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**The United Nations in Syria, or
how the road to hell is paved
with good intentions**

The United Nations in Syria, or how the road to hell is paved with good intentions

An analysis of the risks for the United Nations to participate in Turkey's plan to resettle millions of Syrian refugees to Northeast Syria

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I. Background

On 9th October 2019, the government of Turkey informed the United Nations Security Council (UNSC) of the launching of the *Peace Spring Operation*, on the basis of Article 51 of the United Nations Charter.¹ Ever since, the numerous instances of hate speech relayed by Turkish-backed opposition armed groups, the killings of civilians such as that of Hevrin Khalaf, filmed and published on social media, and the numerous acts of violence qualified by Amnesty International of war crimes, have forced more than 215,000 civilians to leave their home, 100,000 of them being still displaced to date, and killed more than 200 civilians.²

On 1 November 2019, the United Nations (UN) published a statement entitled Guterres in Turkey: UN to study 'new settlement areas' plan for Syrian refugees indicating that "[t]he Secretary-General stressed the basic principles relating to the voluntary, safe and dignified of return of refugees. He informed the President that [UNHCR](#) (the UN refugee agency) will immediately form a team to study the proposal and engage in discussions with Turkish authorities, in line with its mandate."³

The "proposal" submitted by Turkey has not been published, but Turkey's vision of resettlement, based on the displacement of Kurdish communities from their areas of origin along the Turkish border, has been expressed in numerous occasions. President Erdoğan himself has stated that, because of its geological features and the fact that it was deserts, the occupied area was designed for Arabs, and not Kurds. The announcement by the UN was worrisome for human rights defenders and populations of the area, who know that the capacity of the United Nations to cause damage equals its capacity to benefit them. While we urge the UN to carefully weigh their participation in projects that could reveal

¹ Letter dated 9 October 2019 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, S/2019/804, <https://undocs.org/S/2019/804>; *Kurdish-led health authority in northeast Syria says 218 civilians killed in Turkish offensive*, Reuters, 17 October 2019, <https://uk.reuters.com/article/uk-syria-security-turkey-casualties/kurdish-led-health-authority-in-northeast-syria-says-218-civilians-killed-in-turkish-offensive-idUKKBN1WW1A5>

² New Evidence Supporting the National Army's Accusations in the Murder of the Kurdish Politician Hevrin Khalaf, Syrians for Truth and Justice, 10 December 2019, <https://stj-sy.org/en/new-evidence-pointing-to-ahrar-al-sharqiyas-responsibility-for-field-executions-in-suluk-during-operation-peace-spring/>; Amnesty International, "Syria : Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies," October 18, 2019, <https://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/>;

<https://twitter.com/Hiwaosman/status/1184449625303998465?s=20>; Video Evidence Sheds Light On Executions Near Turkey-Syria Border, *Bellingcat*, 1 November 2019 <https://www.bellingcat.com/news/mena/2019/10/31/video-evidence-sheds-light-on-executions-near-turkey-syria-border/>; OCHA Syria | Syrian Arab Republic: North East Syria Displacement, 5 November 2019, <https://reliefweb.int/map/syrian-arab-republic/syrian-arab-republic-north-east-syria-displacement-5-november-2019>; *Kurdish-led health authority in northeast Syria says 218 civilians killed in Turkish offensive*, Reuters, 17 October 2017, <https://uk.reuters.com/article/uk-syria-security-turkey-casualties/kurdish-led-health-authority-in-northeast-syria-says-218-civilians-killed-in-turkish-offensive-idUKKBN1WW1A5>

³ Guterres in Turkey: UN to study 'new settlement areas' plan for Syrian refugees, UN News, 1 November 2019, <https://news.un.org/en/story/2019/11/1050451>.

disastrous, it is critical to reflect on the accountability the UN and its officials are potentially subject to.

II. The road to hell and good intentions

To understand the concern the declaration by the United Nations' Secretary General (UNSG) raised, one must understand the intricacy of the social fabric of the region, characterized by its ethnic and religious diversity. Moulded by trade roads, exiles, crusades and tribal relations, the region has long been a safe haven for anyone keen on establishing there their family, business, or place of worship. The area thus accounts for a number of cities that are diverse in their core, and homes to Assyrians, Armenians, Arabs and Kurds, such as Al-Darbasiyah, Al-Hasakah, Al-Malikiyah, Al-Qahtaniyah, Amuda. Qamishli, initially conceived as a small military observation point by the French mandatory power, today reflects the vitality and diversity of the area, house to Kurds, Arabs, Assyrians and Armenians. Other cities, like Tell Abyad, built by Armenians fleeing the Genocide conducted by Turkey, had become house to this and other communities, and now hosts Arabs and Kurds as well. Similarly, Ras Al Ayn is house to Arabs, Kurds, Assyrians and Armenians and Chechens.⁴

Therefore, any plans to artificially alter this fabric would lead to massive disruption of the area and could be constitutive of the crimes against humanity of forced displacement. In this regard, the words and actions of Turkey and the armed groups it supports are alarming, as documented by a number of human rights organisations, who have revealed abuses committed against civilians by these armed groups.⁵ Turkish President himself detailed his ambitions for the region, revealing a plan that could amount to the forced displacement of thousands of Syrians from the area. In an 80-minute [interview](#) broadcast on 24 October 2019 on Turkey's state-run TRT news network, he answered questions regarding Turkey's invasion of northeast Syria, and Ankara's military offensive, [Operation Peace Spring](#), launched on 9 October 2019, and touched on the Turkey-US and Turkey-Russia understandings, which practically led to the cessation of the operation after controlling Ras al-Ayn/Sari Kani and Tell Abyad. Elaborating on the military operation *Peace Spring*, President Erdoğan explained that it was named so due to the existence of large numbers of springs to the east of the Euphrates River in northern Syria, while mentioning, about the

⁴ Albert Habib Hourani, *Minorities in the Arab World* (London, UK: Oxford University Press, 1947); Edmund Herzig and Marina Kurkchian, eds., *The Armenians: Past and Present in the Making of National Identity* (Routledge, 2005); Hannibal Travis, ed., *The Assyrian Genocide: Cultural and Political Legacies* (Routledge, 2018); Jordi Tejel, *Syria's Kurds* (Routledge, 2009); Jane Arraf, It's A Dangerous Time For Christians In Northeastern Syria, *NPR*, 12 February 2020, <https://www.npr.org/2020/02/12/805154261/its-a-dangerous-time-for-christians-in-northeastern-syria?t=1581772155299>.

⁵ Syria: Civilians Abused in 'Safe Zones': Summary Executions, Blocked Returns by Turkish-Backed Armed Groups, *Human Rights Watch*, 27 November 2019, <https://www.hrw.org/news/2019/11/27/syria-civilians-abused-safe-zones>.

Turkey-Russia understanding that took place on 23 October 2019 to jointly patrol the northern strip (except for the city of Qamishli/Qamishlo) in a depth of 15 kilometers, that Turkey had a written approval from the US to remove the Syrian Democratic Forces (SDF) from the border.

He went on talking about a wide range of issues including the number of Syrian refugees in Turkey, explaining that there are 3.65 million Syrian refugees, most of them Arabs, including Arameans, Chaldeans and Yazidis, and omitting the Kurdish population. Coming to the 350.000 people from Ayn al-Arab/Kobane, who are primarily Kurdish, President Erdoğan refrained from mentioning their origin. Speaking on the US-Turkey Manbij Agreement, he explained, before adding that the population there was 85-90% Arab:

Manbij is actually not the place of these terror organizations.

In this context, Turkish President did not refer to the YPG or the SDF as military bodies, labelling them instead as terrorists. He made a comparison between the Arab population of Manbij and what he called “terrorists”, likely referring to the Kurds. The most disturbing part of the interview however occurred when he referred to the area between Tell Abiad and Ras Al-Ain/Sri Kanye (between 37:00 and 37:40), suggesting in these terms that the Kurdish population’s lifestyle did not fit the features of the area, before moving on to speak about the existence of oil in Raqqa and Deir ez-Zur.:

President Erdoğan: “The important thing in this gigantic area is to control the accumulation of land, and to prepare a living experience that is under control there. The people most suitable for that area are the Arabs. These areas are not suitable for the lifestyle of the Kurds.”

Interviewer: Why is that?

President Erdoğan: Because these are desert region.⁶

⁶ The original transcript of the interview reads as such: *President Erdoğan: “Şu bölge gerçekten devasa bir alan ve bu devasa alanda önemli olan böyle bir birikimi kontrol altında tutmak kontrollü bir yaşam orada hazırlamak ki oraya da en uygun olan Araplardır, Kürtlerin yaşam tarzının uygun olduğu yerler değildir.”*

Interviewer: Ne açıldı?

President Erdoğan: “Çünkü buralar adeta çöl bölgeleri.”



Turkish president Recep Tayyip Erdoğan pointing to the area between Ras al-Ayn/Sari Kani and Tell Abiad on map in the Tv. interview.



A screenshot of the map held up by Erdoğan while explaining plans for resettling Syrian refugees between Ras al-Ayn/ Sari Kani and Tell Abiad.

The declaration by the UNSG thus occurred in a context of worrisome declarations, and while it has not been followed upon publicly to date, it is the opportunity to reflect on the responsibility of the UN for the arms suffered by populations as a result of the error or negligence of the institution. Previous catastrophes due to UN's intervention revealed the extent of the challenge victims face when they attempt to hold the institution to account and ask for reparation. The UN's virtually absolute immunity has thus hindered any attempt by victims and victims' associations to obtain justice and reparation. After giving an overview of this inadequate system, this article will explore an avenue that could open the way to justice and support the UN's efforts to uphold the principle of precaution that must prevail when planning any interventions.

III. The accountability of the United Nations

At the time of its establishment, the United Nations listed in its foundational document, the Charter, four goals. The institution would work "to save succeeding generations from the scourge of war", "to reaffirm faith in fundamental human rights", to uphold respect for international law, and "to promote social progress and better standards of life." These ambitious goals called for significant financial and legal means. Among them, immunity granted to the organisation and its officials aiming at ensuring that deceptive lawsuits would not impede their work, would reveal contentious. The regime of immunity of the UN is ruled by the UN Charter and the subsequent 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN). Article 105 of the UN Charter grants the UN with a functional, albeit broad, immunity. The CPIUN however, later broadened the protection by providing the UN with an absolute immunity. Nonetheless, the CPIUN also creates a two-level immunity, whereby the UN is immune of prosecutions by national courts for all matters, but internally remains accountable for private law matters before a mode of settlement to be established by the institution.

A. Internal immunities

The CPIUN establishes an intricate system ruling the accountability individuals can seek from the institution itself. Article 29 provides:

*The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a **private law** character to which the United Nations is a party.*

The convention thus establishes among claims submitted to the UN a dichotomy between public and private-law ones. By ordering the creation by the UN of an “appropriate mode of settlement” for the latter, it grants *a contrario*, absolute immunity for those claims that qualify as public-law matters.⁷ This results in a twofold system. Claims that have to do with public law are completely covered by the immunity granted to the UN, while those based on a private law matter must be dealt with through an “appropriate mode of settlement”. The distinction between the two areas therefore carries heavy implications, that call for explicit definitions. Despite this significance, the respective scope of each category remains obscure. The convention does not state a clear definition of either division, and the jurisprudence arbitrating on the matter does not provide with sound arguments and, as noted by Pr Mégret, is inaccessible to third parties.⁸ Only a thorough examination of occasional references to the immunity system can therefore guide its understanding.

1. Private claims

Documents published by the UN provide elements informing the contour of the category. A 1995 report of the Secretary-General to the General Assembly identifies two categories of claims that would undoubtedly qualify as private-law matters:

- Disputes arising out of commercial agreements; and
- Claims by third parties for personal injury, death, or property loss or damage, specifically as caused by actions of UN peacekeepers.

2. Public claims

On the other hand, the scope of public-law claims, for which no remedy is offer, is broad. From the practice of the UN, Dr Boon highlights two examples of cases that seem to be understood to qualify as public matters:

- those “that implicate the operational functioning of the UN, which go to the public heart of the organization”; and
- “claims that are “based on political or policy-related grievances against the UN,” such as those related to actions or decisions of the Security Council or General Assembly.”⁹

⁷ Kristen E Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, *Chicago Journal of International Law*, vol. 16, 2016.

⁸ Boon.

⁹ Boon.

3. On the indefinability and expendability of the scope of public claims

These attempts at defining what falls in each of these categories are guiding claimants but do not provide for clarity. These ambiguities led to uncertainties and unsatisfactory dealing with applications for reparation in a number of occasions where circumstances seemed to fulfil the definition of private law and were nonetheless declined the qualification, resulting in the denial of accountability for the victims. That was the case when the responsibility of the UN was revealed in a disaster that hit Kosovo after the 1998-1999 Kosovo war, when 8,000 people from the Roma, Ashkali, and Egyptian minorities were forced from their homes. The UNSC then deployed an international presence that would become Kosovo's *de facto* government, and establish camps to host internally displaced persons from the city of Mitrovica. Set up in the vicinity of mining facilities, the camps, hosting around 600 families for five years, were contaminated by high levels of lead, that can cause permanent damage to the nervous system and affect brain development. Upon a claim brought to the UN, the institution determined in 2011 that the it did not take on a private-law character but instead "amount to a review of the performance of UNMIK's mandate" and were therefore not receivable.¹⁰ Similarly, in 2010, an epidemic of Cholera brought by Nepalese peacemakers to Haiti led to the infection of 600 000 and the death of 8 000 people in three months. The Institute for Justice and Democracy in Haiti (IJDH), a non-governmental organisation, and the Bureau des Avocats Internationaux, an Haitian law firm, claimed reparations on behalf of five thousand victims of Cholera, on the basis of the negligence of the UN, who failed to test the peacekeepers sent to Haiti who would be at the origins of the contamination, and to react promptly to the disaster. A year and a half after the submission of the petition, the UN determined that the claim was of public nature:

With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946.

The case remained open for a number of years, during which claimants attempted to find a *forum* for their claim to be heard. Events thus punctuated the life of the case, from the filing of a class action with the UN in November 2011, to the submission of a complaint to the New York Federal Courts and the subsequent appeal process, ending with the decision of the US Supreme Court upholding the immunity of the UN.¹¹

¹⁰ Boon.

¹¹ GEORGES v. UNITED NATIONS: THE LAWSUIT AGAINST THE UN FOR CHOLERA, Institute for Justice and Democracy in Haiti, <http://www.ijdh.org/cholera-litigation/>.

Both decisions are, however, hard to justify. As noted by Pr Mégret, indeed, the very nature of the UN, inherently political, has the potential to give any decision a policy and therefore public element to it.¹² More, an area of claims considered to belong to the realm of private law by the UN, that is “non-consensual use and occupancy of premises” undoubtedly involves consideration of policy level.¹³ The apparent dichotomy between public and private-law matters, that seemed to promise to give victims an avenue for accountability, therefore appears to be stretched to such an extent as to make its application meaningless.

B. External immunities

External immunities are those immunities that protect from prosecutions brought before jurisdictions, as opposed to claims brought before the UN system. Usually used as a last recourse by applicants whose claims have been brushed off by the UN, cases filed before jurisdictions have failed victims as well. Article 105 of the UN Charter at first conceived immunities as functional and limited, granted only when necessary:

“The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”

Nonetheless, the CPIUN later broadened the privilege, thus modifying the immunity into an absolute one.

“the United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”

While domestic courts could legitimately decide to uphold the UN Charter over the CPIUN, they have consistently interpreted the UN’s immunity as absolute.¹⁴ One of the instances dealt with the UN’s responsibility during the Srebrenica Genocide. On the offset of the Yugoslavian conflict, the UN established, in 1993, safe zones under the protection of UN Peacekeepers. In July 1995, the Bosnian Serb Army of Republika Srpska attacked Srebrenica’s safe area. Not sufficiently equipped to counter the attack, UN Protection Force

¹² Frédéric Mégret, “La Responsabilité Des Nations Unies Aux Temps Du Choléra,” *Revue Belge de Droit International* XLVII, no. 1 (2013): 161–189.

¹³ Mégret.

¹⁴ Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*.

evacuated the area, leaving behind the population under its protection. The attack resulted in the death of 8,000, mainly boys and men. Families of victims brought a case before the UN Secretary General, to no avail. They went on to submit a claim to Dutch courts, who recognized the immunity of the UN before civil jurisdictions. The claimants then brought the case on the basis of the right of access to a court under Article 6(1) of the European Convention on Human Rights to the European Court of Human Rights, that found that the Dutch court's decision did not violate the applicants' rights of access to a court.¹⁵

IV. Individual accountability

It is not only of utmost concern that the UN Secretary General, former United Nations High Commissioner for Refugees, could consider assisting the Republic of Turkey in its plan to forcibly and definitively displace a population. It also could lead to his liability. Indeed, the acts of deportation and forcible transfer conducted by the Turkish army and the opposition groups it backs could be qualified, according to Articles 7(1)(d) and 8(2)(b)(viii), as a crime against humanity, a war crime, or both, and may even constitute genocide, if the required intent is demonstrated. The liability of President Erdoğan, Turkish officials and Turkish-backed opposition armed groups for the crimes against humanity of deportation and forcible transfers is already under scrutiny and will be dealt with. However, International Criminal Law's general principles of liability aim at applying to any person who commits, participates or is in any fashion responsible for international crimes. Several doctrines, thus, expand criminality to not only the primary offender, but other individuals who participate to the crime in any way.

A. Provisions

1. Common Purpose liability

Building upon the International Criminal Tribunal for Former Yugoslavia's (ICTY) case law, the Statute of the International Criminal Court (ICC) provides in its Article 25(3)(d):

[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] in any other way contributes to the commission or attempted commission of such a

¹⁵ Netherlands Court of Appeals, *Mothers of Srebrenica v. State of the Netherlands*, Case No. 200.022.151/01, 30 March 2010); European Court of Human Rights, *Stichting Mothers of Srebrenica v. Netherlands* (Admissibility), App. No. 65542/12, 11 June 2013, <https://hudoc.echr.coe.int/fre?i=001-%20%20122255#%7B%22itemid%22:%5B%22001-122255%22%5D%7D> .

crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or*
- (ii) Be made in the knowledge of the intention of the group to commit the crime;*

The **material elements** to fulfil Article 25(3)(d) are therefore clearly stated and consist first in a crime or an attempt within the jurisdiction of the ICC, that, in the case of interest to us, is the forcible transfer and deportation. The statute adds that the crime must be committed by a group of persons who act together with a common purpose. Finally, Article 25(3)(d) provides that the contribution to the commission of a crime by the accused ‘in any other way’.

The ICC later on clarified Article 25(3)(d) in several regards. First, it held that the contribution of the alleged perpetrator need not be essential, but merely “significant”. Pre-Trial Chamber I clarified that a significant contribution could be assessed taking into consideration:

- (i) the sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose,*
- (ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes,*
- (iii) whether the person creates or merely executes the criminal plan,*
- (iv) the position of the suspect in the group or relative to the group and*
- (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes.¹⁶*

On the question regarding the need or not for the alleged perpetrator to be a member of the group that acts with the common purpose for liability, the same Pre-Trial Chamber also determined:

[T]he Chamber finds that the correct interpretation of 25(3)(d) liability is that it must apply irrespective of whether the person is or is not a member of the group acting with a common purpose.¹⁷

¹⁶ ICC PTC I, Mbarushimana, 16 December 2011, para. 284, https://www.icc-cpi.int/CourtRecords/CR2011_22538.PDF.

For Professor Cassese, the criminal responsibility of outside participants was even the essence of common purpose liability.¹⁸

The **mental elements** of the common purpose liability are twofold. The accused must first have meant to contribute to the commission of the crimes. Second, they must have carried out their contribution either with the aim of furthering the purpose or the activity of the group, but the ICC also determined that the mere knowledge of the intention of the group to commit the crimes was enough to lay the foundation of the liability of the alleged perpetrator on the basis of the common purpose liability.¹⁹

2. Aiding and abetting

A second mode of liability could lead to the prosecution of Mr Guterres, should he facilitate the settlement of refugees to Syria to areas they are not originally from. The ICTY, the ICTR and the SCSL have all introduced in their statute a liability for aiding and abetting. In Tadić, the ICTY stated that:

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime [...], and this support has a substantial effect upon the perpetration of the crime. [...]. The requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.²⁰

The ICC, in turn, provides in Article 25(3)(c) of its Statute that:

[...] a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

¹⁷ ICC PTC I, Mbarushimana, 16 December 2011, para. 284, https://www.icc-cpi.int/CourtRecords/CR2011_22538.PDF

¹⁸ A. Cassese, International Criminal Law (2nd ed, Oxford: Oxford University Press, 2008)

¹⁹ ICC, Blé Goudé, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-02/11-02/11, 11 December 2014, para. 173, https://www.icc-cpi.int/CourtRecords/CR2015_05444.PDF

²⁰ ICTY Appeals Chamber, Tadić, 15 July 1999, <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>

Although the Rome Statute requests, for the aider and abettor's liability to be established, that they intend to facilitate the commission of the crime, ICTY Pre-Trial Chamber determined that:

in the vast majority of cases, the acts of the accused, with the requisite knowledge that it assists a crime, will allow for no other reasonable inference than that the accused intended to assist the commission of an offence.

The ICC confirmed that what is needed for this form of liability to be uphold is:

*that the person provides assistance to the commission of a crime and that, in engaging in this conduct, he or she intends to facilitate the commission of the crime.*²¹

Professor Kai Ambos thus summed up the meaning of Article 25(3)(c): "aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime, i.e., that constitutes a causal contribution to the main act".²²

Therefore, If the United Nations and Mr Secretary General Guterres were to facilitate or agree in any way to the permanent forcible transfer of population, the bare knowledge, that Mr Secretary General Guterres, in his position of Secretary General of the United Nations cannot be deprived of, of the fact that he might assist a crime might lead to prosecution for the war crime and crime against humanity of deportation and forcible transfer on the basis of Article 25(3)(d) and Article 25(3)(c) of the Rome Statute.

B. The immunity of UN officials

1. Provisions on immunity

The main challenge applicants willing to take this avenue would face would lie in the extensive immunity the UNSG is conferred. The CPIUN indeed grants the Assistant Secretary General and higher officials, including the Secretary General himself, full diplomatic immunities. Section 19 of the convention thus provides:

²¹ Prosecutor v. Blé Goudé, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 167, https://www.icc-cpi.int/CourtRecords/CR2015_05444.PDF

²² Otto Triffterer and Kai Ambos, eds., *Rome Statute of the International Criminal Court: A Commentary*, Beck/Hart Publishing, 2016.

*In addition to the immunities and privileges specified in Section IS, the Secretary-General and all Assistant Secretaries General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to **diplomatic envoys**, in accordance with international law.*

The contours of the immunity granted to the Secretary General must therefore be understood in reference to the one granted to diplomats, provided for by the Vienna Convention on Diplomatic Relations (VCDR), that refers to immunity from criminal jurisdiction in Article 29, providing for a personal immunity, that differs from functional immunity in that it provides absolute immunity to the person it's granted during the time of their mandate:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 31 continues:

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.

As a result, the UNSG benefits from a broad immunity, that seems to hinder any attempts to hold them into account. Some options might nonetheless be available to claimants.

2. Overcoming immunity for the purpose of justice obstacle

Although the regime of the immunity granted to UNSG is extensive, it might present more opportunity than that of the UN as an institution. First, the UNSC has authority to waive the immunity when in the interest of the UN. Second, the Agreement between the International Criminal Court and the United Nations, providing for collaboration between the UN and the court, might also compel the institution to waive the Secretary General's immunity. Finally, the case law of domestic courts addressing immunities of former heads of state offers yet another option.

a. Waiver by the UNSC

The first option to overcome the UNSG's immunity lies in Section 20 of the CPIUN, that states:

*Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. **In the case of the Secretary-General, the Security Council shall have the right to waive immunity.***

The UNSC therefore has authority to waive the UNSG's immunity. It is nonetheless questionable whether having recourse to the UNSC, whose decisions are highly political, would be the most suitable option to provide victims with a meaningful access to justice.

b. Personal and functional immunities in the ICC

Diplomats whose States are a party to the Rome Statute cannot benefit from immunity against the ICC's prosecution. The Rome Statute provides in Article 27(2) that:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Applied to diplomats, the provision implies that when ratifying the Rome Statute, States agree that the immunity their officials are granted will not bar prosecutions by the ICC.

Attempting to apply this provision to the UNSG's immunity is however not necessary, as the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, provides, in its Article 19:

*If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if, in the circumstances, such person enjoys, according to the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the United Nations, **the United Nations undertakes to cooperate fully with the Court***

and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law.

The phrasing referring to the United Nations having the duty to waive immunities broadens Section 20, that only gave the UNSC this competence, and a case can be made that other organs of the UN, in particular the General Assembly, have the authority to waive the UNSG's immunity.

c. Personal and functional immunities in national courts

Personal immunity knows no exception when raised before national courts. On the other hand, a significant scholarship and abundant case law go in the direction of a functional immunity that does not impede prosecutions for international crimes before national courts, and although some of the International Court of Justice's judgments have cast doubt about this, it seems to be firmly entrenched among domestic jurisdictions. This is relevant when reflecting on possible avenues for prosecutions against a UNSG, as, when a diplomat's - and by extension the UNSG's - mandate comes to an end, their immunity persists but only to cover official acts, and thus becomes functional.

Article 39 (2) of the VCDR thus provides:

*When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, **with respect to acts performed by such a person in the exercise of his functions** as a member of the mission, immunity shall continue to subsist.*

The reasoning was best illustrated with the House of Lords' decision in the *Pinochet* case, confirming that the immunity of a former head of state did not bar his extradition.²³ If prosecutions were to be initiated against the UNSG *after their mandate ends*, they could therefore overcome their immunity.

²³ Regina v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3). [1999].

V. Conclusion

The founding objectives of the UN must be the compass of the officials acting on its behalf at all time. When they fail to honour them, it is imperative that victims of their negligence and mistakes have access to justice and remedies. The *raison d'être* of the UN does not call for an absolute immunity, but merely, and importantly, for an immunity that allows the UN to function. The risks that opening the way to justice can entail, for an institution whose financial stability and constant pursuit for legitimacy leave little room for challenges, cannot justify the reparations vacuum victims are left in. Widely criticised, the broad immunity granted to the UN is, additionally, no longer justified in light of the evolution of immunities.²⁴ It is essential, for the sake of the UN itself, to establish a functioning mechanism giving victims a voice and a path to reparations. In the current absence of such mechanism, it is critical to think of innovative ways to seek justice for victims of negligence, errors and omissions of the UN. Different avenues have been contemplated. This article reflects on individual accountability, while authors and practitioners have explored other paths, including the filling of cases before domestic jurisdictions to trigger the creation of a claims commission, the reasserting of the true meaning of the *lex specialis* principle, or approaching the argument from a human rights perspective with a focus on the right to access a court and a remedy.²⁵ These explorations are needed and must push the UN not only to review its positions towards immunities, but also to reflect on the duty of care attached to its *raison d'être*. Our statement in favour of a peacekeeping is proof to our trust in the UN, and we cannot conceive a world without them.²⁶ However, as beneficiaries of their programmes, and potential advert victims of their decisions, we hold the institution and its officials accountable for the collateral damages that might emerge of their collaboration with Turkey and urge them to carefully weigh the consequences of a potential assistance.

²⁴ Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*.

²⁵ Rosa Freedman and Nicolas Lemay-Hebert, "Towards an Alternative Interpretation of UN Immunity: A Human Rights-Based Approach to the Haiti Cholera Case," *Questions of International Law* 19 (2015): 5–18; Frédéric Mégret, "Remedying UN Abuses by Forcing the Host State's Hand : Current Case Calls for the Haitian Government to Trigger a Standing Claims Commission," *OpinioJuris*, 2018; Carla Ferstman, "Reparations for Mass Torts Involving the United Nations: Misguided Exceptionalism in Peacekeeping Operations," *International Organizations Law Review* 16, no. 1 (2019): 42–67, <https://doi.org/10.1163/15723747-01601003>.

²⁶ The prospect of a peacekeeping operation in Syria, *Syrians for Truth and Justice*, 20 November 2019, <https://stj-sy.org/en/the-prospect-of-a-peacekeeping-operation-in-syria/>.

VI. Recommendations

1. To the United Nations:

- Refrain from engaging in any plans and activities that will lead to the settling of Syrian refugees in areas they are not from;
- Investigate human rights violations that amounted to the crime of forced displacement that took place in Northeast Syria and in Afrin before that;

2. To stakeholders:

- Ensure that a political solution is found so that refugees can go back to their original home;
- Refrain from engaging in any efforts, such as investments in infrastructure and reconstruction, that will lead to forced displacement and demographic change
- Follow the European Union's position that recalled in October 2019 that it "will not provide stabilisation or development assistance in areas where the rights of local populations are ignored or violated".

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والعدالة

Syrians
For Truth
& Justice



History

Syrians for Truth and Justice was conceived during the participation of its co-founder in the Middle-East Partnership Initiative (MEPI) Leaders for Democracy Fellowship program, who was driven by a will to contribute to Syria's future. Starting as a humble project to tell the stories of Syrians experiencing enforced disappearances and torture, it grew into an established organisation committed to unveiling human rights violations of all sorts.

Convinced that the diversity that has historically defined Syria is a wealth, our team of researchers and volunteers works with dedication at uncovering human rights violations committed in Syria, in order to promote inclusiveness and ensure that all Syrians are represented, and their rights fulfilled.

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