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Promises and Pitfalls in UN Regulation of Judicial Independence

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PROMISES AND PITFALLS IN UN REGULATION OF JUDICIAL INDEPENDENCE

Martha Kiela

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INTRODUCTION

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”¹

An independent judiciary is a human right in and of itself because of its critical role in enforcing *every other* human right by guaranteeing due process of law to the victims of human rights violations.^{2,3} The United Nations (UN) announced in the Universal Declaration of Human Rights (UDHR)⁴ and emphasized in the Basic Principles on the Independence of the Judiciary⁵ that access to an independent and impartial tribunal is a human right.⁶ Article 10 of the UDHR is generally thought of as merely expressing a method of receiving a fair determination of other rights and obligations and not being a right itself; however, the human entitlement of rights extends to the necessary means of obtaining them. An independent judiciary is a fundamental guarantee of due process that is critical to ensuring access to justice.

This article investigates the current mechanisms and power of the UN to ensure judicial independence in the UN Member States. First, it surveys the UN bodies which play a role in creating international regulations for judicial independence and monitoring Member States’ compliance with them. Second, it analyzes the responses of these bodies to challenges to judicial independence by conducting case studies of Venezuela and Poland, and how these actions compare to those of other international organizations and tribunals. The central questions it seeks to answer are which mechanisms of review and enforcement have so far been the most effective in reaching

¹ Universal Declaration of Human Rights art. 10, Dec. 10, 1948, U.N.T.S..

² *Id.* at 40 (citing *Herrera Ulloa v. Costa Rica*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, 171 (July 2, 2004)).

³ More support for the importance of an independent judiciary comes from the American Convention on Human Rights, which allows a majority of the human rights enumerated within it to be suspended in times of war, public danger, or other emergencies – with the exception of “the judicial guarantees essential for the protection of such rights.” Organization of American States, American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S.

⁴ *Id.*

⁵ UN Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, G.A. Res. 40/32 (Nov. 29, 1985) and G.A. Res. 40/146 (Dec.13, 1985), U.N. 40th Sess., Supp. No. 53, U.N. Doc A/40/53 (1985) [hereinafter Basic Principles of the Independence of the Judiciary].

⁶ Omar Garcia-Bolivar, *Lack of Judicial Independence and Its Impact on Transnational and International Litigation*, 18 L. & BUS. REV. AM. 29, 40 (2012) (citing *Herrera Ulloa v. Costa Rica*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, 171 (July 2, 2004)).

the goal of judicial independence, where they fall short, and how they can improve.

The case studies show that the UN General Assembly (GA) and Human Rights Council (HRC) generally use the mechanisms available to them effectively and fully. UN action has been crucial to bringing continued attention to human rights violations occurring internationally—even if the UN’s enforcement mechanisms are weak because its resolutions generally lack legally binding authority. The greatest obstacle to achieving international goals of judicial independence, however, is not a lack of UN action, but rather a lack of Member State compliance and collaboration. Without the full cooperation of each of its Member States and engagement of individual citizens, the UN’s attempts to solve this issue will continue to fall short.

I. BACKGROUND

The judiciary is the backbone of law and order as “judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens.”⁷ In order for judges to effectively carry out their crucial decision-making role, they must be independent from other branches of government. This entails the ability to remain impartial and insulated from influences outside of the merits of the case.⁸ Ensuring such independence enforces the superiority and respect for the law and makes it binding to everyone without distinction; this is made even more important because of the general requirement for a victim to exhaust local judicial remedies before turning to international tribunals for adjudication of their rights.⁹

It is one matter for the UN to announce an independent judiciary as a human right. It is another matter entirely to enforce this right in each and every one of its Member States. Over the last five decades, the UN has enacted several instruments to emphasize the importance of judicial independence and attempt to ensure State adherence with their treaty obligations. The primary methods of monitoring and enforcement include

⁷ Basic Principles of the Independence of the Judiciary, *supra* note 5, at Preamble.

⁸ Garcia-Bolivar, *supra* note 6, at 30.

⁹ This is in the interests of judicial finality and respect for independent governments. However, there are exceptions to this requirement if it is not possible to exhaust local remedies or if there is a demonstrable lack of judicial independence in the courts of that State. Garcia-Bolivar, *supra* note 6, at 39–40.

Universal Periodic Review (UPR),¹⁰ similar programs of peer review,¹¹ special Human Rights Council (HRC) mandated investigations,¹² and the creation of new offices, such as the Special Rapporteur on the Independence of Lawyers and Judges.¹³ These programs are a step in the right direction; however, “in the past two decades, evidence of corruption in the administration of justice has steadily and increasingly surfaced in many parts of the world.”¹⁴ This reality highlights the need to review the effectiveness of the UN’s monitoring and enforcement methods with regard to the independence and integrity of the judiciary. This paper seeks to undertake such a review.

These monitoring and enforcement methods are the first line of defense against threats posed to the independence of judiciaries worldwide. However, they can sometimes lack teeth. The UN depends on Member States to listen to each other’s suggestions through peer review and respond by implementing independent changes. Unfortunately, there are few incentives for Member States to make these changes—the provisions designed to protect the independence of judiciaries create no monetary sanctions nor disincentives other than influencing the reputations of non-compliant countries.

The lack of incentives is exacerbated by the fact that issues with the independence of judiciaries are often more overlooked than other human rights violations as the structure and importance of the judiciary is not as well-understood by laymen and less publicized by news media. A 2018 research study showed that most laypeople are not concerned or even aware of attacks against the courts, but “when provided with examples of real assaults against State judicial independence, they became extremely concerned and somewhat embarrassed that they were unaware of the

¹⁰ International Bar Association’s Human Rights Institute (IBAHRI), *The role of the Universal Periodic Review in advancing human rights in the administration of justice*, UPR INFO (Mar. 2016), https://www.upr-info.org/sites/default/files/news/un_-_universal_periodic_review_-_march_2016_full.pdf.

¹¹ G.A. Res. 58/4, U.N. Doc. A/58/422, United Nations Convention against Corruption, Art. 63 (Oct. 31, 2003) [hereinafter “UNCAC”].

¹² *International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and other Investigations*, UNITED NATIONS HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx> (last visited Mar. 10, 2022).

¹³ Comm’n on Human Rights, Rep. on the Fiftieth Session, Economic and Social Council, Res. 1994/41, U.N. Doc. E/CN.4/1994/132, (Mar. 4, 1994).

¹⁴ United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11, United Nations Office on Drugs and Crime, ¶ 47, (Mar. 2015), https://www.unodc.org/documents/corruption/Publications/2014/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf.

attacks.”¹⁵ This study further found that “some of the greatest barriers to community engagement and action to protect judicial independence are a lack of understanding about the judiciary’s role and the impact of the attacks on the average person.”¹⁶ The ramifications are that countries who fail to meet international standards for independent judiciaries will merely receive comments in the peer review and UPR processes, which result neither in international legal consequences nor in pressure from public opinion. The first step in determining the UN’s actions in response to noncompliant countries is determining what these international standards are.

II. KEY METRICS FOR DETERMINING DEGREE OF JUDICIAL INDEPENDENCE

There are five key aspects to look at when monitoring the status of the independence of the judiciary: appointment, conditions of service, decision-making, discipline, and removal. A series of UN resolutions from 1985, named the Basic Principles on the Independence of the Judiciary, lay out the ideals for these aspects of an independent judiciary.¹⁷ These principles remain broad but can serve as guideposts for measuring a country’s judicial independence. This article will later use these guideposts to analyze the independence of the judiciaries in Venezuela and Poland.

A. Appointment

Where a judiciary is sufficiently independent, the only factors taken into consideration in judicial appointments are the judge’s merits, academic credentials, seniority, and other conditions established by the laws of the State.¹⁸ The United Nations has established that:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.¹⁹

¹⁵ Kathy Bonnifield, *Educating the community about judicial independence can help preserve it*, ABA JOURNAL (June 21, 2018), https://www.abajournal.com/news/article/educating_the_community_about_judicial_independence_can_help_preserve_it.

¹⁶ *Id.*

¹⁷ Basic Principles on the Independence of the Judiciary, *supra* note 5.

¹⁸ Garcia-Bolivar, *supra* note 6, at 42.

¹⁹ Basic Principles on the Independence of the Judiciary, *supra* note 5, ¶ 10.

Selecting judges for reasons other than objective merit or qualification requirements, such as political affiliation, economic interests, or other personal interests, could allow politicians to appoint judges not for their qualifications, but to promote a certain political agenda without regard to the law, or to act as a puppet for the political party who appointed the judge. Such an abuse of appointment power is a classic example of corruption.

B. Conditions of Service

There should be clear conditions and assurances for judges during their tenure on the bench to prevent them from being subject to improper and undue influences. The Basic Principles on the Independence of the Judiciary specify that “the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law,”²⁰ and that “judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”²¹ These conditions prevent abuse of the judicial system through inappropriate and unjustified early removal of judges for political reasons.

C. Decision-Making

The next step in the judicial process is the decision-making process itself. The Basic Principles establish that “the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”²² The impartiality of a decision is subject to more varied interpretations than the other measures of independence, as whether decisions are issued “on the basis of facts and in accordance with the law” can be interpreted differently by different people.²³

An additional concern is that if undue or improper influences or threats do exist, they most likely occur behind the scenes, invisible to people outside the judicial process. However, it remains important to analyze the decision-making process of certain countries’ judiciaries when other indications suggest that their independence might be threatened. This continuing analysis is critical to ensuring that “judicial proceedings are conducted fairly and that the rights of the parties are respected.”²⁴ When a judge is unable to

²⁰ *Id.* ¶ 11.

²¹ *Id.* ¶ 12.

²² *Id.* ¶ 2.

²³ *Id.*

²⁴ *Id.* ¶ 6.

make an impartial decision in accordance with the law, independence of the judicial office is lost, and the judiciary becomes “an outlet of merchandise to be sold.”²⁵ The Basic Principles recognize this as they impose a duty for each Member State “to provide adequate resources to enable the judiciary to properly perform its functions.”²⁶

It is also critical for other branches of government to give the judiciary its due respect. In a judicial system retaining its independence, judicial decisions should only be reversed through the appellate process.²⁷ The Basic Principles dictate that:

[T]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.²⁸

The executive and legislative branches should not unduly interfere with the integrity of the decision-making process and the resulting decisions.

Due respect for the judiciary also includes immunity for judges for actions taken in their official legal capacity.²⁹ Likewise, courts should be assigned cases by objective criteria rather than at the discretion of a group or an individual or at the request of judges for impermissible reasons, such as personal, financial, or political motivations.³⁰⁻³¹

All of these principles are crucial to maintaining respect for the rule of law by both governmental entities and the people of that country. If any of these are violated, judicial decisions may be overturned based on political motivations or individuals may use personal liability to threaten judges into deciding a case in a certain direction.

²⁵ Garcia-Bolivar, *supra* note 6, at 43.

²⁶ Basic Principles on the Independence of the Judiciary, *supra* note 5, at ¶ 7.

²⁷ Garcia-Bolivar, *supra* note 6, at 43.

²⁸ Basic Principles on the Independence of the Judiciary, *supra* note 5, ¶ 4. This section exempts executive actions such as Presidential Pardons, as that would fall under the category of “mitigation or commutation by competent authorities of sentences imposed by the judiciary.” Of course, the use of any such executive pardon powers must still remain “in accordance with the law.”

²⁹ *Id.* ¶ 16 (“Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.”).

³⁰ Garcia-Bolivar, *supra* note 6, at 44.

³¹ Basic Principles on the Independence of the Judiciary, *supra* note 5, ¶ 14 (“The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration”).

D. Discipline

The procedures for discipline and removal of judges can also reveal the degree of the independence of the judiciary. There should be a process for submitting complaints about a judge, and the public should be aware of both this process and which body oversees the resulting discipline.³² This body should be independent from the judicial system and establish clear rules defining both ethical issues and conflicts of interest. The Basic Principles establish that “[a]ll disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct”³³ and that “[d]ecisions in disciplinary, suspension or removal proceedings should be subject to an independent review.”³⁴ This ensures the independence of the judiciary from political machinations that could lead to ignoring complaints against judges favorable to the political party in power, or alternatively, creating complaints against judges unfavorable to the political party in power.

E. Removal

Having established and detailed procedures and criteria for removal ensures that political parties cannot take advantage of the system which would result in the concerns discussed above. The Basic Principles state that “[j]udges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.”³⁵ While vague, this provision underlines the high bar that judiciaries must meet for the types of misconduct that should lead to removal. Without this high bar, judges could be removed for inane reasons.

Each of the five key aspects discussed above, working in tandem, are necessary to ensure an independent judiciary. The UN ambitiously set these out as its guidelines for every Member States’ judicial system to retain independence, but these guidelines are not self-executing—the UN must monitor and enforce these guidelines using separate bodies and mechanisms.

III. UNITED NATIONS ENFORCEMENT OF JUDICIAL INDEPENDENCE THROUGH ITS BODIES AND RELEVANT TREATIES

Two bodies are central to ensuring judicial independence in the UN: the General Assembly (GA) and the Human Rights Council (HRC). The GA is the UN’s main body, consisting of representatives from every Member State,

³² Garcia-Bolivar, *supra* note 6, at 44.

³³ Basic Principles on the Independence of the Judiciary, *supra* note 5, ¶ 19.

³⁴ Basic Principles on the Independence of the Judiciary, *supra* note 5, ¶ 20.

³⁵ Basic Principles on the Independence of the Judiciary, *supra* note 5, ¶ 18.

while the HRC is a committee created by the General Assembly in 2006.³⁶ Both of these bodies' main mechanism for action is passing resolutions upon which the entire body votes. However, the HRC has some additional specialized mechanisms and power for monitoring violations of human rights.

A. General Assembly

The General Assembly of the United Nations is the “chief deliberative, policymaking, and representative organ of the United Nations.”³⁷ It consists of all 193 members of the UN, and meets in two sessions throughout the year.³⁸ The Assembly has the power to make recommendations to States on international issues within its competence, consider and approve the budget, and elect non-permanent members of the Security Council.³⁹ The Basic Principles on the Independence of the Judiciary, adopted in 1985 and discussed above, are some of the most important UN resolutions on the topic of judicial independence. A second key resolution on this issue is the United Nations Convention against Corruption (“the Convention”), which was adopted in 2003.⁴⁰

1. The Convention's Structure

The Convention prides itself as “the only legally binding universal anti-corruption instrument” and a “unique tool for developing a comprehensive response to a global problem.”⁴¹ But the reality of the Convention's effectiveness is quite a different story.

As of November 2021, 189 countries are party to the Convention, whose goals are to “promote and strengthen measures to prevent and combat corruption more efficiently and effectively.”⁴² The Convention's primary mechanism of enforcement is a peer review system which functions by “review[ing] periodically the implementation of this Convention by its State Parties; [and] [m]aking recommendations to improve.”⁴³ It relies on voluntary participation and contains no sanctions or penalties for non-

³⁶ G.A. Res. 60/251 (Mar. 15, 2006).

³⁷ *Functions and Powers of the General Assembly*, UNITED NATIONS, <https://www.un.org/en/ga/about/background.shtml> (last visited May 26, 2023).

³⁸ *Id.*

³⁹ U.N. Charter art. 11, ¶ 1, 17, ¶ 1, 18, ¶ 2.

⁴⁰ UNCAC, *supra* note 11.

⁴¹ *United Nations Convention against Corruption*, UNITED NATIONS (last visited Mar. 14, 2022), <https://www.unodc.org/unodc/en/corruption/uncac.html>.

⁴² UNCAC, *supra* note 11, at art. 1.

⁴³ UNCAC, *supra* note 11, at art. 63.

compliance.⁴⁴ This review mechanism is similar to the idea of Universal Periodic Review (UPR), established in 2007, which also relies on Member States to review peer States' implementation of human rights law and make recommendations for improvement.⁴⁵ However, even in this endeavor, the Convention falls short—the country reports created in this peer review process “are never published and remain confidential,” subverting one of the Convention's primary goals of transparency.⁴⁶

At least facially, the articles of the Convention seem to put forth mandates: “each State Party *shall*.”⁴⁷ Upon closer examination, these provisions are not as mandatory as they seem. First, many of these “mandatory” formulations are followed by caveats, such as “shall *consider* adopting legislation” or “shall . . . in accordance with the fundamental principles of its legal system.”^{48,49} Second, most of the Convention's provisions are not self-executing, so the UN depends on each Member State to implement the ideas expressed within the Convention.⁵⁰ Consequently, the Convention begins to resemble “*lex simulata*, which refers to a ‘vehicle for sustaining or reinforcing basic civic tenets, but not for influencing pertinent behavior.’”⁵¹ The Convention has been successful in recruiting almost every State to affirm the theoretical importance of anti-corruption measures but less successful in incentivizing substantive changes to the systems of these States. The lack of incentives naturally and inherently gives rise to enforcement issues.⁵²

⁴⁴ Edmund Bao and Kath Hall, *Peer Review and the Global Anti-Corruption Conventions: Context, Theory, and Practice*, SSRN 1, 10 (Aug. 1, 2017), <https://deliverypdf.ssm.com/delivery.php?ID=313027093103007071097095093105071095029078064077029082029098017075115110102018001103006022018042109022044118085024092110027107006076043087080127000115023113095007099010045062064025091086123024121069116013126067113120010110099091100126100067015124003031&EXT=pdf&INDEX=TRUE>.

⁴⁵ International Bar Association's Human Rights Institute, *supra* note 10, at 12.

⁴⁶ Ophelie Brunelle-Quraishi, *Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis*, 2 NOTRE DAME J. INT. & COMP. L. 101, 138 (2011). Brunelle-Quraishi mentions in this article that “it could . . . be argued that confidentiality is necessary in order to achieve the active participation of Member States.” *Id.* at 139. The Convention “encourage[s]” every State party under review “to exercise its sovereign right to publish its country review report or part thereof.” REP. OF THE CONFERENCE OF THE STATES PARTIES TO THE U.N. CONVENTION AGAINST CORRUPTION, 3d Sess., CAC/COSP/2009/15 (Dec. 1, 2009) [hereinafter UNCAC CONFERENCE REPORT, 3d Sess.], at ¶ 38. But there are so many other references to maintaining confidentiality that any encouragement to publish their reports is almost meaningless. *Id.* at ¶ 3(g), ¶ 31, ¶ 37, ¶ 39.

⁴⁷ UNCAC, *supra* note 12.

⁴⁸ UNCAC, *supra* note 12.

⁴⁹ Ophelie Brunelle-Quraishi, *supra* note 46, at 108.

⁵⁰ Ophelie Brunelle-Quraishi, *supra* note 46, at 134.

⁵¹ Ophelie Brunelle-Quraishi, *supra* note 46, at 135.

⁵² Ophelie Brunelle-Quraishi, *supra* note 46, at 126.

This theme is seen in the provision of the Convention which specifically addresses the independence of the judiciary, Article 11:

(1) Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

(2) Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.⁵³

Article 11, paragraph one establishes a mandatory obligation, while compliance with paragraph two is optional.⁵⁴ The United Nations Office on Drugs and Crime recognizes that “a code of judicial conduct will do little to improve judicial performance and enhance public confidence if it is not enforceable.”⁵⁵ However, its suggestion for overcoming this barrier is no more concrete: “Therefore, the State party should consider encouraging the judiciary to establish a mechanism to receive, inquire into, resolve and determine complaints of unethical conduct of members of the judiciary, where no provision exists for the reference of such complaints to a court.”⁵⁶ While this offers solutions where a country is eager and willing to improve, it provides no more enforcement power to the Convention than Article 11 itself.

Weak though enforcement capabilities may be, there is a method of monitoring inherent to the Convention which took six years to negotiate: a peer review system overseen by the Conference of the States Parties to the Convention (COSP) and its subsidiary body, the Implementation Review Group (IRG). The first cycle of this review process started in 2010.⁵⁷

2. *The Convention’s Weak Overview and Enforcement*

Scholars differ in their evaluations of the peer review system, with some concluding that “the review process lacks effectiveness.”⁵⁸ Nevertheless,

⁵³ UNCAC, *supra* note 11, Art. 11.

⁵⁴ Office on Drugs and Crime, *supra* note 14, ¶ 7.

⁵⁵ Office on Drugs and Crime, *supra* note 14., ¶ 29.

⁵⁶ Office on Drugs and Crime, *supra* note 14., ¶ 29.

⁵⁷ Conference of the States Parties to the United Nations Convention against Corruption, *Implementation Review Group First Meeting: Provisional agenda and annotations*, U.N. Doc. CAC/COSP/IRG/2010/1 (May 14, 2010).

⁵⁸ *UNCAC Review Mechanism: Up and Running but Urgently Needing Improvement*, TRANSPARENCY INTERNATIONAL (Nov. 25, 2013), <https://www.transparency.org/en/news/uncac-review->

others note that “[c]ompliance does appear to be increasing through a range of indirect means such as persuasion, incentives and disincentives.”^{59,60} The former argue that COSP review cannot maintain momentum and effectiveness because there is no formal follow-up process;⁶¹ the latter believe that “publicly available reviews carry reputational sanctions” and Member States therefore are motivated towards compliance by the fear of compromising their reputation as reliable partners.^{62,63} Each argument is half-right; while there are ramifications for non-compliance, those ramifications are intangible. Non-compliant countries merely suffer blows to their reputations rather than experience direct, tangible, and immediate consequences. Additionally, it has been proven that “a state’s sensitivity to normative pressure depends on its relationship to the source of that pressure.”⁶⁴ Therefore, a peer review system is only worth as much as a country values its reputation on the world stage and how much it respects the country giving them feedback. If every country valued its reputation so highly as to comply with every human rights treaty, enforcement of international treaties and regulations would not pose an issue. Unfortunately, this is not the case in today’s world.

The issues inherent to peer review are especially consequential to the Convention, as “the concept of ‘natural resisters’ is quite pertinent in the case of legal anti-corruption measures in that many individuals already profit from the way things currently stand.”⁶⁵ Corrupt individuals, parties, and governments are less likely to see the worth in changing the status quo when they benefit from and abuse the status quo. In this equation, the incentive to avoid reputational consequences holds little to no water. This inherently poses a threat to the effective implementation of any anti-corruption measures and “will probably prove to be a significant problem in many countries.”⁶⁶ Some scholars conclude that reputational consequences are more effective when a single country is an outlier among its peers. But that efficacy is still undermined or tempered by the fact that “the presence of one

mechanism-up-and-running-but-urgently-needing-improvement [hereinafter “UNCAC Review Mechanism”].

⁵⁹ Edmund Bao & Kath Hall, *supra* note 44, at 20.

⁶⁰ See Deirk Hanschel, *The Enforcement Authority of International Institutions*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS* 843, 844 (Springer, 2010).

⁶¹ UNCAC, *supra* note 11.

⁶² Edmund Bao & Kath Hall, *supra* note 44, at 21.

⁶³ See Ophelie Brunelle-Quraishi, *supra* note 46, at 143.

⁶⁴ Rochelle Terman & Erik Voeten, *The relational politics of shame: Evidence from the universal periodic review*, 13 *REV. INT. ORGAN.* 1, 19 (2018).

⁶⁵ Ophelie Brunelle-Quraishi, *supra* note 46, at 134.

⁶⁶ Ophelie Brunelle-Quraishi, *supra* note 46, at 134.

disobedient State is enough to create an incentive for other members to disobey the rules.”⁶⁷

All these efforts are further undermined by the lack of transparency or publicity of the Convention review process. A country review report is created by the reporting states at the conclusion of the review process. The report identifies the country’s challenges, successes, and good practices, and contains observations for future implementation. However, crucially, “these reports are never published and remain confidential.”⁶⁸ Only the reviewed State, its two reviewing States, and the secretariat of the COSP view the complete country reports.⁶⁹ The secretariat then compiles “the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the country review reports” and includes them in a thematic implementation report that is then submitted to the IRG.⁷⁰ “Executive summaries” of all finalized country review reports are made available to the public “for information purposes only.”⁷¹ States parties can request to review other country reports, but if the reviewed country does not make their finalized report accessible, “the requesting State party shall fully respect the confidentiality of such reports.”⁷²

This lack of publicity and confidentiality waters down the goals of the Convention and is a consequence of the struggle to negotiate the monitoring system “in order to please the largest number of Member States.”⁷³ In a system which already has difficulties with enforcement, it is possible that foregoing a promise of confidentiality of these reports would have prevented any engagement from some State parties to the Convention, especially “many developing countries [which] are worried that close monitoring will expose deficiencies that their governments will be inadequate to remedy.”⁷⁴ This type of compromise is endemic to international law. As a result, the Convention is both more hypocritical internally and less effective externally—the confidentiality of the reports prevents the reputational consequences of non-compliance from reaching their full potential for incentivizing States to implement anti-corruption measures.

⁶⁷ Ophelie Brunelle-Quraishi, *supra* note 46, at 134.

⁶⁸ Ophelie Brunelle-Quraishi, *supra* note 46, at 138.

⁶⁹ UNCAC CONFERENCE REPORT, 3d Sess., *supra* note 46, ¶ 18, 19, 26.

⁷⁰ UNCAC CONFERENCE REPORT, 3d Sess., *supra* note 46, ¶ 35.

⁷¹ UNCAC CONFERENCE REPORT, 3d Sess., *supra* note 46, ¶ 36.

⁷² UNCAC CONFERENCE REPORT, 3d Sess., *supra* note 46, ¶ 39.

⁷³ Ophelie Brunelle-Quraishi, *supra* note 46, at 140.

⁷⁴ Ophelie Brunelle-Quraishi, *supra* note 46, at 140.

The consequences of these shortcomings appear in the 2021 report from COSP which addressed Article 11 and judicial independence. It found that the most prevalent challenge to implementation of this Article of the Convention was the “lack of measures or insufficient measures to strengthen judicial integrity and integrity in the prosecution service, and lack of mechanisms to ensure compliance with relevant measures.”⁷⁵ This “most prevalent” challenge simply restates the general challenge to ensuring judicial independence rather than identifies a more specific issue. This lack of specificity shows just how far Article 11 of the Convention has fallen short in achieving its goal and the lack of a way forward to achieve implementation through this mechanism.

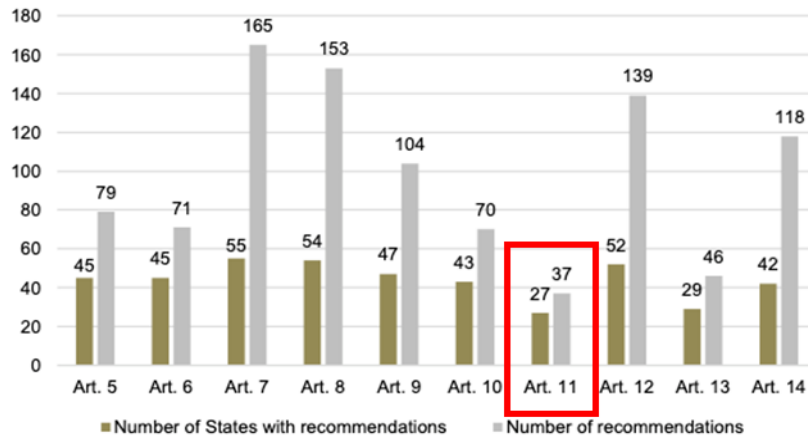


FIGURE 1. CHALLENGES IDENTIFIED IN THE IMPLEMENTATION OF CHAPTER II OF THE CONVENTION

Another concern with Article 11 is the number of recommendations received from the review process. The eleven Articles in Chapter II of the Convention cover a plethora of different issues: preventative anti-corruption policies, practices, and bodies (art. 5, 6), recruitment and retention of public sector employees (art. 7), codes of conduct for public officials (art. 8), public procurement and management of public finances (art. 9), encouraging public reporting to increase access to information about public administration (art.

⁷⁵ Conference of the States Parties to the United Nations Convention against Corruption, Implementation of chapter II (Preventative measures) of the United Nations Convention against Corruption: Thematic report prepared by the Secretariat, U.N. Doc CAC/COSP/2021/5, at 4 (Oct 8, 2021).

10), preventing corruption in the private sector (art. 12), promoting citizen participation (art. 13), and preventing money laundering (art. 14). Out of all of these, Article 11 received the fewest number of recommendations and had the lowest number of States with recommendations.⁷⁶

As shown, Article 11 received only 37 recommendations total across 27 countries, compared to the 165 recommendations across 55 countries received in regard to Article 7, which relates to public officials.⁷⁷ The reason for this disparity is unclear, and there is no lack of possibilities. One potential reason is that judicial independence is more complicated of an inquiry and so it is overlooked in favor of other, less complicated issues. Perhaps it is because “states are more lenient towards their strategic partners in the peer-review process.”⁷⁸ Alternatively, perhaps States understand that they could not offer concrete ways to improve other States’ judicial independence or that even if they did offer recommendations, they would be nonetheless ignored by the receiving State. Whatever the reason, this disparity demonstrates that even among the methods geared toward reviewing these aspects of Member States’ governmental and political systems, judicial independence does not receive the attention it deserves.

B. Human Rights Council

The HRC is “responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all.”⁷⁹ It comprises forty-seven UN Member States elected by the GA, who hold staggered three-year terms on a regional group basis. The HRC’s actions are reviewed by the GA every five years.⁸⁰ The HRC only has the power to “make recommendations to the General Assembly,” and therefore does not have a significant amount of leeway in being decisive on a topic. For example, it cannot take actions such as imposing sanctions or otherwise disincentivizing or punishing non-compliance with international human rights law. However, it does have three specialized powers that are key to its involvement in monitoring global human rights violations.

The first specialized power is oversight of Universal Periodic Review (UPR).⁸¹ This is similar to the Convention’s method of peer review as a

⁷⁶ *Id.* at 3.

⁷⁷ *Id.*

⁷⁸ Terman and Voeten, *supra* note 64, at 1.

⁷⁹ G.A. Res. 60/251, *supra* note 36, ¶ 2; *Welcome to the Human Rights Council*, UNITED NATIONS HUMAN RIGHTS COUNCIL (last visited Mar. 15, 2022), <https://www.ohchr.org/en/hr-bodies/hrc/about-council>.

⁸⁰ G.A. Res. 60/251, *supra* note 36, ¶¶ 7, 16.

⁸¹ G.A. Res. 60/251, *supra* note 36, ¶¶ 7, 16.

mechanism to monitor and police Member State compliance with international agreements—a mechanism whose effectiveness is hotly debated in the international.⁸²

The HRC’s second specialized power is the ability to establish independent international fact-finding missions to investigate human rights violations in UN Member States. These missions collect detailed information from inside specific Member States to better inform future UN action. One of these missions was sent to investigate human rights violations in Venezuela and is discussed in greater detail in Section V.

The third power comes from UN Special Procedures. This arm of the UN is made up of special rapporteurs, special representatives, independent experts, and working groups that monitor, examine, advise, and publicly report on thematic issues or human rights situations in specific countries.⁸³ These groups are tasked with “analyzing human rights situations, making relevant recommendations, and striving for justice for the victims.”⁸⁴ The HRC first appointed a Special Rapporteur on the Independence of Lawyers and Judges in 1994⁸⁵ and has extended the mandate regularly since that time.⁸⁶ This Special Rapporteur conducts research, investigations, and country visits in order to monitor the judicial independence of Member States and make concrete recommendations to States and other actors.⁸⁷ The current mandate holder at the time of publication is Margaret Satterthwaite, who was appointed in October 2022 and succeeded Diego Garcia-Sayan.⁸⁸ The Special Rapporteur has had a significant role in Poland in recent years, as discussed more in Section V.

Through these mechanisms, the HRC has more discretion, power, and leeway than the GA, whose effectiveness can be dampened due to its more general functions and wider array of responsibilities. The case studies in the

⁸² See e.g., Terman and Voeten, *supra* note 64; Edward McMahon and Marta Acherio, *A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council*, 18 GLOBAL GOVERNANCE 231 (2012); *The Universal Periodic Review: A Skewed Agenda?*, CENTER FOR ECONOMIC AND SOCIAL RIGHTS (June 2016), http://www.cesr.org/sites/default/files/downloads/CESR_ScPo_UPR_FINAL.pdf; Brett Schaefer, *Universal Periodic Review Reflects ‘Deficiencies’ of Human Rights Council*, THE HERITAGE FOUNDATION (Mar 17, 2021), <https://www.heritage.org/global-politics/commentary/universal-periodic-review-reflects-deficiencies-human-rights-council>.

⁸³ HRC Res. 16/21, ¶ 22 (April 12, 2011).

⁸⁴ *Id.* ¶ 17.

⁸⁵ Commission on Human Rights Res. 1994/41 (Mar. 4, 1994).

⁸⁶ See Human Rights Council Res. 8/6, U.N. Doc A/HRC/8/6, (June 18, 2008); Res. 17/2, U.N. Doc. A/HRC/17/2 (July 6, 2011); Res. 26/7, U.N. Doc. A/HRC/26/7, (July 10, 2014); Res. 35/11, U.N. Doc. A/HRC/35/11, (July 10, 2017); Res. 44/8, U.N. Doc. A/HRC/44/8, (July 23, 2020).

⁸⁷ *Special Rapporteur on the Independence of Judges and Lawyers*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (last visited Feb. 20, 2023), <https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers>

⁸⁸ *Id.*

next section highlight how the HRC is critical to international fact-finding on human rights violations.

IV. PRACTICAL APPLICATION: JUDICIAL INDEPENDENCE IN VENEZUELA AND POLAND

To give further consideration to the goals and mechanisms of the relevant UN bodies, this article undertakes case studies of UN action in two countries that have struggled to maintain the independence of their judiciaries: Venezuela and Poland.

In case studies of judicial independence, as with other matters of corruption, a common issue is that the text of the law accommodates for the proper procedures, but the implementation does not mirror the law. When analyzing the independence of a judicial system, therefore, the focus should be “more on the practice and less on the theory as expressed in the laws,” as the practical application of the law can have a very different impact than what the text suggests.⁸⁹ The less faithful the law’s application is to its text, the more corrupt the system is likely to be. For each of the case studies, this article will address (1) the Constitution and laws as they are written, (2) implementation and its consequences, and (3) actions by the UN in response to issues with implementation.

A. South American Case Study: Venezuela’s Judiciary

Venezuela’s government is one of the most corrupt in the world.⁹⁰ According to the Corruption Perception Index (CPI) calculated by Transparency International, Venezuela is ranked 177th out of 180 countries, with a score of fourteen out of 100 (with a score of zero being highly corrupt).⁹¹ It retained this rank and score in 2022.⁹² The Venezuelan government thus had and continues to have significant issues with

⁸⁹ Garcia-Bolivar, *supra* note 6, at 42.

⁹⁰ *Venezuela, Corruptions Perceptions Index 2021*, TRANSPARENCY INTERNATIONAL (last visited Mar. 15, 2022), <https://www.transparency.org/en/cpi/2021/index/ven>.

⁹¹ *Id.* The Corruption Perception Index is based on experts’ and business peoples’ perceptions of corruption in the public sector, which considers many different manifestations of public sector corruption, such as bribery, diversion of public funds, officials using public office for private gain without facing consequences, nepotistic appointments in the civil service, laws ensuring that public officials must disclose finances and potential conflicts of interest, legal protection for people who report cases of bribery and corruption, and access to information on public affairs and government activities, among others. *The ABCs of the CPI: How the Corruption Perception Index is Calculated*, TRANSPARENCY INT’L (Dec. 20, 2021), <https://www.transparency.org/en/news/how-cpi-scores-are-calculated>.

⁹² *Corruptions Perception Index 2022*, TRANSPARENCY INT’L, <https://www.transparency.org/en/cpi/2022> (last visited Apr. 13, 2023).

corruption, which impacts both the political system as a whole and the daily lives of individual citizens, as will be discussed in greater detail next.⁹³

1. *Venezuelan Constitution*

In 1999, Venezuela established a National Constituent Assembly (the Assembly). The Assembly was tasked with drafting a new Constitution, thereby developing a new legal order, to guide the country through novel systems of social, economic, and political welfare.⁹⁴ The Assembly immediately passed a decree declaring the judiciary to be “in a state of emergency and reorganization.”⁹⁵ It subsequently created an Emergency Judicial Commission to evaluate the performance of judges and dismiss those who “had unjustified judicial delays in the processing of the cases assigned to them, those who had seriously breached their duties, or those showing signs of wealth whose provenance could not be ascertained, and to replace them with alternates or provisional judges.”⁹⁶ These preliminary steps allowed the Assembly to take discretionary actions against judges without justification. The Assembly’s disregard for judicial independence, therefore, was evident from the very beginning and foreshadowed the plethora of challenges that the Venezuelan judiciary has had to face over the last two decades.

The Assembly ultimately drafted and adopted a new Constitution in 1999.⁹⁷ Article 254 of this Constitution states that “[t]he Judicial Power is autonomous, and the operating, financial and administrative autonomy of the Supreme Tribunal of Justice is hereby established.”⁹⁸ Article 255 additionally provides that:

Appointment to a judicial position and the promotion of judges shall be carried out by means of public competitions to ensure the capability and excellence of the participants, with selection by the juries of the judicial circuits, in such manner and on such terms as may be established by law . . . Citizen participation in the process of selecting and designating judges shall be guaranteed by law. Judges shall be removed or suspended from office only through the procedures expressly provided for by law. Measures shall be taken

⁹³ *Venezuelan Justice System Plays a Significant Role in the State’s Repression of Government Opponents*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R (Sept. 16, 2021), <https://www.ohchr.org/en/press-releases/2021/09/venezuelan-justice-system-plays-significant-role-states-repression?LangID=E&NewsID=27479>.

⁹⁴ Human Rights Council, *Detailed Findings on the Independent International Factfinding Mission on the Bolivarian Republic of Venezuela*, U.N. Doc A/HRC/48/CRP.5, at 8–9 (Sept. 16, 2021) [hereinafter 2021 Findings on Venezuela].

⁹⁵ *Id.* ¶ 22.

⁹⁶ *Id.* ¶ 23.

⁹⁷ Constitución de la República Bolivariana de Venezuela [Venezuelan Constitution of 1999].

⁹⁸ *Id.* at art. 254.

by law to promote the professionalism of judges, and the universities shall cooperate to this end, organizing their corresponding law schools curricula to specialized studies in judicial practice.⁹⁹

These provisions—at least facially—provide for the autonomy of the judiciary and the appointment and removal processes. In theory, they meet the requirements of an independent judiciary as measured by the Basic Principles including the necessary protocols. But the implementation of these protocols shows a different story.

2. *Implementation of Constitutional Provisions*

Even after the new Constitution was adopted in December 1999, the Assembly continued to circumvent or altogether ignore the new constitutional framework by continuing to discipline and remove judges until the adoption of the Judicial Code of Ethics in 2009.¹⁰⁰ Specifically, the Assembly enacted a Special Law in 2000 which established a commission to pre-select judicial candidates without conforming to the provisions of the recently adopted 1999 Constitution.¹⁰¹

The attempted *coup d'état* against then-President Hugo Chavez starkly revealed the consequences of the increased political control over the Supreme Tribunal of Justice. This Supreme Tribunal initially ruled that “it did not have jurisdiction to initiate an investigation against those allegedly responsible, referring to the event as a ‘power vacuum’ and not as a *coup d'état*.”¹⁰² In response to the Tribunal’s inaction, Hugo Chavez convinced the Assembly to increase the number of justices on the Tribunal from twenty to thirty-two in May 2004 which, in effect, increased his power over the Tribunal by appointing justices of his choosing.¹⁰³ In December 2004, the Assembly appointed the new justices.¹⁰⁴

Five years later, the expanded Superior Tribunal itself created an auxiliary body called the Judicial Commission, which was responsible for the suspension and appointment of judges to fill vacant posts. The creation of this commission clearly presented the absence of separation between the judiciary and its disciplinary committee, as the Tribunal now controlled who was appointed and removed from itself which violates the requirements of the Basic Principles.¹⁰⁵

⁹⁹ *Id.* at art. 255.

¹⁰⁰ 2021 Findings on Venezuela, *supra* note 94, ¶ 23, 24.

¹⁰¹ *Id.* ¶ 29.

¹⁰² *Id.* ¶ 30.

¹⁰³ *Id.* ¶ 31.

¹⁰⁴ *Id.* ¶ 31.

¹⁰⁵ *Id.* ¶ 32.

Out of the many instances of corruption this series of interferences caused,¹⁰⁶ one key moment stands out as an example of Venezuela's complete lack of judicial independence: the criminal prosecution of Judge Maria Lourdes Afiuni. Afiuni ordered that an individual who had been arrested without an arrest warrant receive pre-trial release under bail.¹⁰⁷ Subsequently, President Chavez called on the Chief Prosecutor to give Afiuni the "maximum penalty."¹⁰⁸ The Justices of the Tribunal complied and convicted Afiuni in 2019 of "spiritual corruption"—a conviction that was apparently "a first in Venezuelan history" because the offense "has not been recognised in the country's criminal legislation"—and sentenced her to five years in prison.¹⁰⁹ Her prosecution created "an atmosphere of fear amongst judges, marking a shift in their independence, commonly referred to as the 'Afiuni effect.'"¹¹⁰ In 2017, Judge Tovar of the Tribunal was "threatened with becoming 'the next Judge Afiuni'" when signing an arrest warrant in the presence of several officials of the state intelligence services and the Bolivarian National Guard, who were present to ensure her compliance with their demands for the arrest warrant.¹¹¹

This is in marked contrast with the Venezuelan Constitutional provisions. Judge Afiuni's prosecution serves as a prime example of how different the legal system can be on paper and in practice, and why, in analyzing judicial independence, it is important to look beyond a state's constitution. Venezuela's Constitution, in Articles 254 and 255, clearly provides safeguards against judicial abuse. One way it does this is in providing for specific circumstances that allow a judge's removal and allow citizen participation in the selection of judges.¹¹² However, all of these Constitutional tenets have been violated in practice.

When comparing the metrics of judicial independence discussed in Section III to the realities of judicial independence in Venezuela, there is

¹⁰⁶ See 2021 Findings on Venezuela, *supra* note 84, Table 1 at pp. 13, for a list of laws and resolutions in Venezuela regarding the justice system.

¹⁰⁷ 2021 Findings on Venezuela, *supra* note 94, ¶ 33.

¹⁰⁸ See RNV Web Press, (AUDIO) Presidente Chávez: "Pido 30 años de prisión para la jueza Afiuni", APORREA (Dec. 11, 2009), <https://www.aporrea.org/actualidad/n146924.html>.

¹⁰⁹ Venezuela: Human rights organisations appeal to the UN on case emblematic of Maduro's assault on the Rule of Law, INTERNATIONAL BAR ASSOCIATION (Nov. 12, 2020), <https://www.ibanet.org/article/EC49B347-C770-44F9-8735-D0215422028B>; UN expert condemns new sentence for jailed Venezuelan judge as "another instance of reprisal," UN NEWS (Mar. 26, 2019), <https://news.un.org/en/story/2019/03/1035451>.

¹¹⁰ 2021 Findings on Venezuela, *supra* note 94, ¶ 33.

¹¹¹ Human Rights Council, *Detailed Findings on the Independent International Factfinding Mission on the Bolivarian Republic of Venezuela*, U.N. Doc A/HRC/45/CRP.11, ¶ 382, FN 859 (September 15, 2020).

¹¹² Constitución de la República Bolivariana de Venezuela 1999, art. 255 (Venez.).

obvious and overt serious corruption. The appointment of judges is not on their merits, but rather on their political beliefs. Decision-making is corrupted by both threats of prosecution and the personal liability placed on judges for actions taken in their professional capacity. The disciplinary body is not separate from the Tribunal itself, and judges are removed for unconstitutional reasons merely at the discretion of politicians. Such a system cannot—and indeed has not—afforded its citizens due process, as shown clearly by the enforcement against Judge Afiuni and the later threats against Judge Tovar.

It is not only judges that suffer as a result. This abuse of the judicial system has permitted and perpetrated many other serious human rights violations; without proper safety measures and independence, the judiciary cannot give victims justice nor keep the other branches of government accountable. The resulting pattern of “brutal policing practices, poor prison conditions, impunity for human rights violations, lack of judicial independence, and harassment of human rights defenders and independent media,” some of which have amounted to crimes against humanity, has been labeled by several UN officials as “a human rights crisis.”¹¹³ Since 2014, “5.5 million of an estimated 32 million Venezuelans have fled their country.”¹¹⁴

3. UN Response

Upon learning of the situation in Venezuela, the HRC mandated an investigative mission, and the HRC along with other bodies created plans to deliver humanitarian relief to Venezuelan citizens and refugees.¹¹⁵ Meanwhile the Security Council was deadlocked and failed to pass either of two resolutions, one authored by the United States and the other by Russia.¹¹⁶

¹¹³ MARTA VALIÑAS ET AL., *Taking Venezuela's Human-Rights Crisis Seriously*, UN HIGH COMMISSIONER FOR HUMAN RIGHTS, https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFMV/Op_ed_Venezuela_EN.pdf; HUMAN RIGHTS WATCH, *Venezuela: Events of 2020*, <https://www.hrw.org/world-report/2021/country-chapters/venezuela>.

¹¹⁴ HUMAN RIGHTS WATCH, *Venezuela: Events of 2020*, <https://www.hrw.org/world-report/2021/country-chapters/venezuela>.

¹¹⁵ Human Rights Council Res. 42/25, U.N. Doc. A/HRC/Res/42/25, at ¶ 24 (Oct. 8, 2019); *See generally* Response for Venezuelans, *2019 Regional Refugee and Migrant Response Plan for Refugees and Migrants from Venezuela*, UNHCR (December 2018), <https://www.unhcr.org/en-us/partners/donors/5c330bc74/2019-regional-refugee-migrant-response-plan-refugees-migrants-venezuela.html>.

¹¹⁶ *UN political chief calls for dialogue to ease tensions in Venezuela; Security Council divided over path to end crisis*, UN NEWS (Jan. 26, 2019), <https://news.un.org/en/story/2019/01/1031382>. The U.S. called on the UN to recognize the leader of the opposition legislature, Juan Guaidó, as Venezuela's interim president. Russia called this “the shameless action of the United States and its allies — aimed at ousting a legitimate Government in breach of international law and attempting to engineer a coup d'état in Venezuela.” *With Venezuela Buckling under Severe Shortages, Security Council Emergency Session Calls for Political Solution to End Crisis, as Divisions Emerge over Path Forward*, UN NEWS (Jan. 26,

Individual countries, as well as the European Union, have taken more direct actions. In particular, the United States has imposed sanctions on Venezuela repeatedly over the last fifteen years,¹¹⁷ and the European Union adopted sanctions against Venezuela in 2017.¹¹⁸

The HRC established the investigative mission (the “Mission”) in Venezuela in 2019 to focus on human rights violations occurring in that State.¹¹⁹ The Mission was intended to “investigate extrajudicial executions, enforced disappearances, arbitrary detentions and torture, and other cruel, inhumane or degrading treatment since 2014 with a view to ensuring full accountability for perpetrators and justice for victims.”¹²⁰ The other language used in the respective resolution includes operative clauses. For example, the resolution “urges the Venezuelan authorities to engage with the United Nations human rights system”¹²¹ and “calls upon the Bolivarian Republic of Venezuela to cooperate fully with all relevant regional mechanisms for the promotion and protection of human rights and to grant free, full and unfettered access to the Inter-American Commission on Human Rights.”¹²² This language is foreseeably weak, as the HRC does not have power to do much more than “urge” and “condemn.” Nevertheless, the authorization of the Mission in Venezuela is important even if it reflects the outer edge of the HRC’s power, as it brought some of the rights abuses to light for the rest of the world.

In response to the Mission, the Maduro regime has “tried to create an artificial conflict between [the Mission’s] work and that of the Office of the UN High Commissioner for Human Rights.”¹²³ The regime “scorned the

2019), https://press.un.org/en/2019/sc13680.doc.htm?_gl=1%2A107cp52%2A_ga%2AMzU5NDI1MDc4LjE2NDk5NjQ5ODE.%2A_ga_TK9BQL5X7Z%2AMTY3NjU3MjMxMC4xLjAuMTY3NjU3MjMxMC4wLjAuMA. The US draft resolution called for the UN to recognize Mr. Guaido’s interim presidency while new elections are held. In contrast, Russia’s draft resolution called for a dialogue between the Venezuelan Government and its opposition. Nine countries voted for the US resolution, but Russia and China vetoed it; only four countries voted in favor of the Russian resolution. *Venezuela: Competing US, Russia resolutions fail to pass in Security Council*, UN NEWS (February 28, 2019), <https://news.un.org/en/story/2019/02/1033832>. The failure of these resolutions also highlights how the continuing animosity and clashes between Russia and the United States frequently cause deadlocks in the Security Council as a direct consequence of their veto powers.

¹¹⁷ CLARE RIBANDO SEELKE, CONG. RSCH. SERV., *Venezuela: Overview of U.S. Sanctions* (Nov. 30, 2022), <https://sgp.fas.org/crs/row/IF10715.pdf>.

¹¹⁸ Francisco Hernandez Fernandez, *The Court of Justice of the European Union: The New World Court?*, 25 AM. SOC. OF INT’L L. INSIGHTS, no. 19, Sep. 28, 2021, at 1.

¹¹⁹ H.R.C. Res. 42/25, *supra* note 115, ¶ 24.

¹²⁰ *Id.*

¹²¹ *Id.* ¶ 28.

¹²² *Id.* ¶ 30.

¹²³ Valiñas et al., *supra* note 113.

report,” refused to engage, and dismissed all critical findings.¹²⁴ The Maduro government ignored six letters sent to them from the Mission and some “have claimed that [the Mission] led a phantom mission that worked from abroad and did not seek official data.”¹²⁵ When they are not ignoring or scorning the Mission, the Venezuelan government claims that “any allegations of abuses have been or are being investigated,”¹²⁶ but offer no further clarification or compliance with the Mission or international human rights treaties.¹²⁷ Without permission from the Venezuelan government, however, UN officials may not enter the country, as dictated by Article 2 of the UN Charter.¹²⁸

Despite these challenges, the Mission published their most recent report in 2021. The report specifically focused on “the justice system’s role in investigating and prosecuting real and perceived opponents of the Government, and in perpetuating impunity for human rights violations and crimes committed against them.”¹²⁹ In preparing this report, the Mission conducted “a detailed analysis of 183 detentions of perceived or real opponents,” “an extensive document review,” and 177 interviews, including “57 with victims . . . 60 with legal representatives . . . and 36 with former judges and prosecutors working in institutions of the justice system . . .”¹³⁰ The Mission’s most important findings include that “the deterioration of prosecutorial and judicial independence has . . . accelerated in recent years.”¹³¹ The National Assembly has “passed laws circumventing [the] constitutionally mandated process,” which has allowed “political interference in the selection of Supreme Tribunal justices” and “resulted in a permanent shift in its ideological alignment and had a cascading effect over all institutions within the judiciary.”¹³² As a result, the Chief Justice has pressured justices of the Supreme Tribunal to take early retirement, in violation of the constitutional requirements regarding the removal of

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Venezuela has additionally withdrawn from the Organization of American States and therefore also withdrawn from the American Convention of Human Rights. *See, Venezuela to Withdraw from OAS, Denounces Campaign by Washington*, REUTERS (Apr. 26, 2017), <https://www.reuters.com/article/us-venezuela-oas/venezuela-to-withdraw-from-oas-denounces-campaign-by-washington-idUSKBN17S330>.

¹²⁸ U.N. Charter art. 2, ¶ 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter”).

¹²⁹ 2021 Findings on Venezuela, *supra* note 94, ¶ 7.

¹³⁰ *Id.* ¶¶ 11-13.

¹³¹ *Id.* ¶ 14.

¹³² *Id.* ¶¶ 92, 94.

Supreme Tribunal justices. Similarly, judges in other courts “reported being dismissed via a brief letter, without any process or evaluation.”¹³³ Furthermore, “judicial and prosecutorial actors at all levels . . . had received instructions about how to decide certain cases, especially political ones,” which came both from political actors and from within the judicial and prosecutorial hierarchy. This includes the Supreme Tribunal Justices, who “routinely receive orders with respect to how to decide judgments.”¹³⁴ This clearly raises issues not only with every benchmark of judicial independence discussed in Section II of this Article but also with Venezuela’s own Constitution.

The Mission’s 200-page report goes on to discuss a plethora of additional constitutional and international law violations in many other spheres, with detailed illustrations of specific instances of violations of judicial process and independence. It concludes with recommendations to several different bodies and groups within Venezuela, including the Supreme Tribunal of Justice and the Venezuelan Executive Branch. While important, these recommendations likely fall on deaf ears, as the Venezuelan government has not complied with or even acknowledged the Mission since its founding.¹³⁵ This is clear in the Mission’s recommendations to the Executive Branch of Venezuela, which state that Venezuela should “implement the recommendations published by the Mission in its 2020 Report,” and “[c]ooperate with the Mission, engage in dialogue and grant its Members and personnel access to Venezuela to conduct investigations *in situ*.”¹³⁶ While identifying steps forward is a crucial part of the process to improve the current situation, is offering recommendations to a clearly uninterested Venezuelan government a waste of the Mission’s time and resources? Because of this concern, some UN officials, including the Under-Secretary-General for Political and Peacebuilding Affairs, have said that “only Venezuelans can resolve” the “deepening protracted crisis” occurring in Venezuela.¹³⁷

While the Mission’s 2020 Report itself does not offer concrete recommendations to international organizations, a report on the Venezuelan judiciary prepared by an international non-governmental organization, the

¹³³ *Id.* ¶ 107.

¹³⁴ *Id.* ¶ 132.

¹³⁵ *Venezuela failed to implement over 80% of UN recommendations on civic rights*, CIVICUS (Jan. 21, 2022), <https://www.civicus.org/index.php/media-resources/media-releases/5555-venezuela-failed-to-implement-over-80-of-un-recommendations-on-civic-rights> (“Of the 40 recommendations received, Venezuela only partially implemented seven and did not implement 33.”)

¹³⁶ 2021 Findings on Venezuela, *supra* note 94, ¶¶ 530, 533.

¹³⁷ *Only Venezuelans can resolve Venezuela’s deepening crisis, DiCarlo tells Security Council*, UN NEWS (May 20, 2020), <https://news.un.org/en/story/2020/05/1064602>.

International Commission of Jurists, fills that gap.¹³⁸ Their report suggests that international organizations and actors should “publicly call on the responsible Venezuelan authorities to comply with their commitments to upholding international human rights and rule of law,” “maintain a mechanism to address proper accountability for gross human rights violations,” “offer international cooperation and assistance on the administrations of justice,” and “implement projects and areas of cooperation that focus on strengthening the rule of law, judicial independence and accountability for serious human rights violations.”¹³⁹ An even more specific proposal comes from the Due Process of Law Foundation, which suggests the creation of “an international mechanism or commission against impunity in Venezuela,” under the responsibility of the Office of the UN High Commissioner for Human Rights, with goals of coordinating international cooperation in areas of justice reforms, military justice, and transitional justice.¹⁴⁰ This body furthermore “could lead or assist in the organization of an international oversight mechanism for various democratic re-institutionalization processes in Venezuela, such as the process of appointing new judges and prosecutors.”¹⁴¹ These recommendations provide innovative, concrete ways of moving forward that the UN has not yet attempted.

In Venezuela, therefore, UN action has been crucial to bringing continued attention to human rights violations occurring there but its enforcement powers leave something to be desired. Only the future will show what actions the UN will take in light of recent recommendations, but it will undoubtedly be limited by Article 2’s restriction on entry into the country without the permission of the State.¹⁴² Without the possibility of military force, the UN is stretched to its institutional limits in attempting to implement change in Venezuela. As it stands, the independence of Venezuela’s judiciary has been and continues to be fundamentally

¹³⁸ Carlos Lusverti, *Judges on the Tightrope: Report on the Independence and Impartiality of the Judiciary in Venezuela*, INT’L COMMISSION OF JURISTS (ICJ) FOR LATIN AMERICA (June 2021), <https://www.icj.org/wp-content/uploads/2021/06/Venezuela-Judges-on-the-tightrope-Publications-Reports-Thematic-reports-2021-ENG.pdf>.

¹³⁹ *Id.* at 52-53.

¹⁴⁰ Ramiro Orias, *Transition of the Venezuelan Justice System: Points to Consider in Democratic Re-Institutionalization*, DUE PROCESS OF LAW FOUNDATION (June 2020), https://dplf.org/sites/default/files/judicial_transition_ven_eng_vf.pdf.

¹⁴¹ *Id.* at 15.

¹⁴² See also Human Rights Committee, U.N. Doc. CCPR/C/133/D/3003/2017 (Jan. 25, 2022) (HRC’s most recent action on the situation in Venezuela includes the adoption of the Committee’s Views under the Optional Protocol of the International Covenant on Civil and Political Rights, denouncing Venezuela’s recent actions in the violation of the due process rights of Allan Brewer-Carrias, announcing that Venezuela “is under an obligation” to declare the proceedings against Carrias null and void, and demanding that Venezuela must provide information about the measures taken to give effects to the Committee’s Views within 180 days).

compromised due to the Venezuelan government's refusal to comply with international judicial standards.

B. *European Case Study: Poland's Judiciary*

In 2021, Poland ranked 42nd place out of 180 total ranked countries, with a score of fifty-six out of one hundred—as of 2022, it fell further in the ranks, to 45th place with a score of fifty-five.¹⁴³ As a case study, Poland provides an interesting comparison of UN and EU enforcement capabilities, especially in light of threats to the independence of their judiciary which began to arise in 2015. While Poland's response to pressure from either of these organizations has not been ideal, it shows a greater willingness to come into compliance with international standards than has Venezuela. Poland's response further shows that while the EU has a more potent enforcement power than the UN, it is not an unassailable solution.

1. *Polish Constitution*

The Polish Constitution of April 2, 1997 provides “for dualism of the judiciary authority” comprised of courts and tribunals.¹⁴⁴ The Polish Court system includes the Supreme Court, common courts, administrative courts, and military courts, while the Tribunal system includes the Constitutional Tribunal and the State Tribunal.¹⁴⁵ In addition to this, the National Council of the Judiciary (NCJ) is a “constitutional collegiate body guarding the independence of courts and judges.”¹⁴⁶ Some of the tasks that the NCJ is responsible for include: providing opinions on acts concerning the judiciary and judges, adopting resolutions concerning matters referred to the Constitutional Tribunal for an examination of their consistency with the Constitution, considering and evaluating candidates to serve offices of judges, and adopting a catalogue of professional ethical rules of judges.¹⁴⁷

The Polish Constitution, like Venezuela's, is facially in compliance with the requirements of judicial independence as measured by the benchmarks discussed previously. It establishes that “[j]udges, within the exercise of their office, shall be independent and subject only to the

¹⁴³ Poland, *Corruptions Perceptions Index 2021*, TRANSPARENCY INTERNATIONAL, <https://www.transparency.org/en/cpi/2021/index/pol> (last visited May. 04, 2023); Poland, *Corruptions Perception Index 2022*, TRANSPARENCY INTERNATIONAL, <https://www.transparency.org/en/cpi/2022> (last visited May. 04, 2023).

¹⁴⁴ *The Judiciary in Poland*, MINISTERSTWO SPRAWIEDLIWOŚCI [Ministry of Justice], <https://www.arch.ms.gov.pl/en/the-judiciary-in-poland/> (last visited Mar. 16, 2022).

¹⁴⁵ *Id.* The Constitutional Tribunal rules on constitutional challenges to statutes and is the only court in Poland with the authority to strike down unconstitutional statutes. The State Tribunal has exclusive jurisdiction over indictments for crimes committed by high state officials but convenes very rarely.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Constitution and statutes.”¹⁴⁸ However, the Venezuelan judiciary case study shows that the words of a constitution only mean so much.

2. *Implementation of Constitutional provisions*

The present threats to the Polish judiciary emerged in 2015. A candidate of the Law and Justice (Prawo i Sprawiedliwość, “PiS”) Party won the presidential election in May 2015 and won a majority in the *Sejm*, the lower house of Poland’s parliamentary body, in October 2015.¹⁴⁹ On October 8, 2015, before the end of its term, the seventh-term *Sejm* elected five new judges to the Constitutional Court to replace those whose terms of office were due to expire in November and December of 2015.¹⁵⁰ However, the new President of the Republic refused to swear them in, so violating the Polish Constitution.¹⁵¹ On November 25, 2015, upon starting the new term, the eighth-term *Sejm*, in “an unprecedented move,” revoked the election of the five judges by the previous *Sejm*.¹⁵² In December of 2015, the eighth-term *Sejm* elected five replacement judges who were immediately sworn in by the President of the Republic.¹⁵³ These acts “marked the beginning of what is widely referred to by analysts as the rule of law crisis in the country.”¹⁵⁴

Two years later, the *Sejm* passed an act which lowered the retirement age for Supreme Court judges from seventy to sixty-five years, a move that forced one-third of the judges of that court to leave their posts earlier than expected, including the First President of the Supreme Court.¹⁵⁵ The President of the Republic now has discretion to allow judges that were newly over the retirement age to remain in office.¹⁵⁶ This Act also significantly changed the rules regarding the disciplinary liability of judges.¹⁵⁷ According to the Venice Commission, there was “an intensification of the disciplinary

¹⁴⁸ The Constitution of the Republic of Poland Apr. 2, 1997, art. 178. *See also* art. 179 and 180, which establish strict conditions on the appointment and removal of judges, art. 186, which establishes the role of the National Council of the Judiciary to safeguard the independence of courts and judges, and art. 195, which states that the judges of the Constitutional Tribunal shall be independent and subject only to the Constitution.

¹⁴⁹ *Grzęda v. Poland*, App. No. 43572/18, ¶ 14 (Mar. 15, 2022), <https://hudoc.echr.coe.int/fre?i=001-216400>.

¹⁵⁰ *Id.* ¶ 15. The “seventh-term” *Sejm* refers to the fact that it is the 7th elected *Sejm* since the transition from the communist Polish People’s Republic to the democratic Third Polish Republic in 1989.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* ¶ 22.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* ¶ 23.

procedures against ordinary judges” and “inquiries . . . were opened . . . in respect of more than forty judges who were vocal in criticizing the reform.”¹⁵⁸

In 2018, the *Sejm* adopted yet more legislation regarding the judiciary. The 2018 Act changed the method of election of judges to the NCJ by transferring election powers from the judiciary to the *Sejm*, which subsequently removed from office the NCJ judicial members who had been elected under the previous system.¹⁵⁹ It also extended the power and discretion of the Minister of Justice, who is simultaneously the Prosecutor General, with regard to the internal organization of the courts and to the appointment and dismissal of the courts’ presidents and vice-presidents.¹⁶⁰ This is yet another example of Polish legislation violating its own Constitution.

These Acts of 2017 and 2018 reveal that Poland’s judiciary suffers from many of the same issues as Venezuela’s. All of the indicia of independence, including appointment powers, decision-making, and the discipline and removal of judges, highlight just how seriously the PiS Party’s actions have compromised the independence of the judiciary since 2015. These actions violate not only the Polish Constitution but also EU law.

3. *EU Response*

In response to the Act of 2017, the European Commission brought several infringement actions in the Court of Justice of the European Union (CJEU). With regard to the retirement age requirements, the CJEU found that that this legislation did violate Poland’s obligations under EU law.¹⁶¹ In compliance with the CJEU’s December 2018 judgment, the Polish *Sejm* amended the act to limit the application of the new retirement age to judges who entered into service after January 2019 and “allowed the reinstatement to that court of judges who had entered into service before that date and who had been obliged to return under the contested legislation.”¹⁶² It is not clear, however, that any forcibly-retired judges were reinstated after this

¹⁵⁸ *Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Amendments to the Law on the Common Courts, the Law on the Supreme Courts and Some Other Laws of 18 June 2020*, 123d Sess., Doc. CDL-AD(2020)017, ¶ 11, VENICE COMM’N (June 22, 2020), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)017-e) (last visited Apr. 13, 2023).

¹⁵⁹ *Grzęda v. Poland*, App. No. 43572/18, ¶ 20 (Mar. 15, 2022), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-216400%22%5D%7D>.

¹⁶⁰ *Id.* ¶ 18.

¹⁶¹ *Id.*

¹⁶² *Id.* ¶ 22.

amendment passed.¹⁶³ A second ruling with regard to the new disciplinary procedures from the 2017 Act found that Poland had again violated its obligations under EU law and that the Disciplinary Chamber in Poland did not fulfil the requirements of an independent and impartial tribunal.¹⁶⁴ However, “despite this judgment, the Disciplinary Chamber continued its activities . . . [which] makes it impossible for any court . . . to question the legitimacy of any court established in accordance with the current legislation.”¹⁶⁵ Furthermore, in continuing to operate even in blatant violation of EU law and UN resolutions, the Chamber has “lift[ed] immunity from prosecution in cases against judges.”¹⁶⁶

There are ninety-three other cases currently pending before the European Court of Human Rights regarding Poland’s judicial independence.¹⁶⁷ In one of them, the 2021 case of *Grzęda v. Poland*, the UN Special Rapporteur on the Independence of Lawyers and Judges was given permission to intervene and submit an amicus brief regarding Poland’s judicial independence to the Court.¹⁶⁸ This particular case concerned Jan Grzęda, who has been a Polish judge on the Supreme Administrative Court since 1986. He was also elected to the NCJ in 2016 but was removed in 2018 under the aforementioned legislation adopted in that year by the *Sejm*. The Special Rapporteur’s submission of an amicus brief in this case exemplifies that position’s importance not only to the UN but also to other international organizations in order to ensure the independence of judiciaries worldwide.

However, to this day, Poland has still not heeded the repeated warnings of the EU. In a subsequent case brought before the Court of Justice of the European Union, *Commission v. Poland*, the Court again found in July 2021 that Poland’s changes to their judiciary had violated EU law; in the absence of the suspension of the offending provisions of national legislation, the Court issued another decision in October 2021 ordering Poland to pay a daily

¹⁶³ Two former judges of the Supreme Court contested their forced retirement as a result of the new Act on the Supreme Court, which lowered the retirement age. The Supreme Court of Poland found in 2020 that it had no jurisdiction to rule in these cases and remitted them to the District Court. *Id.* ¶ 109.

¹⁶⁴ European Commission for Democracy Through Law, *Joint urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Amendments to the Law on the Common Courts, the Law on the Supreme Courts and Some Other Laws of 18 June 2020*, 123d Sess., Doc. CDL-AD(2020)017, ¶ 16 (June 22, 2020).

¹⁶⁵ *Id.*

¹⁶⁶ *Grzęda v. Poland*, App. No. 43572/18, ¶ 23.

¹⁶⁷ European Court of Human Rights, *Premature ending of mandate for a member of the Polish National Council of the Judiciary: violation of the Convention*, ECHR PRESS RELEASE 091, (Mar. 15, 2022), <https://hudoc.echr.coe.int/eng-press#%20>.

¹⁶⁸ Brief for the Special Rapporteur on the Independence of Lawyers and Judges as Amicus Curiae, *Grzęda v. Poland*, App. No. 43572/18 (2021).

penalty of one million Euros.¹⁶⁹ As of April 2023, the EU has lowered the fines from one million Euros daily to \$500,000 Euros in light of partial reforms undertaken by Poland to rectify the previous changes to their judicial system. Poland has paid an unspecified amount of the fines levied against them.¹⁷⁰ However, it continues to defend its original reforms as unproblematic and even necessary for the improvement of the rule of law in Poland.¹⁷¹ Even worse, as of 2021, Poland’s highest court has ruled that “EU treaties are incompatible with the Polish Constitution.”^{172,173} It remains to be seen how far-reaching the consequences of these actions both by the EU and Poland will be, and whether they will ultimately result in Poland’s exit from the EU.

4. *UN Response*

In 2017, the UN Special Rapporteur conducted a state visit to Poland to investigate the attacks on judicial independence. In his subsequent report, he concluded that “the main effect – if not the main goal – of these measures [of reform of the judicial system] has been to hamper the constitutionally protected principle of judicial independence.”¹⁷⁴ He provided ten recommendations for Poland to move toward compliance with international standards.¹⁷⁵ While these recommendations were general and idealistic, they evoked a response—Poland responded to the Special Rapporteur with its comments just two months later.¹⁷⁶ Poland’s response characterized its reform as “aim[ed] at streamlining the functioning of the justice system” and

¹⁶⁹ Case C-204/21R, *Commission v. Poland*, ECLI:EU:C:2021:878 (Oct. 27, 2021). The EU has additionally withheld other pandemic recovery funds from Poland over Poland’s refusal to adhere to European democratic and rule-of-law standards. Suzanne Lynch, *Poland’s clash with Brussels hangs over EU summit*, POLITICO (Oct. 20, 2022), <https://www.politico.eu/article/eu-summit-poland-warsaw-clash-with-brussels-eu-commission/>.

¹⁷⁰ Nicolas Camut, *EU court slashes daily fine against Poland to €500K in rule-of-law dispute*, POLITICO (Apr. 21, 2023), <https://www.politico.eu/article/court-justice-eu-reduce-fine-against-poland-e500k-rule-law-dispute/>.

¹⁷¹ *White Paper on the Reform of the Polish Judiciary*, THE CHANCELLERY OF THE PRIME MINISTER [of Poland] (Mar. 7, 2018), <https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chancellor-white-paper-3-18.pdf> (“the criticisms of the reforms is unfounded . . . Poland needs judicial reforms [which] will make the judiciary more effective”).

¹⁷² Georgi Gotev, *Poland’s PiS party is pushing the country towards EU exit, EPP warns*, EURACTIV (Oct. 8, 2021), <https://www.euractiv.com/section/elections/news/polands-pis-party-is-pushing-the-country-towards-eu-exit-epp-warns/>.

¹⁷³ This also violates Poland’s Constitution, as Article 9 states that “The Republic of Poland shall respect international law binding upon it.” THE CONSTITUTION OF THE REPUBLIC OF POLAND Apr. 2, 1997, art. 9.

¹⁷⁴ Human Rights Council Res. 38/38/Add.1 ¶ 72 (Apr. 5, 2018).

¹⁷⁵ *Id.* ¶¶ 77-85.

¹⁷⁶ Human Rights Council Res. 38/38/Add. 2 (Jun. 6, 2018).

“respond[ing] to social expectations.”¹⁷⁷ It described the changes made by the amendments enacted after its “dynamic dialogue” with the European Commission.¹⁷⁸ It attempted to defend the lower retirement age by stating that “the right to retirement makes one of the guarantees of judicial independence, next to the guarantee of non-removability, thus statutory indication of the age of judges’ retirement—earlier than before—does not prejudice the independence of courts.”¹⁷⁹ The Polish Government then points to the “White Paper on the reform of the Polish judiciary” as “comprehensively present[ing] the rationale for the whole reform of the judiciary system undertaken in Poland.”¹⁸⁰ Although this response is merely justification of their decisions and leaves much to be desired, it does show that Poland still listens to the Special Rapporteur and the HRC. What’s more, Poland has demonstrated that it is still willing to engage in the international stage—which means that hope of finding a way forward might not be lost.

Ironically, despite its repeated violations of UN regulations and EU law, Poland was elected to the HRC in 2019 for the 2020-2022 term,¹⁸¹ another potential indication of how the independence of the judiciary is undervalued as a human right. That viewpoint is further emphasized by the fact that the UN has taken no other action to uphold the independence of Poland’s judiciary. Ultimately, the UN’s role in Poland has been limited almost exclusively to the activities of the Special Rapporteur on the Independence of Lawyers and Judges. As shown in case study of the Venezuelan judiciary’s failings, this is not the full extent of the UN’s power—it could be doing more to ensure judicial independence in Poland.

However, here, unlike in Venezuela, there is also the benefit of observing the actions of the EU and its bodies. The Court of Justice of the European Union and the European Court of Human Rights have been active in denouncing Poland for its illegal reforms, thanks to the diligent prosecution by the European Commission.¹⁸² The power and decisions of European Courts are everything the UN cannot be—legally binding, forceful, and punitive. Yet, Poland’s national reforms, which violate not only EU law but multiple international treaties, evade the consequences enforced by these Courts. Sanctions are the oft-cited, much wished-for enforcement

¹⁷⁷ *Id.* at 2.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 3. See *White Paper on the Reform of the Polish Judiciary*, *supra* note 160.

¹⁸¹ *Poland elected to the Human Rights Council for 2020-2022*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF POLAND (Oct. 18, 2019), <https://www.gov.pl/web/diplomacy/poland-elected-to-the-human-rights-council-for-2020-2022>.

¹⁸² See, e.g. Case C-204/21R, *Commission v. Poland*, ECLI:EU:C:2021:878 (Oct. 27, 2021); *Grzęda v. Poland*, App. No. 43572/18 (Mar.15, 2022).

solution by critics of the UN, but even sanctions of one million Euros per day have not been sufficient to incentivize Poland to repeal its legislation compromising judicial independence.¹⁸³ The lack of consequences for Poland will be compounded by the fact that the world will overlook Poland's violations of judicial independence given the more pressing situation in eastern Europe with the invasion of Ukraine and, subsequently, the world's glorification of the Polish government for accepting Ukrainian refugees.^{184,185} This situation shows that perhaps sanctions are not the solutions that people think they are. Instead, the international community needs to look to more innovative ways of incentivizing international compliance with the requirements of judicial independence established by international treaties.

CONCLUSION

In front of the Security Council in 2018, President Judge Theodor Meron of the International Residual Mechanism for Criminal Tribunals drove home the importance of an independent judiciary and said:

[A]t a time when the world is facing deeply troubling trends related to the undermining of independent judiciaries and the weakening of the rule of law, we at the United Nations simply cannot afford to be anything less than exemplary when it comes to our own handling of interference with judicial independence and actions undertaken in contravention of UN immunities.¹⁸⁶

The investigations of UN mechanisms and the analysis of case studies above show that the UN is a critical actor in creating international regulations and monitoring Member States' compliance with them.

With regard to monitoring, the UN's mechanisms are pivotal for setting the groundwork for future action. The Mission authorized by the HRC in Venezuela is an excellent example of the mobilization of these mechanisms,

¹⁸³ Baczynska, *supra* note 160.

¹⁸⁴ Aleks Szczerbiak, *How will the war in Ukraine affect Polish politics?*, NOTES FROM POLAND (Mar. 3, 2022), <https://notesfrompoland.com/2022/03/03/how-will-the-war-in-ukraine-affect-polish-politics/> (“the war in Ukraine has now completely overshadowed all of these issues [of the ongoing “rule of law” disputes with the EU political establishment] and is likely to consolidate support for PiS, [which] will probably benefit from what political scientists call the “rally effect”).

¹⁸⁵ Cf. Poland's past views on accepting refugees – Jan Cienski, *Why Poland doesn't want refugees*, POLITICO (May 21, 2017), <https://www.politico.eu/article/politics-nationalism-and-religion-explain-why-poland-doesnt-want-refugees/>; Mateusz Mazzini, *Poland Demonized Refugees. Now It's Struggling to Integrate Them*, FOREIGN POLICY (Mar. 29, 2022), <https://foreignpolicy.com/2022/03/29/poland-demonized-refugees-now-its-struggling-to-integrate-them/> (“the Polish State for years pretended that migration, a truly global phenomenon, was not its problem—and worse still, the politicians who continue to run the country demonized migrants and refugees, seeing them only as existential threats to the nation.”)

¹⁸⁶ *UN should be 'exemplary' in defending judicial independence, top Judge tells Security Council*, UN NEWS (December 11, 2018), <https://news.un.org/en/story/2018/12/1028291>.

but it is inherently limited by Venezuela's non-compliance and refusal to allow members of the Mission to carry out their duties within Venezuela. Universal Periodic Review, while not within the scope of this article, presents another important opportunity for monitoring the compliance of Member States. Other monitoring mechanisms, such as the role of the Special Rapporteur on the Independence of Lawyers and Judges, are also significant to maintaining a close watch on the judicial independence of Member States.

The Special Rapporteur's general annual report, which highlights a key challenge to judicial independence that occurred every year, includes recommendations which are a good starting place to build from.¹⁸⁷ The Special Rapporteur also regularly conducts country visits to UN Member States to take a closer look at that country's judiciary.¹⁸⁸ Other international organizations support the Special Rapporteur's recommendations and add recommendations of their own.¹⁸⁹ Member States, such as Poland, regularly review and respond to the Special Rapporteur's country visit reports, which is a positive sign of continuous engagement with the international community. While it might not be concrete action, this engagement shows that certain Member States do react to scrutiny and peer pressure. This demonstrates the critical role of the Special Rapporteur to focus solely on this issue and bring attention to it. In an ideal world, the international regulations promulgated by the UN paired with these monitoring mechanisms would be enough to pressure States into compliance; unfortunately, this world is not the ideal one and the international community must consider other possible solutions.

Many international groups often criticize the UN's enforcement capabilities. However, the case study of Poland shows that even if the UN could bring sanctions against its Member States for non-compliance, there is no guarantee that the sanctions would be an effective punishment or incentive. The State in question could simply refuse to pay them, as Poland

¹⁸⁷ See *Thematic Reports of the Special Rapporteur on the Independence of Judges and Lawyers*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/documents-listing?field_content_category_target_id%5B186%5D=186&field_entity_target_id%5B1280%5D=1280 (latest thematic report regarded the Agenda for Sustainable Development and was published in July 2022).

¹⁸⁸ See *Country Reports of the Special Rapporteur on the Independence of Judges and Lawyers*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/documents-listing?field_content_category_target_id%5B182%5D=182&field_entity_target_id%5B1280%5D=1280 (latest country report was of Bolivia and was published in June 2022).

¹⁸⁹ See also Committee of Ministers Elsinore, *State of Democracy, Human Rights, and the Rule of Law: Role of Institutions and Threats to Institutions*, 128th Sess., 11-24, (May 18, 2018), <https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-role-of-institutio/168086c0c5>.

has. Other punishments that could be more directly effective, such as trade sanctions, will always inherently remain outside of the purview of the UN.

As shown in the case study of Venezuela, the UN is already pushing its limits in attempting to enforce compliance with its international regulations. The UN cannot carry the entire international community on its back—it is a limited tool and a starting place for other international actions. The world is better off for its existence, but it cannot accomplish anything without the support of its Member States. If countries such as Venezuela and Poland will not heed the regulations of either the UN or the EU, perhaps they will heed public movements from their own people, trade sanctions from neighboring countries and important trade partners, or other forms of increasing international pressure on them to comply with international regulations.

This presents another way forward: a new focus on bottom-up action from the people, rather than top-down action from the UN. The Under-Secretary-General for Political and Peacebuilding Affairs stated in 2020 that “only Venezuelans can resolve” the “deepening protracted crisis” occurring in Venezuela—and this is true for the rest of the world: only the citizens of a country have direct control over resolving the current crises affecting them.¹⁹⁰ In order to accomplish this, one possible action is to increase public awareness and knowledge of violations of judicial independence with the goal of mobilizing an international response. There are a few key steps that the UN and the international community can take in pursuit of this goal, including “implement[ing] . . . measures to secure a more [favorable] environment for the safety of journalists in our Member States,” and “assist[ing] Member States in strengthening . . . guarantees for the freedoms of assembly and association,” among similar actions.¹⁹¹ These measures are not directly related to judicial independence, but they are crucial for encouraging monitoring and reporting to increase public awareness of issues faced by judiciaries worldwide.

The UN has provided the framework, the forum, and the necessary information—now it is time for the members of the international community and their citizens to take on individual responsibility for each other’s actions and transform each Member State into a role model for other States.

¹⁹⁰ *Only Venezuelans can resolve Venezuela’s deepening crisis, DiCarlo tells Security Council*, UN NEWS (May 20, 2020), <https://news.un.org/en/story/2020/05/1064602>.

¹⁹¹ Committee of Ministers Elsinore, *supra* note 188, at 7.