on Human Rights.[300]

D. The Arab Court of Human Rights

Another key omission in the enforcement system is the lack of an Arab Court of Human Rights. NGOs have taken key roles in enhancing the credibility of the European Court of Human Rights decisions. The Council of Europe adopted the European Convention on Human Rights in 1954 and established its Court, based in Strasbourg, France, in 1959.[301] The Convention covers a vast geographical area and is confronted with a wide diversity of legal systems.[302] The European Court is not a court of appeals and is primarily used for claims of violations of the European Convention.[303] Although, the Court is faced with many challenges, including long procedures often lasting years and the failure of state complaints; almost none of the state parties to the European Convention have ever filed a complaint against another state for violating the European Convention. The Court has received a large number of complaints from individuals (more than 120,000 were pending at the end of 2012).[304]

Additionally, the Court can boast of a number of successes, among which its power to order provisional measures, usually implemented by states, and the development of its jurisprudence, including decisions on more geo-strategic issues arising between states.[305] Here again, civil society organizations have played a tremendous role in establishing, supporting and helping to develop the European human rights system.[306] NGOs still play a fundamental part today as they participate in procedures before the Court, represent victims, and act as third-parties intervening in support of complaints to highlight specific

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[298] *Id.*

[299] *Id.*

[300] Open Society Foundations, Arab Regional Office (2015), *The League of Arab States, Human Rights Standards and Mechanisms, Towards Further Civil Society Engagement, A Manual for Practitioners*, Mervat Rishmawi, Available at:https://www.opensocietyfoundations.org/sites/default/files/league-arab-states-manual-20151125.pdf

[301] Directorate-General For External Policies Policy Department (2010), *The Role Of Regional Human Rights Mechanisms*, Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] European Journal of International Law *(2014), The Successes and Challenges for the European Court, Seen from the Outside* Available at: www.ejiltalk.org/the-successes-and-challenges-for-the-european-court-seen-from-the-outside/.https://www.ejiltalk.org/the-successes-and-challenges-for-the-european-court-seen-from-the-outside/

[306] *NGO Participation in Regional Human Rights Systems, A Comparison of Europe and the Americas*, M.F. Rietveld,2015, Available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/33629/Rietveld-Myrinne-s1580868-MA%20Thesis-2015.pdf?sequence=1

issues.[307] They also remain active in the reform of the Court to prevent states from significantly reducing its powers.[308]

The European Court could be a source of inspiration for a future Arab Court of Human Rights, notwithstanding the challenges NGOs should ensure are addressed, such as the Court's ability to adequately address high numbers of complaints, the execution of judgments, and the refusal of certain states to implement the Court's decisions.[309]

LAS and OHCHR held a conference in Cairo on May 22-24, 2014.[310] LAS and the Bahrain National Institution for Human Rights organized another meeting in Bahrain on May 25-26, 2014.[311] The LAS Secretary General, Nabil Al-Arbabi, announced at both meetings the expert committee of the LAS had finalized its work regarding the Arab Court of Human Rights and the final draft would be submitted for the approval of the ministerial council in its next meeting.[312] Although, The Statute of the Arab Court of Human Rights was approved by the Ministerial Council of the LAS on 7 September 2014,[313] it has faced criticisms, as it is not gender-inclusive, does not authorize courts to prescribe interim measures, does not include guarantees for the protection of victims, witnesses, and civil society organizations, and mechanisms and processes for judges' nomination are not clear.[314]

V. Conclusion

Despite the establishment of the PACHR and the Arab Charter on Human Rights, Arab countries lack an effective regional human right system. This, in addition to enabling individuals and civil society to get access to justice and exercise their right to a fair trial even a quasi-judicial body, will not protect and promote human rights as it should. This is because the proposed Arab Court of Human Rights looks like an empty vessel without substantial changes to the Statute. If the Court is to be effective, it must be able to order interim or provisional measures, to order measures capable of protecting victims, witnesses and other participants in Court proceedings from reprisals, the host State must be required to provide the

[307] *Id.*
[308] *Id.*
[309] European Journal of International Law *(2014), The Successes and Challenges for the European Court, Seen from the Outside* Available at: www.ejiltalk.org/the-successes-and-challenges-for-the-european-court-seen-from-the-outside/.https://www.ejiltalk.org/the-successes-and-challenges-for-the-european-court-seen-from-the-outside/
[310] Human Rights Watch (2014), *Proposed Arab Court of Human Rights: An Empty Vessel Without Substantial Changes to the Draft Statute*, Available at: www.hrw.org/news/2014/06/06/proposed-arab-court-human-rights-empty-vessel-without-substantial-changes-draft.
[311] Id.
[312] Human Rights Watch (2014), *New Arab Human Rights Court Is Doomed from the Start*, Available at: www.hrw.org/news/2014/11/26/new-arab-human-rights-court-doomed-start.
[313] Human Rights Law Research Guide - LibGuides at University of Melbourne, Available at: unimelb.libguides.com/human_rights_law/regional/arab.
[314] Human Rights Watch (2014), *Proposed Arab Court of Human Rights: An Empty Vessel Without Substantial Changes to the Draft Statute*, Available at: www.hrw.org/news/2014/06/06/proposed-arab-court-human-rights-empty-vessel-without-substantial-changes-draft.

necessary guarantees for the Court and its staff. Therefore, there must be mechanisms to ensure that the Court's judgments are actually implemented in practice.[315]

By denying the right of victims to have direct recourse to the Court, the Statute defeats the very purpose and objective of establishing the Arab Court of Human Rights. Amendments to the Statute's access provisions should be introduced to ensure direct access at a minimum for individuals who allege they have been a victim of a violation of a right within the jurisdiction of the Court.[316] Further reforms needed include proper guarantees for the independence and impartiality of the Court and its judges, a requirement for the Court to interpret the Arab Charter of Human Rights consistently with States' other international law obligations, and for the Court to have broad discretion to decide whether cases are admissible, without the undue restrictions of a strict prerequisite to exhaust local remedies.[317] Unfortunately, the Arab system of human rights lacks in many ways in comparison to its European, African and Inter-American counterparts.

The shortcomings of the Arab system of human rights are evident through the region's recent struggle with regressive human rights violations. Particularly in the wake of Arab Spring and later revolutions that the Committee has ignored, the LAS has instead focused its attention on decisions related to reform initiatives in Arab countries and the political bodies of the LAS.[318] Therefore, balances of power and political interests continue to be the main motives behind these decisions.

After the ratification of the 2004 charter, there have been ongoing discussions about enhancing the Arab human rights system. For instance, from February 16-18, 2013, more than 50 human rights defenders representing national, regional, and international NGOs, as well as human rights experts from different regional and universal human rights systems gathered in Cairo, Egypt.[319] This gathering was convened to discuss the challenges faced by the LAS in enhancing the protection and promotion of human rights in the region and to propose visions for the reform and strengthening of the LAS' human rights component.[320] The Secretary-General of the LAS encouraged participants to recognize the need to reform on the fourth anniversary of the Arab Human Rights Day where he recognized the need to reform the Arab Charter on Human Rights. It has become a pressing requirement that the Arab Charter on Human Rights is brought into conformity with universal human rights standards.[321]

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315 International Commission of Jurists, *News: Press Releases*, available at: www.icj.org/arab-court-of-human-rights compr ehensive-amendments-required-before-ratification-new-report/.

316 *Id.*

317 International Commission of Jurists (2014), *Arab Court Statement*, https://www.icj.org/wp-content/uploads/2014/06/Arab-Court-Statement-June-2014-ENG-FINAL1.pdf

318 Human Rights Law Research Guide - LibGuides at University of Melbourne, available at: unimelb.libguides.com/human_rights_law/regional/arab.

319 Cairo Institute for Human Rights Studies (2013), *The League of Arab States in the Wake of the Arab Spring*, Mervat Rishmawi, Available at: http://www.cihrs.org/wp-content/uploads/2013/09/Arab-Leage.pdf

320 *Id.*

321 *Id.*

State parties affirmed the LAS needs to be impartial and fair in its decisions on human rights issues throughout the Arab region and it needs to address other pressing human rights situations in the Arab region, including in Bahrain, the Kingdom of Saudi Arabia, the United Arab Emirates, Oman, Yemen and the Occupied Palestinian Territories with the same degree of determination and persistence it has shown over the situation in Libya and Syria.[322] State parties reaffirmed no justification – political, cultural, religious or economic – can derogate from the obligations of State and non-State actors in the Arab region to respect, protect, and fulfill universally recognized human rights standards and norms. State parties also asserted the Arab Charter on Human Rights in its current form is inconsistent with international human rights standards and lacks effective guarantees to ensure the aspirations of the Arab people for an effective human rights system.[323]

Participants stressed the LAS cannot take on a new role in democratic transition, consult with civil society, nor support its claims in that regard, without operating an effective change in the modality of its relationship with civil society organizations by setting forth mechanisms and unambiguous criteria based on transparency to ensure a permanent relationship across all the LAS bodies. LAS has to clarify the protection mandate of the LAS by enhancing its monitoring capacity. Means to do this include, but are not limited to: 1) enabling the issuance of recommendations and resolutions on the human rights situation in the Member States, 2) enabling the establishment of independent special procedures to receive information from any source and investigate allegations, and 3) publicly qualify the human rights situation in the Member States and establish an independent complaint mechanism to deal with individual and collective communications received in accordance with established practice in other systems. LAS has to take into account the experience accumulated through the development of human rights protection mechanisms at the regional and international levels.[324]

[322] International Foundation for Human Rights (2013), *The Arab League and Human Rights: Challenges Ahead Regional Seminar held in Cairo on 16-17 February*, available at: https://www.fidh.org/IMG/pdf/rapport_lea_uk-lddouble.pdf
[323] *Id.*
[324] *Id.*

COMMERCIAL AGENCY LAW

Reflection on Exclusivity of Commercial Agency in Jordan

Bashar H. Malkawi*

I. Introduction

Any foreign manufacturer desiring to market its products in Jordan has several courses open to it. The foreign manufacturer could establish wholly-owned subsidiary in Jordan or enter into a licensing or joint venture agreement with a company doing business in Jordan. If the foreign company wants a less significant presence, it is left with the alternative of having a local commercial agent market and sells its products. Commercial agency has taken an increasing share of domestic and international business. The number of agencies and percentage of total retail sales has grown rapidly, far outpacing economies as a whole.[325]

The law of commercial agency in Jordan is statutory. Agency is subject to regulation through the Jordanian Civil and Commercial Codes.[326] A basic law also exists regulating agency legal relationships; Law of Commercial Agents and Intermediaries No. 28 of 2001.[327]

Given the high financial commitment of agency investments, and the time duration of most agency agreements, it is not surprising that the legal issues surrounding exclusivity and termination are among the most controversial in agency law. Clauses governing exclusivity and termination are likely the most important provisions in the agreement, as they limit what an agent may do.

The purpose of this article is to study certain aspects-exclusivity and termination- of commercial agency according to the Jordanian law.[328] The article is divided into three sections. Section two explains the general rules governing commercial agency in Jordan. Section three

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[325] See Augustin Jausas, International Encyclopedia of Agency and Distribution Agreements 23-26 (2008) (agency contracts run to the tune of billions of dollars worldwide).

[326] The Arab legal system distinguishes between acts to which private persons are parties (civil acts) and acts to which merchants are parties (commercial acts). The former are generally subject to the civil code and the latter to the commercial code. The civil and commercial codes complement each other in many areas including agency relations. See H S Shaaban, Commercial Transactions in the Middle East: What Law Governs? 31 Law & Pol'y Int'l Bus. 157, 160-163 (1999). See also See Mohamed El-Sayed El-Keky, Commercial Law 78 (in Arabic) (2004).

[327] See Law of Commercial Agents and Intermediaries No. 28 of 2001, Official Gazette No. 4496 (July 16, 2001).

[328] The article examines mainly the agency laws of Jordan. Reference to laws of other Arab countries will be made when necessary. The agency laws in the countries discussed share similar characteristics. For example, in Egypt, Jordan, Kuwait, Saudi Arabia and the UAE, where private enterprise is encouraged, foreign suppliers must use agents in practically all instances. In general, these countries reserve agency activities to their own nationals. Agents are regulated by mandatory registration procedures, and they are protected against arbitrary termination by their foreign principals. See Sections II and III *infra*.

analyzes exclusivity of commercial agents. Finally, the article concludes by summarizing the main issues discussed and provides recommendations to streamline agency law in Jordan.

II. What is an Agency?

The Law of Commercial Agents and Intermediaries No. 28 of 2001 defines a commercial agent broadly so that it covers commission agent, agent who distributes on his own behalf (distributor), and agent who distributes on behalf of a foreign company or a trader whose headquarter is located outside Jordan (commercial agent).[329] Moreover, the Commercial Code defines commercial agency as an agency related to commercial acts involving an agent who carries out his duties in the name of his principal.[330] The concepts of commercial agency and other intermediaries such as distributorship are not clearly distinguished in the Jordanian laws.[331] As a result, regulators and practitioners alike may suffer from uncertainty about the exact kinds of commercial arrangements intended to be regulated as agencies.

The Jordanian law should define a commercial agency, in a straightforward manner, as an independent individual or juristic person who is contractually controlled by a principal and assigned to promote, sell, distribute products and provide services in the name and on behalf of the principal for remuneration.[332] The distributor is an independent contractor who buys and resells for his own account and is normally free to fix his own resale prices.[333] The distributor must generally pay the manufacturer regardless of whether or not he has been paid by his own customers. The distributor thus acts on his own behalf and assumes the risk of possible

[329] A commercial middleman is defined as any person who carries on the profession of mediation with a view to concluding or facilitating the inclusion of commercial dealings and transactions, in return for a fee provided that such a person is not an employee or a deputy of either one of the two parties to such commercial transactions. *Id*. art. 2. While Arab jurisdictions that regulate commercial agency share common definitional approaches, each jurisdiction has its own definitional subtleties and mix of exclusions and exemptions. See Egyptian Code of Commerce of 1999, art. 5; Kuwaiti Code of Commerce of 1980, art. 271; Lebanese Commercial Code of 1942, art. 272; Moroccan Commercial Code of 1996, art. 393; Syrian Code of Commerce of 2007, art. 154; and UAE Commercial Transactions Law of 1993, 217.

[330] Acts defined as commercial in the commercial include purchase of goods intended to be sold as they are or after their manufacture, leasing of goods for lease, exchange operations, banking operations, land and maritime and air transport, brokerage and commission, insurance, public entertainment, and business agencies. Other commercial acts which are similar to these acts by nature or aim are considered commercial acts. See Jordanian Code of Commerce No. 12 of 1966, art. 6.1 & 2, 81.1.

[331] Commercial agencies and distributorships are essentially different and governed by different laws on Western legal systems. See Rochelle B. Spandorf, Franchise Player, 29 Los Angeles Lawyer 34, 43 (2006). See also Uri Benoliel, Rethinking the Distributor-Manufacturer Fiduciary Relationship: A Marketing Channels Perspective, 45 Am. Bus. L.J. 187, 215 (2008).

[332] A person is independent if he is essentially free to arrange his activity and determine his hours of work. It is important to point out the distinction between an independent agent and an employee. Any person who is regularly entrusted to solicit business for an entrepreneur or conclude business in his name is deemed an employee. Whether someone is independent turns on the factual circumstances of each case; merely having an agreement declare independence or non-employee status may not suffice.

[333] In the agency situation, the manufacturer retains an absolute control of the price at which his products will be sold in Jordan.

insolvency of the customers, which is not the case for the agent.[334] In contrast with a distributor, a commercial agent does not own the goods and thus must render the proceeds of his sales to the principal.

Agents in Jordan are only subject to certain nationality and registration requirements.[335] There is no age, experience in the agency's field of activity, or financial restrictions as requisites for registration. An individual agent should be a Jordanian national.[336] A company, acting as an agent, must also be Jordanian.[337] The Law of Commercial Agents and Intermediaries of 2001 does not set parameters for determining how a company could qualify as a Jordanian. Such parameters would have included majority of Jordanian ownership, having an office in Jordan, or majority of board of directors are of Jordanian nationality.

In addition to the nationality condition, a commercial agent must be duly registered at the Commercial Agents Registry of the Ministry of Industry and Trade.[338] A person who desires to practice as a commercial agent must submit an application to the Registrar. The application contains personal information of the agent and the principal and a copy of the agency agreement.[339] The agency agreement may include many provisions, but the most crucial which ought to be included are territory, products, exclusivity, commission rate, effective term, just cause for termination, compliance with law, and governing law and dispute resolution.

A commercial agent will be crossed off the Register in case of submitting incorrect information, termination of the agency agreement, or expiry of its term.[340] Non-registration results in a fine.[341] Non-registration does not invalidate an unregistered commercial agent. Thus, a failure to register will not prevent a commercial agent from practicing as such. A commercial agent must be duly registered in order to qualify for the protection and enjoy the privileges of the law.[342] An agent will not be entitled to any indemnity upon termination if the agent is not duly registered with the commercial registrar at the time his contract is terminated by the principal.

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[334] In practice, however, the contrast between an agent and a distributor is often not so marked. This is the case, for example, where the manufacturer participates in or follows closely the activities of the distributor, or where, for a variety of reasons, the distributor's gross profit upon his resale of the goods is not more than the commission which a sales agent would normally receive on such a sale. This is also the case where the distributor is granted payment terms by the manufacturer which exceed those the distributor normally grants to his own customers.

[335] The laws of other Arab countries imposes financial and professionals qualifications for practicing agency. See Fredrick J. Taylor Jr. & Howard O. Weissman, Middle East Agency Law Survey: Legal Requirements for Commercial Agency Arrangements in the Middle East: A Survey of Algeria, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Saudi Arabia, Syria and the United Arab Emirates, 14 Int'l Law. 331 (1980).

[336] See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 3.

[337] *Id*.

[338] *Id*. art. 5.

[339] *Id*. art. 6.a(1) & (2). See also Howard L. Stovall, 'Short Form' Agreements under Arab Commercial Agency Law: Some Legal and Practical Issues, ABA Middle East Law Committee Newsletter (September 2016) (The commercial agency agreement must be drafted in Arabic or accompanied by an Arabic translation. Preparing this Arabic translation could be relatively costly if the parties commercial agency agreement is lengthy, and a local commercial agent would usually prefer to avoid incurring this translation cost).

[340] *Id*. art. 9.

[341] *Id*. art. 18.a(3).

[342] *Id*. art. 10.a.

However, even if an agent were not so registered when he entered into the agency agreement and he so represented in the contract, he could probably under certain circumstances register after the signing of the sales agency contract, thus defeating any representation or undertaking not to register which he might have made in the sales agency contract.

An agent must have a direct relationship or link with his principal.[343] The direct relationship requirement is enforced through the registration process and the law does not grant any exceptions or discretion in this regard. The direct relationship requirement is intended to prohibit the use of sub-agents. Without the direct relationship requirement, a commercial agent would become sub-agent of foreign parties intervening between him and the producers or manufacturer. This type of intervention, if permitted, would defeat the requirement that the agent must be a Jordanian national. Another reason that may justify the requirement of direct relationship is to maintain prices of products low for consumers. Interference of many intermediaries could increase costs of production. However, taking into consideration the continuous exorbitant prices of products in Jordan, as well as in other Arab countries, makes this reasoning a mere illusion.[344] Prices are inflated anyway and generally increased by commissions paid to hidden middlemen and brokers. The reasonable justification for the rule of direct relationship is to maintain the requirement of nationality and make commercial agency a closed circuit.

The Law of Commercial Agents and Intermediaries of 2001 does not address in details rights and obligations of parties to an agency contract. The Law of Commercial Agents and Intermediaries of 2001 states, in one article only, that an agent is under an obligation to keep sufficient quantities of spare parts for the products and offer facilities for after-sale services.[345] The bulk of the parties' rights and obligations are found in the Commercial and Civil Codes. The parties cannot modify these rights and obligations by agreement as they are statutory duties.

The primary duty for an agent is to carry out the authority granted to him by the principal.[346] In carrying out his authority, the agent must act with the care of an ordinary person.[347] An agent receives the funds of his principal as a trustee.[348] As such, the agent the liable if the funds are lost due to his negligence. The products must be sold at a price fixed by the principal.[349] Hence, an agent is not free to sell the products at a lower price or any other price.

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[343] The commercial agency laws of Egypt, Kuwait, Syria, and UAE have similar requirement of direct relationship. See Thomas F. Clasen, International Agency and Distribution Agreements: Middle East/Africa/Asia/Pacific 25-31 (1994).

[344] See Taking the Strain; Food Prices and Protest, The Economist (May 10, 2008) (As a result of food inflation, millions of people are being pushed into hunger and malnutrition—and 30-odd countries face social upheaval unless food policy improved. In the Middle East, the part of the world most dependent on food imports, there have been demonstrations and strikes in Egypt, Morocco and Jordan. But all three countries withstood more serious food riots in the late 1970s and 1980s. Some countries in the Middle East, such as Syria, have so far survived demonstrations by issuing ration cards or hiking wages).

[345] See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 11.

[346] An agent may exceed the authority granted by the principal is the outcome is beneficial to the latter. See Jordanian Civil Code No. 43 of 1976, art. 840.

[347] *Id*. art. 841.

[348] *Id*. art. 846. See also Jordanian Commercial Code, art. 84.

[349] See Jordanian Civil Code, *supra* note 26, art. 852.

The agent, as part of the agency contract, must report to the principal the agency's activities and other information regarding its performance.[350] The purpose of this reporting obligation is to keep the principal abreast of the affairs of the agency and to act accordingly, if necessary.

As a commercial agent has certain duties, the principal is also bound by certain duties. For example, the principal is under an obligation to remunerate the agent.[351] The Jordanian law does not specify any remuneration maximum. The agent's remuneration could be based on a percentage of the value of the contract obtained through the agent. Moreover, the law does not specify if the commercial agent has a right to remuneration for the business concluded which is to be attributed to his activity. In some cases, an agent may have the right to remuneration without having conducted any attributable activity. If, for instance, an agent is assigned an exclusive sales area or a defined group of customers, he has the right to claim remuneration for all contracts concluded with persons within the scope of the area or with the designated customers, even though he did not actually participate in the transaction. The law does not determine when the remuneration is due. It could be due upon the completion of the supplier's performance of the transaction. Unless otherwise provided by contract, the principal could account for remunerations on a monthly basis.

The principal is bound by the agent's actions.[352] However, the agent is jointly and severally liable with the principal to the local merchant for whose benefit a contract has been concluded until all the terms and conditions of the contract have been performed.[353] Finally, the principal is liable for any damages caused to the agent through the ordinary performance of the agency.[354] The principal is not liable if the damage is caused by the agent's own negligence.

Courts in Jordan have exclusive jurisdiction in settling disputes arising out of commercial agency contracts.[355] A foreign court cannot decide such disputes. Moreover, the use of arbitration is not permitted.[356] The wording of the law means that the parties do not have the choice to use arbitration even after a dispute has risen. The exclusive jurisdiction of Jordanian courts is thus mandatory and leaves no room for using other alternative dispute resolution mechanisms. There is no obvious reason as to why the law grants courts the exclusive jurisdiction in settling commercial agency disputes without any exceptions. The exclusive jurisdiction of Jordanian courts could be intended to protect local agents by not using foreign courts which they are not familiar with.

The Law of Commercial Agents and Intermediaries of 2001 provides that after a certain length of time, three years post contract termination or term expiry, claims arising out of agency contracts will not be heard.[357] This rule is founded upon considerations of public policy. Documents may be lost, witnesses may be dead, and the recollection of events long past may

[350] *Id*. art. 856.
[351] *Id*. art. 857.
[352] *Id*. art. 859.
[353] See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 15.
[354] See Jordanian Civil Code, *supra* note 26, art. 859.
[355] See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 16.a.
[356] In general, arbitration can be used to settle all civil and commercial disputes. See Omar Aljazy, Arbitration in Jordan: From Old to New, 25 Journal of International Arbitration 219, 223 (2008)
[357] See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 16.b.

have become dim. Passage of time extinguishes the legal right of enforcement; it does not extinguish the underlying obligation.[358] Parties cannot contract out by denying the lapse of a period of time. Courts would invalidate such a provision on the ground that it contravenes public policy.

III. Exclusivity of Commercial Agency

Exclusivity exists when a manufacturer utilizes only one agent for the sale of his products. The Law of Commercial Agents and Intermediaries of 2001 and related laws do not regulate the exclusivity clause. In contrast to some legal systems mainly in the Gulf States-Kuwait and UAE, the Law of Commercial Agents and Intermediaries does not set out the basic elements which a contract of commercial agency must contain.[359] Rather, the Jordanian Legislature left the exclusivity provision to the agreement of the parties. In other words, exclusivity is determined by general principals of contract and is a matter of negotiation between a foreign principal and its Jordanian commercial agent. In practice, all commercial agents are Jordanian nationals and enjoy exclusive privileges.

The first inquiry into exclusivity involves the express language of the agency agreement between the parties. Agency can be *de facto* exclusive without an express agreement between manufacturer and agent.

A manufacturer can simply appoint an agent to a particular geographical area and impose limitations that confine the agent's sales to that area. For example, a cheese manufacturer might expressly prohibit each agent from selling cheese outside its assigned territory. This type of restriction can be referred to as an "exclusive territory" as it results in a closed territory.[360] A manufacturer can agree that the agent will sell the manufacturer's product only within a specified territory. This arrangement, which can be referred to as creating an "exclusive sales territory," limits the agent's freedom to deal with other manufacturers. In other words, the agent is not free to sell the goods of other manufacturers in the designated areas. A manufacturer may also forbid its agents to sell to certain designated customers or customer classes.[361] These types of agency restraints involve the allocation of customers or classes of customers among agents on the basis of characteristics other than geographic location. The manufacturer may reserve certain accounts to certain agent because, among other things, it is more qualified to serve the special needs of those customers. In addition, the manufacturer may assign a class of customers to some, but not all, agents so as to permit agent specialization.

[358] Jurisprudence of Arab countries allow an action to enforce a claim of right to be barred by the passage of time. However, the Sharia does not recognize the legal notion of passage of time as extinguishing any right. This distinction between a legal right and its enforcement, which is cogent, has greatly influenced the laws of Arab countries. See Mahir Jalili, Time Bar Clauses in Saudi Arabian Contracts, 13 International Construction Law Review 488, 490-91 (1996).
[359] See Kuwaiti Code of Commerce, art. 274.
[360] See Ernst-Ulrich Petersmann, International Competition Rules for Governments and for Private Business**:** A "Trade Law Approach" for Linking Trade and Competition Rules in the WTO, 72 Chi.-Kent L. Rev. 545, 550 (1996).
[361] The Law of Commercial Agents and Intermediaries No. 28 of 2001 does not address customer restraints.

The question is whether the manufacturer, having granted the agent territorial exclusivity, may, thereafter, lawfully engage in market expansion conduct designed to increase the manufacturer's market penetration within the territory already provided to the manufacturer's agent. Agents fearing encroachment of their established and well-developed territories could respond by filing lawsuits against the manufacturer. The encroachment of the manufacturer violates his contractual obligations to the dealer.

A. The Law and Economics of Competitive Market

Competition is the linchpin of the free market system. A market is considered competitive if individual firms in that market have little or no power to influence the price or other terms on which products are sold.[362] By ensuring that resources are allocated efficiently and by spurring innovation, competitive markets ultimately maximize consumer welfare.

The relationship between competition and commercial agency is particularly relevant to so-called "vertical restraints".[363] Vertical restraints frequently involve manufacturers and distributors. Vertical restraints typically relate to the geographic territories or classes of customers to which distributors sell, the degree of exclusivity the manufacturer or the distributor can count on from the other, and the prices at which distributors sell. The negative anti-competitive effects of exclusivity can be considerable.

Exclusivity of commercial agency can be a restraint of trade or monopolization.[364] Exclusivity can raise barriers to entry or market access and thus enhance unilateral price-raising power. The loss of business resulting from exclusivity could lead to claims of anti-monopoly violations by excluded parties.[365] An exclusive agency can eliminate rivalry among agents in the sale of the manufacturer's product and has the potential of permitting the authorized agent himself to exercise some market power.[366] However, the manufacturer's or agent's purpose could be not to limit rivalry in itself or to permit an agent to exercise market power but rather to render more efficient the distribution of his product. The manufacturer would not grant the exclusive

[362] See Michal S. Gal, Imported Antitrust Competition Policy for Small Market Economies 35 (2003). See also Michal S. Gal, Market Conditions under the Magnifying Glass: The Effects of Market Size on Optimal Competition Policy, 50 Am. J. Comp. L. 303, 314 (2002).
[363] See Jessica L. Taralson, What Would Sherman Do? Overturning the Per Se Illegality of Minimum Vertical Price Restraints under the Sherman Act in Leegin Creative Leather Products, Inc. V. PSKS, Inc. was not as Reasonable as it Semmed, 31 Hamline L. Rev. 549, 556 (2008). See Barbara Ann White, Black and White Thinking in the Gray Areas of Antitrust: The Dismantling of Vertical Restraints Regulation, 60 Geo. Wash. L. Rev. 1 (1991). See also Val D. Ricks and R. Chet Loftis, Seeing the Diagonal Clearly: Telling Vertical From Horizontal in Antitrust Law, 28 U. Tol. L. Rev. 151, 159 (1996).
[364] See Lahouel, Competition Laws in MENA: An Assessment of the Status Quo and the Relevance of a WTO Agreement, 6-7 (The Economic Research Forum for the Arab Countries, Iran and Turkey: Cairo 2000). For an examination of the competing view of antitrust law see Page, Ideological Conflict and the Origins of Antitrust Policy, 86 Tulane L. Rev. 1 (1991).
[365] In principle, Jordan competition law covers the entire economy; yet it provides several important exemptions. For example, competition law does not apply if other legal provisions do not allow competition in a market for certain goods or services. Such provisions take precedence over the provisions of the competition law. See Jordan Provisional Anti-Trust Law No. 49 of 2002, Official Gazette No. (4560), art. 7 (August 15, 2002).
[366] The Kuwaiti Antitrust Law, for example, prohibits abusive use of a dominant position. See Lahouel, *supra* note 44, 8. See also El-Dean, Privatisation and the Creation of a Market-based Legal System: The Case of Egypt 167 (Egypt competition law forbids exploitative behavior) (Brill Academics: Leiden 2002).

agency unless he believed it would make the distribution of his product more efficient. Exclusivity can be lawful in the absence of monopolistic purpose or anticompetitive effect i.e. the maintenance of a minimum pricing. That exclusive agency is lawful remains to be tested in courts.[367] Therefore, the legality of exclusive agency, under anti-monopoly laws, remains intact.

National authorities in Jordan systematically favor the interests of domestic commercial agents over the interests of domestic consumers. For example, customs authorities will prevent the entry into Jordan of goods originating with a foreign manufacturer who has a duly registered agent for these goods in Jordan but are shipped through a person other than the registered agent. Jordanian courts can issue an injunction to prevent parallel importation made by a third party in breach of the exclusivity clause. Parallel imports involve the importation of genuine goods outside the authorized distribution channels.[368] In other words, parallel importation is the importation of goods from a foreign source by bypassing the authorized local agent therefore allowing the sale of goods directly to retailers or consumers. The matter of parallel importation is addressed through case law as the following case, concerning a Jordanian company called Jordan Mechanical Engineering Company ("Jordan Mechanical") illustrates.

In this case, Jordan Mechanical was acting as an agent of Maggi" chicken stock cubes which is a product of Nestle, a Swiss company.[369] It came to the knowledge of Jordan Mechanical that some Jordanian traders, such as Abdul-Fattah Qinno, imported about 1000 box of Maggi cubes (product of Egypt). These products did not conform to the required specifications. The Court of Cassation found that Jordan Mechanical was entitled to preserve its rights as the authorized agent of the manufacturing company for marketing certain goods.

By bringing the case discussed above, the agent sought to protect regular trade channels. Local agents have built the goodwill of imported products by marketing plan, promotional efforts, and providing a product warranty through after-sale servicing. The purpose of all these programs is to maintain clients and increase the sale of goods. Agents provide services and incur costs that parallel importers may not provide or incur. Thus, parallel importers free ride at the expense of authorized distributors. In addition, parallel imports may damage product quality control. Poor quality could cause consumer confusion and diminish the reputation of the manufacturer and agent.

Conclusion

A successful relationship between the foreign principal and his local agent must be based on familiarity with the laws of Jordan. The Civil and Commercial Codes as well as the Law of Commercial Agents and Intermediaries of 2001 govern agency relationships in Jordan. Many of these codes and laws overlap leading sometimes to confusion. For instance, parties' rights and obligations are found in the Commercial Code, Civil Code, and Law of Commercial Agents and

[367] No case to our knowledge has addressed the question of legality of exclusivity.
[368] Parallel imports or gray market goods are genuine goods and not counterfeits whereby trademark is misappropriated. See Keith E. Maskus, Parallel Import, 23 World Econ. 1269 (2000).
[369] See Court of Cassation, Journal of Jordanian Bar Association, Case No. 95/1418, page 957 (1996).

Intermediaries. The Jordanian legislator should enact a comprehensive commercial agency law that governs all aspects of agency.

The Law of Commercial Agents and Intermediaries gives commercial agency a sweeping scope. The law does not distinguish between agencies and other intermediaries. Consequently, a broad variety of unsuspecting commercial arrangements may qualify as agencies. The Jordanian law should provide a clear definition for each type of intermediaries.

The Law of Commercial Agents and Intermediaries does not regulate exclusivity. Rather, the Jordanian legislator left the exclusivity provision to the agreement of the parties. Rational use of exclusive agency may affect competition and consumer welfare. Anti-monopoly enforcement agencies should not elevate the short-term pecuniary interests of discrete competitors at the expense of competition and consumer welfare. That exclusive agency is lawful remains to be tested in courts. If a case arises in the future, courts should uphold exclusive agency. When the decision to grant an exclusive agency is made by manufacturer acting in its own self interest, consumer welfare could be protected to a greater extent than any *ad hoc* decision-making by a court could secure. A subsidiary rationale for sanctioning exclusive agency is the common-sense notion that courts should not provide artificial, non-market incentives for internal expansion, an alternative to exclusive agency that will be inefficiently pursued if appointments of exclusive agents are met with expense and protracted challenges under the anti-monopoly laws.

Jordanian courts have exclusive jurisdiction in settling disputes arising out of commercial agency contracts. The Law of Commercial Agents and Intermediaries does not permit the use of other alternative dispute resolution mechanisms such as arbitration and mediation. Obviously, Litigation usually does not help in maintaining healthy relations between the principal and agent. The principal and agent must continuously cultivate good personal relationships. Many lawsuits are the product of the parties' failure to honestly or sufficiently communicate their expectations of each other during the course of their agency relationship. ADR mechanisms help mitigate the spillover effects of litigating disputes between principals and agents especially if they are engaged in long-term relationships. Therefore, the law should be amended so as to permit the use of such mechanisms.

On balance, Jordan's approach to the use of commercial agents is restrictive. The law sets certain conditions for a person to act as an agent. For instance, these conditions relate to nationality and registrations. Only Jordanian persons can become agents for foreign principals or manufacturers. In addition to the nationality condition, a commercial agent must be duly registered at the Commercial Agents Registry of the Ministry of Industry and Trade. The purpose of registration, among other things, is to keep record of persons acting as agents. As currently written, the law does not invalidate an unregistered commercial agent who can practice agency. The law should be modified to invalidate unregistered commercial agents so as to protect consumers and other third parties whom may deal with the agent.

As far as the contract is concerned, the structure of a commercial agency agreement varies considerably. A well-written contract, honest communication by the manufacturer and solid justifications for the manufacturer’s business conduct are toward avoiding the filing of a

lawsuit to begin with. If still more reforms do prove necessary, the presently suggested improvements will give future legislative bodies the background for serious consideration and understanding of what, in fact, remains to be done.

Recent Changes to Commercial Agency Law In the Arab Middle East

Howard Stovall[370]

In the aftermath of the Arab Spring and the break-down of government control in a number of Arab Middle Eastern countries (such as Libya, Syria and Yemen), many multinational companies are re-focusing their commercial interests in a smaller regional map, with the increasingly important guidance and support of local commercial agents and distributors.

In 2004 and 2008, I circulated a summary of important developments in commercial agency and distributorship law in the Arab Middle East[i]. The following summary provides an update on some significant subsequent changes to commercial agency and distributorship laws in the region.

1. Egypt

Like many legal issues in Egypt, the question of dealer protection rights is somewhat confusing, and subject to separate but overlapping laws. When originally enacted, the Egyptian Commercial Code (1999) granted a contract agent the right to claim compensation in the event the foreign principal terminated (Article 188) or simply decided not to renew (Article 189) the parties' agreement. More recently, the Egyptian Supreme Constitutional Court struck down Article 189 as unconstitutional, as violating the general principle against perpetual contracts.[ii] Therefore, it is now possible for a foreign principal to allow a contract agency agreement to expire at the end of its fixed term and not be liable to the contract agent for compensation under Article 189 of the Commercial Code.

The Egyptian Commercial Agency Law (1982) did not contain any dealer protections, whether for termination or non-renewal of commercial agencies. However, implementing regulations issued by Ministry of Economy and Foreign Trade Decree No. 342 (1982) were amended in 2005 to allow a registered commercial agent to claim compensation in the event that its foreign principal terminated (Article 13 bis (2)) or chose not to renew (Article 13 bis (3)) the commercial agency without fault by the commercial agent. The Egyptian courts have not decided whether the Supreme Court's ruling striking down Article 189 of the Commercial Code also struck down Article 13 bis (3) of Egyptian Ministerial Decree No. 342.

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Technically speaking, Egyptian Ministerial Decree No. 342 was issued under the Commercial Agency Law rather than the Commercial Code. Therefore, one could argue that the Constitutional Court's judgment on a provision of the Commercial Code should not automatically be extended to a similar provision relating to an entirely different law. However, the contrary argument would be that Article 13 bis (3) of Egyptian Ministerial Decree No. 342 has lost its legitimacy since it also violates the general principle against perpetual contracts. This question has not yet been tested before the Egyptian courts.

Another amendment in 2005 to Egyptian Ministerial Decree No. 342 (Article 15 (1) bis) allows the Commercial Agency Register to refuse to register another commercial agent until the terminated or non-renewed commercial agent has received due compensation and settled any disputes it may have with its principal. There is currently a case pending before the Constitutional Court challenging the constitutionality of this provision.

2. Iraq

Iraq has enacted a new Commercial Agency Law, Law No. 79 of 2017, repealing the Saddam-era commercial agency law, Law No. 51 of 2000.[iii] (The Kurdistan region of Iraq has not yet considered this new law, and which therefore remains subject to prior commercial agency law rules.)

Iraqi Law No. 79 expands the definition of commercial agency to which the new law applies, including contracts in which a foreign party authorizes an Iraqi party to sell goods, products or services in Iraq as a commercial agent, a distributor or a franchisee.

Iraqi Law No. 79 requires a commercial agent to obtain a special license in order to conduct commercial agency activities, and to register its commercial agencies in a special Commercial Agency Register maintained by the Ministry of Trade. To obtain a license, Article 4 of Iraqi Law No. 79 requires the applicant to satisfy various requirements, including: (i) either be an Iraqi national (if a natural person) or an Iraqi company wholly-owned by Iraqi nationals, (ii) have a business office in Iraq; and (iii) be a member of an Iraqi chamber of commerce.

Article 13 of Iraqi Law No. 79 prohibits the import of goods and products, and the provision of a foreign company's services, by the Ministry of Trade (General Company for Exhibitions and Commercial Services) and the Ministry of Finance (General

Customs Authority), except through a commercial agent with a commercial agency contract registered in its name for that foreign company with Iraq as its territory. Prior to Iraqi Law No. 79, imports were not required to made through registered commercial agents, and there is currently some debate locally about the implications of this new rule, e.g., whether it will be strictly enforced, or whether a foreign company will be permitted to appoint multiple non-exclusive commercial agents.[iv]

Prior Iraqi law did not contain any special statutory "dealer protection" governing termination (or expiration) of a commercial agency. In general, such termination (or expiration) was governed by the agreement of the contractual parties, and general Iraqi legal rules. For example, Article 946 of the Civil Code states that an agency ends when the fixed period for the

agency has expired, when the principal or agent dies, or when the work that is the subject matter of the agency agreement is finished. Article 20 of Iraqi Law No. 79 has now added some uncertainty to the situation, stating (in my unofficial translation from the Arabic):

> The principal is not permitted to terminate the agency contract, or to not renew it, unless there is a reason justifying its termination or non-renewal. The agency contract may be terminated by mutual consent between the agent and the principal, or according to an agreement concluded between the parties on the basis of which the arbitral rules and authority, and the applicable law, are determined.

The Iraqi courts have not yet had occasion to interpret this provision of Iraqi Law No. 79. However, it appears that the parties to an Iraqi commercial agency contract have some latitude to agree on the terms and conditions for termination/non-renewal (and any resulting compensation), including through dispute resolution (arbitration) and choice of governing law clauses.

3. Kuwait

The previous and long-established (1964) Kuwaiti commercial agency law has been replaced by a new Commercial Agency Law, Law No. 13 of 2016[v]. Among the more significant features of Kuwaiti Law No. 13, the definition of commercial agency is expanded to expressly include distributors and franchisees. Article 1 defines commercial agency as "every agreement in which a party holding the legal right entrusts a merchant or company in Kuwait to sell, promote, or distribute goods or products, or provide services, in the capacity of an agent, distributor, franchisee or licensee of the producer or the original supplier in exchange for a profit or commission."

Under Article 2 of Kuwaiti Law No. 13, a foreign company is permitted to have non-exclusive commercial agency agreements, and Article 4 further allows parallel imports of goods and products even if there is an existing exclusive commercial agent or distributor for such goods/products. However, unless otherwise explicitly agreed by the parties, Article 278 of the Kuwaiti Commercial Code still seems to entitle an exclusive commercial agent to remuneration when transactions are concluded directly by the principal or a third party within the agent's product line and territory, even if such transaction was not concluded as a result of the agent's efforts.

Article 9 of Kuwaiti Law No. 13 states that the principal may not terminate the commercial agency without a breach thereof by the commercial agent, and otherwise the principal shall be liable to compensate the agent for the damage it incurred as a result of such termination; any agreement to the contrary is expressed to be null and void. This provision appears to broaden the specific "dealer protections" contained in the Kuwaiti Commercial Code, such as Articles 281 and 282 applicable to contract agents and exclusive distributors.

Finally, Article 20 of Kuwaiti Law No. 13 re-confirms existing law, to the effect that all judicial lawsuits arising from the application of the Commercial Agency Law must be heard by the Kuwaiti courts. However, Article 20 also allows the parties to agree to arbitration for the settlement of any disputes.[vi]

4. Oman

The Oman Commercial Agencies Law, Royal Decree No. 26 (1977) as amended, is the primary Omani law governing the relationship between a foreign principal and an Omani commercial agent. (The Commercial Code, promulgated by Royal Decree No. 55 (1990), also contains provisions relevant to commercial agency arrangements.) The most recent amendments to the Omani Commercial Agencies Law, enacted by Royal Decree No. 34 (2014), significantly liberalized certain aspects of commercial agency in the country, and opened the Omani market for increased free trade and competition.[vii]

For example, until the 2014 amendments, the Omani Commercial Agencies Law had stated that if a foreign principal terminated a registered Omani commercial agency agreement without justifiable cause, the commercial agent was entitled to "suitable compensation". (The same rule applied to a principal's decision not to renew a fixed term commercial agency, if the commercial agent could also demonstrate that it was successful in distributing and promoting the relevant products, and that it would have been deprived of the expected benefit of its efforts as a result of the non-renewal.) The 2014 amendments repealed Article 10 of the Omani Commercial Agencies Law, thereby eliminating that express right to such compensation.[viii] The parties are now free to negotiate the terms of renewal and termination of the commercial agency.

However, the 2014 amendments did not change Article 18 of the Omani Commercial Agencies Law, which states that the local courts shall decide all disputes between an agent and principal regarding the agency contract, and may decide on appropriate compensation depending on commercial and local practices (unless the parties have agreed to arbitrate their dispute).

The 2014 amendments also repealed Article 5 of the Omani Commercial Agency Law, which had allowed the Minister of Commerce to ban the import of goods into Oman that were the subject of a registered commercial agency if the principal had unilaterally cancelled the commercial agency without justifiable cause.

Finally, the 2014 amendments repealed Article 7 of the Omani Commercial Agencies Law, which had prohibited a foreign principal from selling or distributing its goods itself or through a third party, and gave the registered commercial agent a right to claim commission from the principal for any such parallel imports.

5. Qatar

Qatari Law No. 2 (2016) amended the existing Qatari Commercial Agency Law, Law No. 8 (2002). Among the most significant changes, the Qatari Commercial Agency Law is now expressly applicable not only to commercial agents but also to exclusive buy-resell distributors. Prior to the 2016 amendments, the Qatari Commercial Agency Law was applicable only to registered commercial agents who were exclusively authorized to negotiate and conclude contracts for the relevant goods or services on behalf of a principal.

The 2016 amendments also revise the rules applicable to parallel imports.[ix] A registered Qatari commercial agent is no longer entitled to claim commission from third parties who import products covered by the registered agreement. The registered agent has recourse to its principal

for commission on such parallel imports, in accordance with the agreement between them. (The text of this provision seems to allow the principal and agent to agree to a reduced commission, or no commission at all, for such parallel imports.) In all cases, no commission will be owed to the registered commercial agent for parallel imports intended strictly for the importer's personal use, or for re-export outside Qatar.

Unfortunately, the 2016 amendments did not address the strict "dealer protections" available to registered commercial agents (and exclusive distributors) in the event that the foreign principal decides to terminate (or not renew) their agreement. Provisions in both the Qatari Commercial Agency Law as well as the Qatari Commercial Code (2007) entitle qualified commercial agents to make claims for compensation in the event of such termination or non-renewal.

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Many of the new commercial agency laws in various Arab countries, as well as the recent amendments to commercial agency laws in other Arab countries, seek to restrict the formation of monopolies, encourage free trade and foster competition, and secure the availability of goods and services at reasonable prices.[x] In that sense, this legislation is encouraging a liberalization of local markets. In many instances, however, these new laws and amendments have also expanded the range of commercial arrangements (agency, distributorship, franchise) that are subject to "dealer protection" rights entitling local parties to compensation in the event of termination or non-renewal of their agreements.

E N D N O T E S

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[i] Stovall, "Recent Developments in Arab Commercial Agency/Distributorship Law", Corporate Counsel's International Adviser (1 June 2004), and Stovall, "Recent Changes to Commercial Agency and Distributorship Law in the Middle East", Texas Transnational Law Quarterly (September 2008).

[ii] See, e.g., LEX Africa, "The non-constitutionality judgment regarding fixed-term commercial agency contracts in Egypt – January 2014", https://www.lexafrica.com/the-non-constitutionality-judgment-regarding-fixed-term-commercial-agency-contracts-in-egypt-january-2014/ (accessed 14 January 2019).

[iii] See, e.g., Hannouche Associates, "Commercial representation in Iraq under new Commercial Agency Law" (21 May 2018), https://www.internationallawoffice.com/Newsletters/Company-Commercial/Iraq/Hannouche-Associates-LLP/Commercial-representation-in-Iraq-under-new-Commercial-Agency-Law (accessed 14 January 2019).

[iv] See Al Janabi, Aqrawi, Gunson and Zeynelabidin, "Client Alert: Enforcement Scenarios for Iraq's New Commercial Agency Law" (7 November 2018), http://amereller.com/wp-content/uploads/2018/11/20181107-IraqCommercialAgency.pdf (accessed 14 January 2019).

[v] See, e.g., Oxford Business Group, "Kuwait introduces updated and amended laws", https://oxfordbusinessgroup.com/overview/call-renewal-important-laws-have-been-recently-updated-and-amended (accessed 14 January 2019).

[vi] The Kuwaiti Court of Cassation recently confirmed the enforceability of an arbitration clause in a Kuwaiti distributorship agreement. See Balz and Gunson, "Client Alert: Kuwait's Court of Cassation Upholds Arbitration Clause in Distribution Agreement", http://amereller.com/wp-content/uploads/2018/10/181013-Kuwait-Distributor-Agreement-Arbitration-.pdf (accessed 14 January 2019).

[vii] See, e.g., Oxford Business Group, "Amendments to the Commercial Agencies Law took effect in mid-2014", https://oxfordbusinessgroup.com/analysis/amendments-commercial-agencies-law-took-effect-mid-2014 (accessed 14 January 2019).

[viii] Agrawal, "Application of commercial Agency Law of Oman" (April 2017), https://www.stalawfirm.com/en/blogs/view/commercial-agency-law-of-oman.html (accessed 14 January 2019).

[ix] Sultan Al-Abdulla & Partners, "New Amendments to the Commercial Agency Law" (1 July 2016), http://qatarlaw.com/new-amendments-to-the-commercial-agents-law/ (accessed 14 January 2019).

[x] See, e.g., Gulf Times, "New law to help curb monopolies in business" (26 April 2016), https://www.gulf-times.com/story/490204/New-law-to-help-curb-monopolies-in-business (accessed 14 January 2019), referring to the 2016 amendments to the Qatari Commercial Agency Law.