HOW TO SECURE ACCOUNTABILITY FOR SERIOUS HUMAN RIGHTS VIOLATIONS?

REPORT OF THE ACCOUNTABILITY ROUNDTABLE SERIES

UNIVERSAL RIGHTS GROUP

INTRODUCTION

The need for greater 'accountability' for human rights violations and abuses is an oft-repeated refrain in the international human rights community. While few doubt the importance of strengthening international accountability mechanisms and processes, there is: a growing need to reconceptualize, and seek wider agreement on, what is meant by 'accountability;' to objectively assess the degree to which the international mechanisms and processes established to deliver accountability are (and are capable of) succeeding; to take stock of recent policy experiments designed to address weaknesses in the international human rights accountability system; and to identify ways to further strengthen that system to deliver accountability for human rights abusers and justice for victims.

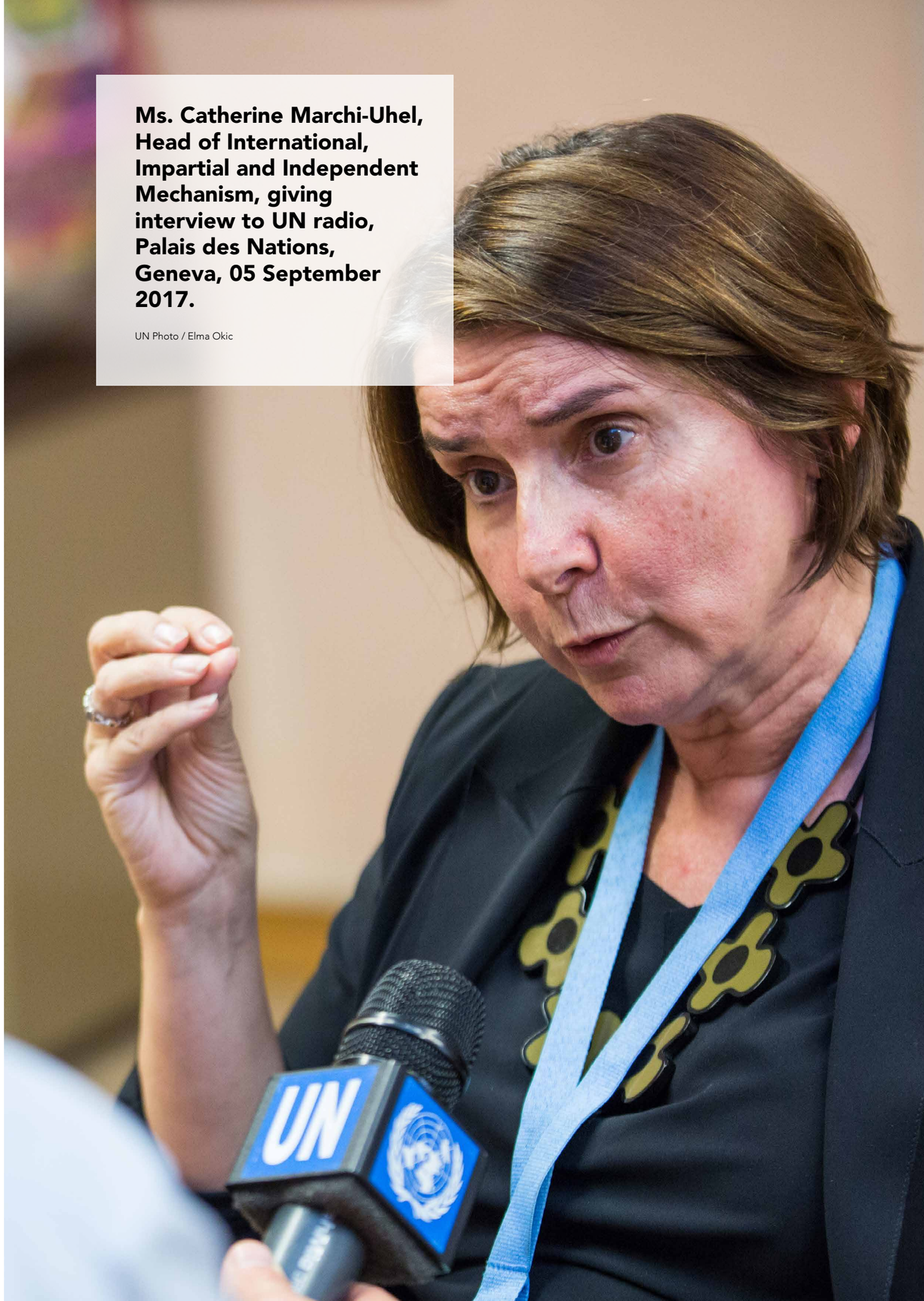
Under the traditional theory of international human rights law, only States, as the sole duty-bearers of rights-based obligations, may be held accountable, either legally, for example before the International Court of Justice (ICJ), or through a form of moral, political, and diplomatic reckoning before the international community. Victims are thus limited to seeking judicial remedy before national (and in rare cases regional) jurisdictions or to securing the political support of the international community to apply pressure on their State to uphold its obligations.

However, over recent years, international efforts to secure meaningful accountability for human rights violations have increasingly considered the responsibility of individuals, businesses, and other non-State actors - traditionally only legally accountable under criminal law. This shift is visible in the evolution of the mandates of international investigative mechanisms to reflect a 'criminalisation' of human rights fact-finding, by affording greater importance to the identification of individual perpetrators; as well as through the proliferation of other mechanisms to pursue individual accountability, including through political means such as targeted sanctions. However, considering that most of these mechanisms are not equipped to support legal accountability processes, there is a need to reassess their purpose and function, and to ask whether they are delivering on their promise (or are even capable of doing so).

Notwithstanding, over recent years the international community appears to have taken several steps towards a criminal law approach to human rights accountability, with the emergence of investigative mechanisms mandated to build case files on individual perpetrators. Since the General Assembly (GA) established the International, Impartial and Independent Mechanism on Syria in 2016, the latter has collaborated with national courts from 11 States on at least 61 different occasions, while the International Independent Mechanism on Myanmar, established by the Human Rights Council (Council) in 2018, has collaborated with International Criminal Court prosecutors and parties in the ICJ case brought by the Gambia.

Moreover, over recent years, individual UN member States and regional blocs have increased non-judicial retributive action against individual perpetrators of serious human rights violations (and grand corruption) via targeted human rights sanctions (often referred to as 'Magnitsky-style sanctions'). This new approach represents a paradigm shift for human rights accountability that goes beyond the traditional State-centric framework by addressing retributive measures to individuals and non-State actors and bypassing jurisdictional limits of courts – with potential benefits for prevention, accountability, and redress.

Notwithstanding, there is room to further increase the effectiveness of these new targeted sanctions regimes by strengthening their design and application. Increased coordination and collaboration in sanctions approaches



Ms. Catherine Marchi-Uhel, Head of International, Impartial and Independent Mechanism, giving interview to UN radio, Palais des Nations, Geneva, 05 September 2017.

UN Photo / Elma Okic

A general view of the 15th Session of the Human Rights Council

UN Photo/Jean-Marc Ferre

and application would assist in securing maximum impact and thus deterrence and accountability, while operating in a transparent and inclusive manner with adequate procedural safeguards. This could help improve international legitimacy and reduce claims of politicisation. To truly deliver on their potential, as possible alternatives to international accountability mechanisms and processes, such regimes must, however, also involve and respond to the needs of victims and their representatives.

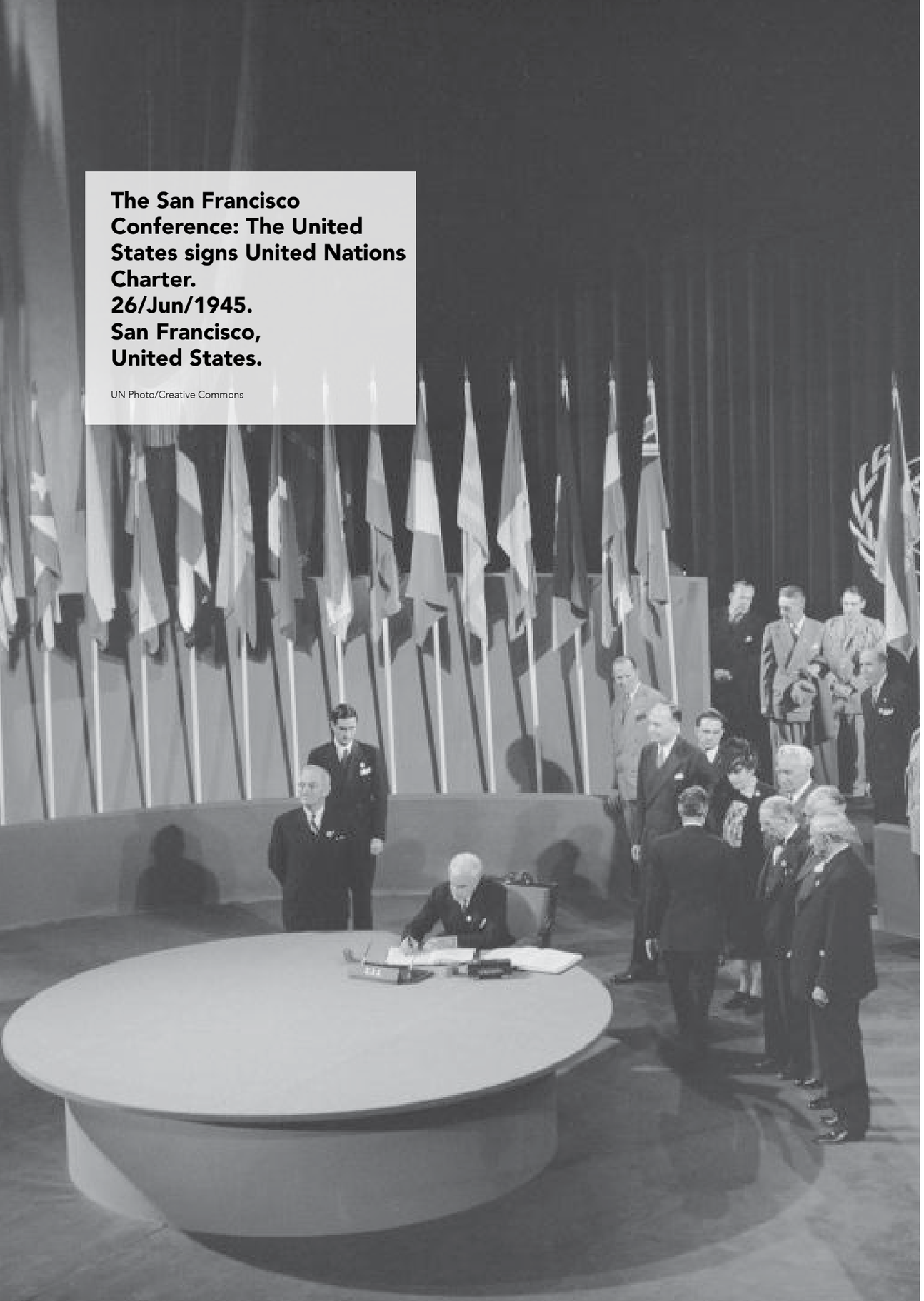
Against this backdrop, in August-September 2021, the Universal Rights Group (URG), in cooperation with the Permanent Mission of the United States to the UN Office in Geneva, organised a series of policy dialogues with a cross-regional group of over 150 experts, to seek conceptual clarity and analyse emerging trends and best practices in international efforts to secure 'accountability' for human rights violations.

The first session, held on 24 August 2021, focused on targeted human rights sanction regimes, and provided an opportunity to share good practices and lessons learnt, and consider improved coordination of 'Magnitsky-style' sanction regimes. Discussions sought to address the following:

01. How can targeted human rights sanction regimes improve the prospects of accountability for human rights violations and abuses? What are the success factors and limits in terms of securing accountability? How do these regimes 'fill the gap' in existing international accountability processes? How can they help improve the prospects of justice for victims?
02. What are some of the best practices in the design and application of targeted human rights sanction regimes? What are the most important procedural safeguards to guarantee such regimes are human rights compliant? How can sanctions remain credible and avoid claims of politicisation?
03. How can States with human rights sanction regimes better collaborate to ensure greater impact? How can more States be encouraged to develop their own targeted high-quality human rights sanction regimes?

Two additional sessions followed on 31 August and 1 September 2021 focusing on UN-mandated accountability efforts, notably through fact-finding and other investigative mechanisms. Discussions sought to address the following questions:

01. What do stakeholders (i.e., States and civil society) envision when mandating or calling for investigative mechanisms to secure accountability and/or identify perpetrators? How are these mechanisms delivering on their accountability mandates and their promise of providing justice to victims? What are the obstacles and success-factors? How can a victim-centric approach be prioritised?
02. In light of the trend of 'criminalisation' of human rights fact-finding and the emergence of a new class of international investigatory mechanisms mandated to build case files, to what extent are international mechanisms able to facilitate legal accountability processes at national, regional and international levels? Should securing legal accountability be the primary objective of all international investigative mechanisms? If so, how can they strengthen their evidence collection to ensure they are to prosecutorial standards? How can cooperation with national, regional, and international investigatory and prosecutorial authorities be improved?
03. What are other non-judicial avenues to secure accountability? What are examples of good practices in the operations of UN-mandated investigative mechanisms to further these ends? How can fact-finding operations be strengthened to ensure greater accountability to the truth? How can the international community make better use of their findings? What are best practices to avoid politicisation in their findings, to better engage with and protect victims, witnesses, and members of civil society, to draft more impactful reports, to engage more effectively with national and international media?



The San Francisco Conference: The United States signs United Nations Charter.
26/Jun/1945.
San Francisco,
United States.

UN Photo/Creative Commons

ACCOUNTABILITY: IN SEARCH OF CONCEPTUAL CLARITY

A. HOW IS ACCOUNTABILITY DEFINED AND WHAT IS ITS IMPORTANCE?

- While all participants in the policy dialogues recognised the importance of securing greater 'accountability,' both as a general principle and specifically for human rights violations, there was a broad consensus that this common understanding begins to fray when we attempt to operationalise the concept. One participant suggested this may be due to the multiple functions that fall under the umbrella terminology of 'accountability'. Does accountability serve to punish perpetrators, deter violations, offer closure, remedy or redress to victims, or to compel a change in behaviour? It was agreed that accountability can fulfil all these purposes simultaneously.
- Accountability is the element that ensures any normative system - and particularly any legal system - is credible and effective, as all rules depend on how they are fairly enforced. Speakers argued that accountability is the central tenet of the rule of law. The value of accountability is thus the same as the rule of law: it creates checks and balances that help deter and prevent transgressions, and it opens avenues for victims to seek justice and redress, which are critical elements in the longer-term objectives of promoting national reconciliation and ensuring sustainable peace and just societies.
- In this regard, one participant regretted that efforts to secure meaningful accountability are often sacrificed to development and security concerns – i.e., the idea that 'peace comes before justice.' The example of Afghanistan demonstrated that this is a flawed logic, premised on the assumption that the formation of a strong State with sufficiently developed institutions was a precondition for accountability, when without addressing past violations, it is impossible to build institutions anchored in the rule of law, as State formation becomes mired in corruption.
- It was also argued that part of the confusion surrounding the notion of accountability in an international context is that international human rights, humanitarian, and criminal law are distinct bodies of law that articulate norms for different duty bearers (e.g., States vs non-state actors) in different contexts (e.g., during armed conflict in the case of international humanitarian law) (see section I.b). Each has its own origins, scope of application, institutions, methodology, and internal logic, but they are also closely related, and in many ways intertwined, resulting in an intricate system with the shared objectives of protecting people, their rights, and our common humanity. Moreover, each of these bodies of law has created its own mechanisms, processes, and sanctions to foster compliance and accountability. Participants noted that in the UN system, this includes Treaty Bodies, Special Procedures, and investigative mechanisms, amongst others.
- Another speaker noted that confusion around the notion of accountability is because the different bodies established to investigate human rights violations and promote accountability all had different names (e.g., fact-finding missions, commissions of inquiry, human rights commissions, groups of eminent experts, independent investigative mechanisms). They argued that all fundamentally perform the same 'accountability' function by collecting evidence of human rights violations (see section II). This means that the interpretation of accountability mandates is largely left to the discretion and strategic vision of members of the mechanisms, and also depends on the availability of resources.
- Nevertheless, discussants stressed that for these systems to fully harness the potential of the idea of 'accountability' to prevent violations and deliver justice, they must complement systems in other normative realms (moral, political, religious, or social). They cautioned against focusing exclusively on legal accountability at the expense of translating norms of behaviour into other more readily understood and accepted languages.

A view of the ICC premises.
UN Photo/Rick Bajornas

B. CRIMINAL ACCOUNTABILITY AND HUMAN RIGHTS ACCOUNTABILITY: DISTINCT BUT COMPLEMENTARY SCHOOLS OF THOUGHT

- The similarities and differences, as well as areas of convergence and divergence, between accountability for international criminal law and accountability for human rights violations, was a central topic of discussion. The notion of individual international criminal responsibility, as opposed to that of State responsibility, generally associated with international human rights law, both emerged in the aftermath of the Second World War. The former stems from the Nuremberg trials, which established that the absence of national laws criminalising a particular behaviour should not absolve an individual from responsibility for abhorrent acts that constitute international crimes, while the latter stems from the subsequent Universal Declaration of Human Rights and the notion that States have obligations to respect and uphold the rights of their people.
- It was argued, during the meetings, that these two schools of thought produced different accountability systems, in which distinct actors use different working methods to enforce different (though similar) rules addressed to different duty-bearers. While accountability in a human rights context generally refers to documenting and publishing information about violations by a State (i.e., naming and shaming), efforts to secure accountability for international crimes focus on gathering evidence of individual criminal behaviour (i.e., responsibility for war crimes, crimes against humanity, or genocide), with the goal of eventually securing prosecutions. As such, international human rights law is often considered difficult to enforce, since States are expected to adhere to their voluntary decision to uphold a set of agreed standards of conduct vis-à-vis their national populations but cannot easily be compelled to do so (beyond being subjected to pressure from the international community). On the other hand, international criminal law, which binds all individuals and is enforced by States, tends to be perceived as 'having more teeth' and is associated with much more stringent procedural safeguards to ensure fair trial guarantees. It was further argued that by using the language of human rights law, while targeting individual perpetrators, the new trend of having recourse to targeted sanctions constituted a novel paradigm (see section III) at the intersection of human rights and criminal law.
- One discussant argued that while the notion of international criminal responsibility for gross human rights violations essentially lay dormant for most of the 20th century, the two trends of individual and State responsibility came together powerfully in the post-Cold War era - referred to as the 'age of accountability' - with the international tribunals for the Balkans and Rwanda, and the Rome Statute establishing the ICC, as well as significant developments (in the 1990s and early 2000s) in the area of 'universal jurisdiction' (especially in Europe and Latin America). Many human rights activists and lawyers came to realise that documenting human rights violations would not necessarily lead to accountability, for the simple reason that material gathered might not stand up to scrutiny in a court of law. Greater attention was thus given to the link between human rights documentation and evidentiary standards.
- In this regard, several participants said that human rights inquiries should evolve to use the same standards as criminal inquiries. Another argued that since both types of inquiry aim to deliver the truth, which will always be disputed, higher evidentiary standards help investigations and claims of violations hold up to greater scrutiny and thus be more authoritative and impactful. It was further argued that developing common standards could alleviate resource constraints.
- Various participants noted that this is the direction that UN-mandated investigations seem to be moving, pointing to the new investigative mechanisms established to collect, analyse, and store information with a view to facilitating judicial processes (e.g., IIIM for Syria and IIMM for Myanmar), plus hybrid mandates to both publicly document violations and collect and preserve evidence for future prosecution (e.g., Commission on Human Rights for South Sudan). However, others argued that fact-finding missions perform a crucial function in their own right, and that this should not be undermined by bringing international mechanisms closer to criminal investigations.

CoHRSS chairperson Yasmin Sooka speaking with South Sudanese refugees at Kario refugee camp, East Darfur, Sudan, 10 December 2018
Photo/©CoHRSS

C. FROM ACCOUNTABILITY TO JUSTICE: TOWARDS A VICTIM-CENTRED PERSPECTIVE

- A recurring theme during discussions related to the link between accountability and broader objectives of social justice, in which the former addresses the implications of violations for perpetrators, while the latter focuses on the needs and desires of victims, notably their right to remedy and redress.
- Several participants cautioned against focusing solely on judicial accountability, particularly when there are few successful prosecutions of international crimes; while others argued that trials foster accountability but not necessarily justice. The short-term needs of victims and society at large can be overlooked in favour of a longer-term and highly resource-intensive attempts to secure criminal accountability. Participants pointed to the failures of the Special Tribunal for Lebanon, which after 15 years of investigations and criminal proceedings, and a budget of nearly $1 billion, resulted in only one conviction. It was asked whether this money could not have been better spent funding a truth and reconciliation committee or other initiatives aimed at delivering truth, reparations and guarantees of non-repetition.
- Participants also emphasised that by focusing only on accountability, the international community may risk failing to prioritise the needs and wishes of victims, who in the short-term are generally more concerned with halting ongoing violations and reducing suffering, rather than punishing the alleged perpetrators.
- In a powerful intervention, one survivor of violations in Syria explained that for them it was far more important to know the fate and whereabouts of missing family members than it was to have a person allegedly associated with their suffering prosecuted in a European court (e.g., the Koblenz trial in Germany). While acknowledging that the Commission of Inquiry for Syria and the IIIM are important for deterrence and prevention, he expressed frustration that these mechanisms pay only lip-service to 'victim-centric' approaches and working methods. Instead, victims are too often treated as information providers. They pointed to the Charter for Truth and Justice, which Syrian victims and their families elaborated to define a roadmap to guide UN mechanisms and other entities in how to align their work with the priority of short-term justice for those directly affected by violations.
- One member of an investigative mechanism acknowledged the existence of a demand for more victim-orientated and survivor-centred approaches. As such, international accountability mechanisms and processes are moving away from past approaches, focused on the responsibility and rights of the accused, and which tended to consider victims and survivors as witnesses only. Instead, victims are increasingly seen as rights-holders and their agency is given a more central place in mechanisms' working methods. The key, she said, is to start by thinking about what a holistic approach to justice means in a local context, including by prioritising an open dialogue to inform victims of the mechanisms' work, while listening to their needs and expectations. This allows for cooperation frameworks to be established with local civil society organisations that represent

victims in a manner that helps identify areas of possible support by the mechanism, while building greater trust and mutual understanding. One participant pointed to the work being undertaken by the IIIM in Syria to search for missing persons in response to the demands of Syrian victims and survivors, as evidence that international mechanisms do have a certain freedom to adapt their working methods to local demands for justice.

- One participant stressed that to deliver on the promise of accountability, it is important to consider a mechanism's life cycle and financial sustainability. Another stressed the importance of managing expectations and properly explaining the mandate, work and limitations of mechanisms to local populations, in order not to create disillusion further down the road. Several participants highlighted the importance of regular meetings to keep stakeholders appraised.
- Participants stressed the importance of taking a sensitive, victim-centric, and context-specific approach to collecting evidence, prioritising witness protection and victims' hopes and expectations. The first step in any investigation should be to listen to what victims and survivors expect as a result of their cooperation. One participant highlighted the importance, for victims, of being actively involved in truth telling processes, notably in public fora, and the importance of providing capacity building to facilitate victim empowerment. On the other hand, in some cases, anonymity may be preferred, and mechanisms should have the capacity to both secure information and assure sources of that information that they will be protected.
- Another participant argued that an often-overlooked element in victim empowerment is the 'collectivisation of voices,' which helps promote a greater sense of community and 'the acceptance of collective suffering.' They argued that such approaches are often not prioritised because they do not necessarily improve evidence collection, which is why investigative mechanisms need to rethink their objectives.
- Similarly, several discussants raised the importance of ensuring that mechanisms serve purposes of trauma healing and survivor support. This entails having a sensitive approach to evidence collection adapted to the violations being addressed, notably through gender-sensitive working methods – in order to avoid re-traumatisation. Mechanisms should go much further in their efforts to support survivors than simply avoiding re-traumatisation - they should proactively take steps to support victims, notably by listening to their humanitarian needs and providing referral pathways.
- Finally, there was much discussion on how targeted human rights sanction regimes could be developed to better serve the interests of victims by providing platforms for testimonial and empowerment, as well as by repurposing frozen assets to serve as reparations (see section III.c).

II

CHALLENGES AND OPPORTUNITIES FOR SECURING GREATER ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS

A. HUMAN RIGHTS FACT-FINDING VS. CRIMINAL INVESTIGATIONS

- Human rights fact-finding serves many crucial functions, of which the main one, a participant argued, is to record, analyse, and present facts, in line with legal frameworks (i.e., international human rights law and increasingly international criminal law), thus qualifying violations in legal terms and indicating possible responsibilities. They argued that, as a corollary of this core function, human rights fact-finding serves two important purposes, namely establishing a factual independent record of events and alerting the international community to the need for corrective action. The question that remains is whether the law that should be applied in qualifying facts are the standards of international human rights law and State responsibility or the more demanding standards of international criminal law. One participant even argued that for purposes of documentation, it was questionable whether legal terminology was valuable at all.
- The value of pursuing this path of 'criminalisation' of human rights fact-finding and moving towards a legal accountability paradigm in UN-mandated efforts to secure accountability for violations, versus focusing on general instances of violations, was highly debated.
- Nevertheless, participants agreed that to date, human rights fact-finding missions have mostly been ill-equipped to facilitate legal accountability processes due to resource and expertise limitations that do not allow for the collection of evidence to the standards required for criminal prosecutions. Participants highlighted that short-term mandates, insufficient staffing, and delays in staff attributions, along with the lack of training in criminal law, were significant obstacles to mechanisms being able to properly facilitate legal accountability processes.
- One participant even argued that in some cases, by identifying perpetrators, fact-finding missions could undermine judicial processes by lending credence to arguments of bias, politicisation, and lack of due process. Another claimed that by identifying perpetrators and focusing on individual cases rather than on generalised claims of human rights violations, reports could better stand up to claims of politicisation by making it harder to refute the evidence. However, it was also argued that collecting information about individual perpetrators and not publicising them (as the CoI on Syria has done) could be valuable for subsequent criminal investigatory efforts.
- Another participant argued that criminal law labels have the tendency to overshadow other important information and analyses in fact-finding mission reports. He gave the example of how following the publication of the report of the CoI on the Democratic People's Republic of Korea, all attention was focused on whether the information of possible international crimes, notably of abductions of individuals from International Criminal Court (ICC) States parties, warranted Security Council referral to the ICC. As a result, other important analyses included in the report (e.g., on the marginalisation of women), as well as the key recommendations to strengthen inter-Korean dialogue and to improve the fate of separated families, were entirely overlooked. Another participant countered that this very same

HRNK Co-Chair Roberta Cohen and Executive Director Greg Scarlatoiu present UN COI Commissioners (L to R) Sonja Biserko, Marzuki Darusman, and Michael Kirby with HRNK's first Human Rights Award.

Photo/Committee for Human Rights in North Korea

report was instrumental in placing the DPRK on the agenda of the Security Council. Ultimately, it was argued, the use of criminal law labels may be valuable for the signalling/alerting function of human rights fact-finding but not necessarily for its documenting/truth-telling function.

- As such, several participants argued that it was important to avoid creating an identity crisis for traditional human rights fact-finding missions, which perform a particular set of functions that should not be undermined, by bringing them into closer alignment with criminal inquiries. Other important functions of human rights fact-finding that were identified during discussions include: raising awareness of human rights violations and signalling to the international community the need for corrective action, providing victims with a platform to voice their suffering and tell their stories, analysing and advising the international community and other domestic stakeholders on measures to be taken to combat impunity, providing support to improve capacities of national protection systems, and providing background and systemic analyses that can be valuable for prosecutorial authorities.
- Regarding the latter, one participant explained that fact-finding serves vital functions in national and international prosecutions even when perpetrators remain unidentified. Notably, they help criminal investigations by setting the scene, providing information on trends and structural issues, mapping actors and institutional dynamics, and providing an initial diagnosis of the situation. One prosecutor explained that fact-finding missions are often the first to collect evidence and can therefore have access to evidence before it is lost or destroyed. Though they conceded that such information is rarely used in legal proceedings, it is valuable in preliminary prosecutorial examinations when prosecutors are seeking patterns of criminal behaviour. Such information, if properly collected and organised, can help inform decisions to open/pursue a case.
- As such, various participants cautioned against trying to attach objectives that would exceed the current framework of fact-finding, and instead called for greater synergies and cooperation between human rights fact-finding and criminal inquiries/prosecutions, either at national level or at international level through the ICC. Expanding the scope of human rights fact-finding, some argued, might create political and logistical obstacles to the continued establishment of such missions, while increasing competition for limited resources in international justice. On the contrary, it was pointed out that human rights fact-finding missions are a relatively resource efficient manner of signalling the need for greater accountability efforts and

Syrian Civil Society Appeals for Peace and Accountability.

U.S. Mission Photo/Eric Bridiers

therefore of increasing funding for criminal inquiries. Instead of trying to equip human rights fact-finding to perform criminal law functions that are beyond its abilities, it was argued that efforts should be directed at ensuring that the preliminary findings of fact-finding missions are followed-up on and that such mechanisms improve their ability to facilitate non-judicial accountability.

- Participants nevertheless agreed that differentiation between human rights fact-finding and criminal investigations need not preclude human rights fact-finding from evolving towards the use of more diligent and better-defined methodologies, and greater use of stricter evidentiary standards - both to facilitate the subsequent work of criminal investigators and prosecutors, and to strengthen their claims to objectivity. They repeatedly cautioned that an excessive and systematic focus on improving the prospects of delivering legal accountability detracts from other functions that can equally make a difference and lead to concrete action on the ground, by objectively recording facts, providing credible situational analyses, and focusing international attention and to pressure change in State behaviour.

B. FOCUSING ON NATIONAL-LEVEL IMPROVEMENTS

- One member of a human rights fact-finding mission explained how their work had aimed at providing recommendations for institutional reforms aimed at combatting the domestic culture of impunity. Their goal was to ensure their findings could be used by various stakeholders (e.g., domestic civil society, international actors and (future) government actors) in their efforts to secure change. They recounted how various domestic actors had expressed their appreciation for their report, which they had used in their own advocacy and resource mobilization efforts. In this regard, fact-finding missions should formulate targeted recommendations on effective courses of action to a broad range of actors and not only to the international community. The value of improving collaboration with domestic stakeholders not only as witnesses and information providers but also as important domestic change-makers was also highlighted. In this sense, fact-finding missions should strive to inform and empower various actors through their investigations and recommendations. This should be done by developing and maintaining a local and international network of strategic actors that can pursue the accountability efforts of investigative mechanisms even after their mandate ends.
- Several participants pointed out that improving the ability of fact-finding missions to provide an in-depth examination of what impunity means in a particular context by analysing patterns of human rights violations, their root causes, and the circumstances in which they occur, while formulating strategic and targeted recommendations to address the situation, also requires a particular set of skills. While much attention is given to the need to improve staff training and expertise in legal matters, one participant lamented that similar attention is not given to other key skillsets that are fundamental to improving the impact of fact-finding missions, including communication and social media expertise, diplomatic skill and understanding of international affairs, knowledge of local contexts and language skills, as well as expertise in social science research methodologies, military strategy, operations, and strategic advocacy.

The Peace Palace, seat of the International Court of Justice, the Hague, Netherlands. The Court is the principal judicial body of the United Nations.

UN Photo/Andrea Brizzi

Mohamed Auajjar (C), Chairperson of the Independent Fact-Finding Mission on Libya, sitting next to Tracy Robinson (L), and Chaloka Beyani (R), Members of the Fact-Finding Mission, talks to the media during a press conference ahead the presentation of the report of the Independent Fact-Finding Mission on Libya to the Human Rights Council, at the European headquarters of the United Nations in Geneva, Switzerland, 04 July 2022.

Photo/ EPA-EFE Salvatore Di Nolfi

- Another participant suggested that fact-finding missions could do a better job at advising the international community of local justice demands and how to build up national accountability systems and generate a local sense of justice. They stressed that this may in some cases require investigative mechanisms to expand their typical set of activities and require additional resources and expertise but would represent a leap forward in terms of galvanising concerted and effective action for justice, both within the country and internationally.
- Several other recommendations for how fact-finding missions could improve the impact of their work were also raised. One participant focused on the importance of improving the quality of reporting. They noted that many missions had overcome the 23-page limit for fact-finding reports by submitting annexes, which are not limited. The extensive documentation on individual cases of human rights violations provided by the fact-finding mission on Venezuela was highlighted in this regard. They further noted that, at times, focusing in-depth on one issue could be more powerful than attempting a comprehensive study of all human rights violations or abuses taking place.
- It was argued that dissemination and communication strategies could be improved and better cooperation with national and international media could help amplify mechanisms' findings. One member of an investigative mechanism also lamented that the international community did not do more to support their findings by countering the inevitable claims of politicisation.
- Finally, one participant advocated for taking a much more ambitious stance on the improvement of fact-finding missions, moving beyond evidence collection and recommendatory powers towards mechanisms that can drive change and guarantee protection, regardless of their ability to secure cooperation from the State under investigation. While acknowledging that such propositions would require radical reform of the UN and the international order, they nevertheless pleaded for 'shifting the goalposts' to ensure international mechanisms have more power to actively address victims' desires for protection, truth, and reparations.

C. PROSPECTS FOR UN-MANDATED INVESTIGATIVE MECHANISMS TO BETTER SECURE JUDICIAL ACCOUNTABILITY

- As discussed above, regardless of whether participants agreed that the 'criminalisation' of human rights fact-finding is a positive development, it is undeniable that the trend has been underway for several years. Several participants noted this is a direct result of the dysfunction of the international justice system. Blockage at the Security Council and its inability to refer situations of grave human rights violations and mass atrocities (e.g., Syria, Myanmar) to the ICC or to establish ad-hoc tribunals, has led the international community to seek alternatives to further criminal accountability and combat situations of impunity. This has led States to take advantage of the opportunities created by the majoritarian voting systems of the GA and the Human Rights Council to create stronger mandates explicitly aimed at building individual case files to assist national and international prosecutorial efforts.
- Most emblematic in this regard was the GA's establishment (105 States voted in favour) of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM), as well as the Independent Investigative Mechanism for Myanmar (IIMM), established by the Human Rights Council in 2018. This new generation of mechanisms, tasked with compiling, preserving and analysing evidence of the most serious international crimes, while applying criminal law standards to commence preparatory work necessary to support prosecutions, have largely overcome criticisms aimed at previous generations of investigative mechanisms regarding their inability to facilitate legal accountability. Members of these mechanisms noted that they have also interpreted their mandates to include the facilitation of legal proceedings addressing State responsibility, as well as civil liability claims.
- Since its establishment, the IIIM has built a repository of over 2 million records and has cooperated with 13 different competent jurisdictions through 148 requests for information to facilitate prosecutions, most often from States that exercise universal jurisdiction over certain crimes. A senior member of the IIIM explained that the reason this was possible was because of the broad range of staffing expertise on matters ranging from forensic evidence gathering, open-source investigating, case-file building, and witness protection. They explained that the mechanism's central area of work involves collecting evidence previously collected by civil society organisations and the CoI on Syria, and building a central repository of evidence, which was designed to be searchable and shareable. They procured software, which was new to the UN, and regularly conclude agreements with sources to gain access to information and evidence, develop processes to ensure strict confidentiality, and ensure material can be used to support competent jurisdictions. Additionally, the mechanism develops models of structural investigations which cover the context within which the crimes committed in Syria occurred by analysing crime patterns, perpetrator groups, organisational structures within specific detention facilities, as well as by creating modules for proving war crimes and crimes against humanity.
- However, members admitted that while the IIIM and similar criminal investigative mechanisms are undoubtedly an important tool for advancing comprehensive justice, they should not be considered an end in and of themselves. For example, the IIIM member highlighted the important complementary public accountability functions performed by the CoI on Syria, which they are in no position to undertake as it would undermine their ability to deliver on their mandate. They argued that before establishing such an investigative mechanism, the situation in the country, the available avenues for justice and how such a mechanism would fit within the system of international justice should be carefully considered. Furthermore, it was recalled that though such mechanisms facilitate the delivery of justice, they cannot prosecute or adjudicate cases, and that it remained States' responsibility to ensure prosecution of alleged perpetrators. It was further stressed that even with examples of successful prosecutions (e.g., in Germany), there is a long way to go before victims get a sense of justice, while in many cases survivors are demanding a much more holistic approach to justice than one based on criminal accountability (see section I.c). They explained that the mechanism was thus striving to develop a victim-centric approach to its accountability mandate, most notably by listening to the demands of local actors. For example, the IIIM has started to search for missing persons – a key demand of many Syrians.
- Several participants noted that mechanisms to secure legal accountability for human rights violations are very costly both financially and politically, and could therefore only be envisaged in very particular situations of undeniable gravity.

UN Flag at the Calgary War Museums

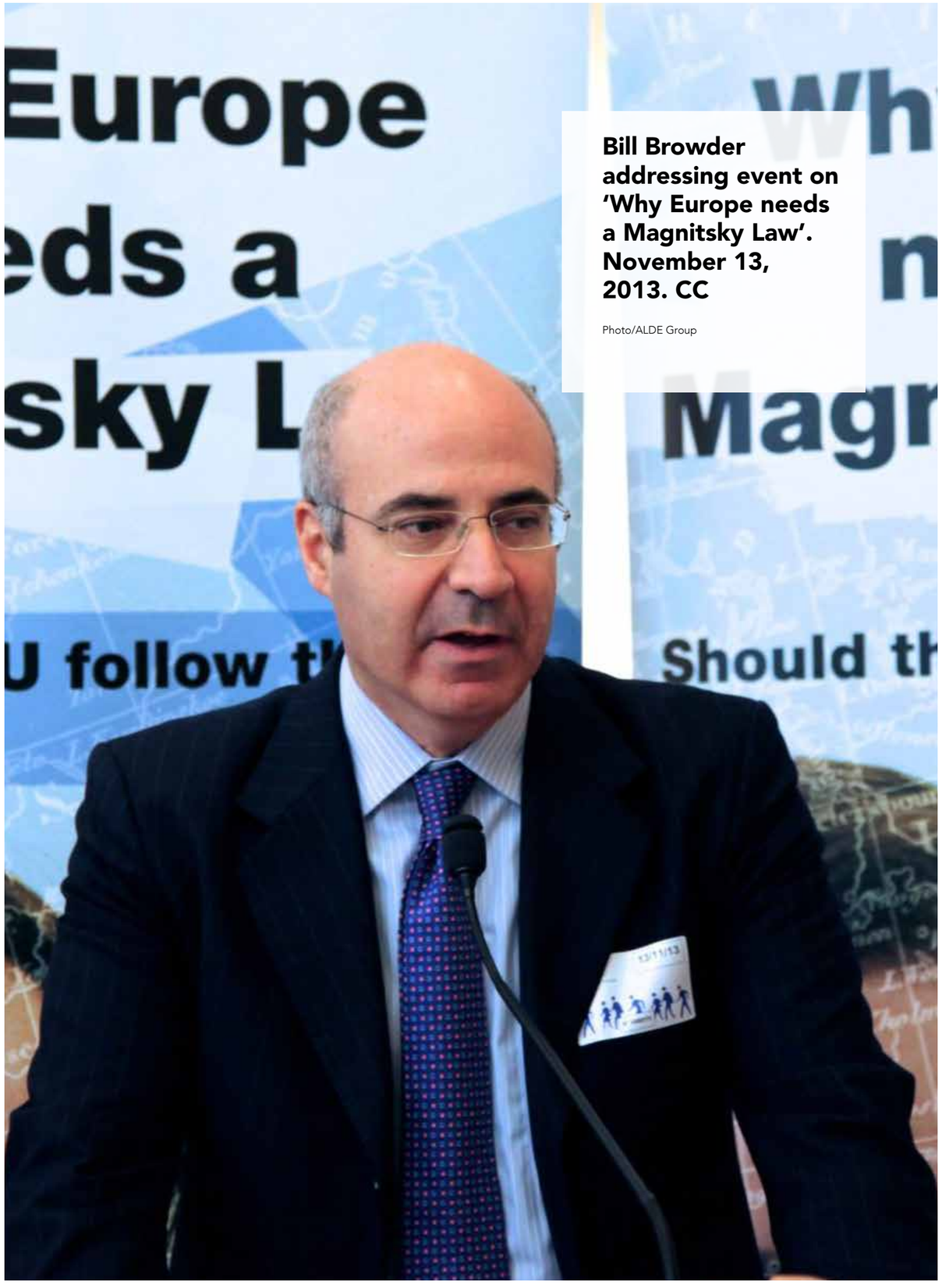
Photo/sanjitbakshi

D. IMPROVING CURRENT INVESTIGATIVE MECHANISMS

- Significant attention was given to improving the capacity of 'traditional' investigative mechanisms to facilitate legal accountability, emphasising the need to bridge the Geneva-Hague gap, as legal responsibility issues have generally been associated with institutions seated in the Hague, while investigative mechanisms are overwhelmingly established by the Human Rights Council, described as 'the only game in town.' Notwithstanding concerns regarding the criminalisation of fact-finding (see section II.a), some argued that there are various contributions to criminal and judicial accountability processes that are compatible with the mandated core human rights functions.
- The first area that was repeatedly addressed was how information and evidence collected by investigative mechanisms could be collected, verified, and analysed in a manner that makes it more useful for criminal prosecutions. This could involve drawing on primary sources, such as documentary, open source, and other forms of digital information, to complement the witness statements that fact-finding missions traditionally rely upon. Additionally, greater effort should be deployed to ensure the probative value of information collected, by preserving chain of custody or, in the context of witness statements, by ensuring that there is clear informed consent in a manner that protects the witness and does not undermine potential use of such evidence in criminal proceedings. One participant stressed the need to create a greater awareness, amongst members of investigative mechanisms, of the importance of reporting on the 'big picture' and the general context, as criminal prosecutions for crimes against humanity require evidence of widespread and systematic attacks on the civilian population to secure criminal prosecutions. In this regard, another participant pointed to the case of Cote d'Ivoire, where the ICC rejected the evidence collected by the CoI as inadequate as evidence of widespread and systematic attacks on the civilian population. As a result, the case had to be adjourned for many months while the prosecutor led his own team to gather evidence on the broader patterns of violations.
- To develop these technical competencies, discussants pointed to the importance of investigative protocols, operational guidelines, and standard operating procedures to steer investigations. One noted that a lot could be learnt from the new generation of investigative mechanisms. By defining investigative strategies that are based on clear protocols, mechanisms would be able to conduct investigations more efficiently, pay better attention to less visible categories of victims, and, most importantly, insulate mechanisms' findings from accusations of bias and politicisation. In this regard, another participant pointed to the Berkeley Protocol on Digital Open Source Investigations, developed by OHCHR and Berkeley University, which offered practical guidance on how to make effective use of digital open source information in investigating violations of international criminal, human rights and humanitarian law.
- Another key issue relates to staffing. A survey of investigative members found that only a very small percentage believed that the right staff had been recruited. It was repeatedly stressed that there was a need for forensic and digital skillsets as well as a very solid grounding in international human rights, criminal and humanitarian law. Participants also lamented the lack of resources such as forensic databases and other relevant software. Unfortunately, the limited resources allocated to fact-finding missions create significant hurdles to improving quantity and quality of available staffing.
- To overcome these challenges, participants stressed the need to find innovative solutions. One member of an investigative mechanism pointed to their experience in seeking additional funding outside of the OHCHR-allocated budget, and the difficulty of doing so without compromising the mechanism's independence. The same representative shared their experience of relying on expertise within her personal networks to complement those of the mechanism. She stressed that these relational and fundraising efforts can be very time-consuming but ultimately pay dividends. Another participant argued that there should be more cooperation amongst mechanisms to pool resources and expertise. An alternative option is to rely on training to rapidly provide staff with the expertise required to fulfil their mandates or a permanent pool of staff able to provide technical support to all mechanisms. One participant pointed to the early successes of the Dutch initiative to create an Investigative Support Unit that has hired temporary staff to fill gaps. Another raised the idea of creating a standing independent investigative mechanism with the expertise to conduct investigations where needed. Many pointed to the high level of political opposition such a move would generate.
- Another issue relates to the impediments created by the yearly renewal of mandates. Some said that this system undermined the ability to conduct proper investigations and have long-term strategies. Additionally, it was pointed out that in most cases during a significant part of their year-long mandate, mechanisms are not properly operational due to administrative issues in hiring processes. For example, a participant highlighted the case of the Libya FFM, which was nine months into its twelve-month mandate before any staff were hired.
- Discussions also addressed the need for greater collaboration with national and international prosecutorial authorities to determine when and how information can and should be shared. It was noted that traditional human rights fact-finding missions collect information, which then sits in a database never to be used since members of such mechanisms rarely have a vision of what to do with the information and wait for prosecutorial authorities to ask for it. Instead, they should proactively seek ways to support prosecutorial authorities, which requires regular dialogue.

Commissioners of Inquiry on Syria Brief Press.

UN Photo/Evan Schneider. 21 April 2017



Bill Browder addressing event on 'Why Europe needs a Magnitsky Law'. November 13, 2013. CC

Photo/ALDE Group

III TOWARDS A NEW FORM OF ACCOUNTABILITY? IMPLICATIONS OF TARGETED SANCTIONS FOR HUMAN RIGHTS ACCOUNTABILITY

An entire session was devoted to addressing the implications of the emergence, development, and deployment of targeted human rights sanction regimes for international accountability efforts. Participants discussed the history and early track record of such 'Magnitsky-style' sanction regimes, as well as how to improve them, and encourage greater uptake and improved coordination in sanction policies.

A. THE EMERGENCE OF A NEW TOOL FOR HUMAN RIGHTS ACCOUNTABILITY?

- Participants considered the rationale behind the establishment of the targeted human rights sanction regime adopted by the United States in 2012 following the death of Sergei Magnitsky, a Russian whistle blower. As the sole punitive option available in a context of impunity, created by the Russian State's protection of the alleged perpetrators, the US adopted legislation to impose financial consequences (i.e., asset freezes and prohibitions of dealing with US banks) and travel restrictions on persons associated with the extrajudicial killing of Magnitsky. At the time, it was argued that though this may not be true justice, it was far better than complete impunity. In response to the outrage of Vladimir Putin who made repealing the Magnitsky Act one of his number one foreign policy priorities, US Government officials and civil society actors realised that a nerve had been struck, which could have far-reaching implications for international efforts to ensure accountability for human rights violations and corruption. As such, in December 2016, the United States passed the 'Global Magnitsky Act,' which instead of only targeting Russian human rights violators/abusers, was expanded to authorize the President to impose economic sanctions on foreign individual or entities identified as engaged in human rights violations or corruption. A US official at the meeting reported that, since then, there have been 330 individuals and entities designated under the regime, demonstrating its flexibility, reach and scope. The objective of the regime is to deter human rights violations, promote accountability, and defend international norms.
- Participants also heard of the parallel Canadian experience of adopting its own targeted human rights sanction regime in 2017, in response to the death of Magnitsky and the equally powerful case of Boris Nemtsov, a leader of the Russian opposition and vocal advocate for Magnitsky laws, who was murdered in 2015, only a few years after giving a briefing to the Canadian Parliament. The legislative proposal had been stalled due to reticence on behalf of Ministry of Foreign Affairs, but ultimately, in the face of threats of retaliatory action by Russia, both Houses of Parliament unanimously adopted the legislation.
- Finally, an EU official presented the European process, which was particularly long-winded due to the requirement of having unanimity of all member States on human rights issues. They argued that this long process of defining and reaching consensus on the framework and criteria for designations had been essential in facilitating the subsequent consensus required for listings. It was explained that significant effort had been made to ensure that listing criteria are precisely defined, given the EU's extensive history of designations being (often successfully) challenged before the European Court of Justice. This burdensome process of inter-state negotiation was also why the adoption of a general targeted human rights sanction regime

was so important for the EU; though the EU already had various human rights sanctioning mechanisms in place, these were country-specific and require extensive negotiations each time. It was further explained that the EU sanctions under their regime would not only focus on cases that are the centre of significant public attention (e.g., the Uighurs in China), but also address cases that are less visible (e.g., LGBTQI community in Chechnya or human rights violations in Libya). EU representatives also reported that countries in the EU's neighbourhood (e.g., Nordic and Balkan States) had decided to align themselves with the EU Magnitsky regime.

B. THE EFFECT OF MAGNITSKY-STYLE SANCTIONS ON ACCOUNTABILITY EFFORTS

- The implications of Magnitsky-style sanctions for human rights accountability were also discussed. One participant argued that the emergence of such targeted human rights sanctions had created a new international accountability paradigm by enabling States to impose consequences on individuals regardless of where they are located, preventing them from taking refuge behind the veil of State sovereignty. They added that those unwilling to join in the Magnitsky coalition are essentially complicit in the violations, arguing that on the one side there were States who seek to impose consequences on those who commit grave acts regardless of jurisdictional considerations, and on the other are States promoting a counter-narrative that 'unilateral coercive measures' - whether targeted or blanket measures given detractors' objectives of assimilating the two - are an unlawful violation of State sovereignty. It was argued that this is an entirely misleading characterisation of Magnitsky-style targeted sanction policies, which generally do not target the weak and downtrodden but rather the abusive elites of a State and are designed not to affect the general population.
- Several participants shared the view that the general purpose of Magnitsky sanctions goes beyond combating impunity to the even nobler objective of securing justice for victims of human rights violations/abuses. Magnitsky sanctions are an extrajudicial, political avenue for promoting accountability, particularly when the offender's State is so corrupt and dysfunctional that victims have no other recourse, and when alternative international legal or diplomatic avenues have failed. While many discussed 'securing justice for victims,' this is usually meant in a retributive way, with one discussant explaining that a 'victim-centred approach' or 'restorative justice' approach is not yet baked into the structure of existing Magnitsky regimes (see section I.c).
- That is not to say that sanctions should be viewed as an extraordinary measure of last resort, with most of the government speakers referring to Magnitsky-style sanctions as an ongoing policy tool to promote behavioural change. As such, it is crucial to have a process in place to remove the targeted individual from listings when behaviour changes for the better. For this reason, various participants argued that targeted sanctions should not be considered a tool for accountability but rather a policy tool for prevention, aimed at creating diplomatic and financial pressure. One participant noted that in the context of the UN, sanctions had to be considered preventative to be legal and align with the UN Charter, however they acknowledged that there was a very different discourse of 'accountability' that prevailed in the context of Magnitsky sanctions. They argued that this raises many questions about the link between sanction policies and other national and international criminal justice processes. For example, they asked that, if sanctions are punitive in nature, then what are the implications for the universal criminal principle of double jeopardy?
- Regardless of whether sanctions should be considered accountability tools, avenues for securing justice or simply prevention tools, there was broad consensus that they should not be considered an end in and of themselves, and that they should not be considered as a replacement for other accountability, justice, and prevention mechanisms. However, several civil society participants argued that in the current degraded context of international justice, Magnitsky-style sanctions were often the only way to impose consequences on perpetrators.
- It was also noted that targeted sanctions are not in and of themselves new. Indeed, several participants pointed to the history of UN targeted sanctions,

The Security Council unanimously adopts resolution 2254 (2015).

UN Photo/Eskinder Debebe

to draw comparisons and lessons for unilateral Magnitsky-style sanction policies. It was noted that the Security Council has used its power to sanction under Article 41, Chapter VII of the UN Charter, to establish around 30 different sanction regimes, amounting to hundreds of designations, the overwhelming majority of which (i.e., 26/30 regimes) have been targeted in nature. Indeed, one discussant explained that following the devastating humanitarian impacts of the blanket economic sanctions imposed on Iraq in 1990, targeted sanctions came to be considered a more effective and less detrimental policy tool for the UN to pursue. It was argued that the true novelty of Magnitsky-style sanctions lies in the use of human rights language as grounds for sanctioning, as well as the unilateral rather than multilateral nature of such sanctions. It was argued that today, the prospects for sanctioning within the Security Council are slim given the degraded geopolitical context and gridlock of the P5. Collaborative targeted sanctioning could thus replace Security Council sanctioning (despite not being as global in reach since all UN member States are required to implement Security Council sanctions) and thus fill the gap created by Security Council paralysis.

Non–Violence or the Knotted Gun by Carl Fredrik Reutersward, UN New York. May 13, 2011

C. BEST PRACTICES AND LESSONS LEARNED FOR STRENGTHENING TARGETED HUMAN RIGHTS SANCTION REGIMES

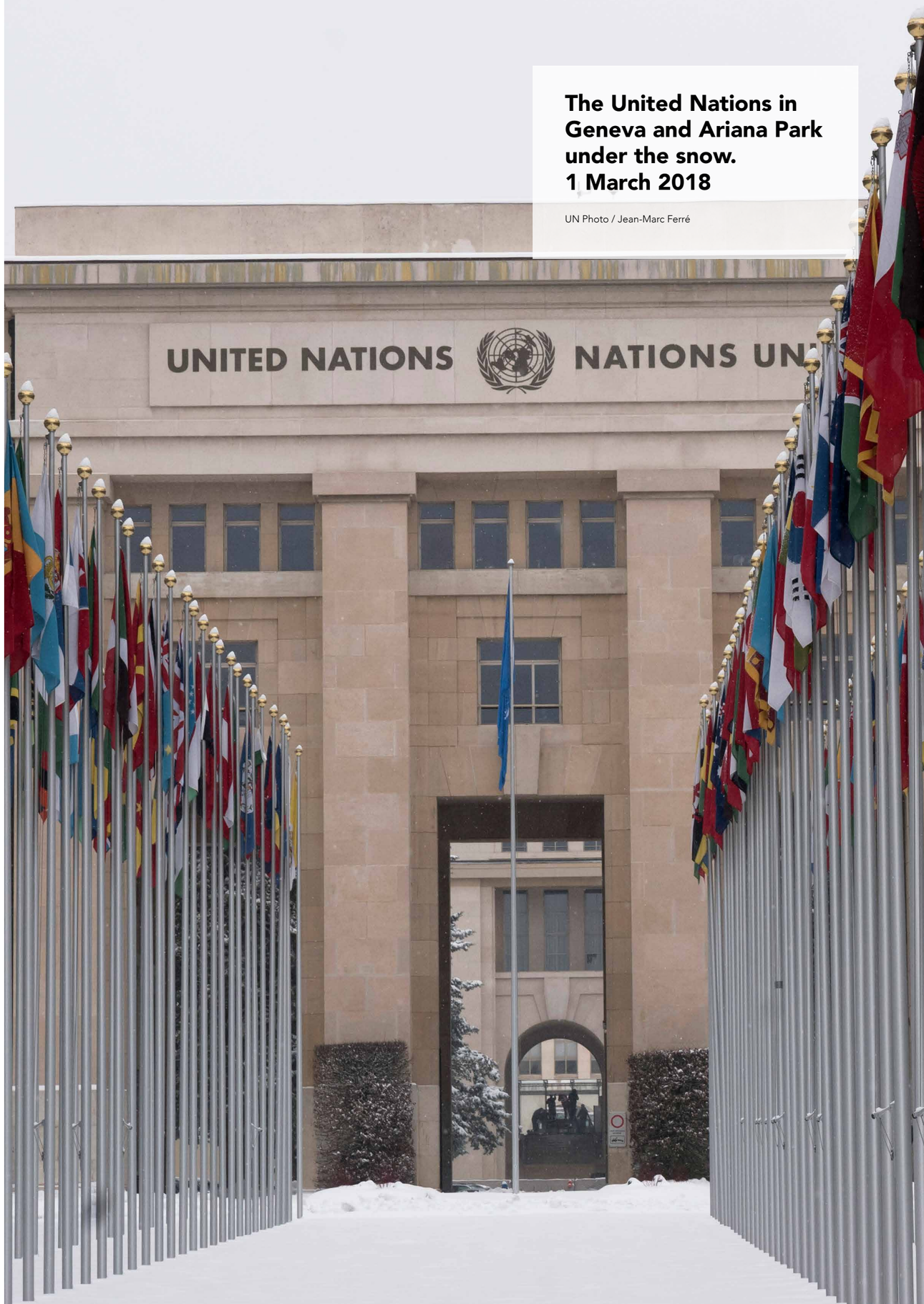
- Participants argued that there was a need to assess targeted human rights sanction policies according to their objectives, which is difficult considering the relatively novel nature of Magnitsky-style sanctions. It was thus argued that the history of Security Council sanctioning could provide lessons for unilateral sanctioning. One discussant explained that targeted Security Council sanctions were generally justified for three broad purposes: promoting behaviour change, constraining the capacity to pursue proscribed activities (e.g., buying weapons for terrorist purposes), or signalling to the target that the activities violate an international norm. Of the three objectives, it was argued that sanctions are most effective at signalling to the target that activities violate an international norm. However, sanctions are only effective at signalling when the target is politically exposed or has some incentive to comply with international norms. It was also argued that Magnitsky sanctions are only effective when targeting elite individuals who have assets abroad and/or intend to or often do travel abroad. One civil society representative explained that some individual sanctions have targeted mid-level officials without assets abroad or capacity to travel, or non-state armed groups that travel freely across porous borders, with very limited effect. On the other hand, sanctions are also ineffective when individuals can successfully evade asset freezing. One academic representative noted that corrupt individuals are likely to be uncommonly well-versed in effective methods of evading sanctions via unsavoury economic devices and relationships or can simply move assets between jurisdictions. For this reason, it was stressed that, particularly in the case of corruption, it was crucial to have coordinated sanctions (which is not the case today since neither the UK nor the EU have corruption included as a punishable offense).
- Various participants also noted that these risks of ineffectiveness were compounded in the context of unilateral sanctioning as unilateral regimes have less reach and greater risk of being subject to claims of politicisation. Participants therefore stressed that the key to the effectiveness of Magnitsky-style sanctioning lay in their 'multilateralization' (i.e., greater uptake of targeted human rights sanction regimes and greater cooperation and coordination in sanction policies), as well as in the use of objective designation criteria and systematic listing policies. One participant argued that sanction policies are driven by career bureaucrats who therefore have limited interest in taking risks, making not sanctioning the default policy, particularly in politically sensitive instances. On the other hand, another participant argued that targeted sanctions could be used as a foreign policy tool in diplomatic negotiations rather than as an objective accountability tool, thus undermining their legitimacy. In this regard, the crucial role that civil society plays as an independent monitor and information provider was highlighted, as well as the value of a whole of Government approach to sanctioning. It was also pointed out that multilateralization helps create legitimacy and counter claims of selectivity and politicization.
- One element of multilateralization involves convincing more States to adopt targeted human rights sanction regimes. Participants shared strategies to overcome domestic obstacles to the adoption of targeted sanction regimes. A former parliamentarian and high-level government official explained that a key element to passing successful Magnitsky-style legislation was to ensure cross-party and cross-government buy-in. To do so, they argued that sharing the victim narrative of Sergei Magnitsky had been important. They argued that such broad domestic buy-in helps withstand pressure and threats from States opposed to such legislation. It was argued that once a legislative proposal for targeted human rights sanctions was tabled, it becomes very difficult to publicly oppose it. The best way to overcome opposition from certain actors who benefit from the fruits of corruption and human rights abuse is therefore to make discussions around Magnitsky-style legislation public. It was thus argued that the key to driving the adoption of Magnitsky-style legislation is through the mobilization of parliamentarians rather that Government officials. One participant explained that despite most targeted human rights sanction regimes having been adopted with unanimous support, in private, they were widely opposed by politicians and government officials who feared the financial and geopolitical repercussions. Representatives of business and

local political interests (e.g., in residential areas that typically attract foreign autocrats) and foreign affairs/diplomatic experts were identified as some of the biggest obstacles to adoption of targeted human rights sanction regimes. It was also argued that Magnitsky-style sanction regimes should become a greater focus in traditional multilateral diplomacy with more discussions being organized at the UNGA, Security Council and Human Rights Council.

- Another key element to multilateralization that was extensively discussed revolved around how to better coordinate designations. One participant highlighted that a study conducted by their organisation had found that only 24% of US Magnitsky designations had also been sanctioned in the UK. Discussions raised more obstacles to coordinated designations than they did solutions. First, more coordination would involve more transparent processes at the cost of confidentiality and effectiveness, since intended targets would be more likely to be informed of their impending sanction and act to mitigate the costs. Second, the different targeted human rights sanction regimes have different designation criteria, evidentiary standards, and procedures, as well as different political priorities and underlying objectives, severely undermining the ability of coordinating designation, even with the political will to do so.
- On the other hand, many participants expressed their view that States could do much more to coordinate their procedures. One representative from civil society raised the issue of streamlining the sanctions submission process across different regimes, complaining that compiling a sanctions submission is time consuming and adjusting the material to adhere to different legal standards and procedures is also labour and time intensive. Some amount of information-sharing between national regimes as to designations or sanctions submissions they have received, along with comparable submission procedures would reduce the load on civil society organisations.
- Participants also suggested that there could be greater coordination in procedural safeguards across different sanction regimes, with one discussant asking what the implications were for the coherence and collective legitimacy of different sanction policies if a review process (e.g., by the European Court of Justice) led to the delisting of a targeted individual in one State or jurisdiction but not in another.

Participants repeatedly raised the importance of ensuring Magnitsky-style regimes met the highest standards of due process norms. One discussant stressed that this was particularly important in a context where such sanctions were being invoked as an accountability measure. They argued that when Magnitsky sanctions are viewed as precursors to judicial proceedings or as alternatives to perceived gaps in national and international justice systems, due process norms relating to criminal procedure should apply. Specifically, it was argued that regimes should have credible and transparent procedures with clear evidentiary standards, clarity regarding burden of proof, rules on classified information, and the presumption of innocence of those 'associated' with violations, clear designation criteria and narrative summaries explaining the basis of a designation, as well as systematic notification processes. It was further argued that delisting a target from Magnitsky designations requires competent and ongoing/periodic reviews of the designee's behaviour as well as easily accessible and clearly specified procedures to challenge designations with evident and objective criteria and conditions.

- Finally, considerable attention was also given to how targeted human rights sanction regimes could evolve to better address the needs and wishes of victims. One discussant raised the need for sanction regimes to move from performing retributive or corrective 'accountability' functions towards restorative functions anchored in victims' right to remedy and redress. It was suggested that a victim-centred approach should focus on improving victims' access to and participation in designation processes, while considering the opportunity created by a possible repurposing of frozen assets to serve as reparations for victims. However, a participant pointed out that moving from freezing assets to seizing, confiscating, and repurposing them to serve as reparations raised various legal and policy challenges, notably by raising the evidentiary standard for targeting even more towards the level of criminal procedures.



The United Nations in Geneva and Ariana Park under the snow. 1 March 2018

UN Photo / Jean-Marc Ferré

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