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Students for the Promotion of International Law (SPIL), Mumbai

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GOVERNMENT LAW COLLEGE, MUMBAI

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ABOUT
STUDENTS FOR THE PROMOTION OF INTERNATIONAL LAW, MUMBAI

In an increasingly integrated world with growing transnational interactions, the significance of International Law has never been greater. We, at SPIL, Mumbai, strive towards taking legal studies to an empirical level and promoting law as an area of enquiry and study far beyond the realms of classrooms. SPIL, Mumbai was born in furtherance of a desire to understand the tumultuous nature of International Relations and to promote greater awareness and appreciation of International Law.

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GENDER PARITY IN DIPLOMACY: AN EXPLORATION OF WOMEN'S PARTICIPATION IN ARMS CONTROL NEGOTIATIONS

- AADITYA BAJPAI AND SHREYA BAJPAI [1]

ABSTRACT

Women's representation in arms control, non-proliferation, and disarmament diplomacy is drastically constrained due to the preponderance of patriarchal standards and perceptions in the subject matter. Despite the many advancements and socially elevated assertions with respect to the participation of women in such proceedings, women's participation in such proceedings is severely limited. When seen from a gendered standpoint, the repercussions of arms control and disarmament on a multitude of demographics may be easier to comprehend than done otherwise. The resolution of disputes, rather than just accepting them as a fact of life, is the path that must be taken if there is to be peace in the world today. It is not possible to go backwards from where we are now in terms of nuclear weapons and armaments. Therefore, rigorous standards for nuclear regulation is the need of the hour, and it is imperative that this regulation be developed effectively using a gendered lens. As also contended by Heather Hurlburt that the likelihood of a strategy being efficacious increase when it is developed through a forum that fosters involvement from a wide range of interested parties, thus placing an emphasis on diversity in decision making.

[1] Students at the Maharashtra National Law University, Nagpur.

INTRODUCTION

The marginalisation of women from arms control diplomacy is an egregious affront to justice and efficacy,[2] for it forgoes the invaluable insights and capabilities that women possess in advancing disarmament, security and human flourishing.[3]

The notion of gender roles and gender stereotypes possesses a profound historical lineage that can be traced back to antiquity, encompassing various ancient civilizations.[4] Across the annals of time, various civilizations have harboured divergent conceptions regarding the prescribed functions and societal obligations assigned to individuals based on their gender.[5] During the era of ancient Greece, it is evident that the male gender occupied a position of prominence and wielded a substantial amount of authority within the societal framework.[6] In the societal framework of yore, women were commonly anticipated to fulfil the esteemed positions of wives and mothers, with their sphere of influence predominantly confined to the domestic realm.[7] In stark juxtaposition, it is worth noting that within the context of ancient Egypt, women were endowed with a greater degree of entitlement,[8] thereby enjoying the privilege of property ownership,[9] active engagement in commercial enterprises, and even the attainment of authoritative roles.[10]

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[2] NERGIS CANEFE, INTERNATIONAL CRIMINAL LAW AND LIMITS OF UNIVERSAL JURISDICTION IN THE GLOBAL SOUTH: A CRITICAL DISCUSSION ON CRIMES AGAINST HUMANITY (Osgoode Hall Law School of York University, PhD Dissertations, 2018).

[3] Veronique Christory, *'Catching up with the curve': The Participation of Women in Disarmament Diplomacy*, HUMANITARIAN LAW AND POLICY, (Aug. 25, 2022), https://blogs.icrc.org/law-and-policy/2022/08/25/catching- curve-participation-women-disarmament-diplomacy/.

[4] Paola Giuliano, *Gender: A Historical Perspective*, UCLA ANDERSON SCHOOL OF MANAGEMENT 1, 20 (2017).

[5] Ignacio Castuera, *A Social History of Christian Thought on Abortion: Ambiguity vs. Certainty in Moral Debate*, 76 THE AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY 121, 200 (2017).

[6] BONNY BALL COPENHAVER, A PORTRAYAL OF GENDER AND A DESCRIPTION OF GENDER ROLES IN SELECTED AMERICAN MODERN AND POSTMODERN PLAYS (Digital Commons @ East Tennessee State University, PhD Dissertations, 2002).

[7] Dessa Meehan, *Containing The Kalon Kakon: The Portrayal Of Women In Ancient Greek Mythology*, 7 ARMSTRONG UNDERGRADUATE JOURNAL OF HISTORY 1, 13 (2017).

[8] S. Allam, *Women As Holders of Rights In Ancient Egypt (During The Late Period)*, 33 JOURNAL OF THE ECONOMIC AND SOCIAL HISTORY OF THE ORIENT 1, 22 (1990).

[9] Lysander Dickerman, *The Condition Of Woman In Ancient Egypt*, 26 JOURNAL OF THE AMERICAN GEOGRAPHICAL SOCIETY OF NEW YORK 494, 500 (1894).

[10] Joann Fletcher, *From Warrior Women to Female Pharaohs: Careers For Women In Ancient Egypt*, BBC (Feb. 17, 2011), https://www.bbc.co.uk/history/ancient/egyptians/women_01.shtml.

In the context of mediaeval Europe, it is evident that women experienced a resurgence of domesticity,[11] wherein their activities were predominantly centred within the confines of their households.[12] Their principal function was perceived to be that of bolstering their husbands' endeavours and nurturing their offspring.[13] This phenomenon can be attributed, at least in part, to the pervasive influence exerted by the Christian Church. The ecclesiastical institution, subscribing to the notion of female inferiority vis-à-vis their male counterparts, propagated the belief that women's fundamental role revolved around procreation.[14] During the epoch spanning the 19th and early 20th centuries, a discernible transformation in the societal position of women commenced to transpire,[15] primarily attributable to their burgeoning participation in the labour force and their active engagement in various social movements, most notably the suffrage movement. [16]

Notwithstanding, the endurance of gender stereotypes remained prevalent, thereby resulting in women frequently receiving inferior remuneration compared to their male counterparts for equivalent labour,[17] while simultaneously being subjected to societal expectations that prioritized their duties as spouses and mothers.[18] Social structures and customs have created fixed, unchanging gender roles throughout history. Today, gender roles and stereotypes continue to evolve and change, but they still influence how men and women are perceived and treated in society.[19] The journey from emancipation to empowerment has been a long one for women. It has involved changing social attitudes, challenging discriminatory laws and

[11] Erin Migdol, Elizabeth Morrison & Larisa Grollemond, *What Was Life Like For Women In The Middle Ages?*, GETTY (Mar. 11, 2021), https://www.getty.edu/news/what-was-life-like-for-women-in-the-middle-ages/.
[12] Valentine M. Moghadam, *Patriarchy In Transition: Women And The Changing Family In The Middle East*, 35 JOURNAL OF COMPARATIVE FAMILY STUDIES 137, 145 (2004).
[13] M. McLaughlin, *The Woman Warrior: Gender, Warfare and Society In Medieval Europe*, 17 WOMEN'S STUDIES 193, 200 (1990).
[14] Ruth Mace, *How Did The Patriarchy Start – And Will Evolution Get Rid Of It*, THE CONVERSATION (Sep. 20, 2022), https://theconversation.com/how-did-the-patriarchy-start-and-will-evolution-get-rid-of-it-189648.
[15] Linda Marie Fedigan, *The Changing Role Of Women In Models Of Human Evolution*, 15 ANNUAL REVIEW OF ANTHROPOLOGY 25, 39 (1986).
[16] Janey L. Yellen, *The history of women's work and wages and how it has created success for us all*, BROOKINGS (May 2020), https://www.brookings.edu/articles/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all/.
[17] Jessica Schieder & Elise Gould, *Women's Work and The Gender Pay Gap*, ECONOMIC POLICY INSTITUTE (July 20, 2016), https://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal- norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/.
[18] Tanja Hentschel, et. al., *The Multiple Dimensions of Gender Stereotypes: A Current Look at Men's and Women's Characterizations of Others and Themselves*, 10 FRONTIERS IN PSYCHOLOGY 1, 10 (2019).
[19] Naznin Tabassum & Bhabani Shankar Nayak, *Gender Stereotypes and Their Impact On Women's Career Progressions From A Managerial Perspective*, 10 IIM KOZHIKODE SOCIETY & MANAGEMENT REVIEW 192, 195 (2021).

practices, and empowering women with education, skills, and resources.[20] After all these advances also the path to decision-making is fraught with difficulties for women. Because of its pervasiveness, this phenomenon of women facing obstacles in independent decision-making may be seen on a Regional, National and even international scale.[21]

In order to understand more clearly, if we delve deeper into the political decision-making process, we will find out that women still continue to be left out or sidelined from these processes, and even when women do take part, they seldom have much of an influence since they usually do so from low-level or middle management roles.[22] Women are often underrepresented in international forums focusing on peace and security.[23] The United Nations Security Council voted in favour of a resolution in 2000 that encouraged more women to take part in decisions involving international peace and security.[24] Now, also after some two decades later, women still make up less than a third of diplomats participating in weapons control and disarmament discussions.[25] A glimmer of hope exists by virtue of the fact that gender parity in disarmament and security decision-making was included in the UN Secretary General's Agenda for 2018.

No one should be denied the opportunity to have a voice in the policymaking processes that directly impact their life, and this includes women. The fact is that gender norms affect not just how weapons are seen and used but also the consequences of aggression. The effects of arms control and disarmament on various demographics may be better understood if seen through a gendered perspective. The peace in the world today is to be brought to the forefront through solving conflicts, instead of living with them. The advanced stages which the world has reached today with regard to nuclear armaments and weaponry cannot be reverted back, for "*you cannot*

[20] K.G. Priyashantha, *Three Perspectives On Changing Gender Stereotypes*, 12 FIIB BUSINESS REVIEW 120, 127 (2023).
[21] K.G. Priyashantha, *Gender Stereotypes Change Outcomes: A Systematic Literature Review*, 5 JOURNAL OF HUMANITIES AND APPLIED SOCIAL SCIENCES 450, 455 (2023).
[22] Felice N. Schwartz, *Management Women and The New Facts of Life*, HARVARD BUSINESS REVIEW (Feb., 1989), https://hbr.org/1989/01/management-women-and-the-new-facts-of-life.
[23] Helen Kezie-Nwoha & Juliet Were, *Women's Informal Peace Efforts: Grassroots Activism In South Sudan*, CMI BRIEF (2018), https://www.cmi.no/publications/6700-womens-informal-peace-efforts.
[24] Torunn L. Tryggestad, *Trick or Treat? The UN and Implementation of Security Council Resolution 1325 on Women, Peace, and Security*, 15 GLOBAL GOVERNANCE 539, 544 (2009).
[25] Federica Dall'archie, *The Case For Gender Balance In Arms Control, Non-Proliferation And Disarmament Negotiations*, 71 NON-PROLIFERATION AND DISARMAMENT PAPERS 1, 12 (2020).

put the nuclear genie back in the bottle".[26] Hence, the need of the hour is stringent nuclear regulation and that the same to be done through a gendered perspective.

A "gender-sensitive" perspective to nuclear policymaking has been advocated for during the past decade by the United Nations, the governments of Canada, Ireland, and Sweden, and other think tanks and civil society associations.[27] There has been a recent uptick in diplomatic declarations made in forums discussing nuclear strategy that highlight the significance of gender sensitivity, in such matters.[28] Despite all these advances and socially uplifted arguments with respect to the participation of women in such proceedings, women's representation in weapons control, non-proliferation, and disarmament diplomacy is severely limited due to the prevalence of patriarchal norms and attitudes in the subject.[29]

The present study undertakes an exploration of the complex intricacies surrounding gender equality within the realm of disarmament diplomacy, specifically honing in on the notable absence of female presence in the domain of arms control negotiation. This scholarly article highlights the utmost importance of fostering the leadership and empowerment of women within the domain of arms control. The present study offers crucial perspectives and recommendations for individuals in positions of authority, professionals in the field, and scholars engaged in the pursuit of establishing a global framework that embodies principles of fairness, equity, and tranquillity. This is achieved through a meticulous and astute examination of the intricate interconnections between gender dynamics, power dynamics, and the concept of security.

[26] Maj-Britt Theorin, *The Non-Proliferation Treaty and a Nuclear-Weapon-Free World*, 10 MEDICINE AND WAR 263, 264 (1994).
[27] Laura Rose Brown & Laura Considine, *Examining 'Gender-Sensitive' Approaches to Nuclear Weapons Policy: A Study of the Non-Proliferation Treaty*, 4 INTERNATIONAL AFFILIATIONS 1249, 1250 (2022).
[28] Cornelius Adebahr & Barbara Mittelhammer, *A Feminist Foreign Policy To Deal With Iran*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE 1, 2 (2020).
[29] Mara Zarka, *The Role of Women In Non-Proliferation And Disarmament Advocacy*, VCDNP (May 5, 2021), https://vcdnp.org/the-role-of-women-in-non-proliferation-and-disarmament-advocacy/.

REPRESENTATION OF WOMEN IN ARMS CONTROL NEGOTIATIONS: THE STORY SO FAR & STATISTICAL DETAILS

The uproar in society with regard to the impact of wars on women, and that they too have a substantive role to play in peace negotiations, the United Nations unanimously adopted Resolution 1325 in the year 2000, and hence this resolution was the first benchmark effort that stressed upon the importance of women in political negotiations.[30] This stance was further strengthened by the formulation of the WPS agenda in 2010, which again emphasized that an underlying condition for the sustenance of peace is the parity between genders and that peace is inherently linked with equality between the genders.[31]

During the temporal span encompassing 1992 to 2019, a discernible pattern emerges, indicating a conspicuous dearth in the inclusion of women within consequential peacebuilding endeavours on a global scale. In the realm of negotiation, it is worth noting that the participation of women was observed to be relatively low.[32] To be more precise, the data reveals that women held a meagre average of 13 per cent of negotiator roles, a mere 6 per cent of mediator positions, and an equally modest 6 per cent of signatory positions.[33] Despite the existence of significant progress in the domain of women's participation, it is disquieting to note that an estimated 70% of peace processes have neglected to include women as mediators or signatories.[34] The aforementioned statistical data sheds light on the conspicuous dearth of female representation in positions of considerable influence, specifically as negotiators, guarantors, or witnesses, within the realm of peace negotiations.[35]

[30] Torunn L. Tryggestad, *supra* note 23, at 544.
[31] Federica Dall'arche, *supra* note 24, at 13.
[32] Katie Shonk, *Women and Negotiation: Narrowing the Gender Gap in Negotiation*, HARVARD LAW SCHOOL DAILY BLOG (Jan. 23, 2024), https://www.pon.harvard.edu/daily/business-negotiations/women-and-negotiation- narrowing-the-gender-gap/.
[33] Pon Staff, *Individual Differences In Negotiation and How They Affect Results*, HARVARD LAW SCHOOL DAILY BLOG (May 9, 2024), https://www.pon.harvard.edu/daily/business-negotiations/in-negotiation-are-your- differences-holding-you-back-nb/.
[34] UN, *UN Deputy Secretary-General Decries Global Trampling Of Women's Rights*, BUSINESS STANDARD (Oct. 21, 2022), https://www.business-standard.com/article/international/un-deputy-secretary-general-decries-global- trampling-of-women-s-rights-122102100217_1.html.
[35] *Women's Participation in Peace Processes*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/womens- participation-in-peace-processes/.

In 2019, the United Nations Institute for Disarmament Research published a comprehensive report examining the manifestation of gender disparity in the realm of arms control and disarmament diplomacy. The findings of this study were evidently unambiguous. According to the research conducted by the United Nations Institute for Disarmament Research (UNIDIR), it was revealed that a mere 35% of diplomats who possessed the necessary credentials to participate in arms control and disarmament conferences were of female gender.[36] The graph exhibited a notable decline, descending to a mere 20%, as evidenced by the comprehensive analysis of the smaller, more specialized forums within the aforementioned report. From a statistical standpoint, it is an undeniable reality that the involvement of women in the realm of disarmament diplomatic negotiations has witnessed a notable rise, ascending from a mere 10% during the 1980s to a more substantial 30% in the year 2015. Nevertheless, it is imperative to acknowledge that this progress remains insufficient, given the indisputable fact that women constitute an equal 50% of the broader societal fabric. Consequently, it becomes evident that women continue to be inadequately represented within the domain of arms diplomacy.[37]

As underscored by Izumi Nakamitsu, the esteemed high representative for disarmament affairs at the United Nations (UN), the 2019 report published by the United Nations Institute for Disarmament Research (UNIDIR) reveals a persistent disparity in the representation of women within the realm of nuclear diplomacy.[38] Despite sustained endeavours spanning numerous decades to tackle this matter, it is disconcerting to note that women merely constitute a meagre 32% of participants in meetings pertaining to this domain.[39] The dearth of female representation in policy diplomacy negotiations is intrinsically linked to the patriarchal structure of our society, a phenomenon that is readily discernible not only in matters pertaining to arms but also in various other domains.[40] According to a survey conducted by the esteemed University of Texas LBJ School of Public Policy, it was revealed in the year 2016, a significant majority of 75% of esteemed male scholars occupied the top positions within foreign policy

[36] Renata Hessmann Dalaqua, *Still Behind the Gender Curve: Gender Balance in Arms Control, Non-Proliferation and Disarmament Diplomacy*, UNIDIR (Jun. 24, 2019), https://doi.org/10.37559/WMD/19/gen2.
[37] *Id.*
[38] Izumi Nakamitsu, *Dangers Posed by Nuclear Weapons Back in Global Spotlight, United Nations High Representative for Disarmament Affairs Tells First Committee*, UNITED NATIONS (Oct. 3, 2022), https://press.un.org/en/2022/gadis3682.doc.htm.
[39] Renata Dwan, *Women in Arms Control: Time for a Gender Turn?* 49 ARMS CONTROL TODAY 1, 7 (2019).
[40] Mary Becker, *Patriarchy and Inequality: Towards A Substantive Feminism*, 21 UNIVERSITY OF CHICAGO LEGAL FORUM 21, 40 (1999).

think tanks in the United States.[41] According to a comprehensive survey conducted in 2014 encompassing 43 globally recognized think tanks, it was discerned that despite constituting 42% of the overall workforce, women were found to occupy a mere 14% of leadership positions within these institutions.[42]

According to the United Nations Institute for Disarmament Research (UNIDIR), it has been observed that the leadership positions in the realm of arms control and disarmament are predominantly occupied by individuals of the male gender.[43] This discernible trend has persisted consistently over a span of four decades. The disparity in gender representation among delegates engaged in disarmament negotiations within the various regional groups of the United Nations exhibits considerable variation.[44] The composition of diplomatic personnel exhibits a discernible pattern wherein the representation of women experiences a gradual decline, while the proportion of men demonstrates a notable exponential increase, as one ascends from regular diplomatic staff to United Nations ambassadors, foreign ministers, and ultimately heads of State or Government.[45]

GENDER PARITY IN NON-PROLIFERATION AND ARMS CONTROL DIPLOMACY: THE GENDERED LENS

The debates, discussions, and academia centred around the feminist ideal of the inclusion of women in matters concerning disarmament diplomacy[46] are the required steps in furtherance of the above-stated ideal.[47] Antonio Guterres, the UN Secretary-General, in "*Securing Our*

[41] Joshua Busby & Heather Hurlburt, *Do women matter to national security? The men who lead U.S. foreign policy don't think so*, THE WASHINGTON POST (Feb. 2, 2017), https://www.washingtonpost.com/news/monkey- cage/wp/2017/02/02/do-women-matter-to-national-security-the-men-who-lead-u-s-foreign-policy-dont-think- so/.
[42] Heather Hurlburt, *Arms Control Needs the Modernizing Lens that Gender Offers*, 49 ARMS CONTROL TODAY 1, 8 (2017).
[43] Carol Cohn, *Sex and Death In The Rational World Defense Intellectuals*, 12 SIGNS 687, 700 (1987).
[44] Renata H. Dalaqua, *Lifting each other up: Feminist foreign policies and gendered approaches to arms control Share*, ELN (Oct. 13, 2022), https://www.europeanleadershipnetwork.org/commentary/lifting-each-other-up-feminist-foreign-policies-and-gendered-approaches-to-arms-control/.
[45] BONNY BALL COPENHAVER, *supra* note 5.
[46] Abhishek Sharma, Feminist Foreign Policy: A Moment Of Introspection, Modern Diplomacy (Dec. 31, 2022), https://moderndiplomacy.eu/2022/12/31/feminist-foreign-policy-a-moment-of-introspection/.
[47] Cheludo Tinaye Butale, *A Feminist Perspective on the Nuclear Weapon Discourse and its Gendered Consequences*, CYPRUS INTERNATIONAL UNIVERSITY (Jan., 2019), https://www.researchgate.net/publication/330182594_A_Feminist_Perspective_on_the_Nuclear_Weapon_Discourse_and_its_Gendered_Consequences.

Common Future: An Agenda for Disarmament" acknowledged that women's participation in decision-making roles has been shown to boost efficiency and output, provide innovative ideas and approaches, free up additional funds, and bolster initiatives.[48]

"*Women are biologically more peaceful, hence their participation is important*",[49] is a devil in disguise, and is both thorny and counter-productive. There exists no statistical data which substantiates that women are "biologically" more peaceful.[50] This argument acts as a weakening link for the participation of women in diplomatic negotiations. Recently in 2020, in a podcast by Sarah Bidgood, *the director of Eurasia Non-Proliferation Program at the James Martin Center for Non-Proliferation Studies*, she asserted a reasonable argument that the socially attested functions and preconceptions levied upon each gender have affirmed to ensure that women in most cases become attuned to acting and behaving in certain ways. This includes being less assertive and less aggressive, and instead focusing on working together with others. Cultivating this cooperative mindset is likely to influence how women negotiate, leading to better results.[51]

The majority of peace processes are founded upon the underlying supposition that the individuals who actively engaged in warfare, predominantly of the male gender, will likewise assume the principal roles in fostering peace.[52] The inadequacy of this particular approach, as eloquently articulated by gender advocate *Sanam Anderlini*, lies in the fact that individuals who engage in warfare seldom possess the necessary background and proficiency in the art of peace-building.[53] The aforementioned observation finds support in empirical research, which has

[48] Paola Giuliano, *supra* note 3, at 2.
[49] Michael Fleshman, *Are Women Better Peacemakers*, UNITED NATIONS (Feb. 2003), https://www.un.org/africarenewal/magazine/february-2003/are-women-better-peacemakers.
[50] U.A. Shimray, W*omen's Work in Naga Society: Household Work, Workforce Participation and Division of Labour*, 39 ECONOMICS AND POLITICAL WEEKLY 1698, 1700 (2004).
[51] Sarah Bidgood, *Promoting Peace: Viewing Peace through a Gender Lens*, APPLE PODCASTS (May 22, 2020) https://podcasts.apple.com/il/podcast/promoting-peace-viewing-peace-through-a-gender-lens/id1515988304?i=1000476191945.
[52] Cheryl de la Rey & Susan McKay, *Peace as a Gendered Process: Perspectives of Women Doing Peacebuilding of Women Doing Peacebuilding in South Africa*, THE INTERNATIONAL JOURNAL OF PEACE STUDIES, https://www3.gmu.edu/programs/icar/ijps/vol7_1/Rey-McKay.html.
[53] Patricia Patzold, *It Is Time to Invest in Peace Again*, TECHNISCHE UNIVERSITAT BERLIN (Nov. 1, 2021), https://www.tu.berlin/en/about/themenportal-ueber-die-tu-berlin/queens-lecture-2021/interview-with-sanam- naraghi-anderlini.

substantiated a robust association between the involvement of women and favorable outcomes in negotiation processes.[54] These outcomes include the successful implementation of agreements and the long-lasting sustainability of peace.[55] Simultaneously, peace agreements are not solely concerned with the cessation of hostilities, but rather frequently serve as comprehensive frameworks delineating the prospective political structure of the nation.[56] The omission from this particular course of action may yield severe and enduring repercussions for the disenfranchised factions' political, social, and economic standing. Numerous obstacles impede the active involvement of women in peace processes.[57] The aforementioned factors encompass traditional gender norms and practical challenges associated with inadequate personal safety, transportation, and childcare provisions.[58] In instances where women are afforded the opportunity to participate, their involvement is frequently employed in a tokenistic manner, serving to validate decisions made, rather than granting women an authentic voice within the process.[59]

The argument for gender balance and parity is especially compelling in the discussions concerning nuclear weapons. The legitimate commitment of governments to disarmament, as laid forth in Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, has been called into doubt by a number of intriguing studies that have connected the acquisition of nuclear weapons to a manifestation of masculinity and ego.[60] As per the "*Masculinity Theory*" proposed by Helen Caldicott,[61] the active and efficient involvement of women in non-proliferation diplomacy provides fresh insights with respect to more effective and fruitful results in the same, henceforth, contributing to a shift in the narrative, and furthermore enabling the exploration for common ground across nuclear and non-nuclear

[54] Janis S. Bohan, *Regarding Gender: Essentialism, Constructionism, and Feminist Psychology*, 17 PSYCHOLOGY OF WOMEN QUARTERLY 5, 10 (1993).
[55] Cheryl de la Rey & Susan McKay, *Peace As A Gendered Process: Perspectives Of Women Doing Peacebuilding In South Africa*, 7 INTERNATIONAL JOURNAL OF PEACE STUDIES 91, 97 (2002).
[56] Milton Rinehart, *Understanding The Concept "Peace": A Search For Common Ground*, 20 PEACE & CHANGE 379, 385 (2009).
[57] Outi Donovan, *Women's Participation in Peace Mediation*, THE INTERPRETER (Mar. 8, 2022), https://www.lowyinstitute.org/the-interpreter/women-s-participation-peace-mediation.
[58] Jodi York, *The Truth(s) About Women and Peace*, 8 PEACE REVIEW 323, 325 (1996).
[59] Ute Kelly & Rhys Kelly, *Towards Peaceful Adaptation? Reflections on the Purpose, Scope, and Practice of Peace Studies in the 21st Century*, 6 PEACE STUDIES JOURNAL 3, 46 (2013).
[60] Carol Cohn, *Sex and Death in the Rational World of Defense Intellectuals*, 12 WITHIN AND WITHOUT: WOMEN GENDER AND THEORY 687, 717 (1987).
[61] Marta B. Rodríguez-Galán, Hegemonic *Masculinity and Counter-Hegemonic Feminist Discourses For Peace*, 7 SOCIOLOGY FACULTY/STAFF PUBLICATIONS 369, 375 (2012).

weapon states.[62] The central issue surrounding the equitable representation of women alongside men in the realm of armed diplomacy stems from the fundamental reality that women bear the brunt of the adverse consequences inflicted by armed conflicts.[63]

According to the report issued by the United Nations High Commissioner for Human Rights, it has been observed that the utilization of said weaponry exerts a profound influence on the lives of women, frequently resulting in the infringement and endangerment of their fundamental rights. Throughout history, it has been observed that women have been subjected to exploitation and mistreatment, often being utilised as a means to further the objectives of warfare.[64] In addition, there have been instances where women have been coerced into participating in illicit activities such as the trafficking of weapons or humans.[65]

Apart from this, the biological effects to which women are exposed are also adverse.[66] As per the statistical analysis provided by the International Law and Policy Institute,[67] women are nearly twice as likely to develop cancer as a consequence of exposure to ionizing radiation.[68] The study was conducted to examine the incidents that occurred at nuclear power plants, specifically Chernobyl and Three Mile Island, as well as the consequences of nuclear tests, exemplified by the Marshall Islands, and the catastrophic impact of nuclear weapons, as witnessed in Hiroshima and Nagasaki. The aforementioned study posited that the deleterious consequences extend beyond the realm of biological effects, encompassing significant repercussions of a social, economic, and psychological nature.[69] The significance of women's involvement in the realm of disarmament diplomacy cannot be overstated, as it stands in stark contrast to prevailing misconceptions. Women exhibit a genuine interest in this domain,

[62] Terrell Carver, Molly Cochran & Judith Squires, *Gendering Jones: Feminisms, IRs, Masculinities*, 24 REVIEW OF INTERNATIONAL STUDIES 283, 290 (1998).
[63] Riane Eisler & David Loye, *Peace and Feminist Theory: New Directions*, 17 BULLETIN OF PEACE PROPOSALS 95, 97 (1986).
[64] Claire Duncanson & Catherine Eschle, *Gender and the Nuclear Weapons State: A Feminist Critique of the UK Government's White Paper on Trident*, 30(4) NEW POLITICAL SCIENCE 545, 550 (2008).
[65] T. Vishnu Jaya, *Rape as a War Crime*, UN CHRONICLE, https://www.un.org/en/chronicle/article/rape-war- crime.
[66] Herbert D. Grover & Mark A. Harwell, *Biological Effects of Nuclear War I: Impact on Humans*, 35 BioScience 576, 580 (1985).
[67] Anne Guro Dimmen, "The Humanitarian Impacts of Nuclear Weapons from a Gender Perspective" 5 *ILPI-UNIDIR Vienna Conference Series* 3 (2014).
[68] Jian Tong & Tom K. Hei, *Aging And Age-Related Health Effects of Ionizing Radiation*, 1 RADIATION MEDICINE AND PROTECTION 15, 18 (2020).
[69] *Supra* note 3, at 5.

possess a commendable level of expertise, and demonstrate remarkable competence in addressing pertinent issues.

THE TREATY ON NON-PROLIFERATION OF NUCLEAR WEAPONS: GENDER INCLUSIVENESS AND THE WAY FORWARD

The world forces are gearing up and definitely, there is some progress, if not none, with regard to the inclusion of a gender-balanced approach to disarmament diplomacy.[70] The United Nations Office for Disarmament Affairs and the UNIDIR, on 6th April 2021, held a discussion dedicated exclusively towards integrating gender perspectives in the review process of the Non-proliferation Treaty. In the same, Ms. Izumi Nakamitsu also expressed her views about the need for the inclusiveness of a gendered perspective in arms policy negotiations.[71] Statements like the European Union's assertion that "*active and equal cooperation and leadership of women in decision-making and action will be critical in accomplishing further momentum on nuclear disarmament*" represent women as essential to advancing nuclear diplomacy.[72]

The UNODA and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) convened their tenth review conference, where several hundred diplomats and policymakers discussed the importance of diversification, equity, and integration in the field of nuclear non-proliferation and disarmament. However, the fact that this was about gender inclusiveness, yet a very minute percentage of the delegates were women. It was even stressed by Ms. Izumi Nakamitsu that everyone has to do their part to make sure that debates about nuclear disarmament and non-proliferation include people of all genders, races, ages, and abilities.[73] Prominent speakers like Ann Linde (Minister of Foreign Affairs of Sweden), Gustavo

[70] Innocentia Atchaya, *The Need For Gender Balance In Disarmament Efforts*, MODERN DIPLOMACY (July 23, 2022), https://moderndiplomacy.eu/2022/07/23/the-need-for-gender-balance-in-disarmament-efforts/.
[71] Collin McDowell, *Nuclear-arms-control experts push to bring gender equality to their work*, UNITED NATIONS, (Apr. 21, 2021), https://www.un.org/disarmament/update/nuclear-arms-control-experts-push-to-bring-gender- equality-to-their-work.
[72] EUROPEAN UNION EXTERNAL ACTION, https://www.eeas.europa.eu/eeas/eu-statement-%E2%80%93-united- nations-1st-committee-thematic-discussion-nuclear-weapons_en, (last visited May 8, 2024).
[73] *Stepping it up for diversity, equity and inclusion at the NPT Review Conference*, UNITED NATIONS (Aug. 24, 2022, https://www.un.org/disarmament/update/stepping-it-up-for-diversity-equity-and-inclusion-at-the-npt-review-conference.

Zlauvinen (NPT Review Conference President), Maritza Chan (Permanent Representative of Costa Rica to UN), and so on, all emphasised the necessity of gender parity in disarmament diplomatic negotiations.

Speakers generally agreed that the discourse of nuclear disarmament and non-proliferation fare better when they emphasize people and diversity. They demanded that the NPT Review Conference and beyond do more to ensure the full and equal participation of women, young people, and people with disabilities. In the subsequent dialogue, both the audience and the presenters agreed that disarmament and non-proliferation should be more closely linked to other peace, development, human rights, and environmental objectives. Things are prospectively changing for the good for even the Stockholm International Peace Research Institute (SIPRI) hosted a seminar dedicated primarily to "*gender inclusiveness*" in the field of disarmament and non-proliferation.[74] Masculine ideals in disarmament, feminist foreign policy, institutional culture and hurdles, and professional toolkits were among the topics covered.

CONCLUSION

Throughout history, the ethical implications surrounding the utilization of nuclear weapons have consistently been a subject of contention. However, with the advent of the Treaty on the Prohibition of Nuclear Weapons, which officially came into effect in January 2021, the moral reprehensibility of these weapons has been further solidified. Moreover, it is crucial to acknowledge that the aforementioned treaty has rendered the possession and deployment of nuclear weapons illegal for those nations that have become parties to it.

The remarkable exhibition of leadership, unwavering resolve, and unwavering commitment demonstrated by women in their roles as diplomats, activists, and survivors of atomic testing

[74] Alice Zhang, *Empowering Women as the Key for Prosperity: Reflections from CID's Student Seminar on Gender and Development*, HARVARD CENTER FOR INTERNATIONAL DEVELOPMENT (Jan. 8, 2024), https://www.hks.harvard.edu/centers/cid/voices/empowering-women-key-prosperity-reflections-cids-student-seminar-gender-and.

and bombings in Hiroshima and Nagasaki is truly noteworthy. This exceptional display of fortitude has been evident both within and beyond the confines of conference rooms, leaving an indelible mark on the historical narrative. Prominent positions within the negotiation were held by women, exemplified by the esteemed presence of Costa Rican Ambassador Elayne White Gomez as the chairperson. Furthermore, it is noteworthy that women were among the heads of delegation representing highly engaged States during the deliberations. Notable examples include Ireland, New Zealand, the Philippines, South Africa, Sweden, Switzerland, and Thailand.[75]

In the present era, a momentous occurrence has transpired, one that bears great significance in the annals of history. The esteemed United Nations Office for Disarmament Affairs, in conjunction with the esteemed High Representative for the Secretary-General, has been entrusted to the capable leadership of a distinguished woman, namely Ms. Izumi Nakamitsu. During the second session of the ongoing Open-Ended Working Group (OEWG) in March 2022, an analysis of the 280 statements delivered reveals a noteworthy observation regarding gender representation. Specifically, it is observed that more than 120 statements were articulated by women, thereby indicating a substantial presence and active participation of women in this forum. This trend is particularly pronounced within the context of the international law segment, where a significant number of women made their voices heard. Approximately half of the diplomats who participated in the discourse, encompassing representatives from the International Committee of the Red Cross (ICRC), were women. Their deliberations revolved around the pertinent matter of the suitability of international law, specifically International Humanitarian Law (IHL), within the realm of cyberspace.[76]

Amongst other goals, such as guaranteeing the involvement of those who have been most impacted by the problems at hand and the consideration of humanitarian viewpoints, it is vital to combat women's underrepresentation and other patterns of marginalization in these forums. The Women, Peace, and Security Agenda cannot be completely implemented unless states

[75] Ray Acheson, *The Nuclear Ban And The Patriarchy: A Feminist Analysis Of Opposition To Prohibiting Nuclear Weapons*, CRITICAL STUDIES ON SECURITY 1, 4 (2016).
[76] Veronique Christory, *Catching up with the curve: The participation of women in disarmament diplomacy*, ICRC HUMANITARIAN LAW & POLICY BLOG (Aug. 25, 2022), https://blogs.icrc.org/law-and-policy/contributor/veronique-christory/.

address the inherent effects of nuclear weapons on women and take steps to guarantee that women are adequately represented in all aspects of the arms control mechanism.

The initial and paramount measure in the pursuit of gender parity within the realm of arms-related diplomatic negotiations necessitates the dismantling of the irrational stereotype that characterizes this domain as exclusively belonging to the male gender. It is imperative to bear in mind that although a considerable cohort of individuals espouses the notion that augmenting the presence of women in the realm of negotiations will yield enhanced outcomes, such a supposition does not align with empirical evidence. Despite the passage of time, it remains disconcerting that the level of female participation in the realm of arms diplomacy continues to be alarmingly inadequate, as previously alluded to in the introductory discourse of this manuscript. Contrary to the prevailing belief that augmenting female representation in decision-making forums would invariably enhance negotiation outcomes, it is imperative to acknowledge that such an assumption lacks empirical substantiation.

In 2017, the United Nations, under the leadership of Antonio Guterres, made a significant declaration regarding the year 2030 as the designated timeframe within which the comprehensive and equitable engagement of women in arms negotiations is to be achieved. The empirical data reveals that a mere 15% of state delegations were under the leadership of women, whereas a significantly higher proportion of 31% consisted exclusively of male individuals. Henceforth, it is posited that a greater representation of women assumes the role of heads of state delegations in forthcoming deliberations pertaining to nuclear disarmament.[77]

There has been a great deal of feminist literature over the years, but the arms control sphere is still far behind others in its capacity to employ a gender perspective to its operations. The required mindset should be equivalent to what *Heather Hurlburt* proposed through the "*Diversity Theory*" which indicates that enlarging the perspectives of those who formulate policy decisions, eventually results in better outcomes. In the words of Hurlburt, "*Diversity is a form of strength. The more perspectives brought to bear, the more likely a successful outcome*

[77] Lauren Perlik, *Gendered Perspectives and Nuclear Disarmament*, E-INTERNATIONAL RELATIONS (Sept. 24, 2018) https://www.e-ir.info/2018/09/24/gendered-perspectives-and-nuclear-disarmament/.

arrives."[78] Hurlburt contends that the chances of a policy's effectiveness increase when it is crafted through a forum that encourages participation from a wide range of interested parties, hence emphasizing diversity in decision-making. This method may increase consensus and cooperation for policy decisions by making it more likely that they will address the interests and concerns of a broad variety of stakeholders.

In order to address the paramount concerns of global peace and security, it becomes imperative for the international community to establish a platform wherein the voices of women can effectively counterbalance the prevailing narratives propagated by men and the mainstream media with regard to matters of security. The narratives in question frequently exhibit a proclivity towards androcentrism, signifying their authorship and reception by males, without duly considering the perspectives and lived realities of women. The gendered repercussions of a nuclear blast are underscored by the notable impact of radiation on women, both in terms of physical and psychological consequences. This impact extends throughout the lifespan of women who have been directly exposed, thereby affecting subsequent generations, particularly children. Consequently, it is crucial to consider these perspectives in order to fully comprehend the disproportionate effect of radiation on women in the aftermath of a nuclear explosion.[79]

[78] Heather Hurlburt, s*upra* note 41, at 8.
[79] C. Folkers, *Disproportionate Impacts of Radiation Exposure on Women, Children, and Pregnancy: Taking Back our Narrative*, 54 JOURNAL OF HISTORY OF BIOLOGY 31, 50 (2021).

SOCIALLY RESPONSIBLE INVESTING AND CLIMATE FINANCING: ITS ROLE IN ADDRESSING ENVIRONMENTAL CONCERNS

-KANIKA ARORA[1]

ABSTRACT

A critical feature of the current legal and policy regime to address global warming is the concept of "climate finance". However, the idea has not been used or acknowledged sufficiently to the movement of socially responsible investment. SRI's potential contribution to addressing climate change problems is limited currently due to the inadequate government frameworks and an ever-abandonment of ethical agendas by the financial markets. Nevertheless, the question is how the financial markets can contribute to environmental protection goals? There is a rising urgency in the international scenario to combat environmental issues, and the financial sector is an essential stakeholder in this scenario. However, until recently, another critical part of financial markets has been somewhat overlooked, and that is the movement for socially responsible investment. Rather than limiting financial institutions to mere transactional agents in climate finance, SRI envisions a much more active and enlightened role for them. If successful, SRI can overcome the limitations and gaps in official climate regulation by pushing for early corporate action to reduce GHG emissions. However, SRI is not a textbook manual for social responsibility but rather a fluid discourse open to diverse interpretations and practices. One of the most complex and expensive problems humanity has to address is environmental changes and protection. incorporating environmental factors into investment decision-making. Theoretically, SRI's long-standing movement suggests that the financial sector can play a more significant role in environmental protection issues. The movement began from single-issue activism, where the ethical investors ignored the companies which had ties to activities that were deemed to be immoral. However, from the 1960s, the SRI movement broadens its scope to cover broader agendas, such as human rights, focusing on the Vietnam war and the apartheid in South Africa. Since the 1980s and late 1990s, The SRI movement had also started taking up environmental issues. The aim of this chapter would be to understand the relationship between SRI and environmental concerns as are in the ESG model, the concept of climate finance and how SRI seeks to improve corporate social and environmental behaviour beyond what is required by the law.

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INTRODUCTION

A critical and up-and-coming feature of the political, legislative system in most of the States is the concept of "climate finance". However, the idea has not been used or acknowledged sufficiently to the movement of socially responsible investment. SRI's potential contribution to addressing climate change problems is limited currently due to inadequate government frameworks and an ever-abandonment of ethical agendas by the financial markets. Nevertheless, the question is how the financial markets can contribute to environmental protection goals? There is a rising urgency in the international scenario to combat environmental issues, and the financial sector is definitely an essential stakeholder in this scenario[2]. The Kyoto protocol[3] included various economic mechanisms to reduce greenhouse gas emissions cost-effectively and ensured that the major financial market players such as banks and State Wealth Funds are able to work towards environmental protection. However, until recently, another critical part of financial markets has been somewhat overlooked, and that is SRI keeping in mind the Environmental, Social, and Governance (ESG) concerns.

SRI as a legal concept aims to create a framework wherein the financial agents are not limited to only economic concerns, rather, they would play a more involved role in climate finance. SRI expects these financial institutions to work in a manner which is responsive to social concerns and is also sustainable for the environment, and not only concerned with financial gains. It requires these financial organisations to act, keeping in mind the public interest over

[2] Benjamin J. Richardson, Climate Finance and Its Governance: Moving to a Low Carbon Economy through Socially Responsible Financing, 58 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 597 (2009).
[3] https://unfccc.int/resource/docs/convkp/kpeng.pdf.

and above the need for financial gains[4]. If this approach is followed, SRI promises to create a world where in there are low carbon emissions, through the usage of the leverage by the financial institutions, which they hold above the corporates or businesses. Thereby, SRI can act as a bridge to fill the gaps in the legal system, both international and at national levels when it comes to the protection of the environment and regulation of climate change.

There is no textbook of SRI which lays down strictly the rules to be followed when it comes to environmental protection, rather it's a way of opening discussions which lead to different methods and ways of protecting the environment while working towards financial goals. These changes have manifested themselves rather quickly post-2000, especially after the 2007-08 financial crisis[5]. However, the players involved in financial systems have abdicated the lie that they invest according to their ethical aspirations, rather they are clear that their motivations are financial, however, they do address ESG concerns, keeping in mind their appetite for taking financial risks and costs to their investors. Another change in SRI as has been seen over the past two decades is the cause of promoting codes of conduct and setting up standards of responsible investment for the financial society. A few of these codes aim specifically at the protection of the environment and climate change, such as the Carbon Disclosure Project[6].

Environmental degradation and climate prediction is one of the most complicated problems that the society is currently facing. The economy is dominated by the financial system, keeping in mind that we live in a capitalistic society, which aims to development of multiple financial bodies and instruments[7]. Therefore the role of the financial system is pivotal in environmental protection. It is through the financial system that commodification of climate requirements can be made and investments in modes of consumption and the creation of finite and renewable resources would be possible[8]. The players in the financial system have now started considering taking environment protective measures to step towards their self-interest since acting otherwise poses a risk to their investment portfolios' value through tightening regulations and

[4] S Meeker, Economics as if the Earth Really Mattered: A Catalyst Guide to Socially Conscious Investing 12 (Canada, 2015).
[5] C Krosinsky and N Robins (eds), Sustainable Investing: The Art of Long Term Performance (Earthscan, London 2000)
[6] https://www.cdp.net/en
[7] J Froud, A Leaver and K Williams, New Actors in a Financialised Economy and the Remaking of Capitalism, 12 New Political Economy 339 (2007).
[8] S Labatt and R White, Carbon Finance: The Financial Implications of Climate Change (John Wiley, 2007).

reduced incomes.[9] The report of *The International Finance Corporation* made an assessment of climate change and mentioned that it is one of the most compelling reasons for incorporating ESG concerns while making decisions related to investment[10]. However, even though there are multiple studies being published that talk about the effect of global warming and how it would be harmful to the financial sector, still material or substantial changes in the ways of the investment society remain to be seen[11].

The financial sector has been acting mainly towards providing a mechanism that would help allocate capital towards mitigation of the damage done to the environment and adopt environmentally safe processes. In other words, we can say that it has been functioning as an intermediary to facilitate investment oriented towards protecting the environment[12] Further, about retail finance markets, which mainly cater to individuals, climate-friendly investment portfolios are being sold by mutual funds. Green home loans are being offered by banks while taking into account the mortgaged properties' energy efficiency.[13]

Theoretically, the movement for SRI leads to the realisation that the financial sector should play a more significant role in the protection of the environment. The concept of SRI began from activism wherein the investors on the basis of their ethics let go of or avoided investing in companies which were involved in activities which were immoral to them. Later on, since the 1960s, the SRI movement started covering wider issues, such as human rights[14]. However, is only after the 1980s and late 1990s that the SRI movement started taking up environmental issues. As the SRI movement grew, its influence on the financial markets started presenting itself through the processes of ethical screening, best-in-class portfolios shareholder advocacy etc. The aim of SR I is that the investments made should preferably be in those businesses or companies which are responsive to ESG concerns. SRI seeks to improve the corporate functioning or set up in such a manner that it is conducive to ESG concerns above and beyond

[9] A Shell and M Krantz, Global Warming a Hot Spot for Investors, USA Today Online (27 February 2007).
[10] International Finance Corporation, Who Cares Who Wins- One Year On (IFC, 2005).
[11] J Llewellyn, The Business of Climate Change: Challenges and Opportunities (Lehman Brothers, New York, 2007).
[12] http://www.carboncapitalmarkets.com.
[13] United Nations Environment Program Finance Initiative (UNEPFI), Green Financial Products and Services: Current Developments and Future Opportunities in North America (UNEPFI, Geneva, 2007).
[14] R Sparkes, A Historical Perspective on the Growth of Socially Responsible Investment (Greenleaf Publishing, Sheffield, 2006).

what is required by law[15]. However, it can be safely said that the potential of SRI is still to be illustrated.

SRI VIS-À-VIS THE LEGAL SYSTEM

The threats to our environment, which raise profound questions about an economic system's sustainability, are very rarely discussed by the financial community, if at all[16]. The ethical issues which are being created due to climate change must be discussed amongst all the financial players in order to reach a consensus at the international level about what actions must be taken urgently to prevent the same. This deliberation becomes Central if the requirement of the UN Framework Convention on Climate Change calls for equitable sharing of the duty or the accountability of the nations' when it comes to the protection of the environment.

We need to debate ethical issues raised by climate change to reach a consensus internationally about some action that needs to be urgently taken. Ethical deliberation is crucial to lead the world towards an equitable sharing of the burdens of protecting the planet, as has been called for in the UN Framework Convention on Climate Change[17]. For the investors, serious matters such as global warming, present themselves as something which poses either a risk or an opportunity for investment. These financial institutions are run by people who only focus on the financial goals. They are very rarely concerned with the ethical issues which were raised by the conscious investors.

However, the legal system can and does influence the decision-making. The Kyoto Protocol provides a mechanism to create several opportunities for finances, such as lending to companies acquiring technologies that reduce emissions.

[15] Davis, J Lukomnik and D Pitt-Watson, The New Capitalists, How Citizen Investors are Reshaping the Corporate Agenda (Harvard Business Press, Cambridge, 2006).
[16] http://www.climateethics.org
[17] P Taylor, An Ecological Approach to International Law: Responding to Challenges of Climate Change (Routledge, London and New York, 1998).

The concern remains that, industries which were polluting by their own nature would suffer from the environmental regulations, which in turn would also affect their investors. While this would naturally be a matter of concern for any investor, it would explicitly be concerning institutional investors who stand in the position of a fiduciary and who are required to ensure that they work to provide maximum gains to the investors.

A major concern of these investors would be the regulatory risk. The government has begun to tighten its control for example there are taxes on carbon consumption as well as subsidies provided to investments which focus on environmental protection, thereby shifting the competitive balance in their favour[18]. Another concern would be the litigation risk wearing the polluters of the environment can be held liable for the suffering or the destruction that is caused by them[19].

Non-governmental organisations have been actively targeting such financial institutions. A Federation of environmental groups in the US had led a campaign back in 2006 demanding that the banks there should stop giving loans to coal power plants[20]. The result was that, in 2008 the bank of America stopped giving loans to mining projects which were destructive to the environment[21]. On the other hand, companies that focus on low-carbon and energy-efficient technologies are in a more advantageous position and more inclined towards financial gains.[22] Many investors now favouring renewable energies are environmentally efficient technologies, all aimed towards carbon offsetting.[23] However, what is to be noted is that the industries working with non-renewable energies are still thriving[24].

[18] R Stavins, Policy Instruments for Climate Change: How Can National Governments Address a Global Problem? University of Chicago Legal Forum 293 (1997).
[19] J Gupta, Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change 16 Review of European Community and International Environmental Law 76 (2007).
[20] J Donnelly, Banks are Urged not to Finance Coal Power, Boston Globe Online (16 January 2007).
[21] T Zeller, Bank of America to Stop Financing Mountaintop Mining, New York Times (4 December 2008).
[22] World Resources Institute (WRI) and the Coalition for Environmentally Responsible Economies (CERES), Questions and Answers for Investors on Climate Risk (WRI, Washington DC, 2004).
[23] D Berman, Hot for Green Investing, Financial Post (19 February 2007).
[24] Ethical Funds Company (EFC), Head in the Sands? Climate Change Risks in Canada's Oil and Gas Sector (EFC, Vancouver, 2007).

As long as fossil fuels are the cheaper alternatives, those who benefit from them would prevent any changes from happening and SRI would still be difficult in such sectors[25]. Nevertheless, the SRI movement has risen as an answer to the weaknesses of governmental regulations.

SRI'S ROLE IN GOVERNANCE

SRI has catapulted action in several areas, such as risk management and corporate reporting when it comes to environment and climate change and revealing of information which is relevant to these matters as well as in the case of shareholder activism. However, what remains to be seen is whether can a son I work as an alternative for ESG issues regulation in the broader context or internationally. Reasons are plenty, of why it seems doubtful that he saw Roy would be able to positively affect corporate behaviour when it comes to issues related to the environment. SRI, has always focused on social issues above ethical grounds. One has to fight a battle to ensure that a socially responsible business is not financed and to ensure that ESG concerns are taken into account. Further, the SRI market is so restricted that it is not able to influence the marketing cost, therefore it does not give the environmentally conscious companies an advantage in comparison to other non-socially conscious companies which ha unrestricted funds. To top it all, the codes of conduct[26] which laid down the standards of such investment or week and clearly therefore the financial institutions are able to play with the agenda of SRI.[27]

SRI, or the earlier times of ethical investment had taken birth as a disinvestment movement primarily against the crime of apartheid which was taking place in South Africa[28]. However, it was in the latter part of the 1990s that the objectives and the functioning of SRI changed and pressure was slowly being put on big investors to incorporate ESG concerns while making their financial decisions. Some of this pressure came from NGOs targeting pollution-causing

[25] J Leggett, Climate Change and the Banking Industry: A Question of Both Risk and Opportunity, 179 Bankers Magazine 25 (2009).
[26] UNPRI, https://www.unpri.org.
[27] Supra 1.
[28] N Carter and M Huby, 'Ecological Citizenship and Ethical Investment' (2005) 14 Environmental Politics 255; P Dembinski et al 'The Ethical Foundations of Responsible Investment' (2003) 48 Journal of Business Ethics 203.

industries and institutions making them financially[29]. Meanwhile, there were legal changes being made in the regulations concerning the financing of works for development, for example, the Green World Bank project, which can be considered as another reason for the growth of SRI[30].

Even now the major players of the financial investment community are not comfortable with the application of SRI concerns because of the belief that the application of the ESG considerations would negatively impact their profit margins[31]. Partially this is true, although the financial investors also have fiduciary duties thereby getting some leeway from investing responsibly[32]. Apart from this, financial instruments also have some other issues with the application of ESG concerns. These financial instruments fear getting into it unresolvable debates about the correct ethical codes of action. They are investing on behalf of a huge number of investors and their beliefs about the ESG concerns might be different from each other. Therefore they opine that it will not be possible for them to reach a common decision while deciding on ESG-based investments. On the other hand, maximum returns are something which all the investors hope for and would have consensus over.

The concept of "ecological modernisation" which became prevalent during the 1990s, is another factor that shaped SRI philosophy's shift. The position of this concept is that achievement of economic development is possible along with the protection of the environment, by using the means of new technology and managerial know-how[33]. What it actually means to say is very optimistically that when we do something which is good for the climate would automatically be also good for the financial economy, this thought is essentially rooted in the idea that the reduction of waste and using cleaner innovations and technology Will ultimately improve the competition in the market. Essentially, we can surmise that SRI is

[29] S Waygood, Capital Market Campaigning. The Impact of NGOs on Companies, Shareholder Value and Reputational Risk (Risk Books, London, 2006).
[30] O Perez 'The New Universe of Green Finance: From Self-Regulation to Multi-Polar Governance' in O Dilling, M Herberg, and G Winter (eds) Responsible Business: Self Governance in Transnational Economic Transactions (Hart Publishing, Oxford, 2007).
[31] B J Richardson, "Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment" Osgoode Hall Law Journal 46 (2008).
[32] Freshfields Bruckhaus Deringer, A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment (UNEPFI, Geneva 2005).
[33] S Young, The Emergence of Ecological Modernisation: Integrating the Environment and the Economy? (Routledge, New York, 2001).

now also based on a business case scenario. How corporate performance in terms of environmental protection is not measured according to ethical standards, rather environmental problems have to be understood as something which poses a risk to the financial management. These tests are understood to be financially material, that is something tangible, and therefore they receive attention[34].

However, the possibility of protection of the environment and success in business being possible together seems to be unimaginable. What needs to be taken care of is that it should not be considered a pretext for perpetuating business. Investment analysts often consider ESG goals as underdeveloped to be considered to be workable or quantifiable financially. Ideas such as biodiversity or climate protection cannot be covered in traditional finance systems unless they are measured in money spent or earned.

SRI'S MARKET INFLUENCE

It appears that the SRI sector is still tiny and unable to significantly influence the behaviour of the companies to act in a pro-environmental manner.[35] Much of the research seems to have been exaggerated by the industry regarding SRI's influence, primarily because there is a lack of consensus on what would be considered "socially responsible". Despite its slowly increasing pragmatic stance, the SRI market is still tiny because many major financial institutions still do not understand that their behaviour which treats the environment irresponsibly also carries some financial risk instead, they consider such behaviour which is financially irresponsible to be financially advantages to them[36].

Those who advocate the promotion of SRI are of the opinion that such an investment would profit the business is financially and would punish the investment behaviour which is unethical.

[34] UNEPFI, The Materiality of Social, Environmental and Corporate Governance Issues in Equity Pricing (UNEPFI, Geneva, 2004).
[35] Social Investment Forum (SIF), 2007 Report on Socially Responsible Investing Trends in the United States (SIF, 2008).
[36] G Arnold, Handbook of Corporate Finance (Financial Times and Prentice Hall, 2005), 314-330.

Therefore, SRI would increase the financial returns for ethical investments and that would give the businesses some incentive to work on their ESG goals.[37]. Even the big companies are capable of financing themselves or not completely cut off from the investor's demands therefore if there is a decline in the price of the stocks it would affect their market listing. This would give the managers of the businesses some incentive to adopt ESG goals to keep their stock prices favourable[38]. Most of the theories in corporate finance are of the opinion that SRI proponents are incorrect and the stock market prices cannot affect the behaviour of the businesses in favour of SRI per se[39].

For example, the corporate finance theory is of the opinion that trading by investors in any number or form will still not have any effect on its price. As an inefficient market wherein demand is entirely elastic, the stock price depends on the flow of money in the economy. Therefore, all the investors look at the company's stock identically[40]. However, where SRI is able to educate the investors about the financial cost of the companies' actions which are not pro-environment, might affect the stock price[41]. This would be possible only when the investors start viewing unethical behaviour as separate from the market as a whole.

SRI may have some influence if it uses shareholder advocacy and thereby influences the management of the corporation. Institutional investment is usually passive in nature and they never had much incentive to monitor the companies in which they had invested[42]. However, it is believed that they are becoming active even though the impact that these investors have in the decision-making is short-lived[43]. However, sometimes this may induce the management to reflect the ethical investors' unease with the company's policies.[44]

[37] A Beltratti, Socially Responsible Investment in General Equilibrium (University Bocconi, Milan, 2003) 21.
[38] M Jensen and K Murphy, "CEO Incentives? It's Not How Much You Pay, But How" Harvard Business Review 1(1990).
[39] Knoll, Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment, Business Lawyer (2002).
[40] C Loderer et al, The Price Elasticity of Demand for Common Stock, 46 Journal of Finance (1991).
[41] P Rivoli, Making a Difference or Making a Statement? Finance Research and Socially Responsible Investment, Business Ethics Quarterly, 271 (2003)
[42] J Parkinson, Corporate Power and Responsibility: Issues in the Theory of Company Law 168-69. (Clarendon Press, Oxford, 1995).
[43] Davis, J Lukomnik and D Pitt-Watson, The New Capitalists. How Citizen Investors are Reshaping the Corporate Agenda15-16 (Harvard Business Press, Cambridge, 2006).
[44] *Ibid* 16.

To summarize, we can say that SRI has not yet been able to bring about a major change in the markets and their companies which run on institutional investment. The position of a regulator, which would be able to have an influence on these companies, forcing them to behave in a manner which is pro-environment, still seems to be a far dream for SRI. It seems that the only reliance is on environmental regulations to affect the polluters' financial advantages and the socially responsible firms. Nevertheless, it is required that there are reforms aiming at the regulatory mechanism as well as public policy are made if SRI is to reach a position where in it becomes a means of solving environmental problems. The reforms in the law should be such that questions the behaviour of financial institutions rather than just focusing on the frontline companies. Amongst others, primarily the reforms should work at clearly demarcating the fiduciary duties of the investment institutions so that it can strengthen the position of SRI as well as promote better sharing of data by the institutions and the status of their finances about the environmental and social performance, and, in some instances, imposing environmental liabilities[45]. The SRI movement has not yet really pushed for such major changes; instead, it has drafted its model voluntary codes of conduct which can be chosen to be adopted by the institutions and businesses if they choose to. These codes are discussed in the next part of the paper.

VOLUNTARY SRI CODES

CLIMATE FINANCE

As stated in the previous paragraph, SRI has formed its code which lays down regulations to enable the organizations or institutions to coordinate with each other in order to finance responsibility. SRI governance can be diversified in four ways:

[45] B J Richardson, Diffusing Environmental Regulation through the Financial Services Sector: Reforms in the EU and other Jurisdictions, 10(3) Maastricht Journal of European and Comparative Law 18 (2003).

- Normative setup which lays down certain standards which regulate the institutional performance in ESG parameters' context in a substantial manner[46].
- The next is standard which relates to the process which allows for verification of how the institutions have performed according to the ESG standards[47].
- There is a system for management of the institution's activities which helps in guidance of ESG activities of the institutions and their impact[48].
- And finally, a mechanism for comparative evaluation mechanism to rank the performance of different companies to select an investment[49].

Many scholars, however, are sceptical of the intentions of the corporations and are doubtful that these voluntary mechanisms would be able to provide a reasonable means of regulating the environment. These codes are very vague and open-ended in what they are expecting. Most of the investors' favour codes are based on procedural requirements and those which require strict disclosures of investing activities[50]. While some authors are of the opinion that such measures can bring about positive changes in the organisation's behaviour, as it encourages them to reflect and learn, however empirical evidence as regards the same is not conclusive.[51] Another point to note is that these voluntary mechanisms do not have sanctions or enforcement mechanisms, and therefore compliance depends upon only peer pressure or sustained demands of NGOs. The corporate's behaviour in stonewalling the draft UN Norms on Transnational Corporations' Responsibilities is an example of the corporate's attitude towards any regulatory standards with strict enforcement mechanisms.[52]

[46] Benjamin J. Richardson, The Equator Principles: The Voluntary Approach to Environmentally Sustainable Finance, York University, Osgoode Hall Law School (2005) available at https://api.core.ac.uk/oai/oai:digitalcommons.osgoode.yorku.ca:scholarly_works-2067.
[47] The Equator Principles and the Global Reporting Initiative available at http://www.equatorprinciples.com/index.shtml http://www.globalreporting.org
[48] The International Organization for Standardization's ISO 14001 regime, Ruth Hillary (ed), ISO 14001: Case Studies and Practical Experience (Greenleaf Publishing, Sheffield, 2000).
[49] Schmiedeknecht, M.H. Dow Jones Sustainability Indices, Idowu, S.O., Capaldi, N., Zu, L., Gupta, A.D. (eds) Encyclopedia of Corporate Social Responsibility (Springer, Berlin, Heidelberg, 2013) available at https://doi.org/10.1007/978-3-642-28036-8_577.
[50] Ian Maitland, The Limits of Business Self-Regulation 27(3) California Management Review 132 (1995).
[51] M Vidovic and N Khanna, Can Voluntary Pollution Prevention Programs Fulfil Their Promises? Further Evidence from the EPA's 33/50 Program, 53 Journal of Environmental Economics and Management 180 (2007).
[52] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, available at https://digitallibrary.un.org/record/501576?ln=en.

One example of a voluntary code is the Climate Principles, which was finalised in 2008 by the Climate Group, which is an NGO which worked with a few financial institutions with the aim of providing a common global standard for the institutions to follow which would help them in ensuring that their performance is such that helps in managing their impact on the climate[53]. Another example is the Carbon Principles[54], via which procedural standards are being laid instead of strict absolute prevention of these institutions when it comes to working with companies which mostly use fossil fuels, thereby providing leeway to businesses.

However, the UNPRI is much more useful and comprehensive than the above-mentioned codes, as is explained in the next part.

UN PRINCIPLES FOR RESPONSIBLE INVESTMENT (UNPRI)

As a code of conduct which has voluntary application, it is wide in its presence in the sense that the standards that it lays down cover both substantial standards and standards of process which need to be followed. It is made of up six major principles, which are as follows:

"1. We will incorporate environmental, social and corporate governance (ESG) issues into investment analysis and decision-making processes.

2. We will be active owners and incorporate ESG issues into our ownership policies and practices.

3. We will seek appropriate disclosure on ESG issues by the entities in which we invest.

4. We will promote acceptance and implementation of the Principles within the investment industry.

5. We will work together to enhance our effectiveness in implementing the Principles.

6. We will each report on our activities and progress towards implementing the Principles."[55]

[53] See https://www.theclimategroup.org/.
[54] https://www.spglobal.com/marketintelligence/en/news-insights/research/carbon-counts-2007-carbon-footprints-uk-investment-funds.
[55] https://www.unpri.org/.

Once again, these Principles are limited to business case orientation. As mentioned above since these principles for voluntary in application it does not require the signatory party to provide any proof, as to ESG requirements, of their performance. These principles further also do not require verification by any independent system for determining the implementation of the standards by the parties who have signed on[56].

The UNPRI, rather than challenging the financial institutions, seems to be accommodating them, and it is for the same reason that the UNPRI would remain one of the most preferred systems of implementing SRI. In the next part of the paper, the attempt is to see how the investors have responded to these codes.

HOW HAVE THE INVESTORS RESPONDED

RISK MANAGEMENT

For foremost financial institutions, how to understand and manage the financial risks that result from the environmental issues caused by them is a primary concern. The investors have come together and collaborated on the creation of certain forums where they can share their ideas and best practices. One such example is the Investor Network On Climate Risk (INCR) which was the result of the Summit On Climate Risk which took place in 2003 under the aegis of the UN[57]. Another such forum is the Institutional Investors Group On Climate Change (IIGCC) [58]. The main aim of these institutions is to make the financial sector aware of the environmental issues they cause and to advocate public policy reforms. The institutions aim to raise awareness about environmental issues in the financial sector and advocate public policy reforms.

In reference to banks, environmental changes present specific risks in the case of certain projects wherein investments are made in coastal areas or in the case of projects which are dependent on how the weather is at that particular time and place. Currently, there is an absence

[56]https://www.unpri.org/reporting-and-assessment/faq-on-mandatory-climate-reporting-for-pri signatories/5356.article.
[57]https://www.ceres.org/networks/ceres-investor-network.
[58] https://www.iigcc.org.

of a common approach for the international industry to ensure transparency and accountability in their work and decision-making in case of a project in case of their global warming performance.[59]

Environmental protection has become a matter of great concern in reference to the property and insurance industry. Catastrophes which were seen as being caused by global warming have caused the insurance industry to be participating in the climate policy debates.[60] Insurance companies have started collaborating with all-dinner toiletries and putting pressure on policymakers to push for regulatory action and to research and ensure preventive measures.[61] Insurance companies can indirectly help in reducing the damage caused by the global warming risk by encouraging the adoption of measures which would help in mitigating global warming and compensating the victims of the effects of climate change[62].

DISCLOSURE OF IMPACT ON CLIMATE

Investors in order to act responsibly need information about the emissions levels of the companies so that they're able to construct a portfolio which is environmentally responsible and less risky. There is an absence of well-established obligations legally to provide such information as well as there is a lack of proper standards or methods by which such emissions can be reported, this has been a hindrance to SRI on climate issues.[63] As a result of this, the financial institutions have come up with their tools which enable them to take action on global warming. For example, the Carbon Disclosure Project[64] and the Greenhouse Gas Protocol Initiative.[65] The data collected is used to initiate a dialogue between financial institutions and companies in order to tackle climate change.

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[59] J Philpott, Keeping it Private, Going Public: Assessing, Monitoring, and Disclosing the Global Warming Performance of Project Finance" 5 Sustainable Development Law and Policy 45 (2005).
[60] C Flavin, Storm Warnings: Climate Change Hits the Insurance Industry 7 World Watch 10 (1994).
[61] FM Research, Capital Punishment: UK Insurance Companies and the Global Environment 47-49 (Friends of the Earth, London, 2000).
[62] D Kirk, Insurers Voice Need to Combat Climate Risks, Business Insurance, 45 (1999).
[63] PricewaterhouseCoopers (PWC) and International Emissions Trading Association (IETA), Uncertainty in Accounting for the EU Emissions Trading Scheme and Certified Emission Reductions (PWC and IETA, London, 2007).
[64] https://www.cdp.net/en
[65] https://ghgprotocol.org/.

SHAREHOLDERS ACTIVISM

The finance sector can also raise its concern about climate change through the activism of its shareholders. The shareholders can pass resolutions and ensure conversations to force the management to listen to their requirements with reference to environmental practices.[66] Such resolutions usually ask the management to provide information on the climate change risks that can have an effect on the firm. Usually, the firms all the corporate's not open to such interferences however they might accept the disclosure of information about the levels of emissions and fix goals for its reduction so as to assimilate climate risk into their business plans.[67]

CONCLUSION

In conclusion, there is a great deal of untapped potential in the financial sector to influence important shifts in company behaviour, particularly when it comes to sustainability and climate change. Even though SRI has raised awareness of the importance of ethical concerns in investment decisions, it hasn't had much of an impact on tackling climate challenges as of yet. Financial institutions have frequently ignored the wider effects of their investments on the environment and society in favour of optimising returns within the confines of the current economic system. It will take a paradigm change in the way that investment success is determined in order to fully realise the financial sector's potential in the fight against climate change. Dedication to long-term environmental and social sustainability must be balanced with the current emphasis on short-term financial returns. This change necessitates a reinterpretation of fiduciary responsibilities as well as a mental shift in financial institutions' and investors' perspectives. A thorough awareness of an investment's possible effects on the environment, society, and future generations should guide all investment decisions. Institutions may be key

[66] D Cogan, Unexamined Risk: How Mutual Funds Vote on Climate Change Shareholder Risk 299 (CERES, Boston, 2006).
[67] Investor Network on Climate Risk, Investors Achieve Major Company Commitments on Climate Change available at https://www.ceres.org/networks/ceres-investor-network?pid=22.

players in guiding the world economy towards a more robust and sustainable future by incorporating these factors into the heart of financial decision-making.

In this situation, the enforcement of fiduciary duties is essential. Fiduciary duties should be understood to include long-term investment sustainability as well as the need to optimise short-term financial rewards. This involves taking into account the hazards to society and the environment that could jeopardise future profits. Investment institutions can be held responsible for their part in advancing sustainable development by expanding the definition of fiduciary obligations to include these larger factors. To make this change, the definition of a "successful" investment would need to be re-evaluated, going beyond conventional financial measures to take the social and environmental effects of investment choices into account.

Furthermore, even though SRI has raised awareness of the need for ethical investing, it still has to develop in order to more effectively address the ethical aspects of climate change. Thus far, the movement has functioned within the constraints of an economic structure that bears significant responsibility for the deterioration of the environment. The effectiveness of SRI in promoting the systemic reforms required to address the climate catastrophe is hampered by this inherent conflict. For SRI to genuinely support sustainable development, it needs to undermine the fundamental assumptions of the economic structures that put immediate financial gain ahead of long-term environmental care.

Governments, regulatory agencies, financial institutions, and civil society organisations must work together to create a stronger framework for sustainable investment to do this. In this sense, government policies are especially significant since they may offer the incentives and rules required to persuade financial companies to switch to more environmentally friendly operations. This can entail tighter rules governing carbon emissions, financial incentives for eco-friendly investments, and more demands on companies to disclose their environmental impact.

Moreover, it is imperative that investors receive education and understanding regarding the significance of sustainable investing. Financial firms will be forced to implement more ethical

investing methods as more investors demand that their money be managed in a manner consistent with their moral principles. This change in investor tastes may also spur the creation of new financial services and products that place a higher priority on sustainability, thus bringing ethical issues into the mainstream of the banking industry.

Lastly, it is imperative that the ethical consequences of climate change be addressed with increasing urgency as the movement for ethical investing gains pace. This entails calling for systemic changes that contest the underlying economic mechanisms causing environmental deterioration in addition to making firms accountable for their environmental impact. With its enormous power and resources, the financial industry has a special chance to spearhead this change. To make significant progress, though, we must all work together to reconsider conventional investment paradigms, give sustainability first priority, and make sure that moral issues are taken into account before making any financial decisions. By doing this, the financial industry can contribute significantly to creating a world that is sustainable and just for coming generations.

In conclusion, even if SRI has paved the way for a more ethical and ecologically conscious way of investing, it still has to be reinforced and broadened in order to meet the current ethical and environmental issues. The financial industry can shape business behaviour and advance sustainable development, but only if long-term sustainability is included in the definition of fiduciary duties and if SRI advances to address the underlying causes of environmental degradation can this promise be realised. This shift will need cross-sector cooperation, bolstered by robust governmental policies and an increasing public demand for ethical investing.

CHOICE OF LAW IN TORTS: A COMPARATIVE APPROACH

-MADHUSUDAN YADAV[1]

ABSTRACT

The rise of Globalization has led to the development of various International Law concepts, including legal principles relating to transactions and events that occur across jurisdictions. Choice of law has been a deciding factor in the adjudication process for many different laws, in particular, Torts. Foreign Torts has developed on two prevalent legal principles of lex fori and lex loci delicti. The question that further arises after analyzing these principles is which is the most favourable to their larger goal of providing justice. This legal essay attempts to delve into these principles, and their application across jurisdictions and then tries to answer a further question of whether the shift that can be observed across jurisdictions from lex fori to lex loci delicti serves the purpose of the shift to providing flexibility to the courts to provide justice in the larger context.

INTRODUCTION

"The law concerning tort choice of law is in a state of flux." The period in which Peter Kincaid[2] makes this statement is truly the time in which the ever-prevailing questions relating to the choice of law in tort came to the front as globalization led to an increase in cases relating to foreign tort. Roman law, where the concept of "lex loci delicti" (the law of the location where the wrong happened) first took shape, is where choice of law concepts have their origins. The Romans laid the groundwork for contemporary conflict of laws ideas when they understood the significance of applying the law of the location where the tort or harm occurred. In the modern era, there has been significant development relating to choice of law in many European countries including France, Germany and the U.K., but In the United States, choice of law

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[2] Peter Kincaid, Justice in Tort Choice of Law, 18 ADEL. L. REV. 191 (1996).

principles evolved differently in different states, leading to a lack of uniformity. The "most significant relationship" test, proposed by the American Law Institute's Restatement (First) of Conflicts of Laws in 1934, sought to provide a more structured approach to resolving conflicts in tort cases. In recent years, there has been an initiative towards using the law of the location where the injury happened (lex loci delicti) or a more adaptive "interest analysis" strategy. The latter considers the interests of the pertinent jurisdictions and aims to strike a compromise between conflicting policy objectives. This disagreement is more than just a semantic issue; it illustrates a larger resistance among the legal profession to creating a clear-cut, guiding theory of tort choice of law. The critical question at the heart of this debate calls for thoughtful consideration: What should these rules governing tort choice of law ultimately seek to achieve? "Since Solon's times, it has been known that comparative law has one incontestable virtue: it shows up a greater range of possible solutions to a specific problem than any particular legal system can boast of.", F.K. Juengar[3] proposed in his paper. This paper intends to analyze various approaches that could be employed to address the tort law choice issues that have been revealed by existing or anticipated laws.

The analysis is done country by country, but towards the end, some comparisons are made along with notes on specific trends or tendencies that emerge in these systems. Any one of the chosen systems' legal summaries does not claim to be exhaustive. The study does not give an exact explanation of every twist, complexity, and wrinkle in the law of the systems under consideration since only a minimal amount of attention has been devoted to case law and academic commentary, at least concerning codified systems. However, a comparative analysis may be useful in determining whether the relevant legislation is appropriate as remedies for tort-related issues. The initial and primary phase of the research revolved around reviewing a wide range of primary and secondary sources related to the topic. The developments in the English tort law regarding the Choice of law are discussed briefly by Peter Kincaid[4] and he argues that if a deviation from the lex loci standard is required to achieve the desired outcome of treating the parties equally by meeting their expectations, then it should only be done so. The researcher while concurring with this opinion also tries to portray the various obstructions that lead to deviation from lex loci.

[3] Friederich K. Juenger, Lessons Comparison Might Teach, 23 AM. J. COMP. L. 742 (1975).
[4] Peter Kincaid, Justice in Tort Choice of Law, 18 ADEL. L. REV. 191 (1996).

Further, to reinstate the notion Janet Walker in his article[5], very substantially puts forth that, although there is also a fair amount of agreement that it is appropriate to apply a rule favouring the lex loci and some sort of exception (typically one involving the personal law of the parties), there is still some debate and uncertainty regarding the specifics of the exception's nature and its applicability. The researcher also analyses relevant sections of the Hague Convention on product liability as it becomes a very important factor in analyzing the comparative nature from a French perspective as the Hague Convention came into force into French tort law in the very early stage of the conflict of law developments.

STATEMENT OF PROBLEM

While analyzing and understanding the recent developments in the Choice of Law from a comparative perspective, we realize that there is a clear substantial movement towards flexibility. The choice of lex causae has always been a very grey area and whether this different application of various principles like lex loci delicti and lex fori is leading to the delivery of Justice, which seems to be the main goal while providing this amount of flexibility to the Judicial systems of this country.

Development of the Principles of lex fori and lex loci delicti in France, the USA and the UK

France:

The French Legal system seems to favour the conception that the lex loci delicti prevails. However, after the Hague Convention[6] came into force. Lex loci is a legal concept that developed in France as a result of how Article 3(1) of the French Civil Code was interpreted to mean that "laws of police and safety bind all those who inhabit the territory." By this clause, French courts came to the conclusion that the legal implications of a tortious act should be based on the laws of the foreign nation where it occurred. However, it wasn't until 1948's

[5] Janet Walker, Are We There Yet--Towards a New Rule for Choice of Law in Tort, 38 OSGOODE HALL L. J. 331 (2000).
[6] *Hague Convention: Service of Process Abroad* (Butterworths 1993)

famous Lautour v. Guiraud[7] case that the matter was finally resolved in French case law. In this particular case, during the Spanish Civil War, a convoy of French trucks was transporting supplies from France to the Republican government of Spain. The plaintiff's spouse, who was a truck driver in the same convoy but employed by a different company, was murdered in an explosion and fire in Spain caused by one of the trucks, that was being driven by a defendant (a French company) employee. Both the defendant's employee and the plaintiff's husband were citizens of France. When a defendant's activities and the injury take place in other nations, French law is ambiguous regarding how to determine the locus delicti. Especially when civil responsibility stems from a criminal law infringement, prior cases using French law in such circumstances may not be trustworthy precedents. When a French woman was seduced in Portugal, for example, French law was used, highlighting the fact that the harm was principally caused and persisted in France. However, it is challenging to foresee French court outcomes in such cases because there are no precedents for injuries sustained outside of France. The harm or the defendant's conduct seems to be subject to French law when they take place in France. Beyond that, French law is unclear, while contemporary doctrine favours the location of the damage.

In tort cases, French law strictly adheres to the lex loci delicti rule and opposes any departure from it. It's possible that many contentious legal issues would have been settled had the Hague Conventions been ratified, particularly the one on traffic accidents. [8]Beyond what these Conventions address, there are no current efforts to modify tort liability in any other areas. This strategy was reiterated in a 1969 French Draft Statute on Private International Law, which said that non-contractual duties would be controlled by the law of the location where the pertinent occurrence took place.

USA:

The lex loci delicti principle predominated the tort cases in the United States of America up until the 1950s. Dr J.H.C. Morris pioneered the idea of a "proper law" of delict in the 1950s, stating that a court should choose the law that, based on policy considerations, has the strongest relationship with the sequence of events and consequences in a particular scenario. This

[7] *Lautour v Guiraud* (Cour de Cassation), (1948).
[8] C. G. J. Morse, Choice of Law in Tort: A Comparative Survey, 32 Am J Comp L 51 (1984).

strategy gained traction in 1963 when the court rejected the first Restatement ruling in favour of a "grouping of contracts" strategy in the Babcock case. As demonstrated in a case where the applicable legislation was decided by the state with the most care for the particular subject in litigation, Currie's consideration of governmental interests also attracted attention. The ' most significant relationship' test, which emphasizes the significance of the connection between the legal issue and the pertinent jurisdiction, was accepted by the Restatement Second as its general principle in delict law in 1969. This idea is described in Section 145(2) of the Restatement Second as follows,

“2. Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:

a) the law of the place where the injury occurred,

b) the law of the place where the conduct causing the injury occurred,

c) the domicile, residence, nationality, place of incorporation and place of business of the parties,

d) the place where the relationship, if any, between the parties is centred.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.”

The reference to section 6 in section 145 emphasizes the fact that the idea of the "most significant relationship" includes more than a simple count of contacts. Instead, it places a strong emphasis on taking into account both the fundamental legal concepts unique to each state's policies and objectives. The basis of this regulation is a study of governmental interests.

However, not all courts in America follow the same principle. For instance, the "comparative impairment" hypothesis was first introduced in Louisiana's Civil Code, which is a civil law state. The court must decide which state's interests would be least impacted if its law were not applied, by this idea. For example, the lex loci delicti principle governs conduct and safety-related issues. certain regulations are established for certain situations.

UK:

In past, English law has adjudicated actions under both the lex loci delicti commission and the lex fori principle. Dicey and Morris, Rule 203 reads as follows:

1) "As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both

    a) Actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and

    b) Actionable according to the law of the foreign country where it was done.

2) But a particular issue between the parties may be governed by the law of the country which, concerning that issue, has the most significant relationship with the occurrence and the parties."

The usual rule in the aforementioned scenario is clause (1), which states that the wrong must be actionable under both the law of the forum (lex fori) and the law of the location where the wrong happened (lex loci delicti). According to this rule, which was established in the Phillips v. Eyre decision, two requirements must be satisfied to bring a lawsuit in England for an overseas wrong: the wrong must be of a kind that is actionable there and unjustifiable under the law of the country where it occurred. The exception to the norm is clause (2), which is based on the Roys v. Chaplin case. The emphasis is shifted from the actionability of the defendant's behaviour to justifiability under lex loci delicti. Clause (1), which defines that the wrong must be actionable under both the law of the forum (lex fori) and the law of the location where the wrong happened (lex loci delicti), is the standard norm in the aforementioned circumstance.

The Phillips v. Eyre case established the rule that two conditions must be met to file a lawsuit in England for an overseas wrong: the harm must be of a form that is actionable there and unjust under the law of the country where it occurred. Clause (2), which is based on the Boys v. Chaplin[9] case, is an exception to the rule. The focus is now on whether the defendant's actions are justifiable under lex loci rather than whether they are liable. The Private International Law (Miscellaneous Provisions) Act 1995 (UK), which abolishes the

[9] B*oys v Chaplin* [1971] AC 356.

conventional double actionability rule and its flexible exemption, sets forth the present position in English law. Instead, new statutory regulations are introduced. According to Section 11(1), the law that applies is the law of the nation where the events giving rise to the tort occurred. Exceptions are permitted whenever the parties, circumstances, or outcomes render it significantly more appropriate for the laws of another country to apply. This does away with the common law and substitutes it with a lex loci delicti norm with a movable exception, much like Lord Wilberforce did in the Boys v. Chaplin case.

German:

Legislation and court decisions serve as the foundation for West German tort liability choice of law regulations[10]. The German private international law system is presently the subject of multiple reform proposals. Nonetheless, the following summarises the status of the law as of right now:

As to the German Civil Code, BGB, § 823 subs. 1," one who causes harm to another person's life, body, health, freedom, property, or any other right without authorization must reimburse the victim for any resulting damages. The violation of one of the rights listed in § 823 subs". 1 BGB (objective element of the legislative definition of tortious conduct; objektiver Tatbestand), wrongfulness (Rechtswidrigkeit), and fault (subjective element; Verschulden) are the three requirements that must be met. This statutory definition relates to actions that are only slightly related to the infringement they have caused, such as when they fail to take action. It is outlined by the duties of care to maintain safety and protect third parties from harm (also known as the "Verkehr Sicherungspflicht," or simply "Verkehrpflicht"), which German courts began to establish not long after the BGB went into effect.

The reasonable expectations of the public, among other considerations, are a major consideration for the courts when determining the precise requirements. German courts have tackled the difficult problem of establishing the location of a tort. In light of their decisions, the legislation that benefits the plaintiff the most will be applied if the defendant's acts take place in one state while the plaintiff is harmed in another. The plaintiff bears the obligation of

[10] 53. Luer, "The Lex Loci Delicti in Single Contact Cases, A Comparative Study of Continental and American Law," 12 *Ned. Tijd. v.LR.* 124 (1965).

selecting the relevant law. Nonetheless, the plaintiff will have the court decide on their behalf if they are unable to decide or if their choice is not clear. The plaintiff has the right to decide which law applies in circumstances where the defendant's conduct are spread across many countries. However, in the event that the plaintiff sustains injuries in more than one place, the laws of each of those jurisdictions will apply to the particular injuries sustained there. The laws of the foreign countries where the defendant's acts occurred are either applied completely or in conjunction with these laws. It is significant to remember that these laws are distinct from those of other jurisdictions where harm has occurred. When the location of the illegal act—locus delicti—does not rule, determining the proper law in tort cases becomes complex. In these kinds of situations, the accident site's rules—especially those pertaining to traffic—are very important in determining who is liable under German law. When parties, such as spouses or employers and employees, have created statutory or contractual relationships, complications can occur. An additional degree of complication results from disagreements within the legal community about which set of laws—including its tort rules—should govern these connections. Additionally, distinctive choice-of-law principles pertaining to the particular subject govern the outcome of tort suits including "incidental" questions, like the legitimacy of marriages[11]. Establishing culpability, causation, proof of blame, accessible remedies, and other crucial elements are all dependent on the tort law. A notable defence against improper foreign legal influences is provided by Art. 30 of the Einführungsgesetz zum Bürgerlichen Gesetzbuche (E.G.B.G.B.), which gives German courts the authority to refuse the adoption of foreign law if it conflicts with German statutory aims or public morals. In spite of these complications, the legal system makes sure that the relevant law is decided justly, taking into account the interests of all parties.

The Indian Context

The development of foreign tort and the principle of Lex loci delicti has been very similar to the UK developments as the very nature of Tort law in India originates from the English common law. There have been some cases such as Gurung v. Malhotra[12] and Patrick’s Rest., LLC.vs.Singh.

[11] C. G. J. Morse, Choice of Law in Tort: A Comparative Survey, 32 Am J Comp L 51 (1984).
[12] Gurung v. Malhotra, 279 F.R.D. 215 (S.D.N.Y. 2011).

The lex loci delicti principle, which establishes the relevant law depending on the location of the tort, is used in tort cases in India.
For instance, Mumbai's laws would apply if a person from Delhi was involved in an automob ile accident there.

The laws of the country of origin may also apply in cases like internet defamation if the detri mental act originated in another nation (such as the United States) but affects a person in Indi a. In India, lex loci delicti is applied in a complex manner that ensures a just resolution in complicated cross-border tort cases by taking into account a number of variables, including the place of the injury, the residencies of the parties, and international agreements. Additionally, the laws of the producing or transaction countries may be taken into account in product responsibility proceedings involving imported items. These cases have majorly held up the Lex loci doctrine and have very subtly rejected the principle of lex fori. This may seem a very pragmatic move in the historical context too but the developments of the past and around the world have led to the development and application of such doctrines.

While talking about the Gurung vs. Malhotra case, absolutely defying its very judgement Theodore says[13], “It is evident that Gurung and the cases that followed it are incorrectly decided because the Hague Service Convention is exclusive and only postal channels are authorised or permitted by the Convention (with Article 19 set aside) to potentially permit service by email. Thus far, the cases have involved postal service in nations that have opposed it. These choices shouldn't be implemented. Thus far, the cases have involved postal service in nations that have opposed it. These choices shouldn't be implemented.

A more challenging query is this: what happens if the state of destination has not objected to postal service? Although the answer is not entirely apparent, there are valid arguments against reading "postal channels" to include email. If this is accurate, then email service is never

[13]Theodore Folkman, Gurung v. Malhotra Is Wrongly Decided (Dec. 19, 2013), <https://ssrn.com/abstract=2370078>.

allowed as long as the convention is in effect, again excluding situations in which Article 19 applies."

To understand the stance of Indian courts on this issue we could refer to the paragraph from the judgement of Patrick's Rest LLC case:

"The Court concludes that service by email is appropriate and likely to be the best method of effectuating service of process against Mr. Singh. It has been seven months since Patrick's Restaurant attempted to serve Mr. Singh via the procedures outlined in the Hague Convention, but Mr. Singh remains unserved. Despite this, he is clearly aware of the action against him, as evidenced by his ability to hire a local attorney to defend him against this motion. The Court will authorize Patrick's Restaurant to serve Mr. Singh via email so that this litigation may begin to proceed."

This explains to us that the conception of justice from the judicial point of view is not a slave of doctrinal approach it is rather affluent to the nature of justice portrayed.

COMPARATIVE ANALYSIS OF THE JURISDICTIONAL DIFFERENCES

Initially, it was widely agreed that it was improper to apply lex fori in tort matters that were closely related to other legal systems. This departure from lex fori not only heralded the start of this revolution but also marked a crucial turning point in the development of choice of law rules. This shift was caused by the evolution of tort law, which moved from a kind of quasi-public law that supported local conduct standards to a more real form of private law that freed courts to concentrate on a just resolution between the parties. Even though there is general agreement that lex loci should be applied in tort cases, there is still significant disagreement about the nature, extent, and circumstances under which these exceptions should be used.

This attempt, however, fell short of offering a convincing justification for why courts would opt for lex loci and when exceptions ought to be allowed. Even though the 1995 United Kingdom Act was unambiguous, analysis of it didn't reveal when circumstances other than the

tort's place would call for replacing lex loci with a more suitable applicable law. The mystery of why certain courts appeared to know the law even in the face of contradicting authority, while legal professionals and academics couldn't identify a uniform norm or standard continued. The dilemma was answered when it became clear that the private law principles unique to the relevant area of law, rather than the traditional principles of public international law, were the context directing courts in the choice of law question. Courts tend to follow the fundamental principles of tort law, a field with which they are quite familiar while selecting the choice of law in tort cases. As required by standard tort principles, they were therefore inclined to apply the "law most substantially connected" to the case. Courts would manipulate choice of law rules to ensure a result consistent with tort principles if a preexisting conflict of laws doctrines conflicted with these well-known tort principles, confident that this strategy would result in a just outcome from their point of view.

Lex loci delicti has historically been applied as the choice of law in tort matters throughout Continental Europe, especially in the context of French law. Lex loci's effect continues to be felt, but the latest developments indicate that it has somewhat lessened its hold. Recognizing that it is no longer practicable or desirable to use lex loci delicti exclusively is a recurrent subject throughout each of the studied legal systems[14]. As a result, limitations on its unilateral jurisdiction have appeared. These exceptions can take different forms, but they typically involve applying "common personal law"—a body of law from a country where the parties and the tort are more closely connected than the locus delicti. The "personal law" exception's definition varies. Using a "common personal law," regardless of the definition, is based on the idea that it frequently has a stronger connection to the parties than lex loci delicti or that it applies in a way that more closely matches what the parties would expect. These exceptions, though, work automatically. It is not required for common personal law to reflect the expectations of the parties more accurately or to be fundamentally more tied to the parties and the tort. It is typically irrelevant to consider the degree of the parties' connections, the locus delicti, their laws, or the parties' reasonable expectations in light of these elements. It is unclear if and to what degree similar developments in the United States have impacted the shift in European legal systems away from depending primarily on lex loci delicti in tort cases. Even if they don't always agree with them, European scholars are aware of the important publications

[14] Pier Terblanche, Lex Fori or Lex Loci Delicti? The Problem of Choice of Law in International Delicts, 30 COMP. & INT'L L.J. S. AFR. 243 (1997).

that contributed to the American Conflicts movement. It's fair to argue that the conventional choice of law standards in European tort proceedings has been reassessed in light of American ideas. The ensuing laws in Europe are an original adaption influenced by these theories; nonetheless, they do not entirely conform to any particular American theories or procedures. None of the legal systems analyzed in this study adopts the Currie-proposed governmental interest analysis in its original or refined versions, nor do they fully accept the Leflar-proposed "better law" theory or Cavers' "principles of preference." The jurisdiction where the law controlling a claim is to be applied is determined by classic conflict rules, which are commonly followed by these systems. These systems rely on existing conflict rules rather than the American method, which involves a thorough review of substantive law policies before choosing a rule. The development of the laws in the legal systems under discussion reveals a noticeable trend toward flexibility. This change is impacted by practical factors as well as legal theories. The usage of locus delicti as a universally applicable element has become unworkable due to the rising mobility of individuals, improvements in transportation, and the emergence of new communication techniques.

Although reaching certainty in practice or theory is frequently problematic, the requirement for certainty balances the shift away from lex loci in Europe. Flexibility and clarity must be balanced, which is the main problem for nations dealing with international tort cases. The different weights that each of these goals is assigned across various countries is a major cause of the variations in the laws.

CONCLUSION

The fundamental components of the rule of law are coherence and reason. In essence, this means that state coercion should not be open to unconstrained discretion by officials, including judges, but instead be governed by clear and understandable standards. When implemented, these rules must be accurate enough to forecast the results, but not to the point of absolute predictability, which is only feasible with completely mechanical rules. The judges' discretion must be guided when the regulations are not mechanical. This instruction makes sure that judges are aware of the goal of the rule. Words like "substantially more appropriate" are

ambiguous and give judges free rein. Ideological lenses can be used to analyze the balance between public and private interests in "private" laws, such as torts and contracts, and to make the distinction between corrective justice and distributive justice.

In the field of tort law, the social context in which a tortuous act takes place and the connection between the parties play a crucial role in determining the appropriate criteria for recovery. According to conventional wisdom, expectations about the need to prevent harm and the amount of compensation due in the event of harm are shaped by the nature of the connection. Default rules, similar to those that apply to strangers on the street, take into account the parties' location where there is no clear relationship between the parties. The lex loci, or local law of the area where the tort happened, is not the main standard, though, in situations containing foreign elements. Rather, it functions as a backup plan when there isn't a significant relationship between the parties. Importantly, when there is a relationship between the parties that can be identified, even if it is just a shared foreign heritage, showing that it is fair to anticipate tort recovery to be regulated by foreign law, courts should apply that law. This method emphasises the significance of social context above geographic location, which is in line with the basic tenets of choice of law analysis in tort. A new viewpoint is revealed by inverting the traditional roles of the exception (social context) and the rule (geographical context). This viewpoint provides a new reading of accepted norms while highlighting the philosophy underlying the choice of law analysis in tort.

This recently developed rule upends the conventional framework and offers a fresh perspective on jurisdictional distinctions in tort cases. It acknowledges that the main determinant of appropriate standards for recovery should be the nature of the connection between the parties. Although there is room for improvement and criticism, these concepts represent a major step towards a more complex and situation-specific approach to tort law choice of law. The way tort law is developing as a result of new compensation models like no-fault systems highlights the necessity of ongoing modification and adaptation. This novel viewpoint provides a basis upon which courts can securely manage jurisdictional inequalities, creating conclusions that are consistent with their underlying logic and withstand legal scrutiny, even in the face of contradictory norms and conceptions. How is a court justified in applying foreign law to a case?

The rule[15] could be stated like this:

"The law applicable to a tort is the law of the place where the tort is alleged to have occurred unless it can be shown that in the circumstances the parties would not have expected that law to apply.

1) Circumstances which might show such a contrary expectation include the social environment in which the tort occurred and any relationship between the parties existing before the tort.

2) If the contrary intention points clearly to another law, then that law will apply. If the contrary intention points away from the law of the place of the tort, but does not point unequivocally to any other law, the law of the forum will apply.

3) The place where a tort occurred is the place where the injury was suffered, or the effect was felt unless the defendant can demonstrate that in the circumstances it could not foresee its behaviour having an effect outside the country where it took place, in which case the tort is treated as having occurred there."

[15] Peter Kincaid, Justice in Tort Choice of Law, 18 ADEL. L. REV. 191 (1996).

REFUGEE PROTECTION IN FRAGMENTED WORLD: INTERNATIONAL LAW AND HUMANITARIAN CRISES

-ANURADHA DAS[1]

ABSTRACT

The problem of refugees is a new phenomenon, which has aroused the concern of all countries of the world. Today, we live in a world that is at once globalized and disunited. The abstract sheds the complex web of interaction between international law and humanitarian crises, especially as related to the obstacles and remedial measures to protect the rights and dignity of displaced peoples. An essay would investigate the constantly changing refugee protection scenery by looking at factors such as political tensions, ongoing armed conflicts, and climate disasters that trigger people to move across borders. The research, which is based on a multi-disciplinary approach, addresses the part of international legal frameworks in the fulfilment of an imperative need of the refugees in an environment of political polarization and unstable power balance. It examines essential instruments such as the 1951 Refugee Convention and its 1967 Protocol, regional agreements, and customary international law, to establish whether they have been cognizant and cohesive enough to safeguard all refugees adequately in different contexts. This paper considers the part of the humanitarian actors, such as intergovernmental organizations, non-governmental organizations, and host communities, in this legal vacuum as well as in providing essential services like protection to the populations displaced.

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INTRODUCTION

In a world full of political delicacies and consternation, antagonistic wars, and ecological adversities, the plight of refugees is a challenging complication. Resting on the bedrock of international law, the principle of refugee protection represents a light that helps people escape their homes for safety and look for peace. On the one hand, international legal frameworks provide a strong legal foundation for protecting the rights of refugees as today's humanitarian crises are frequently complex and the international response is disparate. On the other hand, the efficacy of this legal system in ensuring the protection of the rights of refugees is now under scrutiny.[2]

The fundamental concept of refugee protection is typically based on the 1951 Refugee Convention and its 1967 Protocol which describe the legal definition of a refugee and present the rights and responsibilities of states to refugees. These very instruments signify the international community's resolve to give shelter to those oppressed, going through conflicts, or simply trying to seek refuge. Nevertheless, remarkable numbers of forcibly displaced people leave behind these outdated instruments, and the shortages of existing legal instruments are glaringly apparent.[3]

The refugee law application, which is inconsistent depending on the state, is the key crisis in refugee protection today. Some countries abide by their obligations under the Refugee Convention and shelter those in need while others have a restricted mindset or policies regarding immigration. The third group does not obey the international law that states the principle of non-refoulement (prohibition of sending refugees back to places where their lives and freedoms are in danger). This is a clear manifestation of the increased vulnerability of

[2] United Nations Security Council: Resolution 1296 (on the protection of civilians in armed conflict). (2000). *International Legal Materials, 39*(4), 1022–1025.http://www.jstor.org/stable/20694031(last visited on May 3, 2024).
[3]GIL LOESCHER, BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS. 661-679.

refugees with the fragmentation being a breeding ground for the persistent displacement and the suffering vicious circle.

Further on, we have witnessed the transformation of the type of humanitarian crises, which are becoming longer-lasting and contain an element of violent conflicts, climate-induced migration, and non-state actors' involvement, which has led to the reformatting of the asylum instrument of protection. The clear distinction between types of migrants such as refugees and other categories like economic migrants or internally displaced people is becoming a challenge in the way tailored legal response is planned.

Moreover, this situation is enhanced by politicization that makes efforts to honour international law and protect refugees particularly challenging. As the time of nationalism, discrimination, and the hate of immigrants gets worse, it becomes the justification for the states to consider refugees as threats to national security or economic stability of the state rather than human beings who are just born from their mothers. This negative environment erodes the compassion and solidarity of shelter elements vital for effective refugee protection, and it also lowers the credibility of the law's international framework.[4]

Despite this, bright sparks and cases of resilience can still be found in this bleak picture. Non-governmental organizations, humanitarian institutions, and grassroots movements always play the most important role when it comes to the protection of refugee rights, supplying essential services, and holding states to account for their obligation to observe international law. In that same regard, a creative refugee protection system such as a regional framework and burden-sharing mechanisms shows how collective action and solidarity may be part of the solutions in solving the global refugee crisis.

The question of the safeguarding of the refugees makes it evident that we have to give a real and principled response based on the fairytales of international laws and children's rights. In the context of the numerous challenges of modern contemporary humanitarian crises,

[4] Ayoob, M. (2001). Humanitarian Intervention and International Society. Global Governance, *7*(3), 225–230. http://www.jstor.org/stable/27800300 (last visited on April 29, 2024).

emphasizing the need for the refugee protection role is not merely a legal but also a moral necessity—an obligation that only comes along with solidarity, compassion, and collective action that humanizes human nature.[5]

LITERATURE REVIEW

In this era of ever-widening divisions, turmoil, and humanitarian disasters causing an uncountable number of refugees, refuge protection entails the utmost significant issues in the formation of international law and humanitarian causes. This topic highlights the intricate interdependent relationships between the legal area, political scenario, and humanitarian aspect.

Indeed, one of the textbooks that covers this field is "The Refugee in International Law" by Guy S. Goodwin-Gill. In this landmark study, the author offers a comprehensive examination of the law on refugees with their civil and political rights, which are under the scrutiny of such an international law mechanism. Goodwin-Gill highlights the development of the refugee law, which started and was highly developed in the aftermath of World War II, In the same period many institutions were also created to address problems of massive refugee influxes and mixed migration flows. This stands as the foundation for the current understanding of the legal responsibilities that states have and what refugees' rights are.[6]

Building upon Goodwin-Gill's insights, scholarly articles like "The Fragmentation of Refugee Protection: The articles by Eiko R. Thielemann, "A Conceptual Analysis", and Jane McAdam, "Refugee Protection: A Guide to International Refugee Law", have both tackled the issue of refugee regime's fragmentation. Thielemann's contribution focuses on a range of stakeholders in refugee conflict, from state and international institutions to non-state actors and civic society

[5] DONNELLY, J, human rights, humanitarian crisis, and humanitarian intervention, International Journal, 48(4), 607–640. http://www.jstor.org/stable/25734034.
[6] Betts, Alexander, and Gil Loescher. "Refugees in International Relations." *Oxford Handbook of Refugee and Forced Migration Studies,* 2014, pp. 233-245.

groups. She outlines the hurdles surrounding coordination and collaboration among these entities, mainly about the coexistence of different jurisdictions and discord resolution textures and policy aims. Through the book, the reader gets the entire idea of international refugee law where the 1951 Refugee Convention and 1967 Protocol, the regional instruments like the Kampala Convention that was adopted by the African Union are covered. This emphasizes the importance of a coordinated approach to the protection of refugees, namely when several legal arrangements and mechanisms will be in place.[7]

Beyond the academic legal scholarship, there are also factual observations and reports from humanitarian organizations like the United Nations High Commissioner for Refugees (UNHCR), which are vital for understanding the real-life issues in refugee protection. The UNHCR Global Trends report published annually summarizes the overall forced displacement trend and disaggregates it by the refugee, asylum-seeker, and IGP categories. This kind of documentation shows the mass and modes of emergence of the displacement crises and thereby contributes to the advocacy and formulation of well-researched and results-oriented policies. However, thematic papers like the UNHCR gender-specific vulnerabilities faced by women and girls while on the run, inform policymakers of the issues in the protection of this gender category, and in turn craft interventions that will address this issue.

In addition, the multidisciplinary approach integrates legal analysis and social studies, which fill the void in the legal protection of refugees. Works such as "Refugee Economies: "Displacement, Development, and Final Destination", a book by Alexander Betts and Paul Collier, discussed the economics of the refugee crisis, including the livelihood of refugees and their roles in host communities. These studies give a novel economic perspective in discussing of the solutions of the situations of protracted displacement and also offer sustainable solutions that may be of great use for any prolonged displacement crises.[8]

[7] DEBARRE, A, International Humanitarian Law in the UN Counterterrorism Framework. In *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework* (pp. 10–26), International Peace Institute. http://www.jstor.org/stable/resrep19637.7 (last visited on May 1,2024).

[8] World Health Organization. *INTERNATIONAL HUMANITARIAN LAW (IHL) AND CORE HUMANITARIAN PRINCIPLES IN ACTION. In A GUIDANCE DOCUMENT FOR MEDICAL TEAMS RESPONDING TO HEALTH EMERGENCIES IN ARMED CONFLICTS AND OTHER INSECURE ENVIRONMENTS.* World Health Organization. http://www.jstor.org/stable/resrep40717.12 (23–61).

Authors of the studies on refugee protection in a pluralistic world spotlight the complex picture of defiance opposed to refugees and the diversity of the legal schemes intended to protect the human rights of displaced persons. Interdisciplinarity brings together texts dedicated to international refugee laws as well as empirical studies into displacement dynamics. That enriches our knowledge of the complex field of humanitarian crisis while allowing us to apply compassion and effectiveness while addressing this crisis.

LEGAL FRAMEWORKS FOR REFUGEE PROTECTION

The legal frameworks for refugee protection occurring at the international level are the main components of international law, ensuring the implementation of international legal standards and assistance to the displaced people facing persecution, crisis, and other situations that threaten their health or livelihood. The assemblage of these frameworks includes a community of international conventions, treaties, regional agreements, and organizational mechanisms devoted to tackling refugee crises and ensuring the protection of refugees from all over the world. Nevertheless, legal frameworks such as the one mentioned above are not free of problems at this stage in their implementation and enforcement which is similar to gaps in protection followed by inappropriate resolutions of the refugee crisis.[9]

The field of international refugee law has an early legal instrument establishing the basic norms and standards, which is the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. They serve as a foundation for the international protection regime by defining a refugee, and state parties' obligations and refugees' rights. Non-refoulement ban contained in

[9] VALKI, L, Kosovo, International Law and Humanitarian Intervention. *Perspectives*, *15*, 45–67. http://www.jstor.org/stable/23615887.

Article 33 prevents countries from handing back refugees who face the threat of life or freedom in the host country. This continues to be done by the UNHCR as well as regional human rights courts which are an important pillar as is the UNHCR.[10]

International refugee law is adopted based on case law – which serves as a great tool for clarifying and making sense of this international law. For instance, one of the practical examples is the 1985 judgment of the European Court of Human Rights (ECHR) in the case called Vilvarajah v The United Kingdom. It follows in that instance, that instead of only excluding the straight removal of an asylum seeker to his country of origin, the Court included among others indirect forms of expulsion (i.e. extradition or deportation) to a third state where the risk of persecution is very high.[11]

Aside from the regional frameworks and institutions, the issue of seeking more regional cooperation and consolidation in the protection of refugees through the regional lens is also addressed. For instance, the Convention Governing the Specific Aspects of the Refugee Problem in Africa reached in 1969 by the Organization of African Unity (OAU), the OAU Refugee Convention, goes beyond the respective article in the 1951 Convention to encompass the definition of a refugee to also include people fleeing events affecting public order. This concept has been broadened to take into account the specific conditions of African states, namely, the issues linked to the displacement triggered by war, insecurity, and human rights abuses.[12]

Another example of the evolution of the refugee framework came with the 1984 Cartagena Declaration on Refugees adopted by the Latin American States, where the term 'refugee' was broadened so that it applied to those who fled the public order disturbance caused by armed conflicts, generalized violence, foreign aggression, internal conflicts, massive violations of

[10] MacFarlane, S. N. (1999). Humanitarian Action and Conflict. *International Journal*, *54*(4), 537–561. https://doi.org/10.2307/40203415.
[11] Salehyan, I., & Gleditsch, K. S. Refugees and the Spread of Civil War. International Organization, *60*(2), 335–366. http://www.jstor.org/stable/3877896.
[12] UNHCR. Global Trends: Forced Displacement in 2023. United Nations High Commissioner for Refugees, 2024.

human rights or other circumstances. The regional instruments embody the plasticity powered by the adaptation of the asylum laboratories to specific diverse and changing migration contexts within specified geographical locations worldwide.

The functional completeness of the legal infrastructure at the international and regional levels notwithstanding, these problems ex principle remain and sometimes even impossible to eliminate. This problem is that the political will of states can be under threat and when these gaps in the protection and insufficient support to the displaced population emerge occurs. Furthermore, these individuals get different interpretations and application of refugee law by their national institutions and law courts which produces differences even in refugee status among them.[13]

As an example, in M.S.S. v Belgium and Greece before the ECHR it was proved that Belgium violated the applicant's rights as defined by the Convention of European Human Rights by choosing to send him to Greece where he had faced inhuman and degrading treatment due to the institutional deficiencies of the system of asylum in the country. Ultimately, the situation in Yugoslavia brought into sharp focus the need for a strong implementation of refugee law, which is to say that international and regional treaties on this topic have to provide for a clear procedure of adjudication.

Also, increased populist undercurrents and anti-immigrant assertions in many countries have encouraged the crafting of harsh asylum policies, border closures, and turned-back operations as well which procedurally undermine refugee protection and intensify humanitarian crises. The European Union's reaction to the refugee influx in the Mediterranean region portrayed by introducing deterrence measures and externalizing migration control through policies has led to questionability about minimum refugee rights and devotion to the solidarity principle in the EU member states.[14]

[13] Hathaway, James C. "The Law of Refugee Status." The American Journal of International Law, vol. 101, no.2, 2007, pp. 271-307.
[14] Lu, C. (2007). *Humanitarian Intervention: Moral Ambition and Political Constraints*, International Journal, *62*(4), 942–951. http://www.jstor.org/stable/40204344

International instruments and regional legal regimes define the same legal rules even though challenges do not go elsewhere during implementation and enforcement. To successfully tackle these problems, all the states, international institutions, civil society actors, and other parties involved, have to make every effort to guarantee refugees relief and their rights to refugee law in a world where a clear distinction gets obfuscated easily.

REFUGEE STATUS DETERMINATION

The refugee status determination (RSD) is the crucial procedure during which asylum seekers' claims are examined and determined whether to be granted or not refugee status including all other rights that are stipulated under international law. There is often no common procedure for RSD across different countries and areas, but it generally consists of a set of interviews, document screening, and investigations to verify the truthfulness of the asylum seeker's claims. This package of programs puts in place the mechanism to prevent individuals who need asylum from the prosecution they are fleeing or the harm they may face.[15]

Nevertheless, security dilemmas regarding fairness and adequate due process are common in the asylum procedure, providing certain constraints for the adoption of efficient refugee protection mechanisms. One of the main troubles is the absence of counselling services and the poor level of understanding for asylum seekers mostly belonging to the lower classes of society. This leaves asylum-seekers with a language skill gap through which they struggle to cope with the complicated legal processes and present their cases properly which could lead to wrongful rejection and refoulement.[16]

[15] Suleiman, K. A, *The International Crisis and the International System: A study on the interplay between the management of international strategic crises and the structure of the international system*, Arab Center for Research & Policy Studies. http://www.jstor.org/stable/resrep12667.

[16] Smits, R., Molenaar, F., El-Kamouni-Janssen, F., & Grinstead, N, *Cultivating conflict and violence: A conflict perspective on the EU approach to the Syrian refugee crisis*, Clingendael Institute. http://www.jstor.org/stable/resrep05288.

Furthermore, in terms of substantive fairness, the RSD framework requires that the authorities in office render quick and unbiased decisions by the competent bodies, presenting options to the asylum seekers to produce evidence, challenge unfavourable rulings, and turn to appeals through a well-defined and effective review process. Failure of the asylum claim processing, inappropriate decision-making, and incomplete review procedure are some of the factors that can screw over the credibility and fairness of the RSD process, therefore rights of the asylum seekers are violated and they go on with the uncertainties while waiting for the decisions.

The difficulties accompanying the identification and protection of vulnerable sub-populations of the refugees as well as vulnerable subpopulations of the refugees make the RSD process even more complicated and create space for specialized procedures and safeguards tailored for their unique protection needs. For example, unaccompanied minors should be properly accommodated, and arrangements for guardianship as well as support services need to be provided in the course of the asylum process for their safety and well-being. In addition, LGBTQ+ people, for instance, have a much greater risk of being victims of persecution, discrimination, harassment, or even violence about their sexual orientation or gender identity. Therefore, this group requires a careful, knowledge-rich, and culturally sensitive approach in cases of RSD.[17]

The case of A.B. v. Canada (Minister of Citizenship and Immigration) illustrates the importance of procedural fairness and protection for vulnerable refugee populations in the RSD process. In this case, the Canadian Supreme Court held that the denial of refugee status to a lesbian refugee claimant from Jamaica was procedurally unfair because the Immigration and Refugee Board failed to consider the claimant's sexual orientation and the risk she faced upon return to her home country. The Court emphasized the need for decision-makers to assess

[17] Ayoob, M, Third World Perspectives on Humanitarian Intervention and International Administration. Global Governance, *10*(1), 99–118. http://www.jstor.org/stable/27800512.

asylum claims holistically, taking into account the intersecting factors of gender, sexual orientation, and other vulnerabilities.[18]

In response to these challenges, many countries have adopted specialized procedures and guidelines for conducting RSD interviews, assessing credibility, and identifying and protecting vulnerable asylum seekers. These measures include the use of trained interpreters, cultural mediators, and trauma-informed approaches to support survivors of torture, gender-based violence, and other forms of persecution. Additionally, the appointment of child welfare officers, legal guardians, and independent advocates can help ensure the participation and protection of children and other vulnerable individuals in the RSD process.

Refugee status determination is a complex and multifaceted process that requires adherence to principles of procedural fairness, due process, and protection for vulnerable populations. By strengthening legal safeguards, enhancing training for decision-makers, and promoting collaboration with civil society organizations and refugee communities, states can improve the integrity and effectiveness of the RSD process and uphold the rights of asylum seekers by international refugee law.[19]

INTERNAL DISPLACEMENT AND STATELESSNESS

The inner movement and the phenomenon of statelessness are the different but linked challenges in refugee protection and human rights law. Providing legal protection to the

[18] Gardam, J., & Charlesworth, H. (2000). Protection of Women in Armed Conflict. Human Rights Quarterly, *22*(1), 148–166. http://www.jstor.org/stable/4489270.
[19] International Crisis Group. (2012). HUMANITARIAN CRISES AND STATE CAPACITY. In *PAKISTAN:NO END TO HUMANITARIANCRISES* (p. Page 2-Page 9). International Crisis Group. http://www.jstor.org/stable/resrep32240.5 .

internally displaced population (IDP) and stateless persons is preserving their rights and fulfilling special demands within the inclusive context of international laws.[20]

Although internally displaced people are those who have run away from their homes driven by conflict, violence, natural disasters, or rights abuse, they remain within the boundaries of their own country. When it comes to these laws, IDPs are not refugees. In these IDPs, there is rights protection that is provided under international humanitarian law and human rights law, including the right to life, liberty, and security of person, as well as the right to an adequate standard of living.

While there are some challenges associated with providing timely and adequate help and safe shelter to IDPs, especially during armed conflict and internal displacement situations, these can be addressed and overcome. This can lead to complex situations, such as a lack of humanitarian aid as well as limited protection from violence, exploitation, and also access to basic needs like healthcare and education. Moreover, the refugees might face many difficulties in the process of finding durable solutions, including voluntary return, resettlement, and local integration.[21]

To illustrate the stateless status, we need to explain the situation of people who are not citizens of any country, which occurs due to ineffective nationality laws, unfair practices, or drastic changes in state organization. Stateless persons are among the most displaced, disadvantaged, and vulnerable groups in society. They face a myriad of barriers in terms of accessing fundamental rights including healthcare, education, employment, and movement.

With the provision of help and protection for people displaced from their home countries, governments, international organizations, and civil society organizations face numerous challenges. Stateless identity holders may not have the right papers, which is problematic as they have difficulty in proving who they are, using important services, or exercising their rights. The issue of statelessness particularly mingles with various other factors of

[20] Jose, B., & Medie, P. A. (2015). *Understanding Why and How Civilians Resort to Self-Protection in Armed Conflict*, International Studies Review, *17*(4), 515–535. http://www.jstor.org/stable/24758565.
[21] Domalain, B. (2023). *Climate change, internal displacement and humanitarian crises in Iraq*, Rudaw Research Center. http://www.jstor.org/stable/resrep51591.

discrimination and marginalization, for example, ethnicity, gender, or religion, culminating in the increase of vulnerabilities and barriers to integration.[22]

State prevention and reduction through legal mechanisms that face the challenge of statelessness are essential in solving such a complex and persistent problem. For the prevention and reduction of statelessness, the provision of international and regional agreements such as the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness constitute important frameworks for states within which states can protect stateless persons' rights and achieve nationality for such individuals.

Also, national laws and policies contribute to minimizing statelessness by carrying rule that guarantees no one is arbitrarily deprived or stripped of his or her nationality simultaneously with the process of determining statelessness, granting legal status and identity documentation to the stateless individuals and, finally, embracing a nationality that is inclusive towards all individuals while safeguarding their rights and dignity.[23]

There is a need for partnerships and government coordination within the structure that consists of governments, international organizations, civil society actors, and communities that are vulnerable. By increasing awareness of the factors underlying statelessness and its consequences, lobbying for legal amendments and adjustments, and offering help and support to stateless people, the institutions involved in this initiative should be working together to identify and solve the root causes of statelessness and to protect the rights and wellbeing of all people, regardless of their nationality or legal status.[24]

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[22] Pusterla, F,Complex Humanitarian Crises in Uncertain Times: The Challenge for the European Union Humanitarian Aid Policy, *St Antony's International Review*, *13*(1), 75–104. https://www.jstor.org/stable/26229123.

[23] Southall, D., & Abbasi, K, *Protecting Children from Armed Conflict*: *The UN Convention Needs an Enforcing Arm. BMJ:* British Medical Journal, *316*(7144), 1549–1550. http://www.jstor.org/stable/25179272.

[24] Clark, T., & Simeon, J. C, *War, Armed Conflict, and Refugees: The United Nations' Endless Battle for Peace*, Refugee Survey Quarterly, *35*(3), 35–70. https://www.jstor.org/stable/48503288.

REFUGEE RIGHTS AND ACCESS TO JUSTICE

Under international law, refugees have some basic rights to be provided with security and basic needs, and they include the right to work, enjoy education, receive healthcare, and have access to justice among others. These rights are recognized and reaffirmed in international treaties like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child at regional and national levels respectively. Nevertheless, it is generally conceded that many refugees would face significant obstacles in achieving their protection and dignity in the host countries where legal, social, and economic backgrounds may hinder the exercising of these rights.[25]

The ability to work should therefore be accorded to the refugees because this brings about self-reliance, they earn a decent living and socioeconomic integration of refugees in their host communities. On the other hand, refugees face a situation where they encounter legal restrictions, administrative barriers, as well as policies that promote protectionism. The barriers include work permit requirements, sectoral bans, and discrimination in employment. Additionally, the refugees might not be able to attribute the knowledge of their qualifications and credentials preventing them from creating their job chances based on their talents and experience.[26]

Likewise, refugees have equal rights to education and healthcare as citizens, but quite a several refugees face barriers in getting the education and healthcare services they desire. There are numerous barriers to education such as language barriers, discrimination, crowded classrooms, and documentation offences. Healthcare services may be deprived for many reasons for instance financial constraints, limits of availability of healthcare services, or discriminations against bigger junctions by the healthcare providers. Nevertheless, mental health issues appear

[26] McCoubrey, H, *INTERNATIONAL HUMANITARIAN LAW AND UNITED NATIONS MILITARY ACTION IN THE "NEW WORLD ORDER*.", International Law and Armed Conflict Commentary, *1*(1), 36–47. http://www.jstor.org/stable/44516055.

in refugees during the displacement and conflict, and at leaving their homeland for good. This singled-out warrior calls for specialized support and care.[27]

Justice is the other most important area that has to do with refugee asylum. Most of the time this area is overlooked or neglected. Asylum seekers can be confronted with issues in comprehending their legal rights and filing legal procedures - both might be quite complex for the ones who come from countries where attorneys are not accessible. Language deficiencies, cultural diversity, and [legal remedies and procedures?] awareness may import a further burden of communication for refugees to get access to justice. Additionally, a refugee can be discriminated against by society, xenophobia, and injustice of the system as well which affects her/his trust and faith in legal authorities and processes.[28]

To make the situation of legal empowerment and justice access easier for refugees, multifaceted strategies should be developed, which take into consideration not only a systemic dimension but also an individual approach. In congruence with these terms of engagement, states have to design and implement their laws and policies in a way that they are consistent with international human rights standards and refugees can be carefully protected and given enough assistance. This process translates into bypassing all the legal obstacles that would deny refugees equal access to employment, education, healthcare, and justice and finally, into the uprooting of discrimination in the society and raising the refugees to the status of equal rights to that of the citizens in the country.[29]

Nonetheless, the provision of legal aid and assistance programs is required to address the considerable gap in the access to legal resources of refugees such as consultancy, representation, and goodwill mediums. The design of such programs would be modelled according to the demands of refugees, taking into account cultural and linguistic aspects as well as people's peace of mind in doing so. Engagement with non-governmental organizations,

[27] Goodwin-Gill, Guy S., and Jane McAdam. *The Refugee in International Law,* Oxford University Press, 2011.
[28] Mills, K, Neo-Humanitarianism: *The Role of International Humanitarian Norms and Organizations in Contemporary Conflict*. Global Governance, *11*(2), 161–183. http://www.jstor.org/stable/27800563.
[29] Davies, G, *Protection advocacy by international NGOs in armed conflict situations: Breaking the barrier,* http://www.jstor.org/stable/resrep50714.

community-based societies, and refugee organizations can enable legal aid services to grow and help refugees know their rights and have access to all the opportunities that await them.

Finally, institutions should provide capacity building to enable legal workers, jurists, and law enforcement officials to gear towards refugee law, human rights principles, and cross-cultural competence. Improvement in the knowledge and skill level of legal practitioners by states ensures the enhancement of justice services quality refugee movements and the same time justice administration fairness and effectiveness.[30]

Together with stronger remedies to help legal empowerment and access to justice for refugees, we should also have broader measures in place to resolve conflicts, build strong friendships among communities, and bolster inclusive and resilient societies that honour human dignity and respect the rights of all people irrespective of the nationality or legality status. Through the development and full-on realizations of human rights within the context of asylum-seeking and thus complying with international law, states provide refugees with possibilities to take refuge in justice as well as a living that is self-reliant and securing integration.

PROTECTION OF REFUGEES IN ARMED CONFLICT

The refugees living in war regions stand up to an increase in risks to their safety, security, and well-being that require the Governments to be prompt concerning their rights and needs. States in such cases are legally bound to fulfil their international obligations, in particular refugee law, human rights law, and IHL, to shield refugees from military conflict. As such, these responsibilities cover the respect of non-refoulement, provision of access to asylum procedures, and granting refugees the same rights as any other individuals affected by the conflict.[31]

[30] Zeid, S. (2015). Women's, children's, and adolescents' health in humanitarian and other crises, *BMJ:* British Medical Journal, *351*. https://www.jstor.org/stable/26521866 .

[31] Coles, G. J. L. (1984). Some Reflections on the Protection of Refugees from Armed Conflict Situations, *In Defense of the Alien, 7,* 78–121. http://www.jstor.org/stable/23141143.

The fact that forced displacement causes obstacles for refugees just highlights even more how vulnerable they are and deprives them of basic public services. Displacement could be caused by the attacks on the refugee camps and settlements directly, as well as by the use of indiscriminate or targeted military operations that usually affect civilians sadly. On the other hand, refugees are at risk of various forms of violence such as violence, exploitation, and abuse committed by armed groups, including gender-based and sexual violence against women, child recruitment, and forced labour. Besides the physical danger they are in, they also experience mental trauma, lost work, and disrupted social networks and support systems.[32]

International humanitarian law virtually remains paramount as it lays down the legal precepts and rules for the combatants and the protection of civilians, among whom are the refugees and internally displaced peoples. Major items of IHL that aim at protecting refugees involve the concepts of distinction, proportionality, and precaution which demand the parties to the conflict to identify between civilians and combatants and abstain from attacking civilian objects, and this assumes all the feasible precautions to prevent harm to civilians.[33]

In addition to this, IHL forbids any mass displacement of civilians, whether they are refugees or just locals, and requires the parties involved in the conflict to ensure that any dislocated person is granted adequate protection, help, and humanitarian relief. The Conventions of Geneva and their Protocols give particular attention to the refugees and the civilians, including the right to humanitarian assistance, medical attention, and protection from random arrests and forced displacements.

[32] Goodwin-Gill, Guy S, The Refugee in International Law: An Appraisal, Revue hellénique de droit international, vol. 52, 1999, pp. 51-76.
[33] Leaning, J. (1999). Medicine and International Humanitarian Law: Law Provides Norms That Must Guide Doctors in War and Peace, *BMJ: British Medical Journal*, *319*(7207), 393–394. http://www.jstor.org/stable/25185505.

CONCLUSION

The current situation of refugee protection demonstrates the indisputable need for having well-anchored international legal frameworks and effective responses. Given the high complexity faced by contemporary conflicts and humanitarian disasters, innovative means as well as international collaboration are needed to find the way out of the situation of stateless persons. The source of the problem lies in the tension between sovereignty—one individual nation's self-governance and the universality of the principle of human rights. International law is a mandatory framework for a settlement of these conflicting issues, suggesting norms on the acknowledgement of refugee status, protection from refoulement, and an opportunity for asylum.[34]

Nevertheless, the limitation of international legal prospects by power interests, the lack of material resources, and the implementation holes are some of the reasons for their weakness. Consequently, this leaves the system fragmented where asylum seekers' protection varies in light of geographical locations, citizenship, and social and economic status. To add to this, the fact that some parts of the world have become homes to more extreme movements like the nationalist and populist ones is also seen to have contributed to more hostilities towards asylum seekers and migrants, thus undermining the efforts to uphold their rights.[35] It is urgent to tackle the root cause such as conflict, living degree, and environmental deterioration to avoid the humanitarian emergencies of tomorrow. It is the joint commitment to respect international law, human rights, and humanitarian principles that would define the foundation for an equitable and compassionate global response to the problems of refugees and displaced people around the world.

[34] International Crisis Group, *Refugee Protection in a Fragmented World: Challenges and Opportunities,* International Crisis Group, 2023.
[35] Belloni, R, The Trouble with Humanitarianism, *Review of International Studies*, *33*(3), 451–474. http://www.jstor.org/stable/40072187.

A TRIANGULAR APPROACH: DISSECTING THE BURMESE SPRING REVOLUTION WITH INTERNATIONAL LEGAL THEORIES

-DRAVIN MAHAJAN[1]

ABSTRACT

This research paper delves into Myanmar's (erstwhile Burma) civil war, through the complicated and elaborate perspective of International Legal Theory. As such, the paper contends that the interaction and collaboration of Rational Choice and Game Theory, Third World Approaches to International Law (TWAIL), and Natural Law not only explain but further enlighten us about what could be the roots of the conflict, hence further determining its progress. This paper posits that long-standing systemic inequality, as brought to the fore by TWAIL, when linked with the calculated strategic interaction of Rational Choice and Game Theory, along with the disorderly conduct of the citizenry bred by Natural Law, provides for a potent triad that exacerbates and hastens the country's discord. Through dissecting these theoretical nuances, this research transcends its mere analytic position to provide a comprehensive underpinning of the forces—though silent, yet crucial—in the conflict. It further attempts to close the gap that largely exists between theoretical discourses and practical resolution in conflict-prone societies through the suggestion of actionable solutions aimed at righting the core issues fueling the unrest. This study hence attempts to do justice to the Myanmar civil war by contributing information on international legal theory.

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INTRODUCTION

Myanmar is a nation with a troubled history and is burdened with a complex and protracted civil war. The Burmese Spring Revolution[2], a civil war in Myanmar, cannot be isolated from the country's hard-fought independence in 1948[3], and a long war of attrition has been spawned by ethnic tensions, military dominance, and stubborn striving for freedom. It originates from the 2021 military coup d'etat by the Burmese military (Tatmadaw), which for long has exercised power in the country through its mode of seizing power during confrontations with the minority ethnic groups who struggle for the right to self-determination[4].

Ethnic minority groups such as the Rohingyas are suffering from deeply founded state-sponsored discrimination, and their citizenship remains unrecognized by the government of Myanmar[5]. Nationalist Buddhist elements have added to this fire by calling to boycott Muslim businesses, attacking Muslim communities[6], which led Muslims to flee from the country.
This in turn was a ripple across the health of the Myanmar state, thus leading to catastrophic consequences that have witnessed the uprooting of more than two million civilians[7] as the conflict continued to spread to more regions. Further, to understand more, the study of the different international legal theories comes in as they provide a critical lens within which the issues emanating from civil strife are dissected and addressed. It gives a way to explain the many variables involving conflicts at home, like the civil war in Myanmar. The importance of international legal theory is such that it can be used to provide a normative basis against which state behaviour can be judged, and it remains still possible to establish the same for the legitimacy of governance, and the rights of people and different groups, inside a state.

[2] Saw Kapi, *Understanding Myanmar's Spring Revolution*, THE DIPLOMAT, (Jul. 14, 2022), https://thediplomat.com/2022/07/understanding-myanmars-spring-revolution/.
[3] Bertil Linter, *Why Burma's Peace Efforts Have Failed: End Its Internal Wars*, UNITED STATES INSTITUTE OF PEACE, (Oct. 2, 2020), https://www.usip.org/publications/2020/10/why-burmas-peace-efforts-have-failed-end-its-internal-wars.
[4] Amara Thiha, *The Tatmadaw's Role in Myanmar's New Politics*, THE DIPLOMAT, (Dec. 30, 2022), https://thediplomat.com/2020/12/the-tatmadaw-roles-in-myanmars-new-politics/.
[5] *Myanmar's apartheid against the Rohingya*, AMNESTY INTERNATIONAL UK, https://www.amnesty.org.uk/myanmar-apartheid-against-rohingya.
[6] Thomas Fuller, *Extremism Rises Among Myanmar Buddhists*, THE NEW YORK TIMES, (Jun. 20, 2013), https://www.nytimes.com/2013/06/21/world/aisa.extremism-rises-among-myanmar-buddhists-wary-of-muslim-minority.html.
[7] *Secretary-General Deeply Concerned by Expansion of Conflict in Myanmar*, THE UNITED NATIONS, (Nov. 15, 2023), https://press.un.org/en/2023/sgsm22034.doc.htm.

Sovereignty is the core of the international legal theory[8]. It is a state's right of self-government[9]. This characteristic is of utmost significance as it creates an essential groundwork to balance the tensions that arise between a state's right to self-govern and the moral and legal obligations the international community may have towards intervening in cases of gross human rights violation or humanitarian crisis. Besides this aspect, there are several dimensions through which international legal theories can shed light on the perspective of civil conflicts, such as Rational Choice and Game Theory, Third World Approaches to International Law (TWAIL), and Natural Law.

Rational Choice and Game Theory are basically the application of mathematical techniques[10] to strategic interactions and provide insight as to the decisions that the conflicting groups may make and the predicted outcome relative to each, given the course of action taken by either party. Further application of this model can reveal the incentives and constraints created by war, thus explaining the parties' actions and reactions.

TWAIL, on the other hand, is an international law critique[11]. It is based on the perspective of third-world countries. It tries to address issues of inequality and subjugation as much as it tries to highlight the status quo and how the law of nations may further it and marginalize some people in a state. In this paper, TWAIL is going to explain the historical and systematic aspects of the marginalization of the ethnic minority and why the civil war occurred.

Certain rights are intrinsic to human nature and are universally understood through human reason, this being the core tenet of the Natural Law Theory[12]. This theory gives a basis from which the state's actions and the conditions that precipitate civil strife may be criticized, a moral ground. Therefore, using it for the study of the Burmese civil war, one can purport that the

[8] Samantha Besson, *Sovereignty*, OXFORD PUBLIC INTERNATIONAL LAW, (Apr. 2011), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472?prd=MPIL.
[9] UNITED NATIONS, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2021/10/Summary_Autonomy_Indigenous-governanve_ABurguete-2.pdf (last visited Aug. 10, 2024).
[10] STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/Archives/spr2004/entries/game-theory/index.html (last visited Aug. 10, 2024).
[11] Mansour Vesali Mahmoud & Hosna Sheikhattar, *A Call for Rethinking International Arbitration: A TWAIL Perspective on Transnationality and Epistemic Community*, SPRINGER LINK, (May. 18, 2023), https://link.springer.com/article/10.1007/s10978-023-09344-7.
[12] STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://iep.utm.edu/natlaw/ (last visited Aug. 10, 2024).

conflict is a manifestation of the people's fight to assert their intrinsic rights against an oppressive regime[13].

It will be apt to posit that the international legal theory is indispensable in the understanding of civil conflicts since it provides not only the theoretical framework through which causes and dynamics of internal wars can be analysed but also for the development of response in terms of legal and policy strategies. These theories will let scholars and practitioners understand how different factors interplay to lead to civil wars and what work could be done towards sustainable solutions, state sovereignty, and the upholding of international law and human rights.

HYPOTHESIS

HYPOTHESIS: THE INTERPLAY OF INEQUALITY, STRATEGIC INTERACTIONS, AND INHERENT RIGHTS IN THE CIVIL WAR

The Myanmar civil war rages on, a clear current example of this theory in play, involving inequality, strategic interaction, and inalienable rights. Provided that the above conditions come in concert, an environment where escalation into civil war is probable.

The hypothesis is that the three factors of inequality, strategic interaction, and inherent rights are conjoint and work interactively in an interactive fashion to raise the risk of civil war. Inequality breeds dissatisfaction and grievances; strategic interaction develops and escalates tension and conflict; violation of inherent rights justifies resistance and rebellion[14]. This would set up a dynamic feedback loop whereby each of the factors reinforces the others, producing a situation in which civil war would now be a probable outcome.

Indeed, the hypothesis of interaction between inequality, strategic interaction, and inherent rights that result in conditions hospitable to civil war is thus vindicated by the case of Myanmar. It is a country in a state of constant strife, and these are but a few among many factors that

[13] OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, https://www.ohchr.org/en/protecting-human-rights-conflict-situations (last visited Aug. 10, 2024).
[14] John Locke, *Chapter 8: Resistance against Unjust Force, in The Essential John Locke, ed. Eric Mack,* ESSENTIAL SCHOLARS, (2022), https://www.essentialscholars.org/sites/default/files/2022-12/essential-locke-chapter-8.pdf.

present a situation not only of probability but also certainty of a civil war. Such an understanding of the interactions has really important meaning when devising strategies looking toward the prevention and resolution of civil conflicts, ensuring respect for the rights of all people, and ways of tackling inequalities so as to ensure peace and stability.

THEORETICAL FRAMEWORK & ANALYSIS OF MYANMAR'S CIVIL WAR

STRATEGIC DECISION-MAKING IN CONFLICT: THEORETICAL FOUNDATIONS OF RATIONAL CHOICE AND GAME THEORY MODELS

The strategic decisions taken by interacting actors in a Burmese civil war would be better understood when viewed from the perspectives of Rational Choice Theory (RCT) and Game Theory. These theories depict an analysis of the motivations and tactics of the Tatmadaw, NUG, vast EAOs, and international stakeholders through a rational calculus of their actions. Rational Choice Theory (RCT) contends that subjects will consistently act strategically in their pursuit of the objectives and choose alternatives that maximize expected utility given a constraint. This model shows the strategic behaviour of actors in a civil war where the government, rebel groups, and civilians are all trying to pursue strategies that further their best interests. RCT assumes that these actors have crisp-cut preferences and also know what the implication of their behaviour is.

The coup[15] of the Tatmadaw in Myanmar on February 1, 2021, is another example of rational choice in the interest of maintaining power and dominance. As the NLD won the elections[16], the military assessed that a coup was the only way to make sure they do not lose their political and economic benefits. Although the costs on the international stage are going to be high, the rational strategy involves an immediate crackdown on the protests, which would send a signal to the protestors that their resistance was futile and to the international community that Myanmar is and will be under military control.

[15] BBC NEWS, https://www.bbc.com/news/world-asia-55882489 (last visited Aug. 10, 2024).
[16] BBC NEWS, https://www.bbc.com/news/world-asia-54899170 (last visited Aug. 10, 2024).

In contrast, the Civil Disobedience Movement (CDM) initiated by pro-democracy activists[17] and civil servants[18] represents a reasoned way of destroying the rule of the military. Using state paralysis as a strategy by participating in massive non-cooperation actions, the participants of the CDM aimed to make the rule of the Tatmadaw impossible to uphold without public support, to increase the internal costs for the regime, and to focus the attention of the international community on them.

Game Theory extends the rational choice framework to strategic interactions, where the payoff of each participant depends not only on their decisions but also on the actions of others. It models conflicts as games in which the players choose strategies based on the expectations of others' actions. Of primary importance in this theory is Nash Equilibrium[19], which describes a state where no player can gain by unilaterally changing strategy if others' strategies remain unchanged[20].

In Myanmar, Game Theory reveals the strategic moves of the military junta and opposition forces. To the military, its coup represented an optimal strategic move that would increase its grip on the state, and it also anticipated a specific response by the opposition. This is what the strategies of protest by the opposition, as well as alliances with the Ethnic Armed Organizations (EAOs)[21], are for—to change the structure of payoffs for the military, breaking out of the old equilibrium and trying to find a new one that best serves democratic governance.

Game Theory also assists in analyzing interactions between the Tatmadaw and different EAOs as games played simultaneously. Each side's move is determined without knowing what the other's current move is. The EAOs' decision to escalate attack following the coup is a result of their calculation that the Tatmadaw's weakened legitimacy provides the opening to take more territories and increase its bargaining power. The offensives by the Tatmadaw into the EAO

[17] Kai Ostwald & Kyaw Yin Hlaing, *Myanmar's Pro-Democracy Movement*, KYOTO REVIEW OF SOUTHEAST ASIA (Sept. 2021), https://kyotoreview.org/issue-31/myanmars-pro-democracy-movement/.
[18] Emily Fishbein, *Myanmar's Striking Civil Servants: Displaced, Forgotten, but Holding On*, AL JAZEERA NEWS, (Aug. 29, 2023), https://www.aljazeera.com/news/2023/8/29/myanmars-striking-civil-servants-displaced-forgotten-but-holding-on.
[19]Tahereh Ahrabi, MA, *Ukraine's crisis in 2022 through the lens of game theory*, CONCORDIA UNIVERSITY (Sep. 2022) https://spectrum.library.concordia.ca/id/eprint/991205/1/Ahrabi_MA_F2022.pdf.
[20] Kenneth Chang, *Explaining a Cornerstone of Game Theory: Josh Nash's Equilibrium,* THE NEW YORK TIMES (May. 24, 2015), https://www.nytimes.com/2015/05/25/science/explaining-a-cornerstone-of-game-theory-john-nashs-equilibrium.html.
[21] Amara Thiha, *It's Time To Rethink Myanmar's Ethnic Armed Organization*, THE DIPLOMAT (Mar. 24, 2023), https://thediplomat.com/2023/03/its-time-to-rethink-myanmars-ethnic-armed-organizations/.

strongholds[22] are strategic moves to reestablish the lost dominance and prevent state fragmentation.

Further, Game Theory can be used to model games of incomplete information, like protests and repressions. The protesters chose to hit the streets to signal widespread opposition[23], and the Tatmadaw repressed them to quash dissent and reestablish control. This multi-stage game involves each side anticipating the other's responses and adjusting its strategies accordingly. The establishment of the NUG is intended to strategically consolidate anti-junta forces and confer some international legitimacy. To the extent that the NUG has gained stature as a legitimate government, it will, in turn, raise the price of military rule through resistance and sanctions. The theory, then, is to alter the payoff structure, forcing the Tatmadaw to either negotiate or lose power.

International sanctions and diplomatic pressure, looked at through an external game-theoretic lens, are efforts to increase economic and political costs to the Tatmadaw such that the continued existence of the coup regime is no longer tenable. The rational response of the military will be to trade off the benefits of maintaining internal control against the pressure and hope that the sanctions and isolation will lead to a negotiated settlement.

Humanitarian impacts, like displacement and human rights violations, are strategic considerations in this conflict. The Tatmadaw displacement of populations in contested areas[24] is aimed at undermining support for EAOs by making local resources unavailable to them, which risks further international condemnation. Similarly, such reports of human rights violations are strategic efforts to create terror and deter resistance, even with the moral and political costs that can otherwise jumpstart further internal resistance and severe international sanctions.

Thus, Rational Choice and Game Theory are adequate frameworks for understanding the strategic level of analysis of civil conflict, such as a civil war in Burma. They explain the

[22]Tetsuo Murooka and Hiroyasu Akutsu National Institute for Defense Studies, *Chapter 4: The Korean Peninsula: North Korea's Growing Nuclear and Missile Threat and South Korea's Anguish*, EAST ASIAN STRATEGIC REVIEW (2017), https://www.nids.mod.go.jp/English/publications/east-asian/pdf/chapter04.pdf.
[23] Associated Press, *Myanmar's Yangon: Aung San Suu Kyi*, AP NEWS (Aug. 1, 2023) https://apnews.com/article/Myanmar-yangon-aung-san-suu-kyi.
[24] Human Rights Watch, *Broken People: Caste Violence Against India's Untouchables,* NEW YORK HUMAN RIGHTS WATCH, (1999), https://www.hrw.org/reports/2005/burma0605/3.htm.

decision-making process of several actors and the possible ways the conflict may evolve. They offer policymakers and negotiators a set of strategic models on which it can be decided how interventions will be designed to steer the course of conflict in the direction of stability and peace. So, the full complexity of all those moves and countermoves in the Burmese civil war can be appreciated, and this requires strategic interventions based on a deep understanding of the underlying motivations and potential strategies of all parties.

TWAIL CRITIQUE OF INTERNATIONAL LAW'S ROLE IN MYANMAR'S CRISIS

Third World Approaches to International Law (TWAIL) involves a critical approach to international law in considering its operation and effects from a Global South perspective, usually alleging that international law operates in such a way that it reproduces historical injustices and modern inequities. To the extent that the MYCI accepts this fundamental tenet, the application of TWAIL to the case of the crisis in Myanmar will condemn international law on the count of how it failed to attend to the roots of the conflict, continued human rights abuses, and how it has reflected the interests of the powerful states over the needs of the weaker states. These dimensions of critique from TWAIL have to be dealt with in a much more elaborate manner.

IMPACTS OF COLONIZATION

This ill-considered policy of the colonial administration, implemented by the British colonial administration[25], remains one of the main root causes behind the current ethnic conflicts in Myanmar[26]. The British followed a divide-and-rule policy[27] and favoured some ethnic groups

[25] United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Humanitarian Update*, UNITED NATIONS OCHA (May. 24, 2024) https://www.unocha.org/publications/report/myanmar/myanmar-humanitarian-update-no-38-24-may-2024.

[26] Paul Bumman, *Myanmar's Humanitarian Crises: Unraveling the Causes of the Civil War and Global Silence*, THE DIPLOMATIC AFFAIR (Oct. 3, 2023) https://www.thediplomaticaffairs.com/2023/10/03/myanmars-humanitarian-crises-unraveling-the-causes-of-the-civil-war-and-global-silence/.

[27] Mandy Sadan, *Ethnic Armies and Ethnic Conflict in Burma: Reconsidering the History of Colonial Militarization in the Kachin Region of Burma during the Second World War*, SOUTHEAST ASIA RESEARCH, JSTOR (Dec. 2013), https://www.jstor.com/stable/23752603.

over others, thus further widening the differences and resentments. To use just one example, during British colonial rule, Karen and some other minority groups were recruited into many positions within the colonial military and administration[28], and this created tensions with the Bamar majority[29].

International law has historically legitimized these colonial borders and state structures, which also legitimize the conflicts arising from these artificially created entities. Without addressing the colonial past and recognizing the territorial integrity and sovereignty of Myanmar, the international community keeps on perpetuating the underlying tensions. The international legal framework often overlooks the fact that such colonial creations were never meant to accommodate the ethnic and cultural diversity of the population within their borders. It is on account of this oversight that strife continues between the central government and ethnic minority groups, such as the Kachin, Shan, and the Rohingya[30].

Post-Colonial State-Building

International post-colonial state-building in Myanmar was heavily influenced by post-1945 international norms[31] and practices focusing on state sovereignty and non-interference that, in many cases, favoured a high degree of centralized control[32] and the integrity of the nation over the accommodation of ethnic diversity. The 2008 constitution of Myanmar that received international support and recognition, both institutionalized military domination and failed to provide genuine federalism or adequate ethnic representation[33].

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[28] Minority Rights Group International, *Karen in Myanmar*, MINORITY RIGHTS GROUP INTERNATIONAL, (Aug. 2017), https://minorityrights.org/communities/karen/.
[29] Htet Paing Oo, *Identity and Social Inclusion*, KYOTO REVIEW OF SOUTHEAST ASIA, Issue 31 (Sep. 2021), (https://kyotoreview.org/issue-31/identity-and-social-inclusion/).
[30] Human Rights Watch, *World Report 2020: Myanmar*, HUMAN RIGHTS WATCH (2020), https://www.hrw.org/world-report/2020/country-chapters/myanmar.
[31] Emizet F. Kisangani & Jeffrey Pickering, *Rebels, Rivals, and Post-Colonial State-Building: Identifying Bellicist Influences on State Extractive Capability*, 58 **Int'l Stud. Q.** 187, 187-98 (2014), http://www.jstor.org/stable/24017857 (last visited Aug. 10, 2024).
[32] Kim N.B. Ninh & Matthew Arnold, *Decentralization in Myanmar: A Nascent and Evolving Process*, **J. Southeast Asian Econ.** (2016), https://www.jstor.org/stable/44132303.
[33] *Myanmar's Fundamental Problem: The 2008 Constitution*, Asia Times (2021), https://asiantimes.com/2021/02/myanmars-fundamental-problem-the-2008-constitution/.

For instance, the constitution reserved 25% of the parliamentary seats for the military[34] and enabled it to assume control of key ministries, which in itself guaranteed that the military, whatever the results of any elections, would have the major say. Such a setup has been disadvantageous to ethnic minorities whose clamour for a more autonomous setup has been consistently unheeded. The inability of these groups to air their concerns has, in fact, exacerbated the conflict and instability within the country.

WEAK AND HYPOCRITICAL RESPONSES

After the military coup of February 1, 2021, the international community, the United Nations[35] to ASEAN[36], spoke out in a concerted chorus of condemnation calling for a return of democracy. However, from the perspective of TWAIL analysis, these responses are much too weak and hypocritical. Various Western nations have imposed sanctions[37] on the leaders of Myanmar's military, but the impact these methods will have in changing the behaviour of military elites is usually minimal. More often than not, the measures increase the pain for ordinary people, who are clearly not insulated from the economic impacts of sanctions.

The sanctions, for instance, have brought economic hardships, with the most vulnerable populations in society bearing the brunt[38], as the military seeks ways through which to circumvent these restrictions, including illicit trade[39] and support from allied nations[40]. The

[34] House of Commons Library, *Myanmar: Military Takeover and International Response* (Feb. 1, 2023), https://commonslibrary.parliament.uk/myanmar-military-takeover-and-international-response/.
[35] Edith M. Lederer, *U.N. Adopts Resolution Urging Myanmar to End Violence, Free Detainees*, Associated Press (June 18, 2021), https://apnews.com/article/united-nations-general-assembly-united-nations-myanmar-business-global-trade-72dbb95927b735de2b83dc1a85abdd72.
[36] Hunter Marston, *Addressing the 2021 Myanmar Coup: A New Strategy for ASEAN*, Austl. Inst. Int'l Aff. (June 7, 2023), https://www.internationalaffairs.org.au Leiden J. Int'l L. /australianoutlook/addressing-the-2021-myanmar-coup-a-new-strategy-for-asean/.
[37] *US, Canada and UK Impose New Sanctions on Myanmar Military*, Al Jazeera (May 17, 2021), https://www.aljazeera.com/news/2021/5/17/us-canada-and-uk-impose-new-sanctions-on-military-military.
[38] U.N. Press Release, *Security Council Resolution on Myanmar Adopted with 12 Votes in Favour, 1 Against, 2 Abstentions*, U.N. Press Release SC/14788 (Dec. 21, 2022), https://press.un.org/en/2022/sc14788.doc.htm.
[39] *Myanmar Junta's Drug Trafficking Links*, The Diplomat (June 6, 2023), https://thediplomat.com/2023/06/myanmar-juntas-drug-trafficking-links/.
[40] *The China-Myanmar Economic Corridor 2 Years After the Coup*, The Diplomat (Feb. 7, 2023), https://thediplomat.com/2023/02/the-china-myanmar-economic-corridor-2-years-after-the-coup/.

limited effectiveness of sanctions points to the need for a more nuanced and comprehensive approach to international pressure.

INTERNATIONAL LAW APPLICATION

This is an essential problem with international law: powerful states and their allies don't tend to be held accountable for their human rights crimes[41], while weak states are often targeted and punished for far less. That said, selective application of international law[42] is a major concern because those states, characterized by their entrenched record of human rights abuse by the Tatmadaw against a plethora of ethnic groups, including, though not limited to, the Rohingya, have not translated into a firm international legal response.

For instance, evidence abounds of crimes against humanity and genocide, but the response from the international community has been slow and ineffective. The International Criminal Court has opened a preliminary investigation into the killings, but the process has been painfully slow, and Myanmar's non-membership with the ICC[43] limits the jurisdiction of that court.

A further soft and unprincipled response from the international community will send a clear signal that it applying international norms and laws solely a posteriori. In the final analysis, such selective application would delegitimize the very credibility and strength of international law in an age that appears more like a tool in a few powerful states' hands than a genuine mechanism for justice.

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[41] Amnesty Int'l, *Iraq: Twenty Years on, Still No Justice for War Crimes by US-Led Coalition* (Mar. 17, 2023), https://www.amnesty.org.uk/press-releases/iraq-twenty-years-still-no-justice-war-crimes-us-led-coalition.

[42] Matthew Saul, *International Responses to Situations of Effective Control*, 34 739 (2021), https://eprints.whiterose.ac.uk/178016/7/LJIL%20author%20accepted.pdf.

[43] Utkarsh Dubey, *ICC Jurisdiction Over Nonparty States*, Jurist (May 13, 2021), https://www.jurist.org/commentary/2021/05/utkarsh-dubey-icc-jurisdiction-over-nonparty-states/.

THE ROHINGYA CRISIS

International responses to the crisis of the Rohingya have received criticism for being highly insufficient and late. There have been gross human rights violations, including evidence of genocide and ethnic cleansing[44], yet international legal mechanisms failed to provide timely accountability and punishment for Myanmar. The preliminary investigation of the ICC[45] into the crimes against the Rohingya is running at a sluggish speed, complicating further the non-membership status of Myanmar.

The emphasis ASEAN places on the principle of non-interference has also impeded the coherent international response to the crisis. The reluctance of the ASEAN to interfere in the internal political affairs of Myanmar has enabled the military junta to continue the persecution of the Rohingya with minimal fears of serious ramifications.

It shows, from the TWAIL perspective, that the inability to protect the Rohingya and respond with accountability again highlights the system inadequacy and bias within the international human rights regime. Based on this experience, TWAIL scholars argue for a more robust and balanced international legal regime that would prioritize the protection of vulnerable populations and ensure accountability, without regard to other geopolitical interests.

THE HUMANITARIAN INTERVENTIONS AND SOVEREIGNTY

Indeed, TWAIL-based criticisms of humanitarian intervention stress how selective it is, as well as how it serves as a tool for political and military meddling by powerful states. In Myanmar, it may be a sign of a broader pattern of engagement that is strategic in nature rather than prompted by consistent legal or ethical standards.

The most telling of these, however, remains the Free Burma Rangers, a humanitarian group working in conflict zones in Myanmar[46]. They deliver medical treatment, food, and shelter for

[44] Feliz Solomon & Esther Htusan, *Myanmar's Rohingya Muslims Face Ethnic Cleansing*, TIME (Sept. 6, 2017), https://time.com/4936882/myanmar-ethnic-cleansing-rohingya/.
[45] Helen Regan, *ICC Prosecutor Karim Khan Visits Rohingya Refugees in Bangladesh*, CNN (July 7, 2023), https://edition.cnn.com/2023/07/07/asia/icc-prosecutor-karim-khan-rohingya-bangladesh-myanmar-int-hnk/index.html.
[46] David Scott Mathieson, *On the Front Lines with the Free Burma Rangers*, Asia Times (Apr. 15, 2023), https://asiatimes.com/2023/04/on-the-front-lines-with-the-free-burma-rangers/ .

people who are in displaced places, in most cases, in territories where no other organizations are capable of coming in. Paradoxically, despite how critical their work is, they get little international support[47], thus epitomizing the selective nature of humanitarian action.

Dealing With System-Level Problems

The TWAIL-grounded approach to international law, therefore, stresses the necessity of addressing the root causes of conflict and inequality in Myanmar. This would redress the decolonial legacies of current borders and political structures and allow for genuine federalism with ethnic representation.

The colonial rule in Myanmar resulted in arbitrarily drawn borders and centralized power structures that did not take into consideration the ethnic diversity of the country. To usher in durable peace and stability, these historical injustices must be addressed. On the other hand, the more inclusive political framework on which real representation of all ethnic groups will be based is another way of satisfying the many years that the members of society have grieved. This could be manifested in the possible forms of greater autonomy for the ethnic regions and full participation of those regions in national governance.

Equitable Economic Policies

International economic policies and interventions must always safeguard equitable development and social justice. Economic growth and investment must achieve fair sharing of benefits and prevent displacement and environmental degradation.

Strict guidelines for international financial institutions have to be put in place, ensuring that investments in Myanmar's infrastructure and industries result in benefits for its local communities, protect its environment, and are aimed at ensuring sustainable development. This

[47] Dave Eubank et al., *Insurgent Relief and Assistance Teams: Free Burma Rangers Organize, Train, Equip, Sustain*, Small Wars J. (Nov. 13, 2023), https://smallwarsjournal.com/jrnl/art/insurgent-relief-and-assistance-teams-free-burma-rangers-organize-train-equip-sustain.

encompasses the provision of fair compensation for displaced communities, local employment opportunities, and the enforcement of strict environmental regulations.

THE PRINCIPLE OF NON-INTERFERENCE

It is this firm belief instilled in the ASEAN policy framework, namely the principle of non-interference, that has likely prevented any effective regional intervention in Myanmar. The principle is fundamentally based on a colonial history in which external intervention was often a disguise for imperial control. Its capability to justify inaction on countless forms of human rights violation should be a caution to the world. There needs to be developed a balance between sovereignty and human rights protection, and the reconfiguration must come through advanced international law, more particularly when the state itself is the violator.

The policies and conditions as spelled out by the International Monetary Fund and the World Bank dictate the economic policy of Myanmar[48]. The conditions and policies as spelled out by these two organizations have only made the structural adjustment programs and the economic reforms further accelerate the liberalization of markets and the austerity measures that increase social unrest and inequalities in the country. For instance, the focus on economic reforms that do not take into consideration changes in human rights and social stability often sets perfect grounds for conflict. Economic policies that fail to consider deep-rooted issues such as ethnicity and politics will only result in uneven development and benefits that are not aptly distributed, such as in the case of Myanmar. This disparity only fuels further resentment and conflict between different ethnic groups.

INTERNATIONAL TRADE AND INVESTMENT

International trade and investment policies are mainly controlled by major global players and enforced by transnational corporations, and they are one of the massive contributors to the

[48] World Bank & International Monetary Fund, *Myanmar: Joint World Bank-IMF Debt Sustainability Analysis* (June 1, 2023), https://documents1.worldbank.org/curated/en581881602272455292/pdf/Myanmar-Joint-World-Bank-IMF-Debt-Sustainability-Analysis.pdf.

crisis in Myanmar. Most of the country's resources, including jade[49], timber[50], oil and gas[51], are harnessed with international investment, which displaces local communities and exerts a negative impact on the environment[52].

For example, the jade mining industry in Kachin State has brought in enormous revenues for the military[53], with vast environmental devastation and displacement of local communities[54]. The oil and gas sectors, dominated by foreign investment[55], likewise provide revenues to the military and its business cronies[56], who, in turn, leave the local populations steeped in poverty and marginalized.

These international economic laws and investment treaties have been criticized by TWAIL academics as continuing to reproduce exploitation and inequality. They argue that such an arrangement has been set in favour of benefiting powerful nations and multinational corporations while exploiting developing countries. What TWAIL calls for is the total overhaul of such policies to work in favour of local communities hosting such resources and at the same time contain strict enforcement of environmental protections. It involves the pushing of laws that call for fair compensation of uprooted communities and stringent environmental regulations to prevent degradation.

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[49] Sebastian Strangio, *A Deadly Gamble: Myanmar's Jade Industry*, The Diplomat (July 13, 2020), https://thediplomat.com/2020/07/a-deadly-gamble-myanmars-jade-industry/.

[50] Sebastian Strangio, *Myanmar Timber Exports Continue Despite Western Sanctions: Report*, The Diplomat (Mar. 15, 2022), https://thediplomat.com/2022/03/myanmar-timber-exports-continue-despite-western-sanctions-reports/.

[51] Norton Rose Fulbright, *Oil and Gas Exploration and Production in Myanmar*, Norton Rose Fulbright (Mar. 1, 2023), https://www.nortonrosefulbright.com/en/knowledge/publications/03c8960e/oil-and-gas-exploration-and-production-in-myanmar.

[52] *Myanmar Climate: Latest News, Breaking Stories and Comment*, Al Jazeera (Dec. 1, 2021), https://www.aljazeera.com/news/2021/12/1/myanmar-climate.

[53] Shannon Tiezzi, *Myanmar's Junta Tightens Its Grip on Jade Billions: Report*, The Diplomat (June 29, 2021), https://thediplomat.com/2021/06/myanmars-junta-tightens-its-grip-on-jade-billions-report/.

[54] Shannon Tiezzi, *Myanmar's Junta Tightens Its Grip on Jade Billions: Report*, The Diplomat (June 29, 2021), https://thediplomat.com/2021/06/myanmars-junta-tightens-its-grip-on-jade-billions-report/.

[55] Nearly $23bn Invested in Myanmar's Oil and Gas Sector till October, Eleven Myanmar (Oct. 10, 2022), https://elevenmyanmar.com/news/nearly-23bn-invested-in-myanmars-oil-and-gas-sector-till-october.

[56] *How Myanmar's Post-Coup Economy Fuels War and Profits the Military*, Myanmar Now (Oct. 18, 2022), https://myanmar-now.org/en/news/how-myanmars-post-coup-economy-fuels-war-and-profits-the-military.

UN AND ASEAN

International organizations, especially the United Nations and the Association of Southeast Asian Nations (ASEAN), have been widely criticized for their timid, circumscribed, and essentially ineffective engagement with Myanmar[57]. For TWAIL scholars, international organizations like these are typically limited and pushed around by the more powerful members at the cost of any attempts to transcend human rights abuses and affect justice.

For instance, both China and Russia, as veto-wielding powers in the UN Security Council, have repeatedly blocked stronger international actions against the military junta[58] in Myanmar, citing their geopolitical and economic interests as being more important than human rights concerns. Chinese investments in the infrastructure and resources of Myanmar are very big[59], and the People's Republic attaches strategic interest to the stability along its border, which is why China hesitates to.

ASEAN has also been slow to act, often hamstrung by its overarching principle of non-interference in the internal affairs of member states. This became evident in the bloc's limited response to the coup and subsequent violence, with fractures showing in its organizational structure and the influence of member states with closer links to Myanmar's military regime.

Arguably, these examples underline how international law and institutions have been tailored to serve the interests of powerful actors, as opposed to promulgating justice and accountability for weaker states and their populations. This argues in favour of reforms in which human rights and democratic principles are placed above geostrategic interests.

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[57] *How the UN is Falling Myanmar,* Special Advisory Council (Oct. 03, 2023), https://specialadvisorycouncil.org/wp-content/uploads/2023/10/SAC-M-Summary-UN-Myanmar-ENGLISH.pdf.

[58] Sebastian Strangio, *China, Russia Again Veto UN Statement on Myanmar Conflict*, THE DIPLOMAT (May 30, 2022), China, Russia Again Veto UN Statement on Myanmar Conflict – The Diplomat.

[59] Dr. Anuradha Oinam, *China's Investments in the Post-Coup Myanmar: An Assessment*, CLAWS (Apr. 08, 2023), China's Investments in the Post-Coup Myanmar: An Assessment – Center For Land Warfare Studies (CLAWS).

Addressing Root Causes

An international law approach grounded in TWAIL would be focused on dealing with the root causes of conflict and inequality in Myanmar. This would entail revisiting the colonial legacies that demarcated the current borders and political structures and promoting genuine federalism with ethnic representation.

Colonial rule in Myanmar created artificial boundaries and centralized structures with power that did not take into account the ethnic diversity in the country. This has been a legacy that fueled other problems between the central government and various ethnic groups.

For example, making the political framework more inclusive and representative of all ethnic groups will help alleviate the grievances that have been long-standing. This could be in the form of more ethnic regional autonomy and ensuring their involvement in national governance.

Equitable Economic Policies

Inclusive growth and social justice should be the pillars on which international economic policy and interventions are based. It has to do so without causing displacement and environmental degradation while ensuring economic growth and investment with fair shares and benefits.

For instance, strong safeguards must be put in place by international financial institutions to ensure that investment in infrastructure and industry in Myanmar would only benefit the local people, protect the environment, and foster sustainable development, including providing fair compensation to the displaced people, local employment, and strictly implemented environmental laws.

Strengthening International Legal Mechanisms

There is also a need to strengthen international legal mechanisms for ensuring accountability with regard to human rights violations and for protecting vulnerable populations. This involves expanding the jurisdiction and enforcement powers of international courts, such as the International Criminal Court, and developing regional human rights mechanisms.

Reform to empower these international legal mechanisms will have to be undertaken, therefore, if such mechanisms are expected to fight human rights abuses, especially when potent states have vested interests. Reforms to empower the ICC with more jurisdiction and enforcement capabilities, so it can bring to justice the perpetrators of human rights abuses regardless of political powers.

For example, a strong regional human rights body in Southeast Asia would bring the issue of human rights abuses in Myanmar closer to the limelight. Such an initiative might have practicality in having a human rights body run parallel to the regional level of Southeast Asia to keep the ICC informed and work together on a joint operation for accountability and protection of vulnerable populations.

REIMAGINING INTERNATIONAL LAW

In the view of TWAIL, the role that international law has played in the crisis in Myanmar is deeply problematic due to the way it demonstrates how international legal regimes ultimately tend to align the interests of power states with the perpetuation of historical and contemporary injustices. There is a need to reimagine international law from its very foundations so that justice and equity should be the centre of it according to the needs of the global South.

This could be done by restructuring international agreements and institutions in such a way that developing countries, their interests, and representation and protection are adequately addressed. This will mean the establishment of a legal framework that will accord priority to human rights, social justice, and sustainable development over geopolitical and economic interests.

This includes international trade and investment agreements that are designed in a way to protect community interests and ecological integrity in order that the fruits of economic development be equitably shared. International organizations should be reformed to make sure that actions taken are guided by ethical principles and the need to serve vulnerable populations, rather than the strategic interests of powerful member states.

International law should be reconceptualized as an instrument for justice and equity, without which the crisis in Myanmar cannot be addressed and real global justice and peace cannot be attained. Such a reconfigured situation will make international law an instrument of for the realization of human rights, social justice, and sustainable development benefiting all nations and peoples.

Natural Law's Role in the Genesis of Civil Unrest

The second one is that Natural Law theory asserts that some of the rights are natural to humankind and are deducible by reason. This theory has significantly influenced people's moral and legal systems. More often than not, it has been a foundation for civil unrest under the violation or denial of natural rights.

Natural Law in Civil War in Myanmar

According to this theory, the government is illegitimate if it fails to protect the natural rights of citizens or, even worse, violates those rights[60]. Therefore, this theory was the basis for the interpretation of the civil disobedience of the people in Myanmar after the military-led coup of February 1, 2021. To be more exact, power was usurped by the military junta without the people's consent, and hence, it was deprived of its natural right to self-determine and opt for the way of being governed by consent. The brutal suppression of peaceful protests was also the violation of natural rights to life and liberty. The proof that people cannot "concur" with the junta was given. Natural Law and Use of Force to Resist Repression

Natural Law – Natural Rights to War principles–. People have a right to war against tyranny. Thus, this rule has been one of the reasons the people of various ethnic groups in Myanmar have resorted to armed resistance against the military authority. In fact, most ethnic armed organizations and newly formed resistance organizations have increased their campaigns, as they believe the only option is an armed struggle to get back their rights and freedoms.

[60] *Locke's Political Philosophy,* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 06, 2020), Locke's Political Philosophy (Stanford Encyclopedia of Philosophy).

The Natural Law theory posits the social contract as having been entered into by those who are ruled to be ruled by and under the law in exchange for the protection of their natural rights. In the context of Myanmar, the military coup is held to be a breach of the social contract and, hence, a breach of the source of moral authority of the state. The resultant civil disorder, therefore, is an expression of this breached social contract where people feel that resistance is a moral duty toward the universal principles of justice and human rights.

Historical Implications of Natural Law for Civil Unrest

Most freedom-fighting movements trace their theories and aspirations to the precepts of the Natural Law theory. The American Revolution was based on the fact that British rule was contravening the natural rights of the colonists. At the core of the French Revolution was the idea of establishing an ideal society that represented such ideals of natural rights to liberty, equality, and fraternity. More recently, the Arab Spring was based on movements that demanded that respect be made for their natural rights to freedom, dignity, and economic opportunity.

Ethical Foundations and Conflict Resolution

Underlying the Natural Law theory is a premise that governance systems must be based on universal moral principles. In conflict resolution, such as is the case in Myanmar, ethical principles to be regarded in the process include autonomy, justice, beneficence, non-maleficence, and fidelity. Interventions must be just, non-prejudicial or selectively discriminatory, and aimed at benefiting the population without causing unintended harm. Fidelity, which demands that promises made in negotiations are kept, is also essential for the building of trust among the stakeholders of a conflict.

Governance and Order in Light of Natural Law

Natural Law theory, conceived by thinkers like Thomas Aquinas and John Locke, holds that a lawful and systematic society bases its ideals on universal moral principles that reflect human nature. As such, the operation of governance and social order on the tenets where political

power is only recognized with the consent of the governed. In Myanmar, the military coup and the associated conflict have undermined the rule of law so much that it now approximates to the state of nature that Locke describes, where natural rights are unassured by the state. It will take the governance of this state based on Natural Law principles, where the consent, justice, and respect of natural rights are observed in Myanmar so that peace and stability are realized.

It underlines the doctrine of Natural Law as much as it is intertwined with civil disturbance: civil unrest always follows when the citizens feel that their natural rights are under threat, as has happened in Myanmar. This theory, at the bottom line, is a moral and philosophic defence for resistance and is underlined by an appeal for structures of governance to be characterized by respect and protection of the same. The resolution of the conflict in Myanmar calls for a fundamental rethinking based on the doctrine of Natural Law in governance and social order so that there is justice, equity, and protection of man's rights.

DISCUSSION

COMPARATIVE ANALYSIS OF OTHER THIRD WORLD CONFLICTS

The civil war in Myanmar reflects the complex interplay of internal and external factors that are common to many third-world conflicts. Comparative analysis with other third-world conflicts reveals shared characteristics and divergent outcomes, providing insights into the nature of such conflicts and potential pathways to their resolution.

Shared Features of Third World Conflicts: It has been seen that many of the third world conflicts share some of the fundamental features. Among these legacies of colonialism, are arbitrary borders, and power structures that do not take cognizance of the political and social realities of post-colonial states, and many of these conflicts are rooted in deep-seated ethnic, religious, or ideological divisions that have been exacerbated by external influences and internal power struggles.

For instance, the DRC conflict shares with Myanmar a colonial history of exploitation and post-independence chaos. The DRC is mired in one of the deadliest conflicts since World War

II[61], which has claimed millions of lives. It is a result of a complex web of internal and external factors, including ethnic tensions and the involvement of neighbouring countries.

Theoretical Lens of International Legal Theory: International legal theory, especially TWAIL, serves as a theoretical lens through which the operations of the international legal system have mostly overlooked the needs of third-world countries embroiled in conflict. It emphasizes the ways by which international law can reinforce and reproduce structural inequalities and injustices that contribute to the outbreak and continuation of conflicts.

In the case of Syria, for example, it is well-established that international legal interventions have been fraught with geopolitical interests and, thus, severely limited by international law in addressing the root causes of conflict. The Syrian civil war, like that of Myanmar's, has been dominated by gross human rights abuses[62] and the failure of the international community to effectively intervene[63].

Divergent Outcomes: These similarities notwithstanding, third-world conflicts can yield divergent outcomes depending on, among other factors, the nature of international intervention, the resilience of state institutions, and the capacity of civil society to mediate and resolve conflicts. The role of natural resources, strategic geopolitical interests, and the involvement of external powers can also significantly influence the trajectory of a conflict.

A case in point is the civil war in Sri Lanka, which for over 25 years was able to find a resolution through a decisive military victory by the government forces. Yet, the issues involved were truly ethnic tension and political representation, and these remain unsolved in their roots, showing that the issue of the attainment of peace sustainably is complex even after the ceasing of active conflict.

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[61] *Conflict in DR Congo is deadliest since World War II, says The International Rescue Committee*, RELIEFWEB (Apr. 08, 2008), Conflict in DR Congo deadliest since World War II, says the IRC - Democratic Republic of the Congo | ReliefWeb

[62] *Accountability for human rights violations in Syria and the role of the UN Security Council*, AMNESTY INTERNATIONAL PUBLICATIONS, (2011), Syria: Accountability for human rights violations in Syria and the role of the UN Security Council (amnesty.org).

[63] Sebahate Shala, *The Responsibility to Protect: How the World Failed in Syria*, WORLD MEDIATION ORGANIZATION (Mar. 13, 2024), The Responsibility to Protect: How the World Failed in Syria – WMO (worldmediation.org).

Implications for Myanmar: Such a comparison, therefore, lends support to the proposition that the end of third world conflicts, including Myanmar's, would need a multifaceted approach to address the underlying causes of the conflict. This would range from tackling issues of inequality and injustice to understanding the strategic interactions of the actors involved and ensuring the legitimate rights of all individuals. The analysis further shows the relevance of international legal theory in response to such conflicts. This has really called for a re-examination of the international legal order in the interest of third-world countries in order to contribute its quota towards the resolution of conflicts in a just and equitable manner.

In essence, the comparative study of third-world conflicts shows that, while the common lines running through these conflicts are obvious, each of them is unique and requires a corresponding solution. The case of Myanmar is a point in the case compared to other third-world conflicts that underline the need for a comprehensive approach combining insights of theory and practical interventions for addressing the complex realities of civil strife.

Historical Context and Its Relevance to the Current Situation

Potentially, deep down in the historical experiences of colonialism and post-colonialism lay the roots of this conflict that organized the political and social terrain of these third-world countries. The term "Third World" was a Cold War invention[64] for those countries that remained non-allied with the capitalist West or the communist East. However, the very non-alignment did not protect them from the influence of the superpowers or the pervasive legacies of the colonial powers.

Such a background is very relevant for such instances as the civil war in Myanmar. More often than not, colonial powers drew borders without any consideration of the ethnic or cultural situation on the ground. What often followed after independence were simply internal conflicts. More so, economic exploitation by the colonial powers simply mainly left these nations underdeveloped, and incapable of dealing with poverty, inequality, and weak institutions.

[64] Leslie Wolf-Philips, *Why 'Third World'?: Origin, Definition and Usage*, Vol. 9, No. 4, Third World Quarterly, pp.1311-1327, (1987), Why 'Third World'?: Origin, Definition and Usage on JSTOR.

The British policy of divide and rule only worsened the ethnic differences in Myanmar, creating a fertile ground for future conflict. In the case of independence, where a stable and inclusive structure of governance could not be shaped, it only created the most prolonged- running civil war in the world, with different ethnic groups either seeking autonomy or federal rights.

The dynamics in third-world nations were further complicated by the Cold War, where superpowers sponsored proxy wars in such countries to forward their geopolitical interests. Interventionist policies by the United States in Latin America[65], for example, meant decades of civil strife and dictatorships[66]. Similarly, Myanmar's strategic position necessarily made it a region of interest to the Western and Eastern blocs, and its internal politics would therefore be always influenced.

Third-world conflicts did not end with the Cold War. In fact, more often than not, the vacuum that the superpowers left behind in cases of internal disputes only meant further escalation, as has been seen in the Balkans and several African countries. The response from the international community channelled through international legal theories, has often been skewed to the level of sometimes fanning conflicts through wrong-headed interventions.

Today, the historical context remains highly relevant as it continues to exert significant influences on the present political and social realities. This includes a shift in power dynamics globally with new economic powers such as China and India, which has introduced new variables in the equation. These countries today take on greater roles in the international scene as investments, diplomatic forays, and sometimes involvement as military backers in the third world further shape today's conflicts on the ground.

In Myanmar, historical grievances of ethnic minorities, a legacy of authoritarian rule, and the strategic interests of regional powers conflate to create a volatile cocktail of conflict. The international legal system, stemming from a colonial past, often struggles with dealing

[65] Leticia Abad and Noel Maurer, *When Interventions Fail: Lessons from the U.S. Experience in Latin America*, CATO INSTITUTE, https://www.cato.org/research-briefs-economic-policy/when-interventions-fail-lessons-us-experience-latin-america.
[66] Hilary Goodfriend, *US Imperialism Alone Can't Explain the Triumph of the Right in Latin America*, JACOBIN (Feb. 05, 2023), https://jacobin.com/2023/05/us-imperialism-far-right-latin-america-dictatorships-homegrown-book-review/.

effectively with these multi-tiered issues. A fundamentally TWAIL critique of international law points to the fact that the legal regime must take serious account of historical context and the several forms of power relations that help to perpetuate conflicts and crises.

Hence, the past is not just a background to contemporary happenings in third-world struggles; it is a living history that completely defines the present. A meaningful analysis of current conflicts—and prescriptions for sensible strategies—can only be done with an understanding of the historical context and a sensitivity to the specificities of each particular case. The case of Myanmar shows how history may be a powerful determinant of contemporary conflicts and proves the need to draw on historical insights in the frameworks of international legal theory and policy.

Multi-disciplinary Insights into the Civil War in Myanmar

The civil war in Myanmar is a multidimensional war with deeply rooted historical aspects that have to be approached multidisciplinary to understand the complexity of the war. Insights from political science, sociology, anthropology, and international relations, among others, contribute to a holistic understanding of the conflict.

One is to understand the civil war from the **perspective of political science** using a state formation approach and the nature of sovereignty. To a political scientist, the stranglehold of the army on power, despite the country's recent flirtations with democracy, is an illustration of the political difficulties in transforming the country from a military dictatorship to a civilian-led one. Equally illustrative of this point is the 2008 constitution, which gave a quarter of parliamentary seats to the army. The author cites this as an example of entrenched power.

The conflict, **viewed sociologically**, is a result of social stratification and marginalization of certain ethnic groups. The crisis with Rohingyas is also seen not just as a political issue but as an expression of society's attitude and internal, deeply ingrained prejudices. However, the military's modus operandi, including the destruction of hospitals and schools, can only be seen as a plan to create havoc in the social structure of the communities siding with the opposition. It is from an **anthropological perspective** that the cultural dimensions to the conflict can be understood. The EAOs and their resistance against the junta reflect their quest for cultural autonomy and preservation. Thus, different ethnic groups challenge the junta's authority by

creating alliances among themselves while becoming new groups since the 2021 coup. This challenges and expresses cultural dissent to central rule.

The **international relations perspective** provides a lens through which to view the externalities that drive the conflict. Myanmar's strategic positioning has attracted the attention of global powers, changing the conflict's dynamics. The international response, the ASEAN Five-Point Consensus[67], and the decisions by the UN Security Council have been crucial to the junta's strategies and the resilience of the opposition.

The **economic perspective** would focus on resource allocation and distribution and economic inequality that have played a part in the origin of the war. Natural resources have been exploited, depriving the local communities of fair compensation. Economic sanctions and foreign investments have also influenced the junta's resourcing in controlling violence, as well as the opposition in resourcing their resilience.

Military studies would elaborate on the tactics and capabilities of the two belligerents. Despite their greater armoury, and support from Russia[68] and China[69], the military controls less than half of the country[70] and struggles to recruit new cadets[71]. The success of the opposition, courtesy of powerful militias and newer resistance forces, highlights the shifting war dynamics in the region.

The disciplines that take **on a humanitarian lens** will focus on the repercussions of the war on the civilians. More than two million people have been displaced, with the healthcare system collapsing[72] under the weight of more cases than patients. Humanitarian aid organizations will

[67] *Chairman's Statement on ASEAN Leaders' Meeting: Five-Point Consensus*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN), (2021), Chairman's Statement on ALM - 24 April 2021 - 5pm (asean.org).
[68] Poppy Mcpherson, *Russian Support for Myanmar Junta destabilising Southeast Asia: US Envoy*, REUTERS (March 24, 2023), Russian support for Myanmar junta 'destabilising' Southeast Asia – U.S envoy | Reuters.
[69] Sebastian Strangio, *China Pledges Support for Myanmar's Junta No Matter How the Situation Changes*, THE DIPLOMAT (April 04, 2022), https://thediplomat.com/2022/04/china-pledges-support-for-myanmars-junta-no-matter-how-the-situation-changes/.
[70] Yangon, *The Military Dictatorship Controls less than 50% of Myanmar*, THE ECONOMIST (May 16, 2024), The military dictatorship controls less than 50% of Myanmar (economist.com).
[71] Reuters, *Myanmar's struggling junta to start drafting young people as soldiers*, NBC NEWS (Feb. 14, 2022), Myanmar's struggling junta to start drafting young people as soldiers (nbcnews.com).
[72] Richard C. Paddock, *Myanmar's Health System is in Collapse 'Obliterated' by the Regime*, THE NEW YORK TIMES (April 19, 2022), Myanmar's Health System Is in Collapse, 'Obliterated' by the Regime - The New York Times (nytimes.com).

be at the centre of supporting the fighting soldiers and the people in the midst of the war in the nation.

Finally, it would be through the **perspective of international and human rights laws** that the conflict would take centre stage. The actions of the junta, through the suppression of the protestors[73] and the direct attacks on the civilians in the name of quelling the protests, bring on a question of war crimes[74] in the most literal manner and the international community's responsibility to intervene.

It will be apt to say that a multi-disciplinary approach to the conflict in Myanmar reveals a kind of interconnection among various factors in sustaining the conflict: political power struggles, social inequalities, and cultural identities; economic interests, military strategies, humanitarian crises, and legal implications all intermingle in this complex tapestry that defies simple solutions. These multi-disciplinary insights themselves hold the key to crafting and undertaking effective responses to the conflict and set in place a way towards realizing a solution that is borne of peace.

SOLUTIONS AND RECOMMENDATIONS

ADDRESSING INEQUALITY THROUGH INTERNATIONAL COOPERATION

Inequality is a complex issue. For example, in countries with conflict, like Myanmar, the issue goes far beyond economic inequality, as it also relates to opportunities[75], resources, and power, with such marginalization usually targeting certain groups, mainly women and girls[76].
Resolving inequality through international cooperation would thus target a fairer distribution of resources and inclusive growth. This must involve investment in education and skills development to empower people of all classes. Such improvements in human capital will

[73] BBC NEWS, Myanmar coup: Dozens killed as army opens fire on protesters during deadliest day (bbc.com), (Feb. 1, 2021).
[74] AMNESTY INTERNATIONAL, https://www.amnesty.org/en/latest/news/2024/02/myanmar-military-air-strikes-that-killed-17-civilians-must-be-investigated-as-war-crimes/, (Feb. 14, 2024).
[75] *Employment in Myanmar in the first half of 2022: A rapid assessment*, INTERNATIONAL LABOUR ORGANIZATION (ILO Brief), (2022), ILO Brief Myanmar FINAL corr.pdf (un.org).
[76] Kathleen Kuehnast, *Myanmar's Ongoing War Against Women*, UNITED STATES INSTITUTE OF PEACE (Nov. 18, 2023), https://www.usip.org/publications/2021/11/myanmars-ongoing-war-against-women.

finally eliminate poverty and inequality, which can make citizens substantial contributors to the economy.

A very important aspect of this is to institute measures of social protection. This means that safety nets and welfare schemes should be in place to provide support to the vulnerable and, ideally, a way out of poverty. These should be designed to be inclusive, to ensure that the most marginalized receive the aid they require.

Inequality can be reduced through combating discrimination. International cooperation can support legislation and policy aimed at eliminating discrimination based on such factors as gender, ethnicity, or economic status. A country encouraging equality will finally ensure that all citizens participate productively in society.

There can also be the use of international cooperation to promote targeted interventions that support social groups at the periphery. Through international partnerships, countries will have the best chance to share experiences and offer technical aid in the development of targeted interventions for social groups that have been left at the fringes, such as ethnic minorities and the rural population.

International cooperation can also work to reduce inequalities by developing a just trade and financial system. By encouraging trade agreements that work for everyone and financial inclusion mechanisms, countries will create a more just, equitable global economy.

After all, international cooperation that can really deal with inequality should be multi-dimensional and adapted to the different dimensions from which it exists. Issues ranging from equitable resource distribution, education, social protection, anti-discrimination, marginal groups, and support to fair trade can be just some of the ways through which the international community comes to the aid of countries like Myanmar in the uprooting of deeply founded inequalities that give rise to civil unrest. Peace and stability, together with the sustainable development of nations into an equitable and just world, is the result.

STRATEGIC INTERVENTIONS BASED ON GAME THEORY

Game Theory is a mathematical model devised for the purpose of analysing strategic interactions. Its application could inform an understanding of the design of interventions in cases of civil conflicts, such as in Myanmar, with a point of understanding the interdependencies and possible reactions of each stakeholder.

It allows the use of game theory to study strategic intervention, which involves the analysis of who the players in the system are, their set of strategies, and possible upshots of these strategies. This, in the context of Myanmar, will have potential players: the military junta, various ethnic armed organizations, the civil government and its supporters, and international players. The different power levels and different goals of each player have to be taken into account in creating relevant strategies.

An application in Game Theory is through the design of an incentive structure, some kind of arrangement that would naturally lead the contesting parties into cooperating. For instance, international players may give or withhold economic aid or sanctions to the military junta. That is, create a Nash Equilibrium where the best response of all parties will lead to the most preferred outcome of peace. And this has to be calibrated in providing robust incentives to change behaviour without leading to another unintended consequence.

Other strategic interventions are signalling and commitment devices by international players who clearly communicate intentions and credibly commit to back them, thereby influencing the strategic calculations of the junta and other opposition parties. This may include promises for the protection of civilians, in return for some kind of concession by the military, or a hands-off policy.

Game Theory also suggests understanding the sequential nature of strategic decisions, implying that the timing and sequence of interventions can be used to change the path of a conflict, understanding that conflict is dynamic and pinpointing the window of opportunity.

To put it briefly, Game Theory offers a systematic way to design strategic interventions in civil conflicts. By taking into account the preferences, strategies, and potential reactions of all parties, international actors can design interventions that are likelier to bring about a peaceful and stable equilibrium. Application of Game Theory to the Myanmar conflict could help in

designing strategies that address the root causes of the conflict and pave the way for a resolution agreeable to all stakeholders.

UPHOLDING NATURAL LAW TO RESTORE PEACE

The concept of Natural Law, which argues that certain rights are inherent and universal, can be a powerful tool in restoring peace to conflict zones such as Myanmar. Upholding Natural Law means the respect and protection of these fundamental rights, most of which form the basis of civil unrest.

The military coup and its follow-up actions in Myanmar have been seen as a violation of the people's natural rights, leading to wide resistance and conflict. The resolution to that effect is that to restore peace, there must have an address and resolution to such perceived violations so that a system of governance treating all citizens with the respect they are due can be realized. International cooperation plays a pivotal role in this process. An example is the fact that the United Nations has the rule of law at the base of peace and stability. In other words, it states that all, including the state itself, shall be held accountable before the law, and the law will stand between peace and a struggle for power and resources. This principle is based on Natural Law since all international efforts to reintroduce peace in Myanmar must focus on the creation of a legal and political order that respects and protects natural rights.

Efforts in peacebuilding should ensure that the most vulnerable are protected from discrimination, harassment, and abuse, as these usually precede conflict. The international community, by upholding Natural Law, can support the establishment of fair, inclusive economies and societies that only lead to lasting peace.

Finally, respect for Natural Law will bring peace back to Myanmar. This calls for the protection of inalienable human rights, the rule of law where everybody is accountable, and international cooperation that guarantees the same. In this way, peace and stability can be ensured in the future with all the conditions that may render it likely.

CONCLUSION

A complex web of civil conflict in Myanmar ties history-based grievances, socio-economic disparities, and contestation for political power together in a tapestry that is quite complex and defies linear solutions. If one inspects this conflict informed by international law and game theory, it seems to be not just a political or military conflict but a manifestation of evil, deeply woven into society, one that has been ignored or unheeded for a long time.

International law and policy will have a major role to play in dealing with the conflict. The inadequacy of the conventional legal framework to deal with these multidimensional problems becomes very clear. It requires the global legal community to reform its principles, suitable for the changing scenario of conflict, especially in countries like Myanmar. How can international law keep evolving to meet the challenges thrown by unequal levels of development? How can legal mechanisms be proactive, and not reactive, in conflicts of this nature? These are urgent questions.

Cooperation should be fostered to ease inequality, but only if based on a real understanding of the causes of the conflict and supported by strategic intervention by the international community. What would be the role of Game Theory in crafting interventions in which the interests of all are aligned? How does Natural Law guide Myanmar toward a future defined by lasting peace?

Myanmar presents an opportunity for the international community to show that it has learned its lessons and can now proceed toward a new era of peace and justice. Very concretely, what would this journey be, and how can we be sure that it is inclusive and just, on the one hand, and sustainable, on the other? Would it be possible to develop a model of conflict resolution in Myanmar applicable to other parts of the world?

Make all the citizens of the world introspective and committed to the cause of peace and justice in Myanmar. Do we take into account the strategic imperatives of all stakeholders? Are our interventions really well-meant and impactful? How do we gauge the effectiveness of these interventions and recalibrate our strategies?

At this defining moment, we have to answer some serious questions. The road to peace in Myanmar is long and tough, but it is a road worth travelling, a road that could make a difference not only in Myanmar but in all nations that are now or in the past stricken by conflicts. Let's

go ahead with this challenge in the hope and knowledge of being able to build a future of peace and solidarity, learning from the mistakes of the past.

COLLIDING RESPONSIBILITIES: AN ANALYSIS OF LIABILITY IN INTERNATIONAL SPACE LAW

-KEERTHI KASTURI AND SRINIDHI S[1]

ABSTRACT

The exploration and use of outer space have necessitated a robust legal framework to ensure peaceful and responsible activities. This paper explores the evolution of international space law, focusing on the key treaties governing liability issues. The paper aims to analyse the current state of space law, particularly regarding liability for damage caused by space activities, and identify potential areas for improvement. The paper examines relevant treaties, conventions, and legal principles, including the Outer Space Treaty, the Liability Convention, and various UN declarations. The paper highlights the key concepts of space objects, launching states, and collisions, emphasizing the importance of clear definitions for accountability. It delves into the concept of liability in international law, focusing on state responsibility and fault-based liability, and analyses the provisions of the Liability Convention. While the convention provides a valuable framework, limitations exist, such as the need to address the role of private actors and the growing problem of space debris. International space law has made significant strides in establishing a framework for peaceful space exploration, but continuous adaptation is crucial to keep pace with the evolving space industry.

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INTRODUCTION

The emergence of international space law marks a pivotal development in regulating activities beyond Earth, ensuring that space exploration and utilisation are conducted in a manner that promotes global peace, security, and equitable access. Central to this legal framework are treaties and principles that address the liability of states for their space activities, reflecting the need for accountability in the face of potential harm caused by space operations. This paper explores the historical evolution and key treaties governing space law, focusing on liability issues arising from space activities.

We begin with an overview of the foundational treaties, including the *Outer Space Treaty* and the *Liability Convention*, which establish the legal responsibilities of states for damages caused by space objects. The discussion then delves into the definitions of crucial terms such as *"space objects," "launching state," and "space debris,"* which are essential for understanding liability in space law. We examine the concept of liability in international law, highlighting how it is addressed in treaties dealing with space collisions and damage.

Further, this paper analyses the application of state responsibility theory and the concept of fault in space law alongside the specific provisions of Article VII of the Outer Space Treaty and the Liability Convention. The principles governing various aspects of space activities, such as remote sensing and the use of nuclear power sources, are also scrutinized. Finally, the paper identifies shortcomings in the current liability framework and proposes solutions to enhance international space law's effectiveness.

EMERGENCE OF INTERNATIONAL SPACE LAW

Developed over the past six decades, space law is a relatively new field of law. Its history can be traced back to the space race to explore outer space between the Soviet Union and the United States during the Cold War. This era marked a significant shift in the global perspective on space, from a mere scientific curiosity to a potential arena for political and military competition. The foundation of the existing space law is built upon five international treaties, which were a direct response to the need for legal frameworks to govern space activities. As a means to establish space law regulations, it is further supported by relevant UN General

Assembly resolutions, bilateral or regional treaties, customary international law, and State and intergovernmental organisation laws and practices. Space law typically operates on two distinct layers of rules and regulations. [2]

Space law operates on two layers. The first layer is international law, which governs the rights and responsibilities of states and intergovernmental organisations in space. The second layer, national law, is pivotal in space law. It encompasses laws crafted to fulfil a nation's commitments under international treaties and laws governing extraterrestrial activities not covered by such treaties. This dual-layered approach ensures that all aspects of space activities are regulated, with national law stepping in to address the gaps left by international law.[3]

TREATIES GOVERNING SPACE LAW

The 1967 Outer Space Treaty, a groundbreaking agreement that addressed space issues, was signed by the United States, the Soviet Union, and the United Kingdom.[4] This landmark treaty, a cornerstone in developing international space law, established several key principles. It affirmed the freedom of exploration, prohibited the placement of nuclear weapons in space, and promoted the peaceful uses of space. The treaty also introduced the concept of *state responsibility* for the actions of their citizens in space, laying the groundwork for future space law.[5]

Several additional treaties were signed during the next years to strengthen the legal foundation for space exploration. The responsibility regime for damage caused by space objects was established in 1972 with the signing of the Convention on International Liability for Damage Caused by Space Objects. Subsequently, states were mandated to record all items launched into space by the 1975 Convention on Registration of Objects Launched into Outer Space.[6]

[2] Dempsey, P.S., *The emergence of national space law,* SSRN 2692639 (2015).
[3] Rathore E. and Gupta, B., *Emergence of Jus Cogens principles in outer space law,* 18(1) Astropolitics 1, 1-21 (2020).
[4] Blount, P.J., *Renovating space: The future of international space law,* 40 Denv. J. Int'l L. & Pol'y, 515 (2011).
[5] Carns, M.G., *Orbital Debris Prevention and Mitigation Efforts among Major Space Actors,* International Law and the Formal Space Treaties, 31-68 (2023).
[6] Wessel, B., *The Rule of Law in Outer Space: The Effects of Treaties and Nonbinding Agreements on International Space Law*, 35 Hastings Int'l & Comp. L. Rev., 289 (2012).

Addressing Liability Issues in Space Activities

1. History

The history of space exploration began in 1957 with the Soviet Union's launch of the first artificial satellite, Sputnik, from the Baikonur Cosmodrome in Kazakhstan. The United Nations responded by establishing the ***Committee on the Peaceful Uses of Outer Space (COPUOS)*** in 1958, which led to significant milestones such as human spaceflight in 1961 and the first moon landing in 1969. Initially, space exploration was dominated by national governments due to high costs and concerns over military applications, particularly during the Cold War era. However, launching the first commercial satellite in 1984 marked a shift towards increasing private sector involvement in space activities.[7]

2. Latest Trends

The late 20th century saw rapid advancements in space technology and exploration, with governments laying the groundwork for future endeavours. Over the past fifty years, private companies have taken a leading role, though existing legal frameworks have struggled to keep pace with these developments. NASA's transition to private sector collaborations, such as the 2012 contract with SpaceX for International Space Station (ISS) support, exemplifies this shift.

3. Conventions on Liability

Despite the benefits, the rise in space activities has heightened concerns about the risks of space debris and collisions. The need for a comprehensive legal framework addressing liability for damages caused by space objects became evident. The United Nations addressed these concerns early on, with COPUOS establishing a working group in 1963 to study liability issues, leading to the 1972 Liability Convention. As of 2021, the convention has been ratified by 98 states and accepted by several international organizations, aiming to ensure victims are compensated and to deter harmful activities.[8]

The Liability Convention distinguishes between *absolute liability* for damages on Earth or to aircraft (Article II) and conditional liability for damages in space (Article III), requiring proof

[7] Siddiqi, A.A., *Competing technologies, national (ist) narratives, and universal claims: Toward a global history of space exploration*, 51(2) Technology and Culture 420, 425-443 (2010).
[8] Reis, H., *Some reflections on the liability convention for outer space*, 6 J. Space L.125, (1978).

of fault for the latter. This distinction, however, often leads to confusion over the concept of *"fault"* in international space law. The ambiguous language necessitates reliance on customary international law and the Vienna Convention on the Law of Treaties for interpretation.[9]

The 1978 Cosmos 954 incident, where a Soviet satellite caused damage upon re-entry, highlighted the complexities of adjudicating liability claims under different jurisdictions. In such cases, international customary laws and precedents like the Trail Smelter and Corfu Channel cases play crucial roles, which will be further discussed in the article. Courts tend to apply strict liability in adjudicating these cases, often without considering causation, leading to criticisms of the convention's effectiveness and calls for more robust due diligence standards.[10]

DEFINING IMPORTANT SPACE LAW TERMS

1. Space Objects

Several technical and legal terms and phrases will be used in this article. The terms *"space object"* and *"space debris,"* which both define the limits of this article, are particularly pertinent. Space objects do not have a universal definition, but they include the components of a space object and its launch vehicle. The term "Space Object" is used throughout various space treaties and conventions. It usually means objects or vehicles launched and made by man into outer space.[11] States cannot choose what components of a space object form or do not constitute an object for this legal definition; rather, any piece of hardware employed in a launch is considered a space object collectively.

Digging out from the United Nation's registry of objects launched into space, the database supports that space objects include man-made items such as satellites,[12] that are sent into space after being utilised in a wide range of space-related activities for various purposes. They also

[9] Sinclair, I.M., *The Vienna Convention on the law of treaties*, Manchester University Press, (1984).
[10] Trepczynski, S., *The Effect of the Liability Convention on National Space Legislation*, 33 J. Space L. 221, (2007).
[11] V. Kopal, *Some Remarks on Issues Relating to Legal Definitions of 'Space Objects,' 'Space Debris' and 'Astronaut,'* Indonesian Journal of International Law, 99–108 (2021).
[12] Kerrest and Smith, 'Article I (Definitions)', in Hobe, Schmidt-Tedd and Schrogl, at 115.

include rockets,[13] as well as 'all parts used in a launch, even those not intended to reach outer space,' such as boosters.[14]

1. Launching State

Space Objects, as previously defined, when launched into space by a particular country or nation, the nation becomes the 'launching state.' The Liability Convention defines this as '(i) [A] State which launches or procures the launching of a space object; (ii) a State from whose territory or facility a space object is launched.'[15]

The concept of a launching state is necessary to impose state culpability for damage caused by space objects. This is so because states that meet the criteria for being considered launching states are the only ones subject to international liability.[16]

2. Collision

There is no precise legal definition for the term "collision" in the context of space law. Generally speaking, it alludes to the uncontrollably returning of a space object to Earth or the "violent striking" of two or more space objects against one other.[17] In addition to the 2009 collision between the US Iridium 33 and the Russian Cosmos 2251 satellite, there were major space object collisions in 2011 and 2012 involving a dormant NASA satellite, an inactive German satellite, and an inactive Russian probe.[18] These instances help to highlight the actual dangers and risks connected to space travel.

3. Space Debris

Space debris, consisting of non-functioning, man-made objects in Earth's orbit or those that have re-entered the atmosphere, poses significant environmental challenges in outer space. Unlike "space object," "space debris" lacks a legal definition but is generally considered man-made, non-functioning fragments. Despite this, space debris falls under the broader category of space objects, as its functionality or lack thereof is irrelevant to its classification. This is

[13] UNCOPUOS, Information Furnished in Conformity with General Assembly Resolution 1721 B (XVI) by States Launching Objects into Orbit or Beyond, UN Doc. A/AC.105/INF.372, 4 May 1978.
[14] *Id.* at 11
[15] Liability Convention, Art. I(C).
[16] *Id.* at 11.
[17] Oxford Dictionaries, 27 February 2015, available at www.oxforddictionaries.com/definition/english/collision.
[18] Hertzfeld and Baseley-Walker, *A Legal Note on Space Accidents*, 59 Zeitschrift für Luft- und Weltraumrecht 230, 231–232 (2010).

supported by the fact that fragments and parts that constitute space debris are considered space objects under international treaties. Including space debris in registration data by countries, such as the US, further supports this view. Consequently, space law applies to space debris, as no separate legal framework governs it. Thus, space debris is treated as a space object within the existing legal regime.

SPACE LAW AND LIABILITY

1. The Concept of Liability in International Law

The legal obligation created to pay compensation when an event that causes injury occurs is called liability.[19] In international law, liability often arises from non-prohibited ultra-hazardous activities, such as space activities, which can cause harm despite not being inherently illegal.[20] Liability in these contexts typically requires proof of causation and damage. The mention of fault in Article III of the Liability Convention can be confusing, as it introduces complexity into an area where *no-fault liability* is often expected. No-fault or strict liability focuses solely on causation and damage without considering fault.[21] This contrasts with fault liability, which requires causation and damage and an element of blameworthiness, such as intention or negligence, in the defendant's conduct.

However, in international law, 'fault' is more commonly linked with state responsibility for wrongful acts. In this framework, the fault is not part of state responsibility but is connected to the primary rules of international law. These primary rules impose substantive obligations on states, and their breach triggers the secondary rules of state responsibility.

This article explores the concept of fault in the context of liability for space object collisions and debris falling on the earth's surface. It indicates that understanding fault in Article III might suggest a connection to state responsibility. Under modern views of state responsibility, fault

[19] Office for Outer Space Affairs United Nations Office at Vienna, Proceedings United Nations/International Institute of Air and Space Law Workshop on Capacity Building in Space Law (2003), at 29.
[20] Bedjaoui, *Responsibility for States: Fault and Strict Liability*, 10 Encyclopedia of Public International Law 361, (1987).
[21] Goldie, *Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk*, 16 Netherlands Yearbook of International Law 175, 194 (1985).

pertains to the primary rules of international law rather than the secondary rules governing state responsibility for wrongful acts.[22] This distinction is crucial for interpreting liability in cases involving space-object collisions. In further sections, the discussion extends to fault about the law of state responsibility for wrongful acts, further clarifying these complex legal concepts.

2. Liability in Treaties dealing with Space collisions

Fault in general international law is understood as a "blameworthy psychological attitude of the author of an act or omission."[23] However, its interpretation within the context of the Liability Convention remains ambiguous. To clarify this, the rules on treaty interpretation in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT) are relevant.[24] According to the VCLT, the interpretation should be based on the "ordinary meaning of the term." Therefore, fault under the Liability Convention does not need to align with the general meaning of international law but should be interpreted based on the Convention's text. Nonetheless, the Liability Convention does not explicitly define this critical term, adding to the complexity.[25]

(i) Article III of the Liability Convention

This lack of a clear definition calls for a careful interpretation based on the treaty's context and the intent of its drafters. Without a precise definition in the Convention, the understanding of fault might diverge from its general international law meaning, requiring a nuanced approach to determine its application in cases governed by the Liability Convention. This interpretation challenges the importance of examining the Convention's provisions and the broader principles of international treaty law to understand fault in treaties.

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[22] BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 44, (1983).

[23] Fundamental differences between the meaning and role of fault in international law are divided into two schools of thought: the objective theory and fault theory. G. Palmisano, *Fault*, September 2007, at para. 8, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690 e1034?rskey=1KmHzq&result=2&prd=OPIL. For a detailed examination of the conflicting views on fault, see especially 'Chapter III Doctrine Section 1: Writings of Specialists', 2(1) ILC Yearbook (1978) 188, paras 487–560.

[24] Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

[25] B.A. Hurwitz, *State Liability for Outer Space Activities in accordance with the 1972 Convention on International Liability for Damage caused by Space Objects*, 33 (1992).

To understand the term "fault" in the Liability Convention, we should look at the purpose of the treaty, which is to establish clear rules for liability for damage caused by space objects. The treaty doesn't directly define "fault," so we need to interpret its meaning based on the overall aim of the treaty, which is to create effective rules and procedures for dealing with such liability. One way to understand this better is to consider the context provided by the Outer Space Treaty. This treaty, which serves as a foundational agreement for space law, includes principles of customary international law that apply to space activities. By looking at these principles and the broader context of the Outer Space Treaty, we can gain insights into how "fault" might be understood within the Liability Convention. Article III states:
"States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, per international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding."

Article III of the Liability Convention integrates customary rules of international law related to state liability and state responsibility into the space law framework.[26] This incorporation means that ambiguities in interpreting "fault" under the Liability Convention may be necessary when referring to general international law principles. When the term "fault" in the Liability Convention is not clear, we have to look at relevant customary international law rules, as per Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which recognizes customary international law as evidence of general practice accepted as law.

(i) Customary Law

The International Law Commission (ILC) has addressed the customary rules of state liability during its release on the injurious consequences of acts not prohibited by international law, including space activities, from 1978 to the early 2000s.[27] The ILC found that the concept of state liability was not well-established in international law and that distinguishing liability for lawful hazardous activities from state responsibility for wrongful acts was problematic. The

[26] Goldie, *Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk*, 16 Netherlands Yearbook of International Law 175, 194 (1985).
[27] P. Sreenivasa Rao, Special Rapporteur, First Report on the Legal Regime for the Allocation of Loss in Case of Transboundary Harm Arising Out of Hazardous Activities, UN Doc. A/CN.4/531, 21 March 2003, at 76, para. 5.

ILC's attempts to clarify these liability regimes highlighted the confusion surrounding fault-based and no-fault liability systems, compounded by the lack of supporting state practice.[28] The ILC often linked liability for activities that are not prohibited to state responsibility for wrongful acts, finding it difficult to differentiate between them. It is noted that state liability had been sufficiently addressed in the articles about State Responsibility, as harm from lawful activities often involved a duty of care, which derived from primary rules considering the state's intent and fault. Consequently, the ILC could not avoid falling into the regime of responsibility for wrongful acts, particularly signalling and emphasizing the duty of due diligence relevant to state liability.

Given the lack of clarity on the meaning of fault in customary international law and the ambiguous nature of the term in the Liability Convention, space law as a special regime does not provide a solution to this interpretive issue. Notably, Ian Brownlie commented that international law, including United Nations Charter principles, applies in outer space, and space law cannot function in isolation from the general international legal system.[29] Legal subsystems cannot exist in isolation; there will always be some degree of interaction with the broader international law framework. While space law can create mechanisms like the Liability Convention for resolving liability issues, there is a presumption against creating completely self-contained regimes.[30] When space law is inadequate or silent, it is necessary to revert to general international law, as indicated by the ILC. Therefore, the Liability Convention, due to its reference to "fault," cannot be examined in isolation from the general rules of international law, such as the Articles on State Responsibility.

AVENUES FOR RECOVERY

A state whose nationals suffer damage from another state's space object can seek compensation through at least three theories, excluding domestic legal systems. This section of the article focuses on fault-based liability, explicitly mentioned in the Liability Convention, but also

[28] Boyle, *Part II International Responsibility: Development and Relation with Other Laws* (Ch. 10 Liability for Injurious Consequences of Acts Not Prohibited by International Law), The Law of International Responsibility 95, 97 (2010).
[29] Brownlie, *The Maintenance of International Peace and Security in Outer Space*, 40 British Yearbook of International Law 1, 1 (1964).
[30] Simma and Pulkowski, *Part II International Responsibility Development and Relation with Other Laws, Ch. 13 Leges Speciales and Self-Contained Regimes*, Crawford et al., 143.

discusses other recovery theories for context. Although responsibility and liability in international space law overlap, they are based on different criteria.[31] States are held responsible for their national space activities, but liability is imposed on launching states through Article VII of the Outer Space Treaty and the Liability Convention.[32] The type of damage, the damaged object, and the damage location dictate proof requirements; sometimes, a wrongful act is needed, while in other cases, mere damage triggers liability.

1. State Responsibility Theory

A state whose nationals have suffered damage from another state's space activities can seek compensation through the concept of state responsibility. This method is less frequently discussed, but it is supported by Franz van der Dunk, who states that state responsibility could provide compensation where liability concepts fall short.[33] A state harmed by the debris could thus claim compensation from another state responsible for damages by failing to meet Article VI of the Outer Space Treaty obligations, avoiding the technical requirements of Article VII or the Liability Convention, which might exclude certain damages.

In international law, states are held accountable for internationally wrongful acts or omissions attributable to them.[34] Such wrongful acts breach a state's international obligations, which can come from treaties, customary international law, or general principles of international order. Article VI of the Outer Space Treaty imposes obligations on states to authorize and supervise the space activities of their non-governmental entities, reversing the general rule that states are not responsible for private citizens' actions.[35] This article clarifies that states are responsible for national activities in outer space, including those by non-governmental entities, thereby making these activities attributable to the state.

The differentiation between *"responsibility"* and *"liability"* is complex and unique. Responsibility means answerability for an act or omission, while liability is a subset of responsibility involving reparations when a legal rule is breached, causing damage to another.

[31] Frans von der Dunk, International Space Law, in Handbook of Space Law 29, 52 (Frans von der Dunk & Fabio Tronchetti eds., 2015).
[32] Liability Convention, Art. IV.
[33] *Id.* at 30.
[34] Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, arts. 1-2 [hereinafter ILC Draft Articles], in Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 26
[35] 9 JAMES CRAWFORD, IX BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 524-551 (2019).

Absolute liability is rare in international law but could apply to super-hazardous space activities. The absolute or fault-based liability standard completely depends on the damage's location and nature, with absolute liability likely for Earth surface damages and fault-based liability for space object damages.

The state responsibility theory has its advantages, such as a broader scope of compensable damages, including indirect and consequential damages typically excluded by the Liability Convention. It is also useful when a private actor from a non-launching state acquires a space object and causes damage, allowing the harmed state to claim against the acquirer's state.[36] This approach may be preferable if the responsible state has greater financial resources than the launching state.

2. Fault in the State Responsibility theory

In the framework of state responsibility, any action or omission that can be attributed to a state and breaches an international obligation is considered wrongful, thus making the state liable.[37] Special Rapporteur Roberto Ago, in the context of the ILC's Articles on State Responsibility, clarifies that 'responsibility' refers to the principles governing state liability for internationally wrongful acts.[38] These principles are distinct from the rules that impose obligations on states, whose violation triggers responsibility.[39]

Responsibility states the consequences of breaching an obligation specific to each state, with these obligations often term as primary rules. Primary rules establish substantive obligations for states. On the other hand, the secondary rules of state responsibility outline the conditions under which a breach of a primary rule occurs and its ensuing consequences. Therefore, state responsibility deals with the secondary obligations arising from violating primary obligations. This distinction raises questions about the role of fault in the regime of responsibility, highlighting the need to understand how fault integrates into the principles governing state liability for wrongful acts.

3. Liability Under Article VII of the Outer Space Treaty

[36] BIN CHENG, STUDIES IN INTERNATIONAL SPACE LAW 487 (1997).
[37] Articles on State Responsibility, Arts 1, 2.
[38] *Ibid.*
[39] 'Chapter IV: State Responsibility', 2 ILC Yearbook (1970) 305, at 306, para. 66(c).

The Outer Space Treaty of 1967 established foundational principles for space liability in Articles VI and VII. It incorporated elements from the 1963 United Nations Declaration on Legal Principles Governing Space Activities. Article VI holds states responsible for national activities in space, including those by governmental and non-governmental entities and international organizations in which they participate.[40] It mandates States to authorize and supervise non-governmental space activities. Article VII states that any State that launches or procures the launch of a space object is internationally liable for damages caused by that object or its components to other States or their citizens, whether the damage occurs on Earth, in airspace, or outer space.

The treaty does not define "damages," leading to broad interpretations of the meaning, compared to the Liability Convention. There is ambiguity regarding the liability standard, whether it is absolute or fault-based and whether these standards change depending on where the damage occurs. Bin Cheng notes the common assumption of absolute liability, especially for damage on Earth, based on customary international law and conventions like the 1952 Rome Convention. However, it remains uncertain if this applies to collisions in space, suggesting fault-based liability might be relevant for damages not occurring on Earth or to aircraft in flight.[41]

4. The Liability Convention

In 1972, the Liability Convention built on international law foundations, including the Trail Smelter Arbitration (1938, 1941),[42] the Corfu Channel Case (1949),[43] and the Outer Space Treaty. It defined "damage" and "space object" and clarified that a launch covers an attempted launch. The convention specified that damages include "loss of life, personal injury, or other impairment of health; or loss of or damage to property of States, persons (natural or juridical), or international intergovernmental organizations." A "space object" includes its component parts, launch vehicle, and parts thereof. The term "Launching State" is defined consistently

[40] BIN CHENG, STUDIES IN INTERNATIONAL SPACE LAW 487 (1997).
[41] *Ibid.*
[42] Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905, 1963 (Apr. 16, 1938, Mar. 11, 1941) (addressing the obligation to prevent transborder damage by air pollution, the Tribunal stated, "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.").
[43] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (referencing a "State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States").

with the Outer Space Treaty and other space-related treaties, identifying a State as a launching State through one of four specific ways laid down below:

i) The State that launches the space object, its component parts, its launch vehicle or parts thereof;

ii) The State that procures the launch of a space object, its component parts, its launch vehicle or parts thereof;

iii) The State from whose territory a space object, its component parts, its launch vehicle or parts thereof is launched;

iv) The State from whose facility a space object, its component parts, its launch vehicle or parts thereof is launched.[44]

Since the Liability Convention is more recent and specifically addresses liability issues, it is the governing treaty for liability claims when both the potentially liable State and the State suffering damages are parties to it. However, the *pacta tertiis* principle means a State not party to the Liability Convention cannot invoke or be subject to it. Nonetheless, the principles of the Liability Convention might apply if they are established as customary international law.[45] Despite offering more clarity, the Liability Convention still leaves significant questions regarding liability for space-related activities unanswered.

(i) Absolute Liability in cases where damage is caused on the surface of the Earth The Liability Convention establishes absolute liability for damage caused by space objects on Earth or to aircraft in flight, independent of fault. The UN Committee on the Peaceful Uses of Outer Space's Legal Sub-Committee encountered little opposition to Article II, likely due to existing international support from the 1952 Rome Convention and the inherently hazardous nature of space activities.[46] The convention also allows a launching State to be exonerated from absolute liability if the claimant State's damages result from its own or its nationals' gross negligence or intentional actions.

(ii) Damage caused in outer space

Article III of the Liability Convention imposes a fault-based liability standard for damage caused by one State's space object to another or persons on board, all occurring in airspace or outer space. A State is liable if the damage results from its fault or that of the persons it is

[44] Liability Convention, art. I(c).
[45] BIN CHENG, STUDIES IN INTERNATIONAL SPACE LAW 487 (1997).
[46] Rome Convention, at 181-182.

responsible for.[47] This aligns with Article VI of the Outer Space Treaty, which holds States accountable for space activities by their governmental and non-governmental entities, although the term "appropriate State" remains ambiguous.

Despite the lack of significant opposition to Article III, the convention does not clarify what constitutes a fault. Judge Manfred Lachs supported fault-based liability in space, reasoning that all launching States assume similar risks once space objects leave the ground.[48] Article III may imply either limited liability to the extent of fault or total liability if fault and causation are proven. However, the specific definition of fault remains undefined, complicating the establishment of liability.

(i) Joint and Several Liability

The Liability Convention acknowledges that multiple States may be liable for damages from space activities. Article IV permits a claimant State to hold one or more launching States jointly or severally liable for damages. This liability is absolute for damage on Earth or to aircraft in flight. However, liability is fault-based for damage to a space object or persons/property onboard not on Earth's surface, depending on the fault of the launching States or those they are responsible for. Compensation is apportioned according to the degree of fault or equally, if the extent of fault cannot be determined. The term "fault" is not defined. While seeking recovery for damage occurring other than on Earth's surface or to aircraft in flight, a harmed State must prove fault to establish liability against the responsible State or States.

OTHER SPACE LAW PRINCIPLES RELATED TO LIABILITY

Space law includes various principles that regulate activities in outer space, emphasizing the importance of liability and responsibility among states. These principles ensure that space exploration is conducted safely, equitably, and for the benefit of all humanity. The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (1962) sets the foundational guidelines for state responsibility and accountability. The Principles Governing the Use by States of Artificial Earth Satellites for International Direct

[47] Paul S. Dempsey, *Liability for Damage Caused by Space Objects Under International and National Law*, 8 (unpublished comment) (on file with McGill University), (2011).
[48] MANFRED LACHS, THE LAW OF OUTERSPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING, 117 (1972).

Television Broadcasting (1982) ensure equitable access and oversight in satellite broadcasting. The Principles Relating to Remote Sensing of the Earth from Outer Space (1986) address the benefits and responsibilities of remote sensing activities. Finally, the Principles Relevant to the Use of Nuclear Power Sources in Outer Space (1992) emphasize liability and compensation related to the use of nuclear power in space. These principles collectively uphold the integrity and shared benefits of outer space activities.

1. *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (1962):*

These principles form the foundation of international space law and aim to ensure that space exploration and utilization are conducted for the collective benefit of humanity. The exploration and use of outer space should be carried out to benefit all of humanity. This principle emphasizes that the advancements and discoveries made in space should not favour any single nation or group of nations but should be shared for the common good.

Outer space and celestial bodies are accessible to all states equally, regardless of their level of development or technological capability. This principle ensures that space is a global common, open to exploration and use by any nation by international law.[49]

No part of outer space or any celestial body can be claimed by any nation as its territory. This means that sovereignty cannot be extended to outer space through means such as occupation, use, or any other method. This principle preserves space as a domain free from national ownership.

States are held internationally responsible for all space activities conducted by their national entities, whether they are carried out by governmental or non-governmental organizations. This principle ensures that states must oversee and regulate the space activities of their entities to comply with international law and the principles outlined in the Declaration. When space activities are conducted by an international organization, the organization and the states participating in it share the responsibility for ensuring compliance with the principles of this

[49] 1962 (XVIII). Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/legal-principles.html.

Declaration. This principle reinforces collective responsibility and accountability in international space endeavours.[50]

2. *Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting (1982):*

This is also known as also known as *Broadcasting Principles*. These principles address the conduct of international direct television broadcasting by satellite, ensuring equal rights, responsibilities, and access to technology for all states.

Every state has the right to engage in and authorize activities related to international direct television broadcasting by satellite. This principle ensures that no state is excluded from participating in satellite broadcasting and that all states have an equal opportunity to engage in such activities. Access to the technology required for international direct television broadcasting by satellite should be available to all states without discrimination. This access should be based on mutually agreed terms, ensuring that no state is unfairly denied the opportunity to acquire and utilize this technology.[51]

States are internationally responsible for the activities related to international direct television broadcasting by satellite that are conducted by them or under their jurisdiction. This responsibility includes ensuring that these activities comply with the principles outlined in the document. States must oversee and regulate these activities to maintain adherence to international standards and principles.

When international direct television broadcasting by satellite is conducted by an international intergovernmental organization, both the organization and the participating states share responsibility. This principle ensures that there is collective accountability for compliance with the principles, promoting responsible and coordinated efforts in international satellite broadcasting. [52]

[50] *Ibid.*
[51] 37/92. Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/dbs-principles.html.
[52] *Ibid.*

3. Principles Relating to Remote Sensing of the Earth from Outer Space (1986):

These principles focus on the conduct of remote sensing activities, emphasizing benefits for all countries, international responsibility, and compliance with international law. Remote sensing activities should be conducted to benefit all countries, regardless of their economic, social, scientific, or technological development level. Special consideration should be given to the needs of developing countries. This principle ensures that the advantages of remote sensing technology, such as environmental monitoring, disaster management, and resource management, are accessible to all nations, promoting global equity. [53]

States that operate remote sensing satellites are internationally responsible for these activities. They must ensure that their remote sensing activities comply with the principles and norms of international law. This responsibility applies regardless of whether the activities are conducted by governmental entities, non-governmental entities, or international organizations to which the states are parties. This principle explains states' accountability for actions taken within their jurisdiction or by their nationals, ensuring oversight and regulation of remote sensing activities to uphold international standards.[54]

This principle highlights that the norms of international law regarding state responsibility apply to remote sensing activities. It reinforces that the existing legal framework governing state conduct and responsibility in international law is relevant and must be adhered to in the context of remote sensing. This ensures that states are held accountable for any breaches of international obligations arising from their remote sensing activities, promoting lawful and responsible use of remote sensing technology.

4. Principles Relevant to the Use of Nuclear Power Sources in Outer Space (1992):

These principles are based on the international legal framework governing the use of nuclear power sources in outer space, emphasizing state responsibility, liability, and compensation. States are internationally responsible for activities involving the use of nuclear power sources in outer space conducted by their governmental or non-governmental entities. This

[53] 41/65. Principles Relating to Remote Sensing of the Earth from Outer Space, https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/remote-sensing-principles.html.
[54] *Ibid.*

responsibility ensures that all national activities comply with the Outer Space Treaty and relevant recommendations. When such activities are conducted by an international organization, the organization and the participating states share the responsibility for compliance. This principle underscores the need to oversee and regulate nuclear power use in space to ensure safety and adherence to international standards. [55]

States that launch or procure the launching of space objects and states from whose territory or facility a space object is launched are internationally liable for any damage caused by those objects, including those carrying nuclear power sources. This liability applies jointly and severally when two or more states launch a space object jointly. This principle is based on Article VII of the Outer Space Treaty and the Liability Convention, ensuring that states are held accountable for any harm caused by their space activities, including potential nuclear incidents in space.

The compensation states are liable to pay for damage caused by their space objects, which is determined according to international law and principles of justice and equity. The goal is to provide reparation that restores the affected party, whether an individual, state, or international organization, to the condition that would have existed if the damage had not occurred. This principle ensures that compensation is fair, just, and sufficient to address the harm caused.
For the purposes of this principle, compensation includes the reimbursement of substantiated expenses related to search, recovery, and clean-up operations. This also includes expenses for assistance received from third parties. This ensures that all costs associated with mitigating the damage, especially those involving complex operations such as dealing with nuclear contamination, are covered by the responsible state(s). This principle emphasizes the comprehensive nature of compensation, addressing both direct and indirect damage costs.[56]

SHORTCOMINGS IN THE LIABILITY CONVENTION AND PROBABLE SOLUTIONS

Despite its significance in addressing liability issues in space activities, the Liability Convention has several gaps and shortcomings that have become apparent over time. One

[55] 47/68. Principles Relevant to the Use of Nuclear Power Sources In Outer Space, https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/nps-principles.html.
[56] *Ibid.*

notable gap is the limited scope of liability coverage, particularly regarding the definition of ***"damage."*** The convention primarily focuses on physical damage caused to space objects or property. Still, it does not address other types of harm, such as economic losses, environmental damage, or individual harm.

Additionally, the convention provides provisions regarding fault-based liability pose challenges in practical application. Determining fault in space activities can be difficult due to the inherent risks and uncertainties involved, including the vast distances and lack of direct oversight. This ambiguity can lead to legal disputes and hinder liability claims' fair and timely resolution. The convention's framework for allocating liability among multiple parties involved in space activity, such as launching states, satellite operators, and manufacturers, is often unclear and subject to interpretation. This ambiguity can result in disputes over the apportionment of responsibility and delay the compensation process for affected parties.[57]

Further, the convention does not adequately address emerging issues in space law, such as the increase of private space companies and the increasing complexity of space activities. The involvement of non-governmental entities in space exploration and utilization presents new challenges for liability determination and enforcement, which the convention does not fully account for.[58]

The Liability Convention's current strict liability regime, which holds the launching state responsible based on ownership rather than control, presents significant conceptual and practical challenges in the contemporary space environment. This approach contradicts fundamental principles of state responsibility and customary international law, emphasizing control over ownership in attributing responsibility for harm caused by space activities.[59]

The convention also fails to address intervening acts by third parties, potentially incentivizing malicious actors to exploit satellites for harmful purposes without bearing accountability. As a result, innocent launching states are unfairly burdened with liability for harm caused by actions

[57] Kayser, V., *Launching space objects: Issues of liability and future prospects*, 1 Springer Science & Business Media 227, 236-238 (2001).
[58] Benkö, M., Schrogl, K.U., Digrell, D. and Jolley, E. eds., *Space law: current problems and perspectives for future regulation*, 2 Eleven International Publishing, (2005).
[59] Kehrer, T., *Closing the liability loophole: the liability convention and the future of conflict in space,* 20 Chi. J. Int'l L 178, (2019).

beyond their control, undermining the convention's purpose of ensuring proper restitution for victims.

Its reliance on goodwill and cooperation between involved states poses weakness, particularly in contexts of armed conflict where claims are unlikely to be compensated. Non-cooperative or hostile launching states can undermine the dispute resolution process by simply refusing to participate, highlighting a fundamental flaw in the convention's design. Which can be currently seen in the Israel-Palestine issue. The strict liability framework lacks exceptions for acts of war, making it unrealistic to expect compensation during ongoing conflicts. It fails to address emerging threats such as cyberwarfare, which can exploit vulnerabilities in satellite systems.[60] To address the gaps and shortcomings in the Liability Convention related to space law, several viable solutions can be proposed:

(i) Expanding the scope of liability coverage to include a broader definition of "damage" is essential. This would involve updating the convention to encompass physical harm to space objects or property, economic losses, environmental damage, and harm to individuals. By acknowledging these additional forms of harm, the convention can better protect the interests of all stakeholders involved in space activities.

(ii) Verifying and refining the provisions regarding fault-based liability is crucial for practical application. Introducing clearer guidelines and criteria for determining fault in space activities, considering the complexities and uncertainties inherent in the space environment, would help mitigate legal disputes and ensure timely resolution of liability claims. This may involve establishing expert panels or arbitration mechanisms to assess fault.

(iii) Enhancing the framework for determining liability among multiple parties involved in a space activity is necessary. Providing clear guidance on the roles and responsibilities of launching states, satellite operators, manufacturers, and other stakeholders would help prevent disputes over the apportionment of liability. This could involve developing standardized contracts or agreements clearly defining each party's obligations and liabilities.

[60] *Ibid.*

(i) Interpret the convention to attribute responsibility based on control rather than ownership, thereby ensuring that the party responsible for causing harm bears accountability.

Another option is to excuse launching states from liability when harm is intentionally caused by another party, respecting state agency but potentially leaving victims uncompensated. However, the most viable solution is to amend the convention to create a hybrid regime that introduces a presumption of liability on the launching state but allows it to present evidence of another responsible party. This approach balances the need to ensure compensation for victims with respect for state agencies, creating a workable regime that holds accountable the actual wrongdoer while deterring malicious actors and ensuring proper restitution for harm caused by space activities.[61]

CONCLUSION

The Liability standard in space law has a lot of shortcomings and calls for an update in the laws. The article revolved around the concept of liability in international law, focusing on state responsibility and fault-based liability, and analysed the specific provisions of the Liability Convention, which form the basis of collision in outer space or debris falling on the surface of the earth. Although international space law has established a framework for peaceful exploration and use of outer space, it must adapt to the dynamic nature of the space industry. Treaties like the Outer Space Treaty and the Liability Convention provide a foundation for addressing liability issues but require continuous interpretation and potential updates. As space activities become more complex and diverse, ongoing dialogue and collaboration among states and stakeholders are crucial to ensure the sustainable and equitable use of outer space for the benefit of all entities.

[61] Larsen, P.B., *Does New Space Require New Liability Laws*, 68 ZLW 196, (2019).

THE JURISPRUDENCE OF SANCTIONS UNDER INTERNATIONAL LAW: THE CASE OF RUSSIA

-MAITREYI CHOALLA AND MANSI SUBRAMANIAM[1]

ABSTRACT

In the name of sanctions under international law, a State can demonstrate its displeasure with any other State's activities. The paper therefore aims to study sanction theory and its jurisprudence in the current scenario and seeks to determine the validity and efficacy of sanctions like those on Russia in international law. An extensive examination of interpretations of the sanction theory as provided by distinguished jurists, legal commentary, international statutes and cases is presented using a doctrinal research method. It is recognised that the premise of the positivists on legal sanctions and their effectiveness in the real world have been substantially read down with the development of international law. The paper concludes that the sanction theory cannot be negated in international law, solely due to some sanctions being not so efficacious or because international legal obligations are breached.

INTRODUCTION

Sanction theory is the contribution of the positivist school of law and further, it can be understood through the ideas and opinions on sanctions, propounded by various positivist thinkers. The Sanction theory finds a conspicuous place in legal positivism which is founded upon three concepts - sovereign, command and sanction. John Austin described sanction as one of the important elements of law. Salmon stated that the term sanction was meant to be an instrument of coercion by which an imperative law is enforced. Such sanctions may sometimes be necessary to deliver justice. Sanctions are a time-honoured tool. Thirty sanctions systems, comprising Fourteen existing systems, have been implemented throughout the post-colonial world, with an emphasis on assisting diplomatic resolution of disputes, nuclear disarmament,

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and mitigating terrorism. Unilateral sanctions imposed by state parties are just an additional category of sanctions, with US sanctions being by far the most severe in this scenario due to its overwhelming influence in the worldwide system. This sanction theory becomes of utmost relevance amidst the Russia-Ukrainian war, where the United States and the United Nations have been imposing different sanctions on Russia.

The efficacy of sanctions on target countries in attaining intended outcomes is mixed. Economic sanctions become an ambiguous mechanism within the international legal order, for which any strong nation can evade accusations of duplicity in the implementation of the ideal of protecting territorial sovereignty, inventing proof to attack a foreign nation. Several legal positivist jurists have regarded international law as not a true law since it is incapable of enforcing sanctions. Their theory would mean that Russia would not be prevented from waging a war on Ukraine due to the absence of binding international legal rules. However, sanctions on target countries, which transcend conventional armed strength and include commercial, fiscal, diplomatic, and cultural sanctions, are growing highly efficacious in our globalized world and international legal order. While some critics point to inadequacies and ineptness in the imposition of forceful sanctions, these deficiencies do not negate the law's validity, rather, they serve as a reminder that international law is a work in progress.

HISTORY OF WAR AND INTERNATIONAL SANCTIONS

Penalties and punishments imposed under the international legal system are known as international sanctions. International Sanctions find their legality in Article 41 of the United Nations Charter[2], under Chapter VII which deals with restoring international peace and security. The history of sanctions dates back to the First World War, wherein sanctions were used by the Allied powers (led by Britain and France) against the German and Ottoman empires; sanctions were imposed, disrupting the supply of goods, energy food and information. The power of economic sanctions in the war was realised when this blockade severely impacted Central Europe and the Middle East, as several thousands died due to hunger and disease.[3]

[2] United Nations Charter, Article 41

[3] Nicholas Mulder, 'The History of Economic Sanctions as a Tool of War' (Yale University Press, 24 February, 2022) <https://yalebooks.yale.edu/2022/02/24/the-history-of-economic-sanctions-as-a-tool-of-war/> accessed 26 May 2022

Economic sanctions began to be seriously considered as an alternative to war after USA President Woodrow Wilson's call for an alternative to armed conflict. In the year 1919, Woodrow Wilson described economic sanctions as *"something more tremendous than war": the threat was "absolute isolation . . . that brings a nation to its senses just as suffocation removes from the individual all inclinations to fight . . . Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside of the nation boycotted, but it brings a pressure upon that nation which, in my judgment, no modern nation could resist."*[4] Post World War- I, Article 16 of the Covenant of League of Nations[5] incorporated economic sanctions as a retaliation to war. Further, post the Second World War, sanctions have been incorporated as an enforcement mechanism in the League's successor collective security system- the United Nations.

However, the use of economic sanctions became widespread after the Cold War. The end of the Cold War and the corresponding victory of liberalism paved the way for the liberal exercise of international economic sanctions. After 1945 and before the Cold War, sanctions had been imposed only in 1966 and 1977, by the Security Council against Southern Rhodesia and South Africa respectively[6](between 1945 and 1990). Post the Cold War, the imposition of sanctions became a regular ordeal; for example, sanctions were imposed by the Security Council almost twelve times in the 1990s. One of the major examples was the sanctions imposed by the UN against Iraq from 1990 to 2003 as a result of the first Gulf War in 1991.[7] Further, in modern times, sanctions have also been used as a retaliation to bilateral violations, or other reasons such as against human rights violations, etc.

SANCTIONS AGAINST RUSSIA

Since the case of sanctions against Russia will be studied in great detail, it becomes important to study the sanctions imposed against it before the recent set of sanctions. Sanctions were imposed frequently against the USSR during the Cold War, by the United States of America; The embargo imposed on the Soviet Union was a severe one, while that imposed on East-

[4]Woodrow Wilson, *Woodrow Wilson's Case for the League of Nations*, (Princeton, NJ: Princeton University Press, 1923)
[5] Covenant of League of Nations, Article 16
[6] Jeremy Matan Farrall, *United Nations Sanctions and The Rule of Law*, (2007).
[7]Kimberly Ann Elliott, Gary Clyde Hufbauer and Barbara Oegg, 'Sanctions' (Econlib) <https://www.econlib.org/library/Enc/Sanctions.html> accessed 28 May 2022.

European countries was milder in an attempt to drive a wedge between the USSR and its allies. While the restrictions were momentarily lightened in the early 1970s, they were again tightened in 1979 after the Soviet Union invaded Afghanistan. Further, in 1983, the Ronald Regan government approved the National Security Decision Directive 75[8], that was aimed at limiting the military options of the Soviet Union, through the use of economic sanctions.

While sanctions were imposed against Russia even after the collapse of the Soviet Union in 1991, the next important set of sanctions were imposed in 2014, as a result of Russia's illegal annexation of Crimea and Sevastopol. Russia became the target of various economic and financial sanctions imposed by the USA, the European Union, Canada, Australia and others.[9] Sanctions were also imposed against private entities and persons whose actions were considered to have undermined the territorial sovereignty of Ukraine. The impact of these sanctions included the banning of the export of arms and dual-use goods for military purposes, as well as goods related to oil exploration to Russia. Further sanctions included restricting the long-term finance of Russian Companies and investors. Thus, the sanctions imposed were all-pervasive, affecting various sectors and parties.

THE SANCTION THEORY

Legal theory defines sanction as a punishment which is official in nature, and that such imposition is to enforce legal obligations. Sanctions are regarded as not just a mere defining characteristic but represent the core of a legal order. Accountability is coupled with sanctions, which relates to the repercussions that come from the rationale of the implementation of that accountability. Today, inadequate and improper sanctions are one of the main reasons for shortcomings in the legal systems of international law, municipal law, crime and human rights. Sanctions may be criminal, civil or international. Sanctions are important because it is hard to monitor actual disruptions in civilized society without them. Without sanctions, it is impossible to recognise both a prospective threat and a perpetrator's wrongs. The Sanction theory finds a conspicuous place in legal positivism which is founded upon three concepts - sovereign, command and sanction.

[8] Iikka Korhonen, Heli Simola and Laura Solanko, 'Sanctions, counter-sanctions and Russia− Effects on economy, trade and finance' (2018) 4 BOFIT Policy Brief
[9] ibid.

JOHN AUSTIN

The concept of sanctions is central to Austin's theory of law. According to him, law is fundamentally and solely a framework of habitually followed commands of the sovereign directed to his people, the breach of these would result in the application of penalties or sanctions. The Austinian theory is positivist in nature because it equates command and obedience to law regardless of the moral right of the sovereign to rule.[10] He contends a legal theory that is imperatival, monistic and reductivist. In his work *'Lectures on Jurisprudence'*, he states that a man acts according to his legal obligation not because it is the moral thing to do, but because the law creates a threat of force or sanctions.[11] To put it simply, a command would be a mere request if it does not inflict a sanction. In his view a threat of force or imposition of sanctions on the subject, makes them habituated to obedience, else ways they would be prone to disobeying such legal directives. Another important aspect of Austin was his Command of Sovereign theory. His framework of law works hierarchically in which the sovereign is a supreme political superior who does not need obedience but his subjects are expected to obey all his commands due to the fear of imposition of a threat in the form of sanctions in case of a violation.[12]

HANS KELSON

Hans Kelson's legal theory is imperatival, and monistic, but not a reductivist.[13] Law has a distinct form and fundamental rule. According to Kelson, the law should be regarded as a framework of impersonal commands to authorities to inflict specific repercussions or sanctions on the happening of specific circumstances. In Kelson's words, *"a sanction is a forcible infliction of an evil".* His legal system is both dynamic and coercive. It is inextricably linked to the prescriptively controlled action of a state's coercive machinery.[14] This coercive nature of law is structurally separate from that of morality and custom. In his *Pure Theory of Law,* he held the view that to consider a norm to be legally valid, it necessitates a corresponding

[10] Leslie Green and Thomas Adams, 'Legal Positivism' <https://plato.stanford.edu/entries/legal-positivism/?utm_source=fbia> accessed 28 May 2022.
[11] Frederick Schauer, 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (2010) 23 Ratio Juris.
[12] Ibid.
[13] Leslie Green (n 9).
[14]Hans Kelsen, *Essays in Legal and Moral Philosophy* (Springer Netherlands 1973).

sanction, or simply without a sanction, a law is not really a law.[15] Further, the execution of a sanction is considered to be the fulfilment of a legal duty. Kelson in the hierarchy of norms, the highest of all being the *Grundnorm,* from which any acceptable conduct derives its legitimacy. He was against the Austinian view that people obliged law due to fear of sanctions. Law is not regarded as the imposition of one's will on another, but rather standards that specify how people should or ought to behave. Therefore, the view of Kelson is that a norm becomes positive law only with a sanction, but not a threat attached.

H.L.A. HART

In his opinion, a law would be considered as inflicting responsibilities, when the public need for compliance is intense and the social conditioning called to press on individuals who breach or appear to breach is high.[16] For Hart, *"law without sanctions is perfectly conceivable.",* a step ahead of the imperativism of Austin and Kelson.*[17]* In his work *The Concept of Law,* though he recognised the necessity of having a sanction for violation of a legal obligation for crimes, he opines that a legal duty is not cast by virtue of a fear of sanction. As per Hart, the most conspicuous element of the law is that its prevalence implies that some types of behaviour are no longer voluntary, but rather such conduct is in a few ways obligatory.[18] Legal obligations, as per Hart remain to prevail despite being aware that such obligation has been breached and there would be no imposition of sanction. He contended that to demonstrate whether a demand can be regarded as a legal duty, it does not necessitate a sanction. Nevertheless, such a sanction might become necessary to demonstrate a demand which forms the element of a legal system as a legal duty.[19]

SANCTION THEORY IN INTERNATIONAL LAW

[15]Ryan Mitchell, 'International Law as a Coercive Order: Hans Kelsen and the Transformations of Sanction' (2019) 29 Indiana International & Comparative Law Review 245.
[16] 'Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions' (1975) 84 The Yale Law Journal 584.
[17]Leo Kanowitz, 'The Place of Sanctions in Professor H.L.A. Hart's Concept of Law' (1966) 5 Duquesne Law Review 19.
[18]Ibid.
[19]Ibid.

Sanction theory is the contribution of the positivist school of law and further, it can be understood through the ideas and opinions on sanctions, propounded by various positivist thinkers. John Austin is considered to be the founder of legal positivism, particularly the command theory.[20] The command theory stipulates that regulations are accompanied by an enforcement mechanism, such as physical punishment, fines, or any other mandate. It is important to note that these traditional theories have expanded in its scope over the years, beyond the notion of command imposed by the sovereign, to include sanctions imposed by sovereign entities against each other. This has been further fuelled by the recognition of international law as a law.

Collective Economic Sanctions remained largely dormant until the end of the Cold War, post which they became a widely used tool of coercion exercised by countries against each other.[21] The increased use of economic sanctions naturally attracted the attention of the legal academia[22]. The development of sanction theory in international law can be attributed to the movement that sought to recognize international law as a law. According to the sanction theory in international law, international sanctions are not just legitimate but are also preferred modes of retaliation to and penalization of acts contravening international law.[23]

JURISPRUDENCE OF SANCTIONS IN INTERNATIONAL LAW

Whether international law is a true law is a pertinent question to address to understand the sanction theory in international law. The given paper concedes to international law being a law, and it opines that it is a settled position that international law is a true law. Oppenheim and J.L. Brierly[24] are examples of jurists who have considered international law as a law. Even the modern analytical positivist school has recognized international law by analysing and determining a structural hierarchy in law, international law is considered a soft law. It is also

[20]Ashwin Singh, 'Sanction Theory of Jurisprudence Solution to COVID 19' (2021)
[21]Farshad Ghodoosi, 'The Sanctions Theory: A Frail Paradigm for International Law', HarvIntlLJ <https://harvardilj.org/2015/02/the-sanctions-theory-a-frail-paradigm-for-international-law/> accessed 17 May 2022.
[22]Kimberly Ann Elliott, Gary Clyde Hufbauer and Barbara Oegg, 'Sanctions' (*Econlib*) <https://www.econlib.org/library/Enc/Sanctions.html> accessed 28 May 2022.
[23]Farshad Ghodoosi, 'The Sanctions Theory: A Frail Paradigm for International Law', HarvIntlLJ <https://harvardilj.org/2015/02/the-sanctions-theory-a-frail-paradigm-for-international-law/> accessed 17 May 2022.
[24]Allen Hunter White, 'The Outlook for International Law by J. L. Brierly', UPaLRev <https://www.jstor.org/stable/3309516> accessed 27 May 2022.

believed that the sanction theory of jurisprudence has allowed international law to be brought under the ambit of the positivist school of law, due to the recognition of international sanctions under international law.[25]

The only difference that exists between the sanctions under municipal law and international law is that while the sanctions under the former are included in an organized legal system, sanctions under the latter are a question of practice and do not constitute a formalized legal system.[26]

Mary Ellen O'Connell, the author of 'The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement' (Oxford Univ. Press)[27], adopted a positive approach to international law, concerning international sanctions. According to her, International rules and regulations are always accompanied by potential sanctions, and it is the potential existence of sanctions that is central to it being considered a law, rather than the effectiveness of those sanctions.[28] International sanctions were used as forms of countermeasures, armed measures and judicial measures, which are aimed at remedying non-compliance. Since these are coercive in nature and aimed at deterrence, international sanctions successfully find themselves a place in the sanction theory of jurisprudence.

CLASSIFICATION OF SANCTIONS

Sanctions under international law can be largely classified as (i) state-imposed sanctions and (ii) collective sanctions. The first refers to the sanctions imposed by a victimized state party against the oppressor state, an example being the imposition of economic sanctions by India against China in 2020, as a retaliation to the Galwan Valley conflict. However, the latter type of sanctions concerns the imposition of sanctions by international organizations or states collectively against a particular state in retaliation to that state's internationally wrongful act.

[25]Farshad Ghodoosi, 'The Sanctions Theory: A Frail Paradigm for International Law', HarvIntlLJ <https://harvardilj.org/2015/02/the-sanctions-theory-a-frail-paradigm-for-international-law/> accessed 17 May 2022

[26] J. L. Brierly, 'Sanction' (1931) 17 Transactions Grotius Soc'y 67

[27] Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theo and Practice of Enforcement,* (Oxford University Press, 2008)

[28] Gordon A. Christenson, 'The Jurisprudence of Sanctions in International Law', HumRtsQ <https://www.jstor.org/stable/40389988>

An example of the same, which will be discussed in further detail, is the set of sanctions imposed on Russia in retaliation to the Russian invasion of Ukraine. Further, sanctions can also be classified as military, economic and political; the most common and widely used sanctions post the Cold War being economic sanctions.

ASSUMPTIONS UNDERLYING INTERNATIONAL SANCTIONS

International sanctions, especially economic sanctions are based on the following assumptions *Firstly,* that states are rational entities which compare their domestic affairs and conditions with that of their international and foreign affairs; *Secondly* that the economic sanctions imposed on a state, and its corresponding economic impact negatively affects the sanctioned state and the subsequent reduction in the cross border commerce is considered as penal action; *Thirdly,* the neglect of a country from world trade will result in the sanctioned state ceasing its illegal actions; *Fourthly,* that when the sanctioned state ceases its illegal actions, the sanctions will be lifted off the state; *Fifthly,* that such an economic sanctioning system acts a system of deterrence, i.e. other states are made aware that any acts contravening peace, security, etc. or any other non-compliance with international obligations by states would result in the recession of the multitude of privileges offered by the world community.[29]

SANCTIONS AND THEIR LEGITIMACY

International Law stipulates several legal rules for sanctioning countries disrupting global peace and engaging in armed conflict. The United Nations Charter's Article 41 gives its Security Council the authority to force sanctions. Before taking action as per Article 41, the Security Council should first establish the occurrence of any potential danger to the tranquilly or disorderly conduct, or external aggression in compliance with Article 39 of the Charter Of the United Nations, and then offer suggestions or consider what course of action to take to maintain global peace and security.[30] Besides the prospect of Sanctions imposed by the United States, international law allows Countries to assist themselves by using non-violent actions upon perpetrators. The International Law Commission has described the scope to which such

[29] Daniel W. Drezner, *The Sanctions Paradox: Economic Statecraft And International Relations,* (1999)
[30] Boris Kondoch, 'The Limits of Economic Sanctions under International Law: The Case of Iraq' (2001) 7 Journal of International Peacekeeping 267.

action is authorised through its 2001 Articles on the Responsibility of States for Internationally Wrongful Acts as well as the 2011 Draft Articles on the Responsibility of International Organizations, and also their relevant Opinion pieces, particularly within portions enshrining the guidelines of sanctions.[31] The concept of jus cogens is codified in Article 53 of the Vienna Convention on the Law of Treaties, 1969. Jus cogens principles, including international human rights laws, and its infringement is not justified and it is widely acknowledged how such principles apply to Security Council legal actions initiated under Chapter VII of the Charter of the United Nations.[32] Various legal challenges concerning international sanctions have approached the International Court of Justice in recent years. For example, Iran had submitted two legal claims against the United States. One is regarding sovereign rights in 2016, another is concerning sanctions inflicted after America pulled out from the Joint Comprehensive Plan of Action in 2018. Iran requested in the later lawsuit for the ICJ to urge the US to suspend existing sanctions. With unspecified grounds, the ICJ uses the word sanctions in its whole interim remedies ruling of in the October of 2018, sans clarifying it, yet evidently meaning to apply to those steps against which Iran objects in its petition.[33]

EFFICACY OF SANCTION THEORY IN INTERNATIONAL LAW

The sanction theory as given by the jurists' states two things most importantly on legal validity - one that sanctions are not always necessary when a law is breached in a legal system, and two that efficacy of the law is also not necessary to determine its validity.[34] The efficacy or effectiveness of international law is thus limited according to most legal positivists. Hans Kelson's view was that the legal validity of a norm is generally efficacious. HLA Hart also opined similarly. He states that legal validity would be meaningless if it is not generally efficacious, but sometimes there may be exceptions to this.[35] Lon Fuller was inclined to say that whatever law needs to accomplish in the future to attain its goals is not the same as law altogether.[36] As a result, the majority of jurisprudence scholars regard sanctions as just natural

[31] Ibid.
[32] Ibid.
[33] Lori Fisler Damrosch and David D Caron, 'The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts' (2011) 105 Proceedings of the ASIL Annual Meeting 497.
[34] Brenner M Fissell, 'Sanctions and Efficacy in Analytic Jurisprudence' [2017] Rutgers Law Review 27.
[35] Ibid.
[36] Ibid.

needs apart from the idea of law itself. As with effectiveness, the sanction is no longer regarded as having any legal significance.

Today, in the international realm economic sanctions have become appealing policy weapons for States seeking to demonstrate their displeasure with any other State's activities. This is when the theory of sanctions and its efficacy come into the picture. Although if sanctions are endorsed by a lot of nations together and preferably approved by a UN vote, providing them the utmost global and geopolitical backing and legality, its efficacy is nowhere to be guaranteed. Today, it is maintained that international law functions due to sanctions and that it is indeed law since it has the ability to sanction. Sanctioning should serve as the major foundation and productive factor for international law, rather than merely as a weapon for responses and retaliations as it is permitted by international law.[37] Since it might sanction lawbreakers, sanction theory permits legal experts to openly articulate international law within the positivistic explanation of law.

Sanctions in international law can be considered to be more efficacious if several countries are backing them, thus increasing the power disparity between the imposing countries and the target countries. In this light, it is worth examining whether sanctions imposed under the authority of the United Nations represent the most extensive sanctions that could be imposed.[38] The dispute about the efficacy of UN sanctions stems primarily from the complexity necessary to organise international operations over a specific target. To adopt international proposals, the current international framework necessitates protracted discourse, multiple ratifications, and sophisticated implementation procedures. This is primarily due to the current status within which the legality of foreign intervention is based on the approval of independent nations with a principle of sovereign rights.[39]

According to legal scholars, it must be demonstrated that disobedience to the law has no impact on the states' projected value, perhaps since there are no overt or covert sanctions for a violation of international law, such as non-financial damages, or, if there are, such sanctions are not ever

[37]Farshad Ghodoosi, 'THE SANCTIONS THEORY: A FRAIL PARADIGM FOR INTERNATIONAL LAW?' [2015] Harvard International Law Journal 12.
[38] Hunter Wayne Neary, 'The Efficacy Of Sanctions As An Instrument Of International Law' (Tallinn University Of Technology 2020).
[39] Ibid.

imposed.[40] Based on the treaty, a highly aggressive action like Russia's attack on Ukraine may be susceptible to a variety of sanctions, some of which are not efficacious and others which are highly efficacious. The Dispute Settlement Body of the World Trade Organization DSU , for example, could be regarded to be quite successful because it has its own authority.[41] Nations do not really breach treaties because of the exact rationale that nations do not really break other actionable agreements. Nations are afraid of reprisal from another side or perhaps some form of damage to reputation, or nations are afraid of a lack of coordination.[42] In other words, international treaties may sometimes work even without *pacta sunt servanda.* Some nations' reprisal like sanctions, functions as an inducement for conformity as well, but it is sceptical of the regulatory impact of global image, which nations properly see as an experimental issue. Reputation should be broken down according to the type of treaty. Thus, making it harder to understand why certain conventions have higher adherence than others.[43]

SANCTIONS: THE RUSSIAN-UKRAINIAN WAR

The purpose of this section is to examine the recent sanctions imposed against Russia, in light of the sanction theory, i.e. to determine the effectiveness of the sanctions in deterring the illegal acts of Russia. The recent sanctions imposed in 2022 are attributed to the Russian invasion of Ukraine, which began in the early hours of February 24, 2022. The conflict clearly involves concerning the use of force, and thus, it is apparent that Russia has violated Article 2(4) of the United Nations Charter[44], by using armed force against Ukraine. The prohibition on the use of force in international law is also part of customary law and a jus cogens principle.

Sanctions have been imposed by the European Union, as well as countries such as the United States, Canada, Japan, New Zealand, and Italy. Russia has been subjected to several financial sanctions. which not only apply to the government but also to individuals. Sanctions have also been imposed by several multinational corporations and organizations, under government

[40] Anne van Aaken, 'To Do Away with International Law? Some Limits to "The Limits of International Law"' (2006) 17 European Journal of International Law 289.
[41] Ibid.
[42] David M Golove, 'Leaving Customary International Law Where It Is: Goldsmith and Posner's The Limits of International Law' 34 46.
[43] Anne van (n 39).
[44] United Nations Charter, Article 2(4)

pressure. Furthermore, the recent set of sanctions has been imposed at an unprecedented speed.[45]

A Brief on Sanctions Imposed on Russia in 2022

The key economic sanctions imposed on Russia are-

- Russian banks have been barred from using the Swift payments network, which is run by the Society for Worldwide Financial Telecommunication. The SWIFT system is an information system that enables cross-national money transfers. It serves as a conduit for messages between institutions in different countries.[46]
- The Central Bank of Russia's assets have been frozen by Western countries, preventing the bank from using its $630 billion (£470 billion) in dollar reserves.[47] Furthermore, the assets of Russia's oligarchs, or wealthy business executives, have been frozen. Further financial measures include Russia's exclusion from the Bank of International Settlements, which means it is no longer permitted to use its services.[48] Even financial systems such as the UK's financial system have excluded Russian banks, and deposits made by Russians in UK financial institutions will be limited.
- Several companies that provide consumer services in different countries have also stopped operating in Russia.

Effectiveness of the Sanctions: Are they achieving their intended Purpose?

The purpose of the Sanctions against Russia has been to stop Russian military activity in Ukraine and to deter any further armed conflict. However, the Russian-Ukraine conflict has raised questions as to the effectiveness of sanctions in achieving the purpose of deterring international illegal activity. War Crimes continue to be inflicted by the Russian military against the Ukrainian population. Even the momentary retreat of Russian forces from certain

[45] Phil Ciciora, 'How effective have economic sanctions been against Russia?', (*Illinois News Bureau)* <https://news.illinois.edu/view/6367/739476220> accessed 24 May 2022.
[46] Krishna Veera Vanamali, 'What is the Swift Payment System' (*Business Standard*, 1 March 2022) <https://www.business-standard.com/podcast/finance/what-is-the-swift-payment-system-122030100049_1.html.>accessed 25 May 2022.
[47] 'What sanctions are Being Imposed on Russia over Ukraine Invasion' (*BBC News*, 16 March 2022) <https://www.bbc.com/news/world-europe-60125659.> accessed 25 May 2022.
[48] 'UK Freezes Assets of Abramovich, six other Russian Oligarchs' (*Aljazeera*, 10 March 2022) <https://www.aljazeera.com/news/2022/3/10/uk-freezes-assets-of-abramovich-six-other-russian-oligarchs.> accessed 25 May 2022.

areas in Ukraine has been attributed to military defeat and not economic sanctions. The war has only intensified over time, and sanctions have seemed to have given no immediate relief in assuaging the conflict. Even, if we consider the long-term impact of sanctions, sanctions imposed on Russia after its illegal annexation of Crimea, have not deterred Russia from attacking Ukraine's sovereignty once again.

Limitations of International Sanctions

The issue lies in the fact that sanctions in International Law, do not directly affect the decision makers/ the regime in power, but rather, they negatively affect the population living in the country. The effectiveness of sanctions relies entirely on the assumption that the hardships faced by the masses will motivate states to cease their illegal acts.

The sanction theory in international law is thus based on certain assumptions (as discussed earlier) that may not always hold true. This has been observed specifically in the Russian-Ukraine Crisis, wherein the sanctions imposed have not resulted in the deterrence of illegal acts. However, this does not render the sanction theory inapplicable to international law as the existence of a law cannot be negated in light of its ineffectiveness. The potential existence of sanctions associated with an international rule is what makes the sanction theory applicable.

Conclusion

The Sanction Theory has been contributed by the positivist school of law, a school that had been long averse to recognizing international law as a law. The sanction theory is integral to the positivist school of law; it does not recognize law that is not associated with sanctions. However, this restrictive interpretation of law soon began to change; this can be noticed in the theories of HLA Hart, who recognized behaviour motivated by legal obligation and not just sanctions. Interestingly, in modern times, the positivist school of law itself has been used to bring international sanctions under the ambit of the sanction theory. Mary Ellen O'Connell draws from the theories of various positivist thinkers to justify that it is enough that there exists a potential sanction and that the effectiveness of a sanction is not integral to the positivist school. This view has helped bring international sanctions under the sanction theory.

On examining the recent case of sanctions against Russia, it is found that in sync with the widespread economic sanctioning practice, several countries have imposed economic sanctions, cutting out Russia from International Trade and Commerce, to coerce Russia into ceasing its internationally illegal activity. However, Russia has shown no indication of ceasing its attack, and sanctions seem to have not affected its illegal activity. This raises questions on the applicability of the Sanction theory in International Law.

However, economic sanctions have become popular policy tools in the international arena for states wanting to express their disapproval of the actions of others. Sanctions in international law can be deemed more effective if numerous countries support them, hence increasing the power disparity between the inflicting and target countries. The efficacy of sanctions depends and thus depends on various factors. The sanction theory cannot be negated in international law, only because of the ineffectiveness of some sanctions or because international obligations are not honoured. As explained by Mary Ellen O'Connell, the ineffectiveness of the sanction cannot be used to negate its existence as a law.

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