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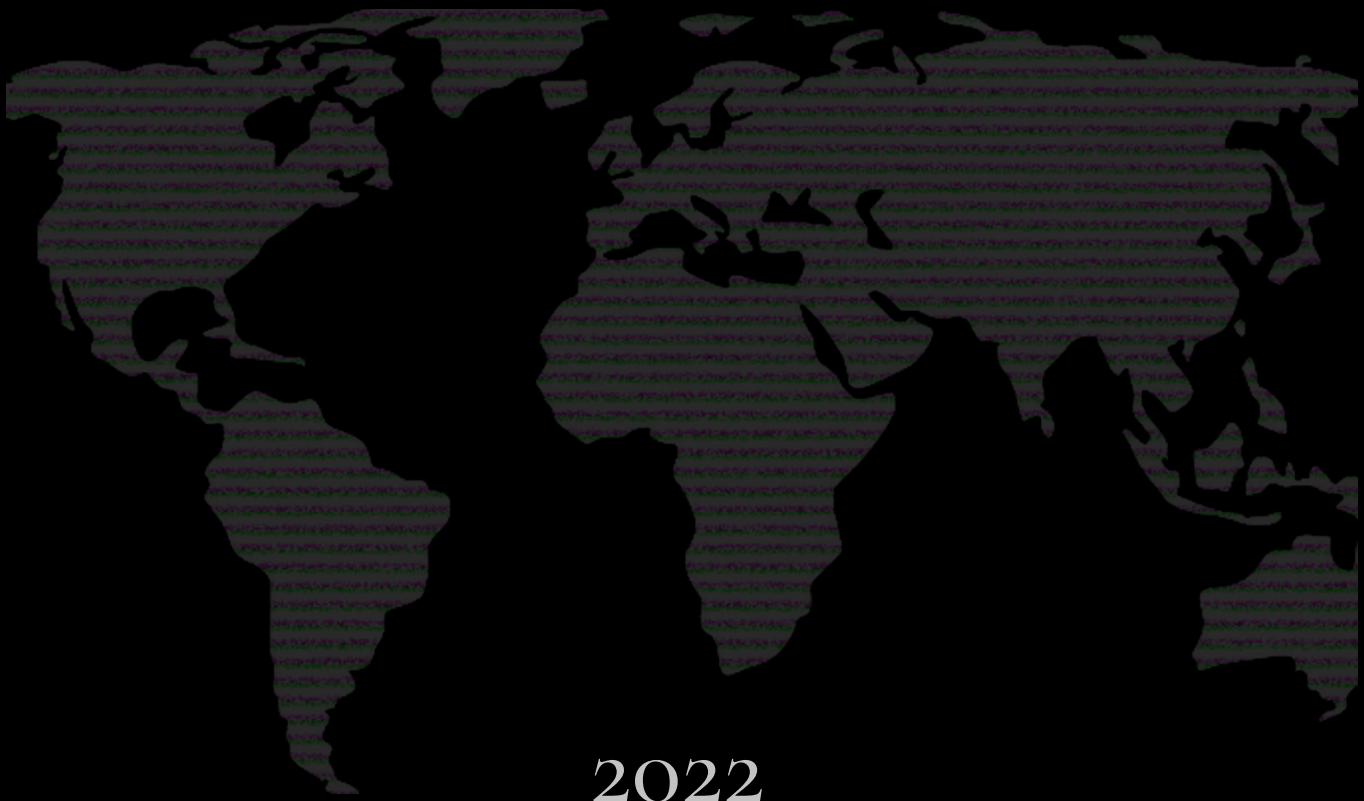

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ABOUT
GOVERNMENT LAW COLLEGE, MUMBAI

Government Law College enjoys the distinction of being the oldest law school in Asia and has since its inception in 1885, essayed a seminal role in the evolution of the legal and judicial landscape of India. Any discussion of India's legal system and culture today is incomplete, in fact, meaningless, without a mention of Government Law College, Mumbai. Looking back over the years, one realizes the immeasurable role of this pioneering law institution has played in the judicial, political and historical life of India.

Government Law College with its illustrious history and a heritage spanning over a century and half, has nurtured some of the greatest minds of today, not only in the field of law, but in various other walks of life. In the 165th year of its glorious existence, this premiere institute of legal training has upheld its tradition of producing meritorious legal scholars who dedicated themselves to public service and reform. The generations of legal distinguished legal luminaries who have been nurtured by this unique institution, have made a seminal contribution globally, to the evolution of legal fraternity. The alumni of Government Law College have been pivotal in placing India on the globe even before she became independent. The great freedom fighter Lokmanya Bal Gangadhar Tilak was an alumnus of this institution. The former President of India, Smt. Pratibha Devisingh Patil also received her legal education from Government Law College. The college also boasts of a history of an illustrious faculty including Chief Justice M.C. Chagla, Badruddin Tyebji, G.S. Rao, V.F. Taraporwala, B.G. Gokhale, S.G. Patwardhan, N.A. Palkhivala and Tehemtan Daruwala among others. Free India's first Law Minister and one of the principle architects of India's constitution – B.R. Ambedkar, Sir Dinshaw Mulla, Sir Bomanji Wadia and Shri A.A.A. Fyzee have served as Principals of this historic institution. With the strength of its glorious past, Government Law College strives incessantly and unremittingly towards a grand future.

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.

This student-based organization seeks to encourage communication and co-operation among students and lawyers internationally. SPIL, Mumbai relentlessly strives to provide greater opportunities for comprehensive studies of international cultures and legal systems, to facilitate global interactions and to publicize educational and career opportunities in International Law. SPIL, Mumbai has successfully organized several events, including a lecture on the working of the International Criminal Court by Professor William Burke White of the University of Pennsylvania, a Model United Nations - Student Exchange Program with students of the School of International Relations, Tehran and the Government Law College International Law Summit- which is held annually, in the month of February. SPIL Mumbai also regularly organizes workshops on the basics of International Law, which have an overwhelming response from Law students across colleges and holds various Debates, Legal Paper Presentations and Intra College International Law Competitions.

INDEX

Title of Paper **Page No.**

ANALYSES ON STATE SOVEREIGNTY HURDLES AGAINST PRIVATE INTERNATIONAL LAW AND JUSTICE

- ***Kelly Ngyah***[1]

ABSTRACT

The concept of sovereignty de jure international justice mechanisms, as it is applicable with private international law, raises a problem for justice-rendering wherein, the difficulty of binding a State against its own jurisdictional competencies becomes unavoidable. Through the objective deployment of philosophical discerns within both theoretical and practical knowledge of suggested and experienced data analysis results, as hauled from an empiricist perspective, the conception of State sovereignty is thus demonstrated as the deceptive hurdle on true justice-rendering, and States' acquisition options are presented within the current private international law's judicial jurisdiction opportunities.

INTRODUCTION

Appreciation of the term sovereignty with regards the international relations and judicial considerations of States is given within article 2 (4) of the 1945 United Nations Charter which states that: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Besides the UN Charter, other appreciation stances of sovereignty have been purported within conventional dispositions and academic philosophies to defend, explain and maintain judicial and political ideologies.Thomas Nagel conceives State sovereignty within the State's territorial boundaries and the population that reflects diverse accidental and historical reasons for which the exercise of the State's sovereign power over its citizens is connected to the citizenry duties of justice towardsone another through the State's legal, social, and economic institutions and made possible

[1] CEO at Modern Advocacy Humanitarian Social and Rehabilitation Association (MAHSRA).

through the same sovereign power.[2] This perception of sovereignty places State power on the advantageous and mutually beneficial relationship between the State and its citizens, which, if supported by the UN Charter's Article 2 (4) position, will entail the obligation for the sovereign State to protect its citizens even within a foreign sovereign territory no matter the tort, therefore, is an assessed international legal impasse.

As expressed by Rawls (1999), in *The Law of Peoples,* his anti-monism is essential to understanding both his domestic theory of a just society and his view of the relationship between domestic and international principles which today is experienced through what he believes to be the nature of sovereign States and in particular their comprehensive control over the framework of their citizens' lives, and that creates the special demands for justification and the special constraints on ends and means that constitute the requirements of justice.[3] His two principles of justice per se are designed only to regulate the basic structure of separate nation-States rather than the personal conduct of individuals living in neither a just society, the governance of private associations, nor the international relations of societies to one another. However, Rawls further identifies that the duties governing the relations among people include not only nonaggression and fidelity to treaties but also some developmental assistance to 'people living under unfavourable conditions that prevent their having a just or decent political and social regime.'[4] This highlights another facet of international justice-rendering consideration stance to which there is a need for further legalists' regulation of the international community. Besides Rawls' philosophies of justice towards a people under a sovereign State, there are several other theoretical arguments to the course of sovereignty that in one way or the other, tune the sovereign to discuss critical international justice rendering views.

I. THE THEORETICAL REVIEW OF STATE SOVEREIGNTY AT THE ENCOUNTER TO PRIVATE INTERNATIONAL LAW-JUSTICE

One more important consideration when addressing theoretical arguments with respect to 'State sovereignty' is the fact that it plays a role in defining the status and rights of nation-States, their

[2] Thomas NAGEL, *The Problem of Global Justice. Philosophy & Public Affairs* **(**Blackwell Publishing, Inc. Philosophy & Public Affairs 33, no.2, Spring 2005) pp 1.
[3] John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), pp 37, ISBN 0-674-00079-X.
[4] Ibid.

citizens and their officials. This somehow implies that if there is a need to recognize the sovereign immunity of States, there should also be such a privileged for its representatives.[5] Now, there's a logical connection between the sovereign privileges of the nation States and the authentication of international treaties form the foundational basis of the existence of international law, therefore sovereignty implies that the political autonomies of one State should for no reason be of 'higher or lower power' than another, then it can be argued that no international law can have value without concerning such sovereign States. The scope of this preliminary discern on sovereignty is to highlight, to what extent it would be judicially detrimental within international justice if sovereign States are faced with judicial issues of international laws to which they have not concerted to and worse more, faced in a situation of international private law justice in which another State of equal standing would have to render decisions over their sovereign privileges. Within the Public international law domain, this quarrel arises in the instance of many State party members to a multitude treaty. For example, when all parties consent to an original treaty and the details are changed or modified over time, such as the case when a treaty-based international institution sees its practice and 'jurisprudence' evolve over time and purports to obligate its members even though they opposed that evolution.[6]

A. Analysing literary conceptions of sovereignty

Before going into the basic theoretical concepts of sovereignty as highlighted in conventional dictums, it is worth a while appreciating and relating some critical conceptual views on the subject matter. In a view, an eminent scholar has described the sovereignty concept as 'organized hypocrisy' where he describes four ways that the term 'sovereignty' has been used.[7] In relation to justice in private international law, Krasner's third and fourth positions for sovereignty consider ─'international legal sovereignty, referring to the mutual recognition of States or other entities; and Westphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations', this would imply that sovereign States should hold an extensive authority overall political and legal issues within its territorial limits & follow

[5] Arrest Warrant of 11 April 2000 (*Dem. Rep. Congo v. Belg*.), 41 ILM 536 (2002) (Int'l Ct. Justice, Feb. 14, 2002) (especially separate opinion of Judge ad hoc Bula-Bula, id. at 597 (in French)).
[6] United States, *Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WTO Doc. WT/DS58/AB/R, para. 130 (adopted Nov. 6, 1998). For more examples, Franck, Thomas M., *The Power of Legitimacy Among Nations*, (New York, Oxford: Oxford University Press, 1990), *supra* note 33.
[7] Stephen D. Krasner (1999), *Sovereignty: Organized Hypocrisy*, *supra* note 8, at pp 9, ISBN 0-691-00711-X

non-observance of foreign sovereign privileges of foreign representatives or citizens found within. Even if the third point indicates that international legal sovereignty should recognize the mutual cognition of other sovereign entities within or without its territorial limits, it does not indicate that such entities would have any legal immunities within the foreign territories, if not otherwise consented to by the host State. As such, if a State is a member of the international community, with due international privileges and also with an obligation to use such privileges in defending its citizens all over, then it would be failing if another Sovereign state denies it such rights, and most probably, the judicial decisions of opposite States may not be equal and thus, the path to justice within the international milieu becomes distorted.

In another view, some other authors have referred to Sovereignty as being 'of more value for purposes of oratory and persuasion than of science and law'.[8] This propaganda view indicates a very huge lapse and laxity in the concern of international justice. If it is considered that sovereignty is only a figurative term, that virtualises the subjects of international public law, then, the very essence of international law would be devoid of its substance and thus international justice baseless. Still, in another view sovereignty has also been explored as a 'social construct' in which 'numerous practices participate in the social construction of a territorial State as sovereign, including the stabilization of State boundaries, the recognition of territorial States as a sovereign, and the conferring of rights onto sovereign States'.[9] As a social construct, the administration of international justice becomes more permeable. However, if mutual understanding between the sovereign entities should fail, because of one or more reasons in such a way that there is a violent conflict, it will become impossible for justice to be rendered within matters of the private international law domain.

View of Haass, a former United States government official elaborates on sovereignty in a succinct manner that also bears the consideration that, modern analysis finds the concept problematic within the international justice arena. According to Haas, sovereignty has been associated with four main characteristics, including, one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory, and the other one capable of regulating movements across its borders, able to make its foreign policy choices freely, and

[8] Michael Ross Fowler & Julie Marie Bunck (1995). *Law, Power, And the Sovereign State, Supra* Note 8, at 21 (Quoting Quincy Wright, Mandates Under the League of Nations 277–78 (1968)).
[9] Cynthia Weber & Thomas J. Biersteke, *Reconstructing the Analysis of Sovereignty: Concluding Reflections and Directions for Future Research, in* State Sovereignty as Social Construct, *supra* note 8, at 278, 278, (Cambridge University Press, May 1996).

recognized by other governments as an independent entity entitled to freedom from external intervention.[10]

Haass' first and fourth points purported for sovereignty, suppose the strong contradictory[11] inviolable privileges of sovereign nations. To the encounter of private international law, these two positions of sovereignty will entail that, States have all the rights to apply their national judicial system to all issues occurring within their territorial limits, even if it be of a foreign sovereign entity. By applying such a thought, it becomes difficult to apply Haass's third purport to foreign policy choices. If the sovereign entity would act as the sole justice system within its territory, it, therefore, implies that it would not be able to apply its foreign policies to other sovereign entities who would act the same in turn, except through a mutual understanding and non-obligatory consideration. As such, in the case of a legal issue arising within the domain of private international law, it would mean that justice can only be rendered if the concerned sovereign State in which such the matter arises wishes so. This, however, would create a very worrisome position for justice-seeking mechanisms with regard to cases such as transnational crimes. Thus, we see that from different author's perspectives or conceptive views on sovereignty, it becomes an important phenomenon of great attention and concern, with end to figure out the alternative measures for justice rendering within the international legal sphere especially with respect to issues arising from the private international law domain.

B. Analysing the critical philosophical growth of sovereignty at the encounter of justice

Before the age of enlightenment, Krasner demonstrates where four preponderant aspects were devoted to the definitional encounter of State sovereignty,[12] classical Ulpian's statements were known in medieval Europe, but sovereignty was an important concept in medieval times.[13] Medieval monarchs were not sovereign, at least not strongly so, because they were constrained by, and shared power with, their feudal aristocracy. However, both the sovereign and

[10] Richard N. Haass, *Sovereignty: Existing Rights, Evolving Responsibilities*, remarks at the School of Foreign Service and the Mortara Center for International Studies, (Georgetown University, at 2, Jan. 14, 2003), http://www.georgetown.edu/sfs/documents/haass_sovereignty_20030114.pdf.

[11] The term contradictory has been used to criticize the mentioned purports with regards private international law justice rendering mechanisms.

[12] Stephen D. Krasner (2001). *Problematic Sovereignty: Contested Rules and Political Possibilities*. pp. 6–12. ISBN 9780231121798.

[13] More at sovereignty (politics)". *Encyclopædia Britannica*. Retrieved 05 of August 2013.

aristocratic phenomena were strongly felt through customs.[14] This follows that around c. 1380–1400, the issue of feminine sovereignty was addressed in Geoffrey Chaucer's Middle English collection of *Canterbury Tales*, specifically in *The Wife of Bath's Tale,* which later in c. 1450,[15] had made use of the same elements of the tale, yet it changed the setting to the court of King Arthur and the Knights of the Round Table.[16] This ancient tale revolved around the English 'Authoritarian' romance, though, it may not be categorically linked to the modern conception of the international justice system, it, however, throws light to the aspect that, sovereignty is egocentric and calculative propaganda that denies the concept of egalitarian justice. The expression of Dame Ragnell, duly outlines that, the notion of women needing sovereignty is to point that, they need a totality of control for their selfish interest regardless that of any other. Such is not a way through which justice can be rendered if it is only one side's position that counts.

However, during the reformation era, a more appropriate understanding and meaning to sovereignty that would actually constitute or form justice-rendering were addressed by Jean Bodin in 1576. In his book, the 1576 treatise called *Les Six Livres de la République*, he argued from an absolute position that a sovereign must be 'hedged in with obligations and conditions, must be able to legislate without his (or its) subjects' consent, must not be bound by the laws of his predecessors, and could not, because it is illogical, be bound by his own laws'.[17] Meanwhile, Bodin makes it explicitly clear that a sovereign entity need not be bound by the laws within its jurisdictional competence, he subjectively highlights that such a sovereign bodyhowever must be bound by obligation and conditions to which the notion of international publiclaw could be held. This may be the case of international conventions and treaties but in the caseof international private law and for the sake of international private law justice-rendering assurances, these obligations need to be extended beyond the existent allowances granted untothe sovereign States. Though Bodin's conception scopes averagely within unique sovereign entities at the encounter of the political and the judiciary power, it may as well serve as an example to relate the international judiciary with the sovereign governing powers of the State.

[14] Ibid.
[15] This narrative concerned the knight Sir Gawain's wedding to Dame Ragnell and as what is purported to be wanted most by women: sovereignty. - *The Wedding of Sir Gawain and Dame Ragnell* (c. 1450).
[16] David Breeden (1450). *The Wedding of Sir Gawain and Dame Ragnell*. http://www.lone-star.net/mall/literature/gawain.htm (last visited on 11 January 2014).
[17] Jean Bodin (1576). *Les Six Livres de la République, Paris 1576* - La souveraineté.

In the Age of Enlightenment, the notion of sovereignty became measured among a sovereign people and their representatives in the sense that, the more the public authorities were granted a liberal trusteeship within the State, the more they demonstrated the likely tendency to abuse such powers. Rousseau, in his 1763 treatise *Of the Social Contract* argued, 'the growth of the State giving the trustees of public authority more means to abuse their power, the more the Government has to have the force to contain the people, the more force the Sovereign should have in turn, in order to contain the Government', with the understanding that the Sovereign is 'a collective being of wonder'.[18] Rousseau's position is similar to that of Bodin's but in a more liberal form, in that, it places real sovereignty in the hands of the people who are in need of the justice that is obtainable through such sovereign privileges. The scope of Private international law cuts across two or more distinctive sovereign considerations within Rousseau's perspectives, therefore, for there to be a real justice-rendering mechanism across the sovereign entities, the judicial jurisdiction ought not to come from a biased and one-sided source but that which is acknowledged, cherished and accepted by all. This position also ties with the legal maxim that 'there is no law without a sovereign'[19] predicated on the assumption that the people have an unbiased means to ascertain the general will. The general will, within the international community, will therefore arise on basis of a general consensus (usually held through international conventions and treaties) reached by the different sovereign State entities in independent international jurisdictions.

C. Analysing the theoretical dispositions of sovereignty from conventional dictums

The historical appreciation of this analysis is rooted within the discoveries of some scholars of international law who identified the modern western originated international system of States, multinational corporations, and organizations, as having begun at the Peace of Westphalia in 1648.[20] It has also been assessed that sovereignty is a term that is often misused.[21] Also, 'there exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was

[18] Rousseau (1763). *Treaties of Social Contract*. Book II Chapter I.
[19] Stallybrass, William Teulon Swan (1918). *A society of states: Or, Sovereignty, independence, and equality in a league of nations*. (Routledge, October 2019), ISBN: 9780429055447.
[20] Gabel, Medard; Henry Bruner, *Global Inc.: An Atlas of the Multinational Corporation*, (New York: The New Press, 2003) pp 2, ISBN 1-56584-727-X.
[21] Stephen D. Krasner (1999), *op, cit.*

universally agreed upon'.[22] These criticisms can however be understood to cover up for the undermined position of the UN charter with regards to States' sovereignty. Furthermore, in appreciating the sovereign-worry stance, H. V. Evatt of the High Court of Australia had held the opinion that 'sovereignty is neither a question of fact, nor a question of law, but a question that does not arise at all'.[23] The numerously variant criticisms, therefore, tie with the fact that sovereignty cannot be a considerable factor if there has to be an effective international justice rendering mechanism. In order to assure an efficient international justice system, there is a need to institute or most probably coordinated a true international justice-rendering jurisdiction that bypasses the sovereign privileges of nations.[24] Even though public international law provides for a series of international justice opportunities (e.g. ICJ and the ICC), it however still does not apply due to intervention opportunities to non-adherent member States. It is, as such, that critical thoughts on the origin of the 'sovereign' notion have indicated other more comprehensive understandings that could outline the early goals of the sovereign conception opportunism on international justice within and without States. Thus, goes that, in 2000, Germany's Foreign Minister Joschka Fischer had argued that the system of European politics set up by Westphalia was obsolete when he referred to the Peace of Westphalia in his Humboldt Speech.[25]

The criticisms of the Westphalian sovereign notion have also been held within terrorist discussions, for example, Lewis 'Atiyyatullah, who claims to represent the terrorist network al-Qaeda and its perception of the international balance of power at present and in the future, declared that 'the international system built up by the West since the Treaty of Westphalia will collapse, and a new international system will rise under the leadership of a mighty Islamic state'.[26]

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[22] Lassa Oppenheim, *International Law 66* (Sir Arnold D. McNair ed., 4th ed. 1928)

[23] S. Akweenda, *Sovereignty in cases of Mandated Territories, in 'International law and the protection of Namibia's territorial integrity*', (Martinus Nijhoff Publishers, 1997) pp 40, ISBN 90-411-0412-7.

[24] An example is given in the case of ICC and the ICJ whose decisions are bounded over all its adherent members.

[25] Fischer, Joschka (May 12, 2000), *From Confederacy to Federation - Thoughts on the Finality of European Integration*.http://web.archive.org/web/20020502231325/http://www.auswaertiges-amt.de/www/en/eu_politik/ausgabe_archiv?suche=1&archiv_id=1027&bereich_id=4&type_id=3, Retrieved on the 4th of August 2013.

[26] Berman, Yaniv (April 01, 2004), *Exclusive - Al-Qa'ida: Islamic State Will Control the World*, The Media Line, archived. http://web.archive.org/web/20040610173219/http://www.themedialine.org/news/news_detail.asp?NewsID=5420. Retrieved 4th of August 2013.

The most worrying position about the phenomenal theories, within the conventional dictums of sovereignty in the international legal sphere, is the isolator presupposition latitude for sovereign States, according to which, although State recognition may signify the decision of asovereign State to treat another entity as also being a sovereign State either expressly or impliedly, it doesn't necessarily signify a desire to establish or maintain diplomatic relations. This would obviously put the wealthier and more advanced nation-States in dominator and dictatorial positions over the poor and dependent sovereign States. The national judiciary dispositions of the superior States would always prime over those of the inferior ones, therebycreating a biased international justice-rendering opportunism. Provided that, there is factually no distinctive definition that is binding on all the members of the community of nations, on thecriteria for statehood, and to which the practical criteria are mainly political, not legal,[27] in a relative consideration, L.C. Green cited the recognition as 'since recognition of statehood is a matter of discretion, it is open to any existing State to accept, as a State any entity it wishes, regardless of the existence of territory or of an established government'.[28] State sovereignty opportunism in such a liberal and non-legally binding scope would be very detrimental to international justice mechanisms, especially at the encounter of private international law and justice. In thiscase, the conflict of laws would obviously prevent the equitable justice choicesof the politically and economically weaker sovereign nation-States. Though this is a blurred recognition stance, international law is however in possession of a number of theories as to how States should be recognized as sovereign entities.

Primarily, in the 19th century, the constitutive theory of Statehood which required that a State in international law was sovereign if and only if another sovereign state recognized it as such, was developed. To this, new States could not immediately become part of the international community or be bound by international law, and the recognized nations did not have to respect international law in their dealings with them.[29] This constitutive theory, a priori, indicates that there was really no effective international justice mechanism from which new States could benefit, from since they needed to be recognised before acquiring such privileges. The one-sided and non-egalitarian culture of the international justice system was enshrined in the 1815

[27] B. Broms, 'IV Recognition of States', in *International law: achievements and prospects*, (UNESCO Series, Mohammed Bedjaoui(ed), Martinus Nijhoff Publishers, 1991), pp 47-48 ISBN 92-3-102716-6 [3].
[28] Israel Yearbook on Human Rights (1989), Yoram Dinstein, Mala Tabory eds., Martinus Nijhoff Publishers, 1990, ISBN 0-7923-0450-0, page 135-136 [4].
[29] Hillier, Tim, *Sourcebook on Public International Law*. (Routledge-Cavendish, February 1998), pp 201–2, ISBN 1-85941-050-2.

Congress of Vienna and the Final Act, which recognised only 39 sovereign States in the European diplomatic system, thus resulting in a firmly established practice that marginalised the faith of future of new States at the cognitive mercy of one or more of the great powers.[30] Pertaining to the constitutive theory, in 1912, L. F. L. Oppenheim highlighted that '...International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition.[31] Through recognition, only and exclusively, does a State become an International Person and a subject of International Law'. This indoctrinated the international law procedure since the early 19th century, therefore it may imply that the recognition of other States by the great powers would only have been in accordance with an interest-based perspective since these great powers had the discretionary opportunity, as for which State was to be chosen for joining their league. From an analytical position, a new State could be recognised through the consistency of its judicial system or the due subordination of its legal opportunism to that of the 'great powers'; its economic potentialthat would promote an interest-based economic relationship with the great powers; its strategic military-based positioning to the great power's military interest for combat zones and other research opportunities; and its pledge of sustainable loyalty both within the economic and political domains towards the great powers.

The conditional considerations behind the constitutive theory that could very well have influenced the new States into joining the league of the great powers, therefore, implies that these new States did not actually or could not boast of enjoying full international justice protection under the dominancy and copied propaganda of the great powers. As such, in the case of issues arising from the private international law domain to which effective justice is expected to be rendered, the possibilities become very limited. This is because, the later sovereign States which probably may have pledged loyalty and allegiance to the great powers that recognised them as sovereign entities, would have no other option than to follow the leadership positions of their 'empowerment masters', even if the adjudicative conclusions are out-rightly not satisfactory. In addition, another principal criticism of this constitutive theory is the confusion that may arise if one State would recognise a new State and the others do not.To this, Hersch Lauterpacht, one of the theory's main proponents suggested that it is a State's

[30] Holsti, Kalevi Jaakko, *Taming the Sovereigns: Institutional Change in International Politics* (Cambridge University Press, 1935) pp 128.
[31] Lassa Oppenheim, Ronald Roxburgh, *International Law: A Treatise*. (The Lawbook Exchange, Ltd. 2005), p. 135.

duty to grant recognition as a possible solution. However, a State may use any criteria when judging if they should give recognition, along with having no obligation to use such criteria and as such States may only recognize another State if it is to their advantage.[32]

Secondarily, in contrast to the constitutive theory which requires a State to be recognised by one or more of the great powers to the final Act of the 1815 Congress of Vienna, the declarative theory as famously expressed in Article 1 of the 1933 Montevideo Convention defines a State as a person in international law if it meets the following criteria: 1) a defined territory; 2) a permanent population; 3) a government and 4) a capacity to enter into relations with other states. According to the declarative theory, an entity's statehood is independent of its recognition by other states.[33] In as much as this theory duly liberates the State from the parentaldictatorship of sovereign existentialism by some great powers, there is still a significant nuanceas to the acceptance of or the rendering of justice within the private international law domain. Because all States are granted autonomous juridical independence within article 4 of the Montevideo Convention,[34] the situation becomes further complicated within the scope of private international law. With issues arising from public international law and justice- rendering mechanisms, the results are almost very efficient and effective because the sovereignparties to such adjudicative instances have duly consented. Whereas in the case of private international law, the declarative theory becomes problematic because according to articles 5 and 8 of the convention[35], it may become very difficult for two opposing or non-allied sovereignStates to agree on the adjudicative instance of one another.

Tertiary, a new theoretical notion of contingent sovereignty seems to be emerging, but it has not yet reached the point of international legitimacy. Neoconservatism is earmarked to have developed this line of thinking further with the assertion that a lack of democracy may foreshadow future humanitarian crises, or that democracy itself constitutes a human right, and therefore nation-States not respecting democratic principles, open themselves up to just war by

[32] Hillier, Tim, *Sourcebook on Public International Law*. op, cit.
[33] Article 3 of the Montevideo Convention, 1933.
[34] Article 4 stipulates that: States are juridically equal, enjoy the same rights, and have the same equal capacity in their exercise. The rights of each one is not dependent upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.
[35] Article 5 stipulates that: the fundamental rights of States are not susceptible of being affected in any manner what so ever; and article 8 declares that: No state has the rights to intervene in the internal or external affairs of the other.

other countries.[36] The two conservatives, Stefan Halper and Jonathan Clarke, in their 2004 book, '*America Alone: The Neo-Conservatives and the Global Order*', provided a succinct introduction to neoconservatism at that time.[37] The current views of neo-conservatives unite around three common themes :

1) A belief derived from religious conviction, that the human condition is defined as a choice between good and evil and that the true measure of political character is to be found in the willingness of the former (themselves) to confront the latter. This neo-conservativist approach frames sovereignty within a moral auspice premise of the sovereign will and conscience. Thus, as a sovereign entity, it, therefore, belongs to the State to choose its collaborative moral obligation towards other sovereign States. This stance is yet not very supportive of the application of effective and efficient justice mechanisms within the scope of private international law, but it helps in hauling the representatives' consciences of the sovereign States to a moral and/or mutually beneficial understanding that may be necessary for justice rendering. But do States act on the basis of moral uprightness or on other interest-based perspectives?

2) An assertion that the fundamental determinant of the relationship between States rests on military power and the willingness to use it. This theoretical view is not very different from the constitutive theory of the 1815 Congress of Vienna because in one or more ways it draws light to the fact that the great powers would be in charge of the sovereign considerations of States. Thus, for the fear of military power and the probable reactions of the most powerful sovereign States, the others will in turn be intimidated into marginal and subordinate adjudicative positions at the mercy of the former; and

3) A primary focus on the Middle East and global Islam as the principal theatre for American overseas interests. This focus concentrates on the United States' zealous hegemonic sovereign control over particularistic contrary sovereignties which are likely breeding grounds for non-conformist movements against the US's neoconservativism. Here, international justice-

[36] Olivier, Michèle (October 3, 2011). '*Impact of the Arab Spring: Is democracy emerging as a human right in Africa*?', *Rights in focus discussion paper*, Consultancy Africa Intelligence. Available online at: http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=866:impact-of-the-arab-spring-is-democracy-emerging-as-a-human-right-in-africa&catid=91:rights-in-focus&Itemid=296. Retrieved 5th of August 2013.

[37] Halper, Stefan; Clarke, Johnathan, *America Alone: The Neo-Conservatives and the Global Order*, (Cambridge, United Kingdom: Cambridge University Press 2004), ISBN 0-521-83834-7

rendering becomes dependent on the will of the Americans which in most respects than not, becomes highly detrimental to both the declarative notion of sovereign States [38] and the implications of justice as a whole within the international community.

II. THE EMPIRICAL REVIEW OF STATE SOVEREIGNTY AT THE ENCOUNTER OF PRIVATE INTERNATIONAL LAW & JUSTICE

The empirical question of sovereignty at the encounter with the mechanisms of justice developed within the private international law domain to be discussed within this section is bounded to the considerations of several epistemic parameters in which the elementary composition of its (sovereignty) definition introduces more precautionary measures to both the violation of the term and the risks engaged against international justice.

A. Sovereign territorial integrity and the Earth's remote censoring satellite worry

The empirical conceptualization of this worry is brought up in terms of three dimensions which are control, autonomy, and authority- generally attributed to the sovereign State.[39] It also concerns the predominant materialistic reading of international relations which situates the operation of each of these three elements within the tangible domain of territory, resting upon the physical foundations of military power and/or economic wealth. In this spectrum, the epistemic lapses of several social constructs that have been overlooked would be briefly examined to determine the trail of the informational dimension of sovereignty and its probable support or opposition to the global status quo of justice within the private international law domain. It follows that in tune to Anthony Giddens' and Michel Foucault's arguments, though in different ways and reaching different conclusions, surveillance technologies have been the basis for the State's administrative power throughout the modern era.[40] Indeed Peter & Ronald have been able to bring out that, 'statistics' and 'State' are derived from the same root; and not

[38] Such as given in the 1933 Montevideo Convention: Article 5 stipulates that: the fundamental rights of States are not susceptible of being affected in any manner what so ever; and article 8 declares that: No state has the rightsto intervene in the internal or external affairs of the other.

[39] Janice E. Thomson, '*State Sovereignty and International Relations: Bridging the Gap between Theory and Empirical Research"*, (International Studies Quarterly, Vol. 39, Summer 1995); and Karen T. LitHn, '*Sovereignty in World Ecopolitics', Mershon International Studies Review*, Vol 41, Issue Supplement_2, November 1997).

[40] Anthony Giddens, *The Nation-state and Violence* (Berkeley and Los Angeles: University of California Press, 1987); and Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1979).

coincidentally, the large-scale collection of statistics began with the emergence of the modern State.[41] These statistics, therefore, form the basis of cross territorial monitoring and evaluation opportunism which may weaken the sovereign conception and/or position of any State at the encounter of its surveyors. Anthony notes, that the importance of surveillance as a medium of power has not been grasped by either the liberal or the socialist traditions in political and economic theory.[42] Empirical data on surveillance has proven to be very influential in many aspects of a State's economy and security integrity. Strange depicted the international knowledge structure and identified four intersecting structures in the world's political economy: security, production, finance, and knowledge to which she instigates that, while most international relations' theorists focus on relational power, or the ability of one agent to influence another's behaviour, the real structural power which 'confers the power to decide how things shall be done'[43] could most probably be obtained from territorial surveillance and intelligence assessment opportunism. The power to decide how things can be done out of intelligence assessment of another sovereign State to the one which is in a litigation instance will obviously turn around the course of justice to the benefit of the surveyors. Priority security concerns of the surveyed States may maintain them in lower demanding and rights seeking positions that duly obstruct the course of international justice.

In another regard, concerning the principle of territorial exclusivity, John Ruggie purports that an epochal development that marked the end of the medieval era has been the defining feature of the modern system of States to which he claims that the recent globalisation of human activities is precipitating the 'unbundling of territoriality' and the 're-articulation of political space'.[44] The worry posed by this globalisation and unbundling of territoriality is that the unbeatable technology of the Earth Remote Censoring Satellite is perhaps better suited to exemplify these trends which inherently erases territorial boundaries by virtue of the global scope of both its observations and its diffusion of information. Though this Earth Remote Censoring Satellite mechanism serves to foster global efforts on transparency, it however undercuts the sovereign principle of territorial exclusivity. The worry behind this territorial exclusivity principle, to a world rendered transparent by satellite technology because of the

[41] Peter J. Taylor and Ronald J. Johnston, '*Geographical Information Systems and Geography*", in John Pickles (ed.), *Ground Truth: The Social Implications of Geographic Information Systems* (New York: The Guildford Press, 1995).
[42] Anthony Giddens, *The Nation-state and Violence. op, cit.* Note 6, 308.
[43] Susan Strange, *States and Markets* (New York: Basil Blackwell, 1988), pp 25.
[44] John Gerard Ruggie, '*Territoriality and Beyond: Problematizing Modernity in International Relations', (*International Organization, Vol. 47, No.1, Winter 1993), pp 171.

non-territorial nature of outer space, is that it is incongruous with the conventional nature of the world's sovereign States. This technology breeds permeability and denies the State's territorial integrity. Worthwhile also remarking here is that as the air space above a State's territory lies within that State's jurisdiction, the space above the earth's atmosphere (outer space) was declared in the 1966 Outer Space Treaty to be a *res communis,* or the common province of humanity,[45] thus implying that, much injustice is committed to sovereign territorialintegrity through the Earth Remote Censoring Satellite system.

In specific terms, the developing countries have now understood States' epistemic sovereignty to be implicit in the norm of territorial exclusivity and the ability to control information about one's country denoted from the launch and threatening position of the Landsat as a crucial component of territorial sovereignty. For example, when NASA espoused an open skies policy with its first launch of Landsat, some Latin American countries such as Mexico countered that their sovereignty over natural resources extended to the dissemination of information about them ─ for instance, Mexico announced that 'no data would be collected over Mexican territory from air or space without prior permission'.[46]

B. The sovereign state's institutionalism worries

The functional comprehension in examining international cooperation has been a productive manner to generate hypotheses and focus empirical research on particular practical aspects of international law which includes how the design of legal procedures and organizations affect or orient outcomes. Though many political scientists and international legalists (lawyers) may see this comprehensive perspective as too narrow, the baseline critique may be rooted in three lines of arguments through which an analysis is made on the institutionalist dogma and its encounter with the international justice system.

Primarily, the creation of institutions and choosing of institutional designs by States are usually beyond just mere furthering of their interests, but such choices depend, in part, on other factors that are seen as appropriate and legitimate and not necessarily or simply on rational cost-benefit

[45] UN *Chronicle,* Vol. 29 (December 1992), '*Legislating the 'Last Frontier',* p.54.
[46] Pamela Mack, *Viewing the Earth: Tire Social Construction of the Landsat Satellite System* (Cambridge, MA: The MIT Press, 1990), pp 187.

calculations.[47] This provides a medium for ignored institutionalisation of ethics or consequential variables that create and build institutions within States which tend to orient particularist forms of behavioural modifiers and to which colossally induce some sort of overlooking attitude at the encounter of 'legal injustice' within, both, national and the international spheres. Duffield argues that important institutional forms, such as 'informal institutions, tacit bargaining, and inter-subjective institutions often arise from processes other than agreement, and that political science studies on rational design and legalization have ignored important independent variables such as interests, power/capabilities, institutional path dependence, and the role of ideas.[48]

Secondarily, another critical empirical review on sovereign States institutionalism has been drawn from concepts such as obligation, precision, delegation, and membership which are overly bureaucratic. Even though these criteria may matter in order to ensure delays for appropriate scrutiny, there is still however much to worry about because the law's role in world politics goes far beyond the public international legal bureaucracy.[49] The need for more precision and lesser ambiguity is just what is highly needed with regard to matters of justice within the international private law domain. Is there really a need to address a particular domain of justice as a 'conflict of laws'? This obviously arises because of the lack of precision and much tolerance of ambiguity in the sovereign context of States within the legal international atmosphere. Some political scientists have, however, examined the phenomenon of precision, to the tune and measure how clearly and unambiguously international agreements define what is required for compliance.[50] The standard assumption by legal analysts has been that precision yields more effective international legal institutions and rules, Jules & Michael; and Franck argue that the extent to which a particular law affects behaviour depends upon the clarity of the law, among other factors. [51] The ambiguity factor is a sure measure for disregard and

[47] Wendt, Alexander, *Driving with the Rearview Mirror: On the Rational Science of Institutional Design*, (International organization, Vol 55, Issue 4, Autumn 2001), pp 1019.
[48] Duffield, John S., *The Limits of "Rational Design*, (International Organisation, Vol 57, issue 2, spring 2003) pp 411.
[49] Finnemore, Martha & Toope, Stephen J., *Alternatives to "Legalization": Richer Views of Law and Politics*, (International Organisation, Vol 55, issue 3, summer 2001) pp 743; and Christian, Reus-Smit, *The Politics of International Law*, (Cambridge University Press, 2004) pp 14-44, *supra* note 46.
[50] Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal. *The Concept of Legalization*, (International Organisation, Vol 54, Issue 3, 2000) pp. 401, *supra* note 131.
[51] Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use of Force, Cease-Fires and the Iraqi Inspection Regime*, (American Journal of International Law, Volume 93, Issue 1, January 1999) pp 124; and Thomas M. Franck, *Recourse to Force*: *State Action Against Threats and Armed Attacks* 8 (noting the evolution of practice regarding the veto power under the UN Charter). (International & Comparative Law Quarterly, Volume 52, Issue 3, July 2002)

consequential non-compliance with legal dispositions to which sovereign States would easily evade due procedural international justice-rendering from the legal guidance of private international law. In fact, a leading legal study of compliance argued that ambiguity is one of the main causes of poor compliance.[52] The procedural manner and judicial force determining the imprecision of international laws at the encounter of sovereign entities falls among the major indicators to be considered, and through which the central finding of political science research has examined legal precision otherwise. Though with regards to nonbinding international agreements, imprecision, can lead to more cooperation because it allows for incomplete contracts, which may be unavoidable when interests diverge and uncertainty is high,[53] the dangers are however more critical than the opportunist liberal interest-based provisions of imprecise clauses. Also, ambiguous agreements may be favoured in some domestic political settings e.g. some research on international trade suggests that unambiguous international obligations can lead to greater political mobilization by domestic groups opposed to trade liberalization.[54] It is obvious that imprecise agreements are at times created to foster flexibility while sending across credible signals but these imprecision and other forms of flexibility must not be so elastic that sovereign States may misinterpret short-term variations in behaviour, as long-run deviations from compliance.[55] Generally, man's imperfect nature obviously requires that agreements be made flexible such that evolutionary phenomenal changes may be accommodated within such agreements through regular amendment proceedings and other modification processes. Some political science research studies on preferential trade agreements find that precision decreases cheating. By increasing the probability of detection and making it a favoured design choice, the task of resolving conflicts of interpretation and sanctioning deviant behaviour is eased.[56] Therefore, the fact that there is a general lack of precision within the private international law domain becomes a great call of concern with regard to aspects of Justice arising therein its legal scope.

[52] CHAYES, Abram & CHAYES, Antonia Handler, *The New Sovereignty: Compliance with International Regulatory Agreements*, (Harvard University Press, 1995), supra note 11.
[53] Abbott, Kenneth W. & Duncan Snidal, *Hard and Soft Law in International Governance*, (International Organisation, Vol 54, Issue 3, summer 2000) pp. 421 *supra* note 136.; Koremenos, Barbara, *Contracting Around International Uncertainty*, (American Political Science Review, Vol 99, Issue 4, November 2005) pp 549 *supra* note 130.
[54] Judith Goldstein & Lisa Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, (International Organisation Vol 54, issue 3, summer 2000), pp 603.
[55] Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, (International Organisation, Vol 62, issue 2, July 2008), pp 477.
[56] McCall Smith, James, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, (International Organization, Volume 54, Issue 1, Winter 2000) pp 137.

Tertiary, there has been a critical study and a specific concern with regard to the legal designs of sovereign States which seems to have been edified in a contrary fashion to that of international law. This is in respect to those legal designs that result from prior historical choices and emerge, in part, through independence and now seem to constrain the modern choices.[57] There is a danger in this field with regard to the sovereign position of States. Prior historical, politico-legal frameworks across sovereign nations are different from several perspectives and as such, in the case of an illegality instant that arises from the domain of private international law, the separate sovereign entities may obviously have different views and approaches for rendering justice. However, considerable efforts are made by a large, growing community of *historical institutionalist* scholars working in international relations and comparative politics, as well as law, and blurring the lines between all these fields with an aim to explain the path dependence of institutions, including legal institutions.[58] These empirical lines may well be able to address probable root causes of private international law and justice rendering impasses.

C. The empirical review of judicial independence at the encounter of international law & justice

Much empirical research on political science has recently analysed several ways in which delegation of problems and conflicts to international courts shape legal evolution.[59] A remarkable finding was, pointed out that the extent of such delegation increases with two variables relating to the design of courts: judicial independence (which depends on the selection method and tenure of judges) and access.[60] Another finding in line with the work done by lawyers on the impact of independent tribunals[61] is that access for private, non-State litigants

[57] Pierson, Paul, *Increasing Returns, Path Dependence, and the Study of Politics*, (American Political Science Review, Vol 94, Issue 2, June 2000) pp 251; Mark Axelrod (2008). *Saving Institutional Benefits: Path Dependence in International Law* (unpublished Ph.D. dissertation, Duke University) (on file with the authors); and Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union,* (Yale Journal of International Law, Vol. 35, No. 1, 2010) pp 115.

[58] Henry Farrell, *The Political Economy of Trust: Institutions, Interests, And Inter-Firm Cooperation in Italy And Germany*, (Cambridge University Press, September 2009).

[59] Shaffer, Gregory & Ginsburg, Tom, *The Empirical Turn in International Legal Scholarship: A Review and Prospectus*, (American Journal of International Law, Vol 106, Issue 1, January 2012) *supra* note 4.

[60] Keohane, Robert O., Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, (International Organization, Vol 54, Issue 3, Summer 2000) pp 457 *supra* note 150.

[61] Posner, Eric A. & Yoo, John C., *Judicial Independence in International Tribunals*, (California Law Review, Vol 93, No.1, January 2005), *supra* note 102.; Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, (93 *California Law Review 899-956, 2005*), pp 899 *supra* note 151.

and compulsory jurisdiction both contribute to judicial independence.[62] Karen's position correlates with the argumentation focus of this paper that requires a new justice system for legal issues arising within the domain of Private international law and which the concept of sovereignty within States has so undermined.

Besides Karen's findings, political scientists, meanwhile observing the operational mechanisms of the World Trade Organization (WTO), have struggled to explain why some disputes brought in front of its jurisdiction are settled, while others are not. One major findinghas been pinned pointed to the fact that democracies are more likely to settle disputes with eachother at the consultation stage.[63] Busch specifically argues that these 'settlements occur becausedemocracies are better able to credibly commit to negotiated settlements and that this finding indicates that democracies use WTO's dispute settling mechanism (DSM) not to ensure adherence to international legal norms, but to tie the hands of other parties'.[64] International trade which forms one of the most important areas (besides transnational criminality), is most likely to have gained the global regard for several international justice systems because of the priority of economic interests held by the influential sovereign States. However, judicial matters within the WTO are still sceptical of the issues brought before it because of, in part, the sovereign State's liberal opportunism to choose its adherence options. Another finding whythe WTO's DSM may not work or fails to address commercial judicial matters is that: in 'low-velocity' industries with relatively few product lines and low turnover, early settlement is lesslikely, perhaps because vested interests are greater and the costs of delay are less onerous than in more vibrant industries.[65] And another worrying finding is that developing States tend not to bring cases to the WTO's system, because of high start-up costs in pursuing such legal action.[66] How can justice, therefore, be rendered in such a materially inconsistent and financially marginal judicial system? Are the international adjudications dependent on the soleauthorities of the international judges?

[62] Karen J. Alter, *Private Litigants and the New International Courts*, (Comparative Political Studies, Vol 39, Issue 1, February 2006) pp 22.
[63] Busch, Marc L. *Democracy, Consultation, and the Paneling of Disputes Under GATT*, (Conflict Resolution Journal, Vol 44, issue 4, 2000), pp 425, 426–27.
[64] Ibid.
[65] Davis, Christina L. & Shirato, Yuki, *Firms, Governments, and WTO Adjudication: Japan's Selection of WTO Disputes*, (World Politics, Vol 59, No.2, January 2007) pp 274.
[66] Davis, Christina L. & Bermeo, Sarah Blodgett, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, (Journal of Politics. Vol 71, No.3, 2009), pp 1033.

Attempts to shed light on the debate of international judges (with regards to their delegation of national governments) have sought to incorporate insights from the study of domestic judicial behaviour, looking at questions such as the causes and effects of judicial decision-making.[67] There are arguments that international judges are a type of agent, to whom national governments delegate important, but limited, authority.[68] Some other international judges are 'thought of as 'trustees', meaning that they have substantial independent powers because their authority derives from sources other than a delegation from national governments'.[69] For example, some studies of the European court found that some judges are more 'activist' than others.[70] The diversity of Judges, therefore, forms the basis for different explanations of the evolution of the legal doctrine within the international justice system, more obviously understood as one rooted in State interest and the other in independent judicial interpretation. More empirical research on other international tribunals to explore the strategic behaviours of judges has come up with similar issues of concern.[71] These empirical results highlight diverse resolutions for the persuasive reasons why some States, over time may become willing to ratify particular Court Statutes and cede authority to the Court. It is so prompted that, such research induced in the 'fourth race of power, looks to persuasion as a driving force for cooperation, rather than to the structure of a problem or narrow calculations of State interest'─ Deitelhoff argues that 'States' willingness to give up sovereignty to the International Criminal Court resulted from persuasion during negotiations that caused States' interests to change.[72]

[67] Staton, Jeffrey K. & Moore, Will H., *Judicial Power in Domestic and International Politics*, (International Organization, Volume 65, Issue 3, July 2011) pp 553.

[68] Garrett, Geoffrey & Weingast, Barry, *Ideas, Interests and Institutions: Constructing the EC's Internal Market*, (in IDEAS AND FOREIGN POLICY: Believes, Institutions and political Change, Edited by Judith Goldstein and Robert O, Keohane, pp 173-206, N.Y Cornell University Press, 1993) *supra* note 37; Garrett, Geoffrey, Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments and Legal Integration in the European Union*, (International Organisation, Vol 52, issue 1, Winter 1998), pp149; and Carrubba, Clifford J., *Courts and Compliance in International Regulatory Regimes*, (Journal of Politics, Vol 67 No.3, 2005), pp 669. DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 148.

[69] Karen J. Alter, *Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice*, (International Organisation, Vol 52, Issue 1, 1998) pp 121; and Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, (European Journal of International Relations, Vol 14, Issue 1, March 2008) pp 33.

[70] Voeten, Erik, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, (International Organization, Vol 61, Issue 4, October 2007) pp 669; and Voeten, Erik, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, (American Political Science Review, Vol 102, Issue 4), November 2008) pp 417.

[71] Carrubba, Clifford J., Gabel, Matthew & Hankla, Charles, *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, (American Political Science Review, Vol 102, issue 4, 2008) pp 435; and Busch, Marc L. & Pelc, Krzysztof J, *The Politics of Judicial Economy at the World Trade Organization*, (International Organisation, Vol 64, Issues 2, April 2010), pp 257.

[72] Deitelhoff, Nicole, *The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case*, (International Organisation, Vol 63, issue 1, 2009), pp 33, 35, *supra* note 50.

The relative doctrines of the international justice system, have been drowned within the sovereign-egoism dream of the most influential States, as had been the case since the 1815 Congress of Vienna (Final Act which recognised only 39 sovereign States in the European diplomatic system) to which the constitutive theory demanded that every other State had to become Sovereign only if it was recognised by one or more of the great powers. Modernity has now advanced with very strong principles of equality and other auto-determinative means for the sovereignty of States but the great powers of yesterday seem to hardly digest this aspect. Their tactical mechanisms to ensure their 'super-sovereign' positions over other sovereign nations are numerous. It follows that an important question recently analysed by political scientists studying the content of international judicial decisions as an evident pattern of legal citation[73] is why the European Court of Human Rights would choose to cite its own precedents so extensively (despite the absence of a norm of stare decisis in international law)[74] and why the Court's tendency to cite precedents varies widely across cases. Also, Legal scholars have already paid significant attention to similar questions, such as the use of foreign law in domestic courts.[75] It can, thus, be deduced that such usage of decisions of precedence will lay a strategic framework and legitimize them, maximizing the likelihood of domestic courts to comply with the judgements. In the tail, the findings become suggestive of the fact that the international judges may not only be trustees under the pressure of domestic governments but inculcate more constrained characteristics towards what they can achieve by domestic courts and otherexternal audiences of estimable value.[76]

The relational empiricism of international judges' adjudicative trials and strategic political appurtenance to different sovereign States to the conceptual focus of this paper is in line to edify the problem of having a non-consolidated judicial framework that would overcome favouritism of the world powers and the subordination of less significant sovereign States towards an efficient and a non-biased justice-rendering system within international private law domain. The conclusive analysis of the findings of the international judges has proven that they

[73] Voeten, Erik, *Borrowing and Nonborrowing Among International Courts*, (Journal of Legal Studies, Vol. 39, No. 2, 2010) pp 547.
[74] Adeleye, Gabriel et al. (1999). *World Dictionary of Foreign Expressions: A Resource for Readers and Writers*, page 371.
[75] Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, (American Journal of International Law, Vol 102, Issue 2, April 2008) pp 241.
[76] Yonatan Lupu & Voeten, Erik, *Precedent in International Courts: A Network Analysis (*British Journal of Political Science, Vol 42, Issue 2, 29 February 2012); and Steinberg, Richard H., *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, (American Journal of International Law, Volume 98, Issue 2, April 2004) pp 247 *supra* note 149.

make their decisions, not based on the true ethics and principles of equality, fairness and justice, but because of the desire to defend other external values and also upon the basis of doctrinal influences. Likewise, such doctrinal influences are copied and applied within sovereignnational judicial systems and courts. This may very well, as would be further analysed, pose asevere issue of 'conflict of laws' or 'legality conflicts' between two litigant parties in an instance of private international law and who face different doctrinal influences within their different sovereign judiciary systems.

CONCLUSION

The analyses and criticisms of the theoretical descendants with respect to the hurdles to State sovereignty within the international justice system especially with respect to the Hague's conventional guidelines for justice rendering mechanisms within the private international law domains implicate:

- That both the constitutive and declarative theories pertaining to the possession of States' sovereignty are flawed and immature or non-considerate mechanisms by which international justice can be achieved, with issues arising from the private international law domain. The theoretical frameworks only represent an ideal option which is almost in-practicable because the analysis of the study has indicated that the sovereign perspectives on States tactically reclassify the notion between higher and lower sovereignties and as such permitting the existence of superior and inferior sovereign States. Also, empirical analysis of the study, indicates that the existent international justice-rendering instances are corrupted by the nationalistic interest-driven and other global policy influences on the independent Judges;

- That the United Nation's Charter had failed from the onset in defining, restricting and guiding the sovereign opportunism that privileges States to hold adjudicative powers within issues arising from the private international law domain, and also that the Statute of the International Court of Justice is a little ambiguous with regards its jurisdictional opportunity over legal disputes concerning public international law and those that have to do with the national legal opportunities;

- That because of the little ambiguity found within the ICJ's Statute; much injustice is being committed to several litigants and/or applicants seeking the arbitral judicial powers of the International Court of Justice;

- That nature of and eventualities of crimes and torts (such as transnational organized crime, terrorism, and other international commercial torts) within the domain of private international law are becoming too cumbersome for their judicial jurisdiction to be left only within the judicial opportunities of national courts;

- That the numerous conventional guides from the Hague's instances and other international treaties enacted as guides for national judicial opportunism at the encounter of the wrongs committed within the domain of private international law are yet insufficient to assure real justice within the mentioned domain;

- And that, the most efficient way of obtaining Justice within the wrongs arising from the domain of private international law is to have a separate arbitral international jurisdiction over issues of the mentioned domain.

The implications therefore should contribute to the international legalist arena by sorting judicial understandings from impact-based approaches in voting texts, and such should attract different conceptual and definitional understandings of terms such as 'State-sovereignty' within multinational conventions, which would be appreciated by a wide majority of legal opportunists in different national languages.

INTELLECTUAL PROPERTY RIGHTS IN THE METAVERSE- COMBATING REAL ISSUES IN THE VIRTUAL WORLD

- *Nikita Chauhan & Harshima Vijaivergia*[1]

ABSTRACT

The Metaverse can simply be defined as a 3D universe that exists in the virtual space. While it is still in the developing phase, some games and virtual platforms provide their users with a Metaverse-like experience. The thought that the Metaverse could be the next version of the Internet is a fascinating one, but it also invites certain legal complexities that need to be acknowledged. When we consider intellectual property rights, it is safe to assume that they will play a vital role within the Metaverse, since user-generated content will be an essential part of it. Companies filing for trademarks of virtual goods and services already show how significant the development of the Metaverse will be. And here come some nagging questions- What legal mechanisms will be put to use to safeguard the IP rights inside the Metaverse? Will the existing framework suffice? How will the law be implemented in a platform that has no geographical bounds? This research paper deals extensively with these questions and provides the existing international framework that deals with IPRs, the potential challenges in the future, and ways to combat those challenges.

INTRODUCTION

The term 'Metaverse; is a new tech lingo that has been gaining more and more popularity over time. In very simple words, Metaverse can be defined as a reality beyond physical qualms, or in other words the 'virtual reality'. It is like cyberspace except that it uses AR and VR to allow people to experience Metaverse in the form of an Avatar by using VR goggles. The curiosity related to Metaverse has accelerated even more around the world since Facebook rebranded itself as 'Meta'. While big tech giants like Microsoft and Meta already have plans to develop various Metaverse platforms, other industries and companies are also gaining enthusiasm for becoming compatible with these futuristic goals.

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The worldwide pandemic revealed that people, after getting adapted to cyberspace, can do a majority of their work online, and it is no secret that 'Work from Home' is the new normal. Everything from education to working shifted to 'online mode' in the wake of the pandemic. And since we have already climbed a few steps on the ladder, the dependence on online platforms is likely to increase in the future. Throw in a VR goggle, and a better and more immersive online experience and you enter the Metaverse.

However, as exciting as it may seem, it comes with its own complexities. As more and more people start using the Metaverse, it will become crucial for them to know and understand their rights in the Metaverse. One such legal domain that needs to be particularly focused upon is Intellectual Property Rights. The Metaverse has proposed both, opportunities as well as challenges with respect to the IP regime.

I. SCOPE FOR INTELLECTUAL PROPERTY RIGHTS IN VIRTUAL WORLD

More interest in the Metaverse will mean advancement in patentable technology related to virtual and augmented reality, formation of new brands, companies and industries, will attract trademarks and also the creation of content by users in the Metaverse, will necessitate the use of copyrights respectively. It, therefore, becomes essential to acknowledge the significance of Intellectual Property Rights in the Metaverse.

Intellectual Property Rights in general deal with the rights the creator has over something created by the virtue of her/his human intellect. Intellectual property can be referred to as an intangible asset and can range from inventions, symbols, names, and marks to artistic creations, designs, trade secrets etc. The major aim of providing intellectual property rights is to recognize the efforts and intellect that the creator has invested into the goods/services, and also encourage people at large to continue inventing and creating a world largely driven by human intellect. Since IP forms a very essential part of our realities, it is more than expected that they will also be imperative in regulating and resolving disputes surrounding IPR in the Metaverse.

Although there is both excitement and doubts about the *not-so-common* concept of Cryptocurrencies and NFTs, influential people or company giants are attempting to enter the

virtual world to market their own virtual products. The same is evident from the rapid increase in the number of trademark and patent applications, along with the registration of other IP tools. These applications are filed by the owners of a variety of industries specifically for claiming their rights over their virtual creations, though they hold these rights even for their real-world products. This implies the companies are already realizing the growing importance of such virtual rights. One of the most favourite brands, McDonald's, recently filed multiple trademark applications for "MCDONALDS" along with the operation of its virtual restaurant consisting of its physical as well as virtual goods.[2] Furthermore, it seeks to register "McCafe" for its entertainment services like physical and virtual concerts.

Following the same, various other individuals and companies have also started registering their virtual assets:

- Walmart filed applications to trademark 'WALMART' for covering the creation and sale of its virtual goods such as electronics, toys, decorations, sporting goods, and personal care products;
- Hip-Hop legend Jay-Z filed a trademark application for 'JAY-Z' hinting his intentions to cover music, clothing, and jewellery goods for use in online virtual worlds; similarly, NBA Legend Kobe Bryant had previously trademarked iconic "KOBE BRYANT", "*Mambacita*", and "Mamba Forever" for goods and collectables in the virtual world.[3]
- The Coachella Music Festival filed a trademark application for 'COACHELLA', for the downloadable audios, videos and featuring live musical performances with NFTs authentication.[4]

There exists a very bright future for Intellectual Property in the Metaverse, where its application will be expanded and reshaped considering the legal requirements for the new virtual environment. This will accompany applications of new non-traditional trademarks, the patentable Virtual Reality and Augmented Reality technology.

[2]Benjamin D. Schwartz, *Trademarks in the Metaverse: Brand Protection for Virtual Goods & Services*, 12 THE NAT. LAW REV. 59 (2022), https://www.natlawreview.com/article/trademarks-metaverse-brand-protection-virtual-goods-services.
[3]Olivia Jones, *The Rise in NFT and Metaverse-Related Trademark Applications*, JDSUPRA (Feb. 23, 2022, 05:23 PM), https://www.jdsupra.com/legalnews/the-rise-in-nft-and-metaverse-related-2940820/.
[4]*Ibid.*

A. Trade secrets

Additional problems of maintaining confidentiality in Trade Secrets will also arise. Trade secrets constitute confidential information that can be either sold or licensed.[5] It may include any technical know-how, commercial information or even a combination of elements. As such, it is known that maintaining secrecy is one of the ultimate requirements in the protection of trade secrets. Now the virtual space will establish much newer ways to preserve the very nature of trade secrets, rather than relying on the old ways of using a Non-disclosure Agreement or restricting access by Biometrics.[6]

B. Patent

With respect to another essential IPR tool in Metaverse, Patent, in the language of WIPO is:

"A patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. "

The scenario around Metaverse will be largely based on technologies and software. These cannot be avoided owing to the fact that these serve as a basic requirement for a patent protection regime.[7] However, considering the growing number of computerized patents authorized by the authorities, this does not seem a far cry. On analysis of hundreds of Patent Applications by Meta, it is crystal clear as to how it plans to commercialize on Metaverse.[8] In the review by Financial Times, it was found that users will be able to buy virtual products via virtual stores and even objects, corresponding to the actual third party sponsored things in the

[5]WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), https://www.wipo.int/tradesecrets/en/ (last visited Feb. 21, 2022).
[6]Suebsiri Taweepon & Chariyaphon Vachanavuttivong, *Thailand: Immersing Intellectual Property Rights In The Metaverse*, MONDAQ (Feb. 24, 2022, 04:06 PM), https://www.mondaq.com/trademark/1156298/immersing-intellectual-property-rights-in-the-metaverse?login=true&debug-domain=.mondaq.com.
[7] Christian Tenkhoff et. al., *The Metaverse: legal challenges and opportunities*, LEXOLOGY (Feb. 24, 2022, 06:34 PM), https://www.lexology.com/library/detail.aspx?g=c1872705-ccbe-49bb-98f4-77092e4f26ec.
[8] Isabel Asher Hamilton, *Meta might let companies sponsor the appearance of objects in the metaverse, patent filing suggests*, BUSINESS INSIDER INDIA, (Jan 18, 2022, 08:34), https://www.businessinsider.in/tech/news/meta-might-let-companies-sponsor-the-appearance-of-objects-in-the-metaverse-patent-filing-suggests/articleshow/88978897.cms.

real world.[9] Furthermore, upon the patent review, it was also revealed that Brands will be examined under a Bidding Process in order to sponsor the 'object appearance' in a virtual store. The traditional inventions would also have a part to play and this has already been considered under a plethora of applications. For instance, even Disney applied for a patent in the USA for the simulation of a *Virtual World*. [10]

Since the advent of the Internet, owners and users of intellectual content or protected content have been exposed to a variety of challenges, relating to authority, monetary benefits and enforcement. While many of these issues are covered by IP Rights and prevailing laws, the 'Metaverse' is capable of challenging the protection currently granted. The question that would arise is: '*Will the information landscape or virtual assets be covered for legal protection and ownership*?'[11]

C. Copyright

WIPO defines Copyright as a:

> *"Legal term used in describing the rights that creators have over their original literary and artistic works. Copyright covers a wide ambit of work from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings."*[12]

The Metaverse ensures first-mover benefits of Software that has already been copyrighted. However, policing the metaverse for infringing copyrighted creations is yet a challenge and in case usage of such is "*de minimis*", there will be an issue in proving infringement. Hence, the law shall not concern itself with trifles.

Viewed from the perspective of copyright laws, non-fungible tokens (NFTs) have invited a lot of opinions and discussions. It has caught attention for multiple reasons and not only due to its

[9]Hannah Murphy, *Facebook patents reveal how it intends to cash in on metaverse*, FINANCIAL TIMES, (Jan. 8, 2022), https://www.ft.com/content/76d40aac-034e-4e0b-95eb-c5d34146f647.
[10]Kyle Johnson, *Disney Patents Virtual World Simulator: Augmented Reality Without Headsets*, WDW MAGAZINE, (Jan. 8, 2022), https://www.wdw-magazine.com/disney-virtual-world-simulator-patent-augmented-reality-without-headsets/#:~:text=On%20Dec.,wearing%20a%20virtual%20reality%20headset.
[11]Pranav Nayar & Vivek Kumar, *Exploring the Meta: Exploring the Legal Ramifications of Metaverse*, RGNUL STU. RES. REV. BLOG, (Feb 23. 2022, 08:45 PM), rsrr.in/2021/12/06/legal-ramifications-of-the-metaverse/.
[12]WORLD INTELLECTUAL PROPERTY ORGANIZATION(WIPO),https://www.wipo.int/copyright/en/ (last visited Feb. 20, 2022).

application in "*Everydays: The First 5000 Days*" digital artwork, which was sold at a whopping 69.3 million dollars in 2021.[13] NFTs can be defined as "*unique digital assets that can be easily and securely traded and are built on Blockchain Technology.*" While the seller may want to permit a non-exclusive license or may even limit the right to use, the buyer always seeks to obtain an exclusive license in NFTs based digital artwork.[14] It can be drawn that NFTs will be considered essential in the Metaverse, where buyers and sellers can trade digital content, artwork and other goods through non-fungible tokens, and consequently make profits by further selling.

D. Data Protection

Data protection is an absolute necessity in the current scenario and the Metaverse also challenges this aspect of law. A user can live a real-life experience inside the Metaverse through VR Goggles even though actually being in virtual reality. Furthermore, the users can build their own virtual avatars that mimic the user's facial expressions, mannerisms and even gestures. The fun part about this would be the VR and other technological equipment that will enable users to participate and enjoy the experience in virtual spaces without even stepping out of their comfort zones and prevent any unnecessary surveillance.

E. Trademark

WIPO defines a Trademark as an

> "*IP form that consists of a recognizable, design or expression that can distinguish goods of one brand from another brand."*

Though Virtual Reality and Augmented reality (VR & AR) facilitate owners of the brands to expand their influence in market and consumer reach, Trademark is yet another IP right that exists at the intersection of video games and virtual space. In the Gaming industry, third-party trademarks are applicable when the brand seeks to simulate the real world (for instance *ESS*

[13]Jacob Kastrenakes, *Beeple sold an NFT for $69 million*, THE VERGE (Mar 11, 2021, 10:09 am), https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million.
[14]Christian Tenkhoff et. al., *The metaverse: Legal challenges and opportunities*, TAYLORWESSING, (Feb. 23, 2022, 12:56 PM), https://www.taylorwessing.com/zh-hant/insights-and-events/insights/2022/01/the-metaverse-legal-challenges-and-opportunities.

Entertainment). Some video games also provide their users with the ability to establish their market presence over a virtual platform and trade in the real world. These opportunities are packed with the likelihood of unauthorized usage of trademarks owned by third parties along with the probability of brand dilution. Ultimately, these risks of using brands call for the caution of trademark owners, especially in the virtual landscape, since the status and protection in law are unclear and still evolving. The brands must be cautious in securing their digital Intellectual property, in a manner Nike did when it claimed its digital trademark rights.[15]

F. Licensing

Apart from infringement, there will be various concerns over the breach in licencing, joint ownership, and safe harbours,[16] along with the rise in organizations dealing in patent cross-licensing and exposure to opportunities in brand licensing. However, the licensing related to content as well as technology has to be carefully dealt with considering all the aspects of 'Metaverse'. Licensing can be simply defined as an agreement made between the owner of intellectual property (Licensor) and the person who seeks to use the intellectual property (Licensee). The licensor is then authorized to use the IP in exchange for a fixed monetary value. It is not difficult to restrict a licensee's rights depending on his/her territory, the rules are yet to be formulated for the virtual world wherein there are no borders or the borders haven't been identified yet. IP issues will also rise considerably with respect to publicity disputes when celebrities and sportspersons are subjected to commercial values through their virtual avatars.

G. Brands

In the markets, the brand of a company is one of the most valuable elements that has made huge waves in the interplay between Metaverse and Intellectual Property. The 'brand' of a company is its precious asset upon which consumer identification, as well as success in markets, is dependent. Moreover, a brand has a huge inter-relation with the goodwill of a company, since people know the latter because of the former. With people increasingly having

[15]Kim Bhasin, *Nike Files for 'Virtual Goods' Trademarks in Shoes, Apparel,* BLOOMBERG, (Nov. 2, 2021, 9:19 AM)https://www.bloomberg.com/news/articles/2021-11-02/nike-files-for-virtual-goods-trademarks-in-footwear-apparel.

[16]Jeffrey Neuburger **&** Jonathan Mollod**,** *In the Coming 'Metaverse', There May Be Excitement but There Certainly Will Be Legal Issues*, PROSKAEUR: NEW MEDIA AND TECHNOLOGY LAW BLOG (Feb. 23, 2022, 09:29 AM), https://newmedialaw.proskauer.com/2021/12/03/in-the-coming-metaverse-there-may-be-excitement-but-there-certainly-will-be-legal-issues/.

their own virtual avatars, it is highly likely that they will also be willing to spend on virtual fashion accessories. For instance, *Gucci*, one of the high-end brands, had its virtual handbag sold out on Roblox, for approximately $4.100, which is much more than the price at which its bags are sold in the physical world.[17] It also raises questions about whether their registered trademarks, *intended for physical world purposes*, are protected against usage when it comes to virtual commodities by a third party. There are several other high-end brands that have acknowledged the potential of virtual spaces and have taken positive steps forward in claiming their rightful position by signing necessary legal contracts like Louis Vuitton with "*League of Legends"*[18], Valentino and Marc Jacobs with "*Animal Crossing"*[19] as well as Balenciaga with *Fortnite*. [20]

II. INTELLECTUAL PROPERTY INFRINGEMENT IN METAVERSE

An emerging and ever-increasing development in cyberspace, VR or AR, brings forth a plethora of questions about the legal facets pertaining to the Intellectual property of both technologies as well as possible unlawful acts within cyberspace. The faces behind Virtual reality may be subjected to lawsuits:

- while exercising their right to publicity, wherein they may use the reputation of a famous person/celebrity to their own advantage and without any permission;
- Due to defamation;
- Invading right to privacy by false portrayal or misrepresented information;
- Deliberately or negligently portraying emotional/physical distress in cases of cyberbullying[21];
- Violation of copyright of respective owners.

[17]Tenkhoff,et. al, *Supra* note 13.

[18] Laura Hawkins, *Choose your fighter: the fashion brands outfitting video gamers*, WALLPAPER (Feb. 8, 2022), https://www.wallpaper.com/fashion/video-games-luxury-brands

[19]*Ibid.*

[20]Simona Tolcheva, *Digital Fashion and the Metaverse: How Does It All Work?*, MAKEUSOF (Feb. 21, 2022, 05:21 PM) https://www.makeuseof.com/digital-fashion-metaverse-explained/.

[21]Margaret Mantel, *Trademark Infringement in Virtual Reality Spaces: When Your Virtual World Gets Too Real*, MICHIGAN L. REV. BLOG, (Feb. 22, 2022, 01:51 PM), http://mttlr.org/2019/11/trademark-infringement-in-virtual-reality-spaces-when-your-virtual-world-gets-too-real/.

It has been indicated that the activities taking place within the confinement of virtual spaces may also provoke criminal activities. Intellectual property rights are exposed to ambiguity and vagary in the real world, due to the emerging concept of virtual spaces like Metaverse itself. It shall only result in much complexity for owners of brands, who are now forced to regularly monitor the brands and ensure their rights are infringed neither in the cyberspaces nor in the real spaces. Needless to say, law enforcement is already taking cognizance of these matters.

In the light of the territorial principle of intellectual property rights, where it has now become possible to pile up evidence about infringement, it is quite difficult for websites to determine and control the point at which such infringement has occurred. Precisely, it is procedurally complicated.

Suppose, a famous influencer on social media does not promote a particular famous brand of apparel but his virtual avatar "does" and appears on the *New York fashion runway* virtually through Metaverse. The brand will undoubtedly receive attention and increase its consumer base, making it necessary to preserve its territorial scope, but it will also make the trademark effective.

Recently, Hermès International and Hermès of Paris, Inc.[22] (referred to as "Hermès") filed a complaint against Mason Rothschild.[23] The action was taken due to alleged trademark infringement, brand dilution and unfair competition against the defendant.[24] In the case, it was asserted that Mason Rothschild is a digital speculator and he sought to misappropriate the brand name METABIRKINS with the view to get rich. It was alleged that Rothschild used the above-mentioned brand to create, market, sell and facilitate the exchange of NFTs. Furthermore, adding "meta" (a generic term) is insufficient in distinguishing his bootlegged version of Hermès' original trademarked name. The cases of IP infringement require the owners of brands to be ready with appropriate actions to enforce their rights in virtual space with as much diligence as in the real world.

[22]Jodi Ann Talliman, *Intellectual Property Rights in the Metaverse: Hèrmes v. Rothschild and the MetaBirkins Saga*, JDSUPRA (Feb. 22, 2022, 07:13 PM) https://www.jdsupra.com/legalnews/intellectual-property-rights-in-the-3168911/.
[23]*Hermès International v. Rothschild,* Case No. 22-cv-00384.
[24] Supra note. 21

Some other cases display how common Ip infringement is and reveals an urgent need to address the need for strict implementation of IP laws in virtual spaces:

1. Richard Minsky built an art gallery on a Virtual gaming platform, naming it "SLART". He trademarked the SLART mark in real life from the U.S patent Office. After a while, it was realized that a virtual avatar on this gaming platform used the "SLART GARDEN" mark in a virtual exhibit. [25]
2. Taser International, Inc., manufacturer and seller of guns, took action against the entities and individuals involved in the virtual infringement of TASER (the company's registered trademark). It was alleged that the defendants were selling and advertising virtual weapons of TASER on a Virtual Gaming Platform. The case raised questions on the usage of the trademark as well as trade dress over *The Second- Life*, a virtual gaming platform.[26]

Protection of IP rights has become imperative in the current scenario where major companies in the market are attempting to chip in and compete for their lucrative prospects in the Metaverse by entering into the gaming sector, commerce and social networking. These strategies would help them in gaining a significant consumer base and shape their purchasing decisions. Enforcement of IP rights is important for brand owners in marketing, promoting and advertising goods and services through Metaverse. As mentioned above, Nike claimed its rights for its worldwide famous symbols *Nike* and *Swoosh* sign, the slogan '*Just do it',* the '*Jumpman'* logo and *Air Jordan* of Jordan. Also, Ralph Lauren applied for trademark protection for virtual clothing and accessories. [27]

A. Trademark and Copyright infringement

Trademark infringement is the consequence of using a mark, identical or somewhat identical to an already registered trademark within the one or related category of products and services and hence causing confusion in consumers' minds.[28] There are likely to be certain legal consequences in case a virtual Avatar is wearing Virtual goods having a registered trademark

[25]*Minsky v. Linden Research, Inc.*, No. 1:08 cv 819 (N.D.N.Y. 2009).
[26]*Taser International, Inc. v. Linden Research, Inc.*, No. 2:09 cv 00811 (D. Ariz. 2009).
[27]Laura Kusserow & Samantha Collins, *The Metaverse and the implications for Intellectual Property rights for fashion brands*, MARKS & CLERK (Feb. 23, 2022, 02:38 PM),https://www.marks-clerk.com/insights/the-metaverse-and-the-implications-for-intellectual-property-rights-for-fashion-brands/.
[28] UNITED STATES PATENT AND TRADEMARK OFFICE, https://www.uspto.gov/page/about-trademark-infringement (last visited Feb. 24, 2022).

of its owner in the 'real world' for instance. This is because this may mislead the consumers into believing that the virtual clothing has been offered or licensed by the real trademark owners. [29] Under the present laws, it is quite unclear as to whether the usage of a trademark in virtual goods can be constituted in the real-world product registered by a trademark.

Copyright Protection along with trademark registration can be granted to a brand when it satisfies two elements i.e., originality and innovation.[30] Furthermore, unauthorized reproduction of a trademark in the form of virtual goods used for the virtual avatars may also be liable for breach of copyright laws.[31]

B. NFTs (Non-Fungible tokens)

With the rise in Metaverse and NFTs, one essential feature is that anyone can create an NFT in their own comfort zone, and sell it thereafter. However, the downside of this feature is piracy i.e., well-known brand designs can be easily copied with very little effort and cost, very much like the counterfeited commodities.[32]

C. Content uploading

Another major concern relates to infringement by users by uploading content that is not authentic. This includes movies, pictures, music, virtual fashion and characters. IP holders desire cooperation with the platform providers to monitor as well as remove the content. However, it becomes difficult to track IP infringing content with an ever-expanding, complex virtual landscape.

D. Patent infringement

Patent infringement can be a result of the illegal and unauthorized use, marketing, or selling of an invention without the prior consent of such use from the patentee. Last year, Apple filed a

[29]Amanda Liu, *Trademark Protection in the Metaverse*, LEXOLOGY, (Feb. 23, 2022, 08:23 AM), https://www.lexology.com/library/detail.aspx?g=1be3918e-e0d1-48f0-99da-0b2d113987a2.
[30]USLEGAL. COM, https://copyright.uslegal.com/enumerated-categories-of-copyrightable-works/creativity-requirement/ (last visited Feb.24, 2022).
[31]Liu, *supra* note at 25.
[32] Kusserow & Collins, *supra* note 23.

patent seeking to remove certain subjects from Metaverse. Cupertino proposed that protection included a route for future "Meta-users" to delete subjects violating the interaction rules formed by the "Meta-users".[33] If the user's virtual avatar harms/violates/attacks the virtual avatar of another user, the former user can 'Stop' him.

Though it is common knowledge that patent applications are required to be authorized by the respective offices but there are already some technical solutions, specifically designed to deal with disputes arising from Metaverse. Facebook's Meta had also previously filed a number of Patent applications for Metaverse, which also included a method of changing the virtual experience of the user.

For example, a VR app enables a person to take a virtual tour to any place possible and he enjoys the element of realism in what he witnesses and hears. The developer does not seek any permission from the owner of the copyright before his app launches. The question of infringement arises as observed in the above example but it is unlike real-world copyright infringement. Not only the use of music will be construed as an infringement as it required prior permission from the holder of copyright but also the VR tour will be a copyright infringement i.e., the architecture, paintings and everything visible through the tour. However,France as an exception requires the app developer to check whether the use of images would need prior permission from the copyright owners for each painting, building or any work covered under copyright and the failure to do the required would attract heavy penalization forinfringement.

E. Passing off in Metaverse

Passing off comes to question when:[34]

- Some goodwill is attached to the owner's goods;
- the misrepresentation by the person who is not an owner forces the public to believe that the goods actually belong to the person who is not the owner

[33]COINYUPPIE, (last visited Feb. 24, 2022). https://coinyuppie.com/a-headache-for-both-nike-and-apple-how-to-provide-copyright protection-for-metaverse-2/

[34]NIBUSINESSINFO.CO.UK, (Last visited Feb.25, 2022). https://www.nibusinessinfo.co.uk/content/passing-definition remedies and defences#:~:text=Passing%20off%20happens%20when%20someone,causing%20financial%20or%20reputational%20damage

- the misrepresentation has caused damage or potential damage to the goodwill, finances or reputation of the owner

Assuming there exists goodwill in the chocolate bar brand, it is likely that the misrepresentation can be proved when it is included in a game. It indicates that there does exist licensing agreement between the two parties i.e., the company selling the chocolate bar and the developer of the game.

Proof of damage is not required for the owner of the brand to raise and enforce his claims, which is strictly required in case of an infringement claim. In his claim against passing off, the owner must prove that the misrepresentation by the defendant caused damage to his goodwill or that damage could be reasonably foreseen.[35]

III. INTERNATIONAL INTELLECTUAL PROPERTY LAWS

International laws applicable to Intellectual property Rights are a patchwork of multiple treaties, being unilateral, bilateral and multilateral. The nature of intellectual property calls for laws in both national as well as international dimensions.

While patents, trademarks and copyrights are the most widely known and used intellectual property rights over which issues arise, domain names, software, databases etc. are also attracting a lot of attention due to frequent infringements as well as litigation to curb them. The World Intellectual Property Organization (WIPO) is the leading international organization that addresses and regulates international issues with respect to IPRs[36]. While all countries have different laws that prevent the rights of creators and also promote innovation, the international legal framework provides the basic outlining of the rights with regard to intellectual property. It also ensures that the rights of the creators are not only preserved in their home country but also all around the globe irrespective of territorial borders. An example of this is the National Treatment Principle, which mandates equivalent treatment to a foreign product that is given to

[35] Andy Lucas & Robyn Chatwood, *Intellectual Property in Virtual World*, LEXOLOGY (Feb. 24, 2022, 6:54 PM), https://www.lexology.com/library/detail.aspx?g=30d7168d-4886-46e1-8ef6-ff7245948a91.

[36]WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO),https://www.wipo.int/portal/en/index.html (last visited Feb. 21, 2022).

the domestic product in a country[37]. The principle is not only applicable to goods and services in general, but under the scope of international law, it is also applicable to copyrights, trademarks, and patented goods of foreign countries at large. The principle is recognized by the various bilateral treaties, the World Trade Organization (WTO), the General Agreement on Tariff and Trade (GATT)[38], and Trade-Related Aspects of Intellectual Property Rights (TRIPS)[39].

IV. INTERNATIONAL INSTRUMENTS THAT GOVERN IPRS: THE HISTORY

Global trade is a very significant part of the development of countries, and as it keeps on increasing, one of the subjects that comes into focus is intellectual property. There are various instruments that have been curated to safeguard the rights of IP owners at a global level.

5.1 The Paris Convention on Protection of Industrial Property- Adopted in 1883, the Paris Convention has very wide applicability, and it applies to industrial properties like patents, industrial designs, trademarks, geographical indications, trade secrets etc.[40]

5.2 The Berne Convention for the Protection of Literary and Artistic Works- adopted in 1886, protects artistic works at large and enumerates the rights of the poets, musicians, painters, authors and all creators at large[41].

5.3 The Madrid Agreement Concerning the International Registration of Marks- also called the Madrid System, is governed by the Madrid Agreement, and the Protocol for governing and protecting different marks and allowing international registrations of the same[42].

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[37]Will Kenton, *National Treatment*, INVESTOPEDIA (Feb. 23, 2022, 3:30 PM),https://www.investopedia.com/terms/n/nationaltreatment.asp#:~:text=Key%20Takeaways,National%20treatment%20is%20the%20principle%20of%20giving%20others%20the%20same,trademarks%2C%20copyrights%2C%20and%20patents.

[38]WORLD TRADE ORGANISATION (WTO),https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited on Feb. 27, 2022).

[39]WORLD TRADE ORGANISATION (WTO), https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm (last visited on Feb. 27, 2022).

[40]WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), https://www.wipo.int/treaties/en/ip/paris/ (last visited Feb. 22, 2022).

[41]WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), https://www.wipo.int/treaties/en/ip/berne/ (last visited Feb. 22, 2022).

[42]WORLD INTELLECTUAL PROPERTY ORGANIZATION(WIPO), https://www.wipo.int/treaties/en/registration/madrid/ (last visited Feb. 22, 2022).

5.4 United International Bureaux for Protection for the Protection of Intellectual Property- set up in 1893, the BIRPI was made to administer the Paris Convention and the Berne Convention respectively. It was later succeeded by the World Intellectual Property Organization (WIPO)[43].

5.5 World Intellectual Property Organization- WIPO is the current international organization that works toward the protection of IPRs and the regulation of laws related to them.[44]

V. INTERNATIONAL IP LAW AND THE METAVERSE

With the Metaverse unfurling slowly, but steadily, it is imperative to recognize the effect that international IPR laws will have on the intellectual property present in the Metaverse. The Metaverse can be said to be geographically boundless unless we consider the servers which root the information that exists in the virtual world to some corner of the globe. The process, however, to locate the roots can be extremely time-taking as well as complex, which is why the need for having laws that specifically govern the IP rights in the Metaverse is escalating. The prime intention of international IP laws is to provide certain basic rights to IP creators. Additionally, they form a foundation for making national/domestic IP laws. As people are investing a lot of time into the Metaverse, the scope for new technologies for accessing the Metaverse, the foundation of new companies, and the creation of vast amounts of content in the virtual world are seamless. And to match this development as well as the probability of disputes that might arise in the Metaverse, it is important to analyze the applicability of International Laws to the intellectual property that exists in the Metaverse.

However, there are various challenging factors that come along the way while attempting to apply the existing international IP framework to the Metaverse.

[43]WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), https://www.wipo.int/about-wipo/en/history.html (last visited Feb. 22, 2022).
[44]*Supra* note at 32.

VI. CHALLENGES PERTAINING TO IMPLEMENTATION OF LAWS IN THE METAVERSE

Various IP related issues including protection, piracy, ownership, and distribution of content will have to be revisited through the eyes of an avatar in the Metaverse in order to get an idea of the potential challenges that follow.

A. An Avalanche of Virtual Lawsuits

Using a Metaverse requires a person to have an avatar and enter the virtual reality by way of that avatar. Now, when the subject matter of any lawsuit related to IP infringement will be the Metaverse, it is difficult and the most potent challenge to outline where, how and by whom lawsuits will be filed. The world at large is still learning about Metaverse and having a concrete idea about the lawsuits that are subject to the Metaverse is quite difficult. Moreover, as people are also investing in real estate inside the Metaverse, for instance, Snoop Dogg recreating his California Mansion as a virtual property in 'The Sandbox', the 'What if?' of the lawsuits are not exhaustive. There might even be a possibility that in the near future lawsuits are filed as well as fought within the Metaverse by lawyer avatars. And what would the implications be? What would the process be? Will the option of filing a lawsuit or settling the dispute within the Metaverse by the parties be a valid and enforceable one?

To answer all these questions, it is important to come up with some concrete laws that enumerate the dos and don'ts within the Metaverse.

B. Jurisdictional Aspects

Our world has territorial boundaries, which provide territorial jurisdiction to countries. But in a world where geographical boundaries have no meaning, new thinking and laws will be required. Moreover, interaction in the Metaverse is not constricted based on geographical borders. Hence, the parties to an IP infringement may well belong to different countries, further complicating the situation. Jurisdiction is imperative to decide whether a court/ tribunal/ judge or any other legal body is competent to adjudicate a matter at hand, based on various aspects like territory, subject matter, and the pecuniary limit of the dispute at hand etc.

Considering international law, numerous factors are analyzed to establish the territorial jurisdiction, including-

- The sovereign right of the State over the party
- The geographical location of immovable property
- Internal waters
- Territorial waters
- Nation aircraft/ships etc.

History is proof that various international issues have arisen in the past, and have been settled on an international platform when States are the subject matter of the dispute. And this is not limited to civil disputes only.

There have also been instances wherein criminal matters became subject to international law because of the different nationalities of the parties. For instance, in the case of France v. Turkey, popularly known as the SS Lotus case[45], a French officer in command of the ship that collided with a Turkish vessel on the high seas and led to casualties, was tried by the Turkish authorities. Authority was given to Turkish authorities to try the officer under the Treaty of Lausanne[46], and it was stated that it is the duty of the State to keep the sovereign rights under limitation.

Hence, the international stance is quite dynamic in matters related to territorial jurisdiction under international law. Since the Metaverse is geographically fluid, it is imperative to acknowledge the implications, challenges, and solutions to potential problems related to Metaverse. And talking about IP rights in specific, as people from all across the world will get an opportunity to interact virtually, but still at a much deeper level than the interaction on social media, intellectual property of creators will also be available on this international virtual forum. Hence, figuring out the jurisdictional aspects of the disputes that might arise in the Metaverse is one of the first aspects of the checklist.

[45] ICGJ 248 (PCIJ 1927).
[46] BRITANNICA, (last visited Feb. 21, 2022) https://www.britannica.com/event/Treaty-of-Lausanne-1923.

C. Intellectual Property Created by Artificial Intelligence

Artificial Intelligence and Machine Learning are two integral concepts used in cyberspace. While machine learning allows the software to self-improve, and thereby improve its accuracy, by learning from the historical data and older algorithms.[47]

Intellectual Property Rights have been designed to incentivize creators by providing them recognition as well as economic benefits. The scope of artificial intelligence creating intellectual property is already a subject of discussion around the globe, as that would require an evolution of the existing laws.

And as humans continue to make AI-related improvements, the probability of artificial intelligence being self-aware, learning from past experiences, and creating intellectual property in the Metaverse on its own, isn't a very distant reality either. While the thought can seem scary, it is important to be prepared for the same, by acknowledging the kind of rights that may/may not be given to the AI, whether the original creator of the artificial intelligence, that further invented something patentable will be credited or not, etc.

VII. IP LICENSING IN THE METAVERSE

Any user can glide quite seamlessly in the Metaverse. Hence brands extending their existence to the Metaverse, along with all creators at large need to be clear about the licensing of their intellectual property inside the Metaverse. For example, if a brand is collaborating with some creator in the Metaverse, and say licensing its IP for usage in a particular game, it is imperative to figure out the details like the term of the license, royalty, way it can be used etc.

The scope of IP licensing in the Metaverse goes beyond the real world. This is because the usage and the repercussions are not limited to unfair use of a trademark, patent or a copyright,

[47]TECHTARGET, (last visited Feb. 21, 2022). https://www.techtarget.com/searchenterpriseai/definition/machine-learning ML#:~:text=Machine%20learning%20(ML)%20is%20a,to%20predict%20new%20output%20values

like in the real world. Reputational damage is one such potential challenge that every IP owner can face in case the IP licensing is not done properly[48].

For example- A clothing brand extended their IP for costumes in a certain game. But the game creator now wants to use the same IP in another game that has a lot of graphic content. Now to mitigate the damage that this use might cause to the goodwill of the brand, it is important for both the parties to discuss the limitations of the use of the licensed IP, terms and conditions of usage, and steps in case of IP infringement by third party etc.

VIII. DIRECT/INDIRECT INFRINGEMENT VIA USER-CREATED CONTENT

Applications like Instagram and TikTok depend essentially on the content created by their users for both, their development as well as their popularity. Metaverse is no different, and user-created content forms an essential part of it. However, there have already been instances wherein the user-generated content indirectly infringes brand rights within the Metaverse. For instance, in the game 'animal crossing', the players started creating their own costumes for their avatars, and many of these costumes mimicked the designs as well as logos of brands fromreal life, (like Louis Vuitton). Now, is permitted such user-generated content good for thebrand,as it will help in advertising? And if allowed, and later used in a damaging way, what will be the rights of the brand? What is the scope of third-party infringement in such scenarios?All these questions need to be answered with concrete laws so that parties can anticipate such concerns and act with respect to their IP rights accordingly.

SOLUTIONS AND THE ROAD AHEAD

Considering the nature and the potential challenges that the use and creation of Intellectual Property inside the Metaverse may lead to, the solution is to have a pre-determined legal framework that will be compatible in order to provide effective remedies. Even though the use and engagement with the Metaverse are increasing, the world has still not passed the threshold where the majority of people are dependent on the Metaverse for not only playing games and

[48]Anthony Lloyd et. al., *An unreal issue: managing IP in the metaverse, DLA PIPER* (Feb. 25, 2022, 9:44 PM), https://www.technologyslegaledge.com/2021/11/an-unreal-issue-managing-ip-in-the-metaverse/.

entertainment purposes but also for other significant days to day activities. And while it hasn't happened, it is a distant possibility, which is why it is imperative to mould the existing laws and create new ones to combat the IP infringement issues that will arise as a result of virtual interaction among people in the Metaverse.

- Focusing upon the impact the international intellectual property laws have had on the rights of IP creators around the world, it is significant to establish a framework that will address and hopefully establish the following for better clarity.

- Establishing a concrete legal framework that irons out the basic wrinkles like jurisdictional aspects, competency of national courts with regard to IP infringement in the Metaverse, limitations of national jurisdiction etc. This will help in establishing a strong foundation in order to make seeking remedies a smoother process in the future.

- Special forums for creators to understand their IP rights in order to protect the same within the Metaverse. Since the Metaverse is an intersection between intellectual property rights and tech law, knowing both will be essential, and having international as well as national forums that are available for spreading awareness and helping creators will promote clarity about both their rights, and the limitations to those rights.

- Specific acknowledgement of intellectual property created by artificial intelligence, and an outline of the rights related to credit, limitation, ownership of such intellectual property, rights of the creator of the AI etc. along with the limitations of those rights. This is important because in case certain rights are provided to an AI, they cannot be the same as the existing IP rights provided to creators at large. The prime reason for the same is that giving ownership, rights to use, economic benefits arising out of IP licensing, or monetary remedies in case of IP infringement to artificial intelligence might not be the most ideal choice. These rights act as an incentive for the creator, and when an Ai is considered to be subject to the same laws, it completely changes the perspective, which is why the creation of new laws is imperative.

- Specialized tribunals at international as well as national levels in order to deal specifically with Metaverse related legal matters, in order to provide speedy trial and expedient remedies to aggrieved parties. The rise in cases of IP infringement will be directly proportional to the

increase in the number of users of the Metaverse. Hence, establishing an effective system beforehand will mitigate the excessive workload that will be put on the judicial system all around the world as the popularity of the Metaverse grows.

The world is an ever-evolving place, and to match the constant changes, the law has also been modified with respect to the requirements of people. The usage of the Metaverse is metamorphosing, and it is going beyond the sole purpose of entertainment, making it important to acknowledge the challenges and potential problems and find solutions to them. While all the problems and disputes that will arise with respect to intellectual property in the Metaverse cannot be predicted beforehand, having a concrete system will not only help the creators but also the judiciary, and international IP organizations at large.

THE ROHINGYA CATACLYSM: CRITICAL ANALYSIS OF THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW

- *Aneesa Firdaus & Ishan Shahi*[1]

ABSTRACT

The International Human Rights Law (IHRL) was made with the objective of securing Human rights for people of all caste, colour, and creed on the planet. Despite the existence of the whole International Human Rights machinery, the mass genocide of the Rohingya Community, one of the biggest human rights violations, happened and is still happening. What is this Rohingya Crisis? Why is the established law unable to tackle this situation? Why was the international machinery not able to stop the crisis from happening in the first place? Even after it happened, why is it unable to provide the victims with justice? Why are the perpetrators still unpunished? Are the IHRL enforcement bodies dedicated to the cause of the Rohingyas or are they derelict about the same? In the light of all these questions, this article analyses how efficient the existing international human rights laws are de facto.

INTRODUCTION

"The rights of every man are diminished when the rights of one man are threatened."

-Sir John F. Kennedy.

International Human Rights law is made up of charters, declarations, conventions, and treaties which were aimed to protect the rights of all humans alike. There are bodies, councils and assemblies which claim to be working for the enforcement of the laws. Still, mass human rights violations happen every day. It is true that such violations cannot be stopped by law just like crimes

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cannot be stopped merely by laws. It is the implementation and enforcement mechanism which reduces the crimes and eventually stops them. It is the punishment of the criminal that deters the crime. It is the redressal of the victim that balances the equilibrium of society. However, in cases where the implementation and enforcement are weak, letters of law are mere words without meaning. International human rights law is one such example.

The Crisis of the Rohingya is a much-known issue among the International Communities and even normal populations around the globe. It has received wide media coverage and international attention. What remains troubling, however, is the unchanged circumstances of the victims of such a huge crisis. Such a situation forces one to reflect on the efficiency of the International Human Rights Law in controlling and managing situations of human rights crisis. If there survives a community on this planet whose rights are being violated for decades and the world knows about it and still cannot do much, how protected are our rights on the same planet with the same international mechanisms?

The present article attempts to discuss the same in detail. The article is divided into four parts, the first part being the introduction. The second part of the article explains a brief history of the Rohingya oppression and their present situation. The third part of the article discusses the human rights granted to the people around the globe and which of those rights of the Rohingyas have been violated by the Myanmar Government. The fourth part of the article throws light on the loopholes in the international human rights laws which has made the Rohingya helpless. Finally, the last part of the article consists of suggestions and conclusions.

I. THE ROHINGYA COMMUNITY & ACCOUNTS OF VIOLENCE AND TYRANNY

The Rohingya is an ethnic community which is Muslim by a majority and predominantly resides in the South-East Asian country, Myanmar, which was earlier Burma. They have been described

as “one of the most discriminated people in the world”[2], according to the UN Secretary-General Antonio Guterres, and “the most vulnerable group of forcibly displaced”[3] according to the United Nations Refugee Agency.

The Rohingyas, also known as the Rohingya Muslims, are not accepted as the citizens of Myanmar by the Myanmar Government. A major part of Muslims in Myanmar belongs to the Rohingyas, who speak their own dialect and practice their own culture which is different from the others. They have had a history of oppression where their government blatantly abused their rights and discriminated against them to the extent that they were denied their citizenship and the government even refused to recognize them as people by excluding them from the 2014 census.[4] Violence, hatred, torture and inhuman treatment forced the Rohingyas to flee from their own land to different countries where they could at least manage to survive. In 2017, there were around one million Rohingyas left in Myanmar.[5]

The Rohingyas have since long witnessed hate crimes against them by the State and population ever since the country’s independence in 1948. Soon after, in 1978, brutal violence by the country’s military forced two hundred thousand Rohingyas out of the country.[6] Further, the degradation of their status began in 1982, when the new citizenship laws were adopted by the Burmese government which excluded Rohingyas from the list of national races. It laid down that a Rohingyawould be classified as a resident foreigner if he does not provide proof of his ancestors’ residencein the same country before 1823.[7] Such a harsh clause took away the citizenship of millions of Rohingyas as proving ancestry was a tough task. Since they were not citizens anymore, the authorities collected their identity cards forcefully and replaced them with “restrictive and regulated” identity cards.[8]

[2] ‘Myanmar Rohingya: What you need to know about the crisis’ (*BBC News,* 23 Jan 2020) <https://www.bbc.com/news/world-asia-41566561> accessed 9 September 2021.
[3] 'For Rohingya, there is no place called home’ (*The Hindu,* 04 September 2017) <https://www.thehindu.com/news/international/for-rohingyas-there-is-no-place-called-home/article19620567.ece> accessed 9 September 2021.
[4] Supra Note 1.
[5] Ibid.
[6] ‘An Open Prison without End: Myanmar’s Mass Detention of Rohingya in Rakhine State’ (*Human Rights Watch*, 8 October 2020) <https://www.hrw.org/report/2020/10/08/open-prison-without-end/myanmars-mass-detention-rohingya-rakhine-state#_ftn358> accessed 11 September 2021).
[7] Supra Note 2, at 2.
[8] Supra Note 5, at 2

Another wave of violence against the Rohingyas was carried out in 1991 due to which 2.5 lakh Rohingyas left the country. However, for the duration of the next six years, the majority of them were forced back to Myanmar, to the Rakhine State where they were "concentrated"[9] away after their properties were taken away forcefully.

Over the years, hatred increased for the Rohingyas among the other populations and the process of "otherization" and "ethnic cleansing" of the Rohingyas was at its peak. Soon, in 2001, the Rohingyas became victims of another wave of violence, this time by the Akanese mobs, another ethnic group of the land.[10]

In 2012, a hate campaign began against the Rohingyas by the Buddhist Nationalists which was favoured by the military. In June, of the same year, large violent ethnic clashes broke out between the Rakhine Buddhists and Rohingya Muslims, which was allegedly instigated by the State and military.[11] The clashes began in four townships earlier, but within four months it spread to a total of nine townships of the Rakhine State which destroyed mosques, schools, homes and the properties of the Rohingya were seized. After this, the Rohingya were separated from the Ethnic community in the Sittwe Township by the government, in order to harmonize the situation between the two groups. However, later the ethnic Rakhine were allowed to head back home while the Rohingya were discriminately held back in the camps. Ever since the Rohingya were never allowed to return back to their own land.

This was followed by a "brutal and organized"[12] crackdown on the Rohingya by the military in 2016 and 2017. In 2016 and 2017, when the Arkan Rohingya Salvation Army (ARSA) militants attacked the police posts, the military would not spare them after that. "Clearance Operations"[13]

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[9] Ibid.
[10] Ibid.
[11] UN, Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, Agenda Item 4, A/HRC/39/CRP.2', (*OHCHR*, 28 September 2018) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf> accessed 10 September 2021.
[12] Supra Note 5, at 2.
[13] 'Burma: Security Forces Raped Rohingya Women, Girls' (*Human Rights Watch*, 16 February 2019) <https://www.hrw.org/news/2017/02/06/burma-security-forces-raped-rohingya-women-girls> accessed 12 September 2021.

were carried out against the Rohingyas which involved the burning of structures and extrajudicial killings. Not only this, the Rohingya women and girls were also raped and abused by the Myanmar Military.

More than 700 were below the age of five among the 6700 Rohingyas that were killed.[14] However, the Fact-Finding Mission claimed that the actual number of deaths is much higher than the figures presented to the world. Such widespread killing and arson lead to the exodus of huge numbers of Rohingya fleeing from their country to different parts of the world seeking asylum.

I. STATUS QUO: CHRONICLES OF FEAR, BRUTALITY AND DESPAIR

Ever since, the situation of the Rohingya, those left behind as well as those who moved out, has been very deplorable. They have become stateless people without the citizenship of any country. While they are being helped in some other parts of the world, the Rohingyas who are stuck in their own land suffer the worst because of the inhuman and torturous conditions that they live in.

They are forced to live in camps which are like open prisons, where their movement is restricted on the pretext of their own safety. They cannot exit the camps without the permission of the officials and at night they cannot even move out of their shelters. If they do, they suffer physical assault to the extent that some have even died due to beatings. Residents of Myanmar RegistrationAct, 1949, under its S.6 (3) asks for detainment and imprisonment for two years, of Rohingyas who move out without their identity documents. Many of those who try to escape the land are oftenimprisoned under this law.

The camps that they live in for the past nine years were originally built to last only two years. Their shelters are mostly made of temporary roofs attached to stilts. For water, there is a pond near the camp, adjacent to which is sewage so closely attached that it is separated only by a low mud wall. The conditions of these camps are unbearable due to increasing overcrowding and vulnerability to

[14] Supra Note 5, at 2.

floods and fires. However, the state government has refused to allocate them new land for camps.[15] Such conditions put them at higher health risks such as waterborne diseases, tuberculosis and other diseases caused due to lack of sanitation and hygiene. Other than this, the Rohingyas are also prone to malnutrition and higher infant and maternal mortality rates. Deaths have also occurred because many times, the children have fallen into "latrine pits, wells, ponds and pools of standing water".[16]

Also, medical emergencies often result in preventable deaths as the patients do not get immediate medical attention. They are not able to reach the hospital in time because they are not able to get permission from the officials easily, and most of the time, they don't have enough money to bribe the officials. Due to economic and financial weakness, they are also not able to pay their medical expenses.

Since they are not allowed to exit the camps without permission, the children are also not able to access education other than the learning centres within the camp where volunteer teachers teach. These centres are in very bad conditions due to a lack of resources. Very few people volunteer to teach and the student to teacher ratio in the only high school for Rohingya Muslims is 100:1.[17] After High School, they are not allowed to attend university for higher education. Thus, they have been trapped in a cycle of ignorance and unskillfulness where the next generations to come would remain helpless.

Due to restrictions on movement, the Rohingya cannot work outside their camps. The widespread hatred against them has led to the other communities boycotting trade with them. Thus, they have been left with very little source of income. They don't have the tools and resources to start their business or do some skilful work. Thus, external aid is their only source of livelihood for now.[18]

[15] Supra note 5, at 2.
[16] Ibid.
[17] Ibid.
[18] 'Comprehensive update on the Myanmar Country Strategic Plan (2018–2022) in view of recent developments, WFP/EB.1/2018/6-D' (*World Food Program*, 15 February 2018) <https://docs.wfp.org/api/documents/WFP-0000051027/download/> accessed September 12, 2021.

I. RIGHTS GRANTED UNDER THE INTERNATIONAL LAWS & BLATANT VIOLATIONS THEREOF

The International Human Rights law, through various declarations, conventions and treaties provides ample rights for a human being to live with dignity, honour, and comfort. However, the main problem is that not all countries have ratified these laws. This section of the article attempts to shed light on the rights granted to Rohingya Muslims by the International Human Rights Law, which have been violated by the Myanmar Government.

The *Universal Declaration of Human Rights, 1948*, lays down a list of rights most of which have been violated by the Myanmar Government of the Rohingyas. The UDHR was signed and ratifiedby Myanmar.[19] Article 1 of the UDHR says that all humans are born free and equal in dignity andrights. Further, Article 2 says that everyone is entitled to equal rights without any discrimination on any basis. Article 5 further lays down that none should be given inhuman or degrading treatmentor torture or cruelty. Article 15 of the UDHR provides the right of everyone to a nationality and the right that no one shall arbitrarily take the nationality away. The UDHR is even considered a part of customary International Law which is binding upon the nation-states as was proclaimed inthe Unofficial Assembly for Human Rights, Montreal[20] and International Conference on Human Rights, Tehran [21]

The *International Convention on Economic, Social and Civil Rights* provides that all people, without any discrimination based on any ground including national or social origin, birth race or other status, shall have the basic rights economic social and cultural rights like the right to work freely in favourable conditions[22], right to live with an adequate standard of living including food, clothing, and housing. The right to continuous improvement to the living conditions is also a part

[19] 'International Law' (*Burma Link,* 27 October 2014) <https://www.burmalink.org/background/burma/international-crimes-and-impunity/international-law/#:~:text=While%20not%20a%20treaty%2C%20UDHR,Declaration%20on%20December%2010%2C%201948.&text=The%20Treaty%20was%20adopted%20at,force%20on%20July%201%2C%202002> accessed 12 September 2021.
[20] S.K. Kapoor, *Human Rights under International Law & Indian Law* (Central Law Agency, Allahabad, 7th edn., 2017) 43.
[21] Ibid.
[22] International Covenant on Economic, Social and Cultural Rights, 1966, art. 6, 7.

of this right.[23] Right to physical and mental health[24], right to education[25], and right to enjoy the benefits of scientific progress and its application[26].

Ethnic cleansing, genocide and mass exodus of refugees and displaced persons have been especially criticised by the international community at the *World Conference on Human Rights, Vienna, 1993*, where it was said that punishment should be given to the perpetrators in such conditions and victims should be compensated.

Coming to the rights provided by the various conventions of international law, the *Convention on the prevention and Punishment of the Crime of Genocide* was specifically made with the aim and intent to prevent genocides and punish the perpetrators if it happens. Genocide has been defined in the convention under Article 2 as doing acts against a particular group such as killing its members or causing serious bodily harm, inflicting group conditions on the group to bring its physical destruction, imposing measures to prevent births within the group and forcibly transferring its children to some other group, to destroy that national, ethnic-racial or religious group. This convention was ratified by the State of Myanmar in 1949 itself and still, blatant torture and killings of a whole ethnic group took place in front of the whole world.

The International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD) also strictly prevents any form of discrimination among humans based on race, colour, descent, or national or ethnic origin. However, Myanmar has not at all signed or ratified this convention yet.

The International Convention on Suppression and Punishment of Crime of Apartheid (1973) lays down that apartheid is a crime against humanity. It says that practices and policies which favour or commit racial discrimination, segregation or apartheid through inhuman acts intending to destroy a racial or ethnic group wholly or partially are a crime against the international community. The *Rome Statute of ICC* also holds apartheid and persecution as a crime.

[23] International Covenant on Economic, Social and Cultural Rights, 1966, art. 11.
[24] International Covenant on Economic, Social and Cultural Rights, 1966, art. 12.
[25] International Covenant on Economic, Social and Cultural Rights, 1966, art. 13.
[26] International Covenant on Economic, Social and Cultural Rights, 1966, art. 15.

The discriminatory laws laid down by the government in Myanmar are a glaring example of apartheid and they should have been prosecuted under this law. The segregation has been done to the extent that the Rohingya have been forced to live in a separate ghetto and are not allowed to intermix with the rest of the people.

The Convention on reduction of Statelessness, 1961 also lays down that nationality should be granted to a person born in the country who would otherwise be stateless. By this convention, all the Rohingya children would receive nationality of the country. However, Myanmar is not a party to such a convention. Also, the Convention on the Rights of the Child, 1990 lays down under its Art. 7 that a child has a right to acquire a nationality immediately after the birth, particularly a child who would otherwise be stateless. Myanmar even ratified this convention in 1991[27] and still doesn't grant nationality to the children of the Rohingya.

The international laws relating to internally displaced persons say that such a person cannot be detained or confined in one place. However, the Rohingyas have been confined in camps which are more like detention camps for 8 years now, thus violating the international laws on internally displaced persons. The citizenship law of the country is against the international customary law which lays down that if a person has a "genuine and effective link" to any state such as family ties, long-term residence, descent or birthplace, then he cannot be rendered stateless.[28]

II. INTERNATIONAL HUMAN RIGHTS MECHANISM: DEDICATED OR DERELICT?

The Rohingya Muslims are stateless people because Myanmar does not accept them to belong to their country. Myanmar's constitution lays down that the right in the constitution can be enjoyed only by the citizens of that country. In such a case, the Rohingya do not have any rights except the

[27] 'Consideration of Reports Submitted by States Parties Under Article 44 Of the Convention, CRC/C/70/Add.21' (*UN Committee on Rights of Child*, November 5, 2003) <https://www.refworld.org/pdfid/403a0f364.pdf> accessed 12 September 2021.
[28] Supra Note 5, at 2.

ones granted by the International Human Rights Law. Therefore, the enforcement of human rights mechanisms in their case becomes even more necessary and essential as they become the most vulnerable group of people in the world.

Proof of this can be seen in the present scenario where the rights of these people are being blatantly violated and the international human rights law has repeatedly failed them. In the case of International Law, a country is not bound to follow it unless it signs and ratifies it. However, if a country does not like a law, it would simply escape by saying that it does not want to follow it and nothing much can be done in that regard. Thus, one of the major failures of International Law is that the countries are not bound by it unless they submit themselves to it. From the International Bill of Human Rights, Myanmar has ratified the ICESCR only recently in 2017[29] while it has not even signed the ICCPR yet at all. The implementation mechanism of the former is weaker than the implementation mechanism of the latter. It has also not signed many conventions and treaties.

The sovereignty of nation-states is another factor which does not let the international human rights law be effective in different states because sovereign states have exclusive control over their own affairs in their own land. Though Human Rights are a matter of global concern, and much awareness has been spread among people about it, nothing much can still be done. Individuals have been empowered enough to send complaints to the UN against their own state for the violations of their human rights if no relief is given by their own government. However, on receiving the complaints, the UN bodies cannot do much other than highlight the matter to the world.

The earlier Human Rights Commission too, though received complaints about human rights, could do nothing except hear the complaint and make recommendations to the Governments which have practically no binding force. As such, its recommendations cannot be enforced. It can only criticise

[29] 'Myanmar ratified key Human Rights Treaty', (*Right to education Organisation,* 27 February 2018) <https://www.right-to-education.org/news/myanmar-ratifies-key-human-rights-treaty#:~:text=On%206%20October%2C%202017%20Myanmar,(Articles%2013%20and%2014)> accessed 12 September 2021.

a government for not complying with the recommendations and bring it to public notice. Thus, public opinion is the only major "sanction behind the international law"[30].

The International Courts can pass verdicts that they can hardly enforce. The Gambia filed an application against Myanmar in the International Court of Justice by the end of 2019 where it accused it of violating the provisions of the Geneva Convention. In January 2020, the court's unanimous decision came against Myanmar ordering it to take "all measures within its power"[31] to prevent the ongoing genocide and to prevent the destruction of evidence. The report of the implementation of the order was also asked by the court within four months. The report was submitted in May 2020, in confidentiality as is the standard practice at ICJ.[32] However, this is a major drawback since even the Rohingya did not come to know what facts were submitted in the report and there have been no actual implementations on the ground for the betterment of Rohingya.

The court had also ordered for reports to be submitted every six months after the first report. The order of the court is legally binding on Myanmar as Myanmar itself is subjected to the jurisdiction of the court by calling the court a "vital refuge for international justice"[33]. An order of the ICJ is forwarded to the UN Security Council[34] which builds pressure on it to address the concerned issue by passing resolutions to direct the concerned nation, in this case, Myanmar, to take the necessary steps to ensure that the acts of genocide are stopped, and international aid reached the victims of the genocide. However, this power has not been used by the Security Council yet because of the misuse of the veto powers by the stronger nations, Russia, and China in order to protect the Myanmar government.[35]

[30] S.K. Kapoor, *Human Rights under International Law & Indian Law* (Central Law Agency, Allahabad, 7th edn., 2017) 65.
[31] 'Rohingya Symposium: Why So Secret? The Case for Public Access to Myanmar's Reports on Implementation of the ICJ's Provisional Measures Order' (*OpinioJuris,* 25 August 2020) <http://opiniojuris.org/2020/08/25/rohingya-symposium-why-so-secret-the-case-for-public-access-to-myanmars-reports-on-implementation-of-the-icjs-provisional-measures-order/> accessed 12 September 2021.
[32] Ibid.
[33] 'World Court Rules Against Myanmar on Rohingya' (*Human Rights Watch,* 23 January 2020) <https://www.hrw.org/news/2020/01/23/world-court-rules-against-myanmar-rohingya> accessed 12 September 2021.
[34] Statute of the International Court of Justice, Article 41(2).
[35] Supra Note 32, at 10.

The UN General Assembly can also pass a resolution asking Myanmar to take the necessary steps and hence encouraging other nations to take steps to make changes in bilateral relations with the country if it does not comply with the order. However, no such thing can be seen happening in the near future and the Rohingya keep on being mistreated and living a life of misery. A case was also filed against Myanmar in the International Criminal Court by Bangladesh for the persecution and deportation of the Rohingya.[36] Jurisdiction issues had arisen due to this because Myanmar is not a member of the ICC. However, it was held by the court that Bangladesh is a member and the completion of crime (deportation) happening in Bangladesh gives the court jurisdiction over the case.[37] In late 2019, the court gave permission for the investigation of the alleged crime against humanity on the Rohingya.[38]

Widespread hatred was poured into the population openly by the Government and other political powers against the Rohingya, labelling them to be terrorists with "uncontrollable" birth rates who want to take over the state.[39] The dominant party in the country, Rakhine Nationalities Dominant Party echoed the words of Adolf Hitler, saying that in the process of "endeavouring to maintain the Rakhine race"[40], even inhumane acts are sometimes necessary.

The discrimination, persecution, and violence against the Rohingya of Myanmar through laws, policies and full support of the government and the military have been done through systematic planning and with the intention to oppress them. The world knows and still, nobody is able to do anything.

[36] *Situation in the People's Republic of Bangladesh v. Republic of the Union of Myanmar* (Order) ICC-01/19.
[37] Supra Note 5, at 2.
[38] 'ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar' (*International Criminal Court*, 14 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495> accessed 12 September 2021)
[39] UN Human Rights Council, 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (September 2018) 1409-1410.
[40] 'Countdown to Annihilation: GENOCIDE IN MYANMAR' (*International State Crime Initiative*, 2015) <http://statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VERSION.pdf> accessed 12 September 2021.

SUGGESTIONS AND CONCLUSION: THE WAY FORWARD

For decades, the Rohingya have been living a life of pain and suffering while the world has just been an audience to it. According to Ursula Mueller, UN Assistant Secretary-General, they are living in conditions "beyond the dignity of any people"[41]. They have been forced out of their own homes, drove out of their own lands, and forced to leave their own country. They have become a group of stateless people whom no country is willing to accept.

As mentioned in the article, many rights have been granted by international law. It is only the failure of the enforcement mechanism which has made the situation difficult. However, the international human rights law is still growing, and it can be expected that it would soon develop a mechanism which would make this possible too. For now, the dynamics of world politics is such that a lot of interference is not possible.

However, one can say that the UN mechanism is not doing as much as it can actually do, and this is due to the politics of the veto nations. In this aspect, something must be done soon. It should repeatedly urge the government of Myanmar and engage with them to remove the discriminatory policies and laws. International pressure should be created on the Myanmar government to take necessary steps to stop the cruelties on Rohingya, restore the life of the community to normalcy and punish those responsible for the whole crisis. The International Community can place targeted economic sanctions and embargo on Myanmar, in order to pressurise them to take the necessary steps. Trade relations can be used as a tool to make the Myanmar government implement the recommendations of the UN General Council. Governments of Countries neighbouring Myanmar should call out on its brutal policies and ask them to immediately remove all discriminatory laws, practices and policies. Not only this, but they should also volunteer to help the Myanmar government in tackling the problems created by Rohingya Militants. Moreover, other steps should be taken by the UN such as providing relief and aid to the Rohingya who are caught in the detention camps as well as in different parts of the world. Justice should be served. If it is happening in some corner of the world today, it can happen in any corner of the world tomorrow.

[41] Supra Note 5, at 2.

ARTIFICIAL INTELLIGENCE IN ARMED CONFLICTS: THE CASE FOR DATA PROTECTION AND PRIVACY

- ***Vishwajeet Deshmukh***[1]

ABSTRACT

Military operations around the globe are developing new technologies with the assistance of artificial intelligence; the progress is at an unprecedented rate that includes advancements in logistical operations, structural upliftment, censorship, surveillance systems, and automated decision-making in armed conflicts. With the rapid progress, data protection and the right to privacy must be viewed from a central perspective. The functions of artificial military intelligence and their impact on data protection and privacy regulations have not been explored from the regulatory perspective. The amount of data generated by government agencies and their utility from military operations must be structurally viewed through the lens of international humanitarian law and international human rights law. In generating data sets, legal and policy questions arise about the ability, not to mention the government's desire, to adequately protect human rights, democratic rights, personal liberties, and digital freedoms in production. The article addresses the shortcomings of the current mechanism of artificial intelligence in armed conflicts and provides strategies to develop the identified shortcomings from an international legal perspective.

INTRODUCTION

In 1960, Norbert Wiener, the father of cybernetics, warned against the thoughtless use of computing power as a substitute for human decision-making in the context of war and politics.[2] What is particularly concerning is that the timescales and reasoning skills in cyber systems and

[1] Student at Government Law College, Mumbai (India).
[2] Wiener Norbert, *Some Moral and Technical Consequences of Automation*, SCIENCE 131(3): 1355–58 (1960)

people are so different that the potential for disaster is high. "We always have to use the full power of our imagination to see where the full use of our new modalities can take us," demands Wiener, as our new machines could be very effective and extremely dangerous.[3]

The development of Artificial Intelligence and its military applications has witnessed unprecedented growth on an international scale. This development urges us to evaluate the position of automated intelligence in armed conflicts, with their applicability to the protection of international human rights and the role of data protection and privacy. The international community has focused on the accountability of the high-tech digital military intelligence, the question of liability for the violations of international humanitarian law that may be committed by the deployment of lethal autonomous weapon systems in armed conflicts.[4] There is no doubt that the question of liability is necessary; the international community has not reflected on theregulation of the development of military intelligence.[5] As the armed conflicts strengthen their artillery with the polish of cyberspace, the scrutiny towards the concurrent application of rights toprivacy, cybersecurity, data protection, data transfer, digital identity, and autonomy must be prioritized to limit the consequences of advanced digital military intelligence globally.

To illustrate the concern, this article shall provide an example of the coup d'etat in Myanmar in February 2021.[6] The reports surfaced concerning the takeover of the state of Myanmar from the democratically elected National League for Democracy (NLD) by the *Tatmadaw*, Myanmar's military.[7] The generals who staged this coup have used surveillance drones, iPhone cracking devices, and hacking software from Western countries that bar sales of such technology to Myanmar.[8] With this power transfer from democracy to a stratocracy, digital data has been vested with military power. The data under the regime threatens the safety of the citizens who had documented any dissent against the military, amalgamated with internet shutdowns, creating

[3] Theodore D. Sterling, *Humanizing Computerized Information Systems*, SCIENCE 190, 4220: 1168-1172 (1975).
[4] Rebecca Crootof, *The Killer Robots Are Here: Legal and Policy Implications*, 36 CARDOZO L. REV. 1837 (2015).
[5] Matthew Ivey, *The Ethical Midfield in Artificial Intelligence: Practical Reflections for National Security Lawyers*, 33 GEO. J. LEGAL ETHICS 109, 118 (2020).
[6] Goldman Russell., *Myanmar's Coup and Violence, Explained*, THE NEW YORK TIMES (May 19, 2021), https://www.nytimes.com/article/myanmar-news-protests-coup.html. (last visited Sept. 29, 2021).
[7] *Ibid*.
[8] Beech Hannah., *Myanmar's Military Deploys Digital Arsenal of Repression in Crackdown*, THE NEW YORK TIMES (Mar. 1, 2021), https://www.nytimes.com/2021/03/01/world/asia/myanmar-coup-military-surveillance.html. (last visited Sept. 29, 2021).

security concerns. This contemporary issue is an example of an intersection between privacy, automated data, protection, sensitive information, and armed conflict with warfare.

This article discusses the current global regime of regulation of military intelligence, military data under international humanitarian law [hereinafter "IHL"], and international human rights law [hereinafter "IHRL"]. Secondly, the article evaluates situational cases of unregulated military intelligence operations with their consequences. Thirdly, the article discusses the evolution of IHRL and a path of regulation of cyber military intelligence with checks and balances to ensure the regime is protected.

I. CURRENT REGIME UNDER IHL AND IHRL

Under the IHL framework, Article 36 of Additional Protocol I to the Geneva Conventions establishes the legal framework and limitation for the study, development, acquisition or adoption of developing weapons utilised in the armed conflict or warfare. [9] The Additional Protocol for the Geneva Convention is a part of customary international law and thus binding on state parties.[10] Thus, establishing a human-centric approach to regulating new weapons in general and by extension to military intelligence.[11]

The International Committee of the Red Cross ["ICRC"] has adopted a context to specific judgment with respect to the regulation of military intelligence, that is to say, that humans take the decisions concerning armed conflicts to ensure that compliances with the law are met with and ethical standards are being adopted.[12] Concerning the usage of artificial intelligence, ICRC

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 36, June 8, 1977, 1125 UNTS 3.

[10] Matheson, M.J., The United States position on the relation of customary international law to the 1977 protocols additional to the 1949 Geneva Conventions. In *The Development and Principles of International Humanitarian Law* (pp. 233-245). Routledge. (2017).

[11] *Artificial intelligence and machine learning in armed conflict: A human-centered approach*, ICRC, 7-8 (June 6, 2019), https://www.icrc.org/en/document/artificial-intelligence-and-machine-learning-armed-conflict-humancentred-approach.

[12] Elke Schwartz, *AI, and Machine Learning Symposium: Humanity-Centric AI for Armed Conflict–A Contradiction in Terms*, OPINIO JURIS (Apr. 30, 2020), http://opiniojuris.org/2020/04/30/ai-and-machine-learning-symposium-humanity-centric-ai-for-armedconflict-a-contradiction-in-terms/.

emphasizes that careful consideration of necessary human intervention and attention must be prioritized, for example, in the case of facial recognition.[13]

Every regulation that requires human-centred intervention to artificial intelligence must accommodate human rights and human rights laws; however, the application of such laws is also quintessential at the step of data analysis and data collection.[14] At the moment production of data, warfare algorithms, warfare applications, and verifications remain primitive with respect tomilitary intelligence. According to international scholars, if advanced military intelligence is to be developed, machine learning is used to collect and refine data; it must prioritize data preservation to ensure its safe usage.[15]

Under the IHRL framework, Article 17 of the International Covenant on Civil and Political Rights [hereinafter "ICCPR"] enshrined the right to privacy in an array of regional and subject-matter-specific human rights treaties as a fundamental right. The right to privacy has extended to the digital space accommodating collecting and protecting "informational privacy."[16] The right to data protection also falls under the ambit of the right to privacy when viewed through the changing technological atmosphere.[17]

According to IHRL, the necessary requisites for safeguards, transparency, non-bias, review, overview, and remedy of potential abuse; are mandated in their application by the State parties. The level of protection and care required while designing algorithms must be compatible with the IHRLs, failing which their production must be halted and application is denied.[18] In a similar

[13] *Id*.
[14] Summary of the 2018 Dep't of Defense Artificial Intelligence Strategy: Harnessing AI to Advance our Security and Prosperity 17 (2019), https://media.defense.gov/2019/Feb/12/2002088963/-1/-1/1/SUMMARY-OF-DOD-AISTRATEGY.PDF.
[15] Ashley Deeks, *Detaining by Algorithm*, HUMANITARIAN L. & POL'Y (Mar. 25, 2019), https://blogs.icrc.org/lawand-policy/2019/03/25/detaining-by-algorithm/.
[16] Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/39/29 (Aug. 3, 2018), https://www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/A_HRC_39_29_EN.docx.
[17] Privacy International, *Guide to International Law and Surveillance* (Feb. 28, 2019), https://privacyinternational.org/sites/default/files/201904/Guide%20to%20International%20Law%20and%20Surveillance%202.0.pdf.
[18] Tess Bridgeman, *The viability of data-reliant predictive systems in armed conflict detention*, HUMANITARIAN L. & POL'Y (Apr. 8, 2019), https://blogs.icrc.org/law-and-policy/2019/04/08/viability-data-reliantpredictive-systems-armed-conflict-detention/.

standard, if military intelligence evolves concurrently with a breach of informational privacy interests, including personal data, IHRL guides the process in consensus with 'data protection and 'informational privacy.'[19]

The scope, limit, and nature of human rights law's application to concurrent and extraterritorial jurisdictions in an armed conflict is quintessential to attaining a legal understanding of artificial military intelligence. It needs to be viewed with a doctrinal perspective of international law. Even if IHL displaces IHRL in armed conflicts[20], we should focus on the development of the technology deployed in these conflicts, which were developed before the conflict; thus, the mandate of conformity of IHRL applies. The current frameworks and international treaties do not address the specific subject matter of informational privacy and data protection.[21] However, it is pertinent to note that this omission or gap in international law could be deliberate.[22] The concern of excluding national security from the legal regime of data protection is a concern for privacy protection and its utility in armed conflict. As a part of 'reasonable restriction' under freedom of speech and data protection, many national laws include exemptions for processing data necessary for national security, sovereignty, and public order.[23]

II. UNREGULATED MILITARY INTELLIGENCE DATA CONSEQUENCES

In an armed conflict, the volume of information sensed, collected, possessed, processed, analyzed, and disseminated increases daily. Data runs the artificial intelligence for machine learning; however, data also generates waste through the system's cycle. With the amount of data being generated, the scope of abuse has been under-appreciated. According to a report published by Future of Humanity Institute in February 2018, "The Malicious Use of Artificial Intelligence:

[19] Cameron F. Kerry, *Protecting Privacy in an AI-driven world*, BROOKINS INST. (Feb. 10, 2020), https://www.brookings.edu/research/protecting-privacy-in-an-ai-driven-world/.
[20] Oona Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1897 (2012).
[21] PRACTITIONERS' GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT 102 (Daragh Murray et al. eds., 2016).
[22] *Ibid*.
[23] HENRY FARRELL AND ABRAHAM L. NEWMAN, ON PRIVACY AND POWER: THE TRANSATLANTIC STRUGGLE OVER FREEDOM AND SECURITY (2019) 168.

Forecasting, Prevention, and Mitigation."[24]; artificial intelligence threatens security in the digital realm, physical assault, and political ideology. These threats are limited to the existing threats and introduce a new form of threat and act as an aid in the evolution of threats.[25] In the cyber domain, artificial intelligence can be used to augment attacks on and defences of cyberinfrastructure. The introduction of such technology into society changes the attack surface that hackers can control and manipulate, as illustrated by automated spear-phishing and malware disclosure tools.[26] The expansion of these threats reaches the privacy threats and social manipulation through social engineering mechanisms. The threat goes beyond machine autonomy, and evidence of the same can be seen through military applications in the USA. Artificial intelligence systems are expanded in the United States military strategy and operations as the US Department of Defense deploys its vision of the "Third Offset" strategy. Human interface and machines control closely together to accomplish military objectives of national security and protection.[27] Commercializing military operations with private corporations raises ethical conundrums with the unstructured and structured data sets utilized by the corporations after the operations. The issue also stems from the data which was discarded. This unregulated military intelligence raises questions about international human rights and their privacy and data governance practices, with the unprecedented development in artificial intelligence.

III. STRATEGIES TO ADDRESS THE MILITARY ARTIFICIAL INTELLIGENCE APPLICATION

A. Diplomatic dialogue

Preferably, autonomous weapon frameworks would be administered by a far-reaching lawful system, including global, transnational, and homegrown laws. While this ideal may not at any point be acknowledged entirely, states furthermore, different parties intrigued by the

[24] Miles Brundage et al., *The Malicious Use of Artificial Intelligence: Forecasting, Prevention, and Mitigation*, 6 (Feb. 2018), https://arxiv.org/pdf/1802.07228.pdf.
[25] Id.
[26] Ibid.
[27] Pellerin, C. 2016. "Deputy Secretary: Third Offset Bolsters America's Military Deterrence," DoD News, https://www. defense.gov/News/Article/Article/991434/deputy-secretarythird-offset-strategy-bolsters-americas-military-deterrence/

administration of this new weaponry can start running after it now. Several international organizations, entities, state parties, manufacturers, scientists, and corporate entities would engage a clarified source within the ambit of the ethical and legal framework.

While the earlier sections have pointed out the existing legal mechanisms and their shortcomings with respect to the development of artificial military intelligence, it is vital to look for avenues that initiate the dialogue to accommodate "artificial intelligence." The international dialogue could be explored through diplomatic channels between State parties, which could be constructed as an "informal nature of rule-making" based on mutual trust. Mutual understandings based on transcontinental diplomatic channels through non-binding resolutions, reports, international practice, policy evaluations, legal briefs on disputes, industry standards, and domestic policies and legal standards could develop a much faster and tailored approach to artificial intelligence developments. Artificial intelligence developments are fast-paced, whereas the legislative approach takes a considerable time to be brought into force, thus diplomatic forums are the best bet. The fast-paced growth of artificial intelligence has driven a need for an ethical framework governing these technologies' usage.[28] The development of artificial intelligence from a military perspective has an omnipresent interest; from government, academics, civil society, international forums, and foreign states. This diplomatic dialogue has to be initiated by an international organization either through the Security Council of the United Nations or the International Committee of the Red Cross, which would accommodate a neutral perspective with a transparent, fair, and human-centric approach. At the immediate level, it could start an interpretive principle-setting campaign centred around analyzing the scope and nature of the application of the rights to privacy and data protection during an armed conflict in the context of military intelligence applications and a general perspective.

Dr. Rebecca Crootof, in the Cardozo Law Review article "The Killer Robots Are Here: Legal and Policy Implications," discusses the regulation of autonomous weapon systems and introduces the

[28] Jessica Fjeld et. al., *Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-based Approaches to Principles for AI*, BERKMAN KLEIN CENTER (2020), https://dash.harvard.edu/bitstream/handle/1/42160420/HLS%20White%20Paper%20Final_v3.pdf?sequence=1&isAllowed=y.

strategy of 'informal lawmaking.' [29] The international legal system has myriad alternative sources of guidance and governance, effecting channelling state action with the informal international setting.[30]

B. Re-evaluating national security exclusion

According to the International Law Commission's *principle of derogability* to the data protection regime, which provides for national data protection laws include exemptions for processing necessary for national security, defense of sovereignty, public order, and the investigation of certain criminal offences.[31] It is essential to have an alternative view to the "principle of derogability." The jurisprudential view of the Court of Justice of the European Union [hereinafter "CJEU"] in the case of *Privacy International v. Secretary of State*[32] addresses the issue of national security exceptions. Privacy International, in this case, submitted their arguments in the form that datasets of communication processed and collected by United Kingdom security and intelligence agencies as unlawful under EU law because they failed to meet essential safeguards under European Union law. In arguendo, the United Kingdom, with the support of governments of the Czech Republic, Estonia, France, Ireland, Cyprus, Hungary, Poland, and Switzerland, claimed that the military application of the artificial intelligence regime was outside the scope of EU law, authoritatively citing Article 1(3) of the European e-Privacy Directive and Article 4(2) of the Treaty of European Union.[33]

Article 4(2) of the Treaty of the European Union states that national security remains the absolute responsibility of the State Parties, and Article 1(3) of the European e-Privacy Directive states that

[29] Rebecca Crootof, *The Killer Robots Are Here: Legal and Policy Implications*, 36 CARDOZO L. REV. 1837 (2015).
[30] Gary E. Marchant et al., *International Governance of Autonomous Military Robots*, 12 COLUM. SCI. & TECH. L. REV. 272, 287 (2011).
[31] Report of the International Law Commission on the work of its Fifty-eighth session, Annex IV: Protection of Personal Data in Transborder Flow of Information, UN Doc. Supplement No. 10 (A/61/10), 224 (2006), http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf.
[32] Privacy International v Secretary of State for Foreign and Commonwealth Affairs, C-623/17, Joined cases C511/18, C-512/18, C-520/18, Judgement, para. 30-32 (Oct. 6, 2020).
[33] *Id.*

the application of the privacy directive is out of the scope of its subject-matter jurisdiction to activities concerning public security, defence, and state security.[34]

The CJEU rejected the arguments from the United Kingdom through the Secretary of State, thereby limiting the scope of the exception. The CJEU interpreted that state parties provided the quantum of intelligence operations; a distinction between general intelligence operations and national security intelligence is required. It cannot be assumed that all intelligence operations fall under the exception for national security. The court noted:
"although it is for the Member States to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, the mere fact that a national measure has been taken to protect national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law."[35]

The CJEU's jurisprudential interpretation carves a path for data protection and privacy regime to be developed and interpreted in an industrial-military artificial intelligence complex. This regime is not immune from obligatory data protection and privacy safeguards on account of the "armed conflict" or "national security." Specific platitudes of the datasets collection, processing, analysis, storage, and dissemination, will determine how the regime of data protection and privacy would be viewed from a military intelligence perspective in an armed conflict.

CONCLUSION

The legal framework and regime with respect to the right to privacy and data protection in an armed conflict setting must be preserved when it comes to artificial intelligence and development. The existing regime lacks the vision required to ensure data protection and privacy. From n armed conflict perspective, IHL and IHRL display shortcomings and gaps in the law that need attention

[34] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 (Directive on privacy and electronic communications), Official Journal L 201, 31/07/2002 P. 0037 – 0047
[35] Privacy International v Secretary of State for Foreign and Commonwealth Affairs, C-623/17, Joined cases C511/18, C-512/18, C-520/18, Judgement, para. 44. (Oct. 6, 2020).

from the international community. The current view of the international community looks at finding the culprit of the future damages rather than preventing the damage from the core. In order to curb this issue, law and policy will have to work hand-in-hand, and a strategy to address the issue is imperative. Diplomatic channels and a jurisprudential view toward data protection and the right to privacy could match the rapid progress of artificial intelligence. To acknowledge and address the harms that could be witnessed through military intelligence in armed conflicts is the need of the hour. “Prevention is better than cure.”

ATROCITIES BEYOND IMAGINATION: RETHINKING WAR CRIMES, CRIMES AGAINST HUMANITY AND GENOCIDE IN THE CONTEMPORARY WORLD

- ***Ananya Chaudhary***[1]

ABSTRACT

Even before the international humanitarian law was codified, war crimes, genocide, torture, rape, human trafficking, crimes against humanity, and other grave international law violations were the order of the day. Such crimes continue to be committed around the world. While recent advances have been made, there are still significant legal and administrative hurdles to overcome before international criminal proceedings can be initiated. Although international courts have prosecuted many cases of mass atrocities in recent years, the current legislation displeases lawyersas well as the general public. It is a common belief that the law's failure is due to the military powers of the world, which, being caught up in the anarchy of global politics, are forcedto make egocentric calculations based on national interests.

This article highlights the evolution of the conceptual understanding of genocide, war crimes, and crimes against humanity and their nuances in present times. Furthermore, it evaluates the principle of universal jurisdiction and an unprecedented trial for genocide against Yazidis in Germany. More and more countries are enacting legislation that enables them to pursue landmark prosecutions like the one in Frankfurt. The paper also discusses the causes of atrocities and possible solutions for preventing international crimes. In addition, it aims to analyze various conventions, tribunals, and statutes dealing with mass atrocity offences.

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INTRODUCTION

"The trouble with what is unthinkable is that at times it must be thought about."

- John Lukacs

The preamble to the Genocide Convention of 1948 precisely remarks that "at all periods of history genocide has inflicted great losses on humanity".[2] It continues by stating that "in order to liberate mankind from such an odious scourge, international cooperation is required".[3] Often, the most violent crimes cited by the international community, such as genocide, crimes against humanity, and war crimes, occur during periods of armed conflict or civil unrest, involving perpetrators, witnesses, and victims.

More than seventy years after the Holocaust, the brutal relentlessness with which it was carried out still has the potential to shock us to the core. Following the said event, as well as other atrocities committed around the world, the international community held proceedings to investigate and penalize crimes against humanity and war crimes. This resulted in a better understanding of war crimes, even though war crime trials had occurred previously. The Nuremberg and Tokyo trials accelerated the adoption of the Convention for the Prosecution and Punishment of the Crime of Genocide[4] (hereinafter referred to as the "Genocide Convention"). This convention prohibited attempts to exterminate particular groups of people.

History has been dotted with atrocities that were seldom penalized because the offenders acted with the power and safety of regimes. The notion that barbarous crimes condoned by governments where they transpired should be prosecuted by domestic or international courts did not take root until the middle of the 20th century.

An international military force was available in Rwanda in 1994 and others accessible that could have prevented the genocide. Nonetheless, the authorities remained silent until the situation had

[2] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [Hereinafter Genocide Convention].
[3] *Id*.
[4] 2 Dinah Shelton, *Encyclopedia of Genocide and Crimes Against Humanity* 771 (Macmillan Reference 2005).

reached a critical point.[5] The world watched as mass atrocities in Cambodia spawned a new term, "the killing fields".[6] These instances show that a better knowledge of the role of spectators, as well as offenders and the victims, is required.

In addition to the establishment of the International Criminal Court (ICC), United Nations Peacekeeping, and humanitarian intervention by the United Nations to avert and retaliate against crimes against humanity and genocide, there has been a multitude of educational programs and cinematic depictions intended to increase public awareness of these offences. The creation of individual criminal liability for grave violations of international humanitarian law has undergone such quick and substantial changes in recent years that it is now an ideal time to assess their main characteristics.

There are five parts to this article. The first part presents an overview of war crimes, crimes against humanity, and genocide. In the second and third parts, this article goes into greater detail about the causes and prevention of these crimes. The fourth part explores the features and significance of the conventions, tribunals, and statutes dealing with crimes of this kind. Finally, the principle of universal jurisdiction and the latest genocide verdict handed down by a German court is discussed in the last part of this paper.

I. BASIC UNDERSTANDING: GENOCIDE, WAR CRIMES, CRIMES AGAINST HUMANITY

A. Genocide

Genocide is the most serious of all human rights crimes since it entails the attempted or actual destruction of an entire national, racial, ethnic, or religious group by killing or injuring its members. Genocide also encompasses the purposeful imposition of living conditions designed to

[5] Antonio Donini, *The Policies of Mercy: UN Coordination in Afghanistan, Mozambique, and Rwanda* 115-117 (1996).
[6] Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide* 59 (Greenwood Publishing Group 2005).

cause the physical destruction of a group. The Holocaust, which occurred during World War II, gave birth to a new lexicon that included the term "genocide".[7]

In his book, "*Axis Rule in Occupied Europe"*[8], originally published in 1944, the Polish jurist Raphäel Lemkin introduced the term "genocide". It is made up of the Greek word "genes", which means race or tribe, and the Latin term "cide", which means killing. Lemkin coined the word in response to Nazi practices of mass extermination of Jews during the Holocaust, as well as past examples of targeted actions that were aimed at the annihilation of specific groups of people throughout history.[9] In the years that followed, Raphael Lemkin spearheaded the movement to have genocide recognized and established as an international crime. The UN General Assembly first proclaimed genocide a crime in 1946. In 1948, the Genocide Convention established it as a separate crime.[10]

There is a general acceptance of genocide as a norm of *jus cogens* (Latin for "compelling law"), an overriding law that transcends the constraints of specific state laws and is inviolable. As a result, genocide is illegal even in those nations that have not ratified the Genocide Convention. It is not limited "by statutes of limitations and is subject to universal jurisdiction".[11]

B. War Crimes

Severe violations of the rules of war that result in individual criminal responsibility constitute war crimes. These crimes have been penalized according to state laws and procedures for a long time. In addition, "the International Criminal Tribunals for the former Yugoslavia and Rwanda have ruled that many principles and rules previously considered applicable only in international armed

[7] Barbara Harff, *No lessons learned from the Holocaust? Assessing risks of genocide and political mass murder since 1955*, 97 (1) American Political Science Review 57-73 (2003).
[8] Raphael Lemkin, *Axis rule in occupied Europe: Laws of occupation, analysis of government, proposals for redress* 79 (The Lawbook Exchange, Limited 2008).
[9] *Id*. at 85-143.
[10] United Nations Office on Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/genocide.shtml (last visited Jan. 8, 2022).
[11] 1 Dinah Shelton, *Encyclopedia of Genocide and Crimes Against Humanity* 396 (Macmillan Reference 2005).

conflict(s) are now applicable in internal armed conflicts".[12] Breach of humanitarian law in connection with such internal conflict amounts to war crimes.

Manfred H. Lachs, a judge of the International Court of Justice, provided a definitive explanation of war crimes. A war crime, he explained, is an act of violence that qualifies as a crime perpetrated during and in relation to the war against a neutral state, its interests, citizens, or stateless innocent people, unless justified under the rules of warfare.[13]

The Charter of the International Military Tribunal that was established after the Second World War was the first to precisely define war crimes on an international level. On August 12, 1949, thefour Geneva Conventions were signed, highlighting the significance of "domestic legislation and domestic jurisdiction in the prosecution and punishment of war criminals".[14] Warring parties are forbidden from using specific warfare tactics under the Hague Conventions, ratified in 1899 and 1907.[15] Additional related treaties have since been signed. However, the Geneva Convention of 1864 and the subsequent Geneva Conventions, including the four 1949 Geneva Conventions and two 1977 Additional Protocols, are largely focused on protecting civilians who are not involved in warfare.[16]

Both the Hague Conventions and the Geneva Conventions classify some, but not all, breaches of their principles as war crimes. In international law, however, there is no single text that codifies all war crimes. International humanitarian law, international criminal law treaties, and international customary law all contain lists of war crimes.

C. Crimes Against Humanity

While commitments were made after the Second World War to eradicate atrocities, crimes against humanity continue to occur with alarming regularity. The French revolutionary Maximilien

[12] 3 Dinah Shelton, *Encyclopedia of Genocide and Crimes Against Humanity* 1143 (Macmillan Reference 2005).
[13] Manfred Lachs, *War Crimes: An Attempt to Define the Issues* (Stevens 1945).
[14] *Id. a*t 1146.
[15] United Nations Office on Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/war-crimes.shtml (last visited Jan. 11, 2022).
[16] *Id.*

Robespierre, a lawyer and statesman who was among the most well-known and prominent personalities of the French Revolution, may have coined the phrase "crimes against humanity". He referred to the overthrown King Louis XVI as a "*criminel envers l'humanité*" (criminal against humanity).[17] After more than a century, writer George Washington Williams wrote to the United States Secretary of State and accused King Leopold of "crimes against humanity" in the Congo Free States.[18]

As of now, crimes against humanity have not been formalized in a specific international law treaty, unlike genocide and war crimes; although efforts have been made in that direction. Nevertheless, the prohibition of crimes against humanity has been considered a mandatory international law norm from which no deviation is allowed and which applies to all states.[19] Furthermore, the concept of crimes against humanity has been incorporated into the criminal laws of several countries.

The Nuremberg Tribunal held the first trials for crimes against humanity. The majority of the prominent Nazi soldiers were found guilty of crimes against humanity and other offences prohibited by the tribunal. A key difference between a war crime and a crime against humanity is that the latter can be committed by a state against its own citizens (for example, by the Nazi Party against Jews in Germany), whereas war crimes can only be committed against a foreigner or an enemy.[20] Crimes against humanity, unlike genocide, do not necessarily have to target a specific group.[21] Any civilian population, regardless of affiliation or identification, can instead be the target of an attack. Therefore, crimes against humanity can occur in times of peace as well as times of internal strife and social upheaval.

[17] 1 Dinah Shelton, *Encyclopedia of Genocide and Crimes Against Humanity* 209 (Macmillan Reference 2005).
[18] *Id.*
[19] United Nations Office on Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml (last visited Jan. 12, 2022).
[20] Geoffrey Robertson, *Crimes against humanity: The struggle for global justice* (Penguin Books Limited 2006).
[21] United Nations Office on Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml (last visited Jan. 14, 2022).

II. GETTING TO THE ROOT CAUSES

Along with systemic inequality and extensive violations of human rights, poverty is one of the factors that contribute to mass atrocities. When a mass atrocity is examined from a strategic viewpoint, the causes become clearer. According to the strategic perspective, mass atrocities should be seen as aspirational policies or merciless strategies seeking to attain the leaders' most vital goals, counter their most serious threats, and solve their most pressing issues.[22]

Ordinary law-abiding citizens can be turned into offenders by specific mechanisms and socio-psychological processes, but people differ in the way they act and the reasons for their actions. Additionally, in terms of motivations, roles played, and the circumstances in which they act, perpetrators differ to a great extent. The research carried out by Alette Smeulers[23] suggests that various categories of offenders can be found among those participating in international crimes. Let's take a look at a few of them.

A. Extremists

Some perpetrators may decide to conduct hate crimes of their own accord, or they may choose to dedicate themselves completely and utterly to a fundamentalist ideal or to a particular leader who is successful in effectively translating their emotions into a rabid and rigid doctrine. Committed to their cause, they go to great lengths to achieve their targets. Due to their obsessive enthusiasm and hatred, extremists can be directly engaged in bodily offences and lead the way in perpetrating brutal and horrific crimes. In certain instances, it is not uncommon for them to kill their foes or even sacrifice themselves for their cause.

B. Miscreants

It is likely that in times of mass hostility, individuals who have already committed crimes under normal conditions will participate in the commission of international crimes as well. Many of them

[22] Benjamin Andrew Valentino, *Final solutions: the causes of mass killing and genocide* 11 (Massachusetts Institute of Technology 2001).
[23] Alette Smeulers, *Perpetrators of International Crimes: Towards a Typology* (Intersentia 2008).

generally have a criminal history. These miscreants are employed by others to exploit the setting of mass violence since they will have less fear of using violence and will be used as tools to further their political agendas. As opposed to being driven by submission or compliance, miscreants are motivated by their interests. They will abandon any cause, organization, or leadership if it benefits them.

C. Exploiters

Motivated by avarice and selfish manoeuvres, some people engage in mass atrocities to exploit the circumstances for financial benefit and other gains. Although these offenders may not be firm believers in the disseminated ideology, they see it as a valuable means to attain dominance, prestige, or money. Coming face-to-face with death and misery, they may be shocked for a short instant, but they are self-seekers who justify and excuse their actions. Typically, a period of conflict or widespread atrocity brings up tremendous opportunities. Benefitting from the fact that a particular group within society is under attack, the exploiters can take over their homes or companies, steal from them, blackmail them, or make a career that they would not otherwise have had the opportunity to make. Often, exploiters do not have to be directly engaged in the atrocities, but they encourage them by remaining silent and profiting from them.

D. Acolytes

Some offenders often don't have any particular motive for committing atrocity crimes. During times of mass atrocities, however, they still engage in criminal activity without any animosity or bitterness or an unquenchable desire for profit, simply because they comply with and follow the crowd. Many of these criminals follow a commander or an authority figure, while others simply obey the hierarchy. However, some are less affected by authority but heavily influenced by a group and are susceptible to groupthink. Their identity is often heavily influenced by their group membership. Many hostile regimes rely on the tacit complicity of thousands, if not millions, of such acolytes.

E. Soldiers

Dedicated soldiers can readily engage in mass atrocities. These individuals belong to a military group that has undergone extensive training. According to them, loyalty, obedience, commitment, and compliance are the most vital virtues a man can possess. They have a solid devotion and allegiance that is unwavering and absolute. These values have been instilled into them, and they embody them in their daily lives. In their view, it is their responsibility to serve their nation, ruler, or senior. They follow instructions and are motivated to do a good job. They feel a strong sense of obligation. Moreover, they are willing to sacrifice themselves if need be. An ordinary soldier would never commit a crime, but officials with malicious intent can misuse their loyalty easily.

III. PLAUSIBLE SOLUTIONS

Crimes of mass atrocity, especially genocide and crimes against humanity, are not impulsive acts. Conversely, they evolve over time as a process, allowing for the spotting of warning signs of their possible occurrence. Averting genocide, war crimes, and crimes against humanity is a long-term process that involves upholding the rule of law and all human rights without bias. It requires forming legitimate and accountable national institutions, curbing corrupt practices, handling diversity effectively, and promoting a secure and diverse nation.[24]

A. The heads-up

Some measures for preventing or minimizing mass atrocities may be viable only if adequate early warning of impending violence is accessible. According to the strategic approach, a fairly credible early warning of mass atrocities might be available in some instances. For example, close observation of regimes with radical ideologies and armed guerrilla groups should improve our ability to predict mass atrocities in advance. It is true that not all measures for preventing mass atrocities necessitate forewarning. Even if adopted after the violence has started, strategies aimed

[24] United Nations Office on Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/prevention.shtml (last visited Jan. 30, 2022).

to safeguard victims or aid their escape, for instance, maybe successful. While these measures are unlikely to prevent all atrocities, they may be able to save a significant number of lives.

B. Changing the power dynamics

One feasible way of preventing or minimizing mass atrocity crimes is to alter the power balance among opposing factions or leaders in societies threatened by mass atrocities. Interventions may vary from funding to military support to outright armed response, based on the urgency and gravity of the situation. Despite the fact that direct military action stands to save lives in many instances of mass atrocities, one must not overlook the nature and scale of the commitment necessary for such interventions. Such an intervention will almost certainly necessitate a significant number of soldiers. To be effective, these soldiers must not only be capable of inflicting substantial fatalities on the adversary but must also be willing to sustain them. At the end of the day, governments must choose between the political risk and ethical uncertainty associated with this type of intervention and the implications of doing nothing.

C. Partition as a solution

Another option for preventing mass atrocity casualties would be to encourage or support the development of autonomous regions for racial or ideological opponents. Many political scientists and international relations experts advocated partition as a potential solution to the conflict in the former Yugoslavia.[25] Sometimes, the partition is viewed as necessary to geographically divide factions that have become so engulfed in hatred that they are unable to coexist. In Bosnia, for example, some of the atrocities linked to ethnic cleansing might have been avoided if the global community had agreed on a partition plan earlier in the conflict.[26]

Similarly, the bloodshed during India's partition in 1947 might have been reduced if the British, Indian, and Pakistani authorities had made adequate preparations and provided more military and

[25] John J. Mearsheimer & Stephen van Evera, Opinion, *Redraw the Map, Stop the Killing,* N.Y. TIMES (Apr. 19, 1999), https://www.nytimes.com/1999/04/19/opinion/redraw-the-map-stop-the-killing.html.
[26] Robert M. Hayden, *Schindler's fate: genocide, ethnic cleansing, and population transfers,* 55(4) SLAVIC REVIEW 727, 741-742 (1996).

humanitarian aid to maintain order and ease the difficulties of resettlement.[27] It must also be noted that partition is unable to avert immense suffering for thousands of innocent individuals, ultimately compelling them to leave behind their homeland, places of worship, and other priceless emblems of their heritage and culture. Given these risks, partition and migration should only be considered when all else has failed.

D. Humanitarian intervention

Most victims of mass atrocity crimes often die while escaping or as a result of disease or starvation in the harsh environments or overcrowded refugee camps to which they are compelled to migrate. Others sacrifice themselves to protect their houses, possibly foreseeing these dangers. While mass atrocities are difficult to completely avoid, swift humanitarian intervention might be able to save many of these people provided adequate housing, sanitation, and security resources are made available.

E. The threat of punishment for perpetrators

Another method for preventing or reducing mass atrocities would be to threaten perpetrators with punishment in order to deter or convince them to stop. The 1994 genocide in Rwanda could have been averted if the international community had issued unambiguous political censure, withdrew financial support, imposed an arms embargo; and turned the citizenry and crucial government officials against the regime of Hutu extremists.[28] It is fair to say that these types of sanctions are frequently enforced half-heartedly, or without comprehensive international collaboration.

[27] Chaim D. Kaufmann, *When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century*, 23(2) International Security 120, 140 (1998).
[28] Alison Des Forges, *"Leave none to tell the story": Genocide in Rwanda* 16-27 (Human Rights Watch 1999).

IV. CONVENTIONS, STATUTES, AND TRIBUNALS PROHIBITING AND PENALIZING MASS ATROCITY CRIMES

Signing the London Charter on August 8, 1945, the United States, France, the United Kingdom, and the Soviet Union established the International Military Tribunal (IMT) to prosecute major war criminals of the Axis powers in Europe.[29] The IMT clarified norms governing the treatment of civilians during wartime and held the offenders individually liable for violating these rules.

On January 19, 1946, General Douglas MacArthur, Supreme Commander for the Allied Powers, issued a Special Proclamation establishing the International Military Tribunal for the Far East (IMTFE) in Tokyo.[30] As the Far Eastern equivalent to the International Military Tribunal in Nuremberg, it was established to prosecute Japanese war criminals "charged individually, or as members of organizations, or in both capacities, with offences which include crimes against peace."[31]

When the Genocide Convention was drafted in 1948, the international community inserted a clause that gave the International Court of Justice (ICJ) jurisdiction over any state that might breach the Convention.[32] Article IX of the Genocide Convention established the ICJ's jurisdiction. It was determined that states had an obligation to both prevent and punish genocide perpetrators.[33] According to Article VI of the Genocide Convention, state parties must try criminals before their national courts if genocide occurred on their territory, or before relevant international tribunals if the state parties have assented to the jurisdiction of these tribunals.[34]

The Geneva Conventions make up the foundation of the law dealing with the conduct of war and distinguish between required military tactics and unjustifiable human misery. The Geneva Conventions and their Additional Protocols are international treaties that lay forth the most

[29] Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279.
[30] Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589.
[31] *Id*. *a*rt. 1.
[32] Genocide Convention, *supra* note 1, at 282.
[33] Martin Mennecke & Christian J. Tams, *The Genocide Case Before the International Court of Justice*, 25(2) Sicherheit und Frieden (S+ F)/Security and Peace, 71, 73 (2007).
[34] Genocide Convention, *supra* note 1, at 281.

significant guidelines for reducing war's brutality. They safeguard citizens, medical professionals, and relief workers who are not actively involved in the combat and the wounded, sick, shipwrecked, or prisoners of war who cannot fight anymore.[35]

An international criminal tribunal was established in 1993 to punish those responsible for mass atrocities committed in the former Yugoslavia, and another tribunal for Rwanda was established soon after in 1994. Although based on precedents established by the Nuremberg tribunals, the international criminal tribunals set up for the former Yugoslavia and Rwanda attempted to move beyond what many perceived as "victor's justice," which characterized the proceedings following the Second World War.[36]

The United Nations established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in May 1993 in reaction to mass atrocities occurring in Croatia, Bosnia, and Herzegovina at the time.[37] News of atrocities in which tens of thousands of civilians were murdered or injured, tortured, and sexually assaulted in detention centres, and hundreds of thousands were forcibly relocated sparked global outrage and prompted the United Nations Security Council to act.[38] The ICTY's tenure, which lasted from 1993 to 2017, profoundly transformed the nature of international humanitarian law, gave victims a platform to speak out about the brutalities they encountered, and established that those deemed most responsible for atrocities committed during armed conflicts could indeed be held accountable.[39]

The ICTR was also the first to acknowledge rape as a method of genocide perpetration.[40] The "Media Case," in which the ICTR became the first international tribunal to hold the media

[35] *The Geneva Conventions of 1949 and their Additional Protocols*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm.
[36] Christopher Rudolf, *Power and Principle: The Politics of International Criminal Courts* 17 (Cornell University Press 2017).
[37] United Nations International Criminal Tribunal for the former Yugoslavia, https://www.icty.org/en/about (last visited Feb. 3, 2022).
[38] *Id*.
[39] United Nations International Criminal Tribunal for the former Yugoslavia, https://www.icty.org/en (last visited Feb. 3, 2022).
[40] *About the ICTR*, United Nations International Residual Mechanism for Criminal Tribunals, https://unictr.irmct.org/en/tribunal (last visited Feb. 3, 2022).

accountable for broadcasts meant to incite people to commit genocide, was another watershed moment.[41] On December 31, 2015, the Tribunal's mandate came to an end.[42]

Based on empirical evidence, it appears that the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have played a significant role in the post-conflict peacebuilding and the introduction of criminal liability within international relations.[43] The former Yugoslavia and Rwanda are not the only areas where the ICTY and ICTR have made a significant contribution to the post-conflict peacebuilding. In spite of their ad hoc mandates, the ICTY and ICTR were influential in shaping the statute of the International Criminal Court (ICC) at the Rome Diplomatic Conference in 1998.[44]

On July 1, 2002, the treaty establishing the world's first permanent international criminal tribunal entered into force, which led to the prosecution of individuals for genocide, war crimes, and crimes against humanity, regardless of their official standing or position.[45] The Rome Statute[46] is the foundation for the International Criminal Court (ICC), an organization designed to break the state-centric shield that lawless state and non-state entities have frequently been able to hide behind under the traditional human rights framework.

The International Criminal Court (ICC) investigates and, if necessary, prosecutes individuals accused of the most grievous atrocities.[47] The Court's mission is to hold those responsible for crimes accountable and ultimately prevent similar atrocities from being committed in the future through international criminal justice. Its role as a court of last resort is to supplement rather than supplant national courts.[48]

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[41] *Id.*
[42] United Nations International Residual Mechanism for Criminal Tribunals, https://unictr.irmct.org/ (last visited Feb. 3, 2022).
[43] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?,* 95(1) AMERICAN JOURNAL OF INTERNATIONAL LAW 7, 9 (2001).
[44] *Id.*
[45] *How the Court works*, International Criminal Court, https://www.icc-cpi.int/about/how-the-court-works (last visited Feb. 3, 2022).
[46] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.
[47] *About the Court*, International Criminal Court, https://www.icc-cpi.int/about (last visited Feb. 3, 2022).
[48] *Id.*

A key step in ensuring the independence and impartiality of the ICC was ensuring its independence from the United Nations Security Council. The permanent members of the Security Council with veto rights would have been able to shield their citizens from the Court's jurisdiction if the Court was made dependent on the Security Council for cases it could adjudicate.[49] As a result, the Security Council's role is confined to recommending matters to the Court.[50] Nevertheless, this is not the only method through which cases are brought before the Court.

V. RECENT JUDGMENT ON GENOCIDE AGAINST THE YAZIDIS

Yazidis have long kept themselves apart in small settlements mostly distributed across northwest Iraq, northwest Syria, and southeast Turkey and have been unfairly referred to as "devil worshippers" because of their odd beliefs.[51] Their faith incorporates components of multiple religions, including Islam and Christianity, as well as historic Persian customs.[52] Because of their oppression, condemnation, and persecution, the population of the Yazidis has diminished dramatically during the last century.

In 2014, an Islamist terrorist group known as the Islamic State of Iraq and Syria (ISIS), or the Islamic State of Iraq and the Levant (ISIL/Da'esh), slaughtered 5,000 Yazidis and enslaved thousands more, occupying Sinjar and surrounding neighbourhoods.[53] In addition, many Yazidis were forced to leave their homeland. ISIS has been accused of genocide, crimes against humanity, and war crimes against the Yazidis by the United Nations.

A German court found a member of the Islamic State guilty of genocide against the Yazidi minority. Taha Al-Jumailly was sentenced to life imprisonment in Frankfurt for offences that

[49] Pam Spees, *Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*, 28(4) SIGNS 1233, 1235 (2003).
[50] *Id*.
[51] *Who, What, Why: Who are the Yazidis?*, BBC (Aug. 18, 2014), https://www.bbc.com/news/blogs-magazine-monitor-28686607.
[52] *Id*.
[53] Elizabeth Schmermund, ISIS *and the Yazidi Genocide in Iraq* 6, 34 (Rosen Publishing Group, Incorporated 2017).

included the killing of a Yazidi girl in Iraq.[54] According to the court, the terrorist enslaved, chained up, and left the five-year-old to die of dehydration in 2015. Taha Al-J is the first Islamic State comrade to be convicted of genocide against Yazidis. In 2019, he was detained in Greece, extradited to Germany, and prosecuted under the universal jurisdiction principle of international law. Jennifer Wenisch, his German wife, was sentenced to ten years of imprisonment for crimes against humanity for failing to save the Yazidi girl she and her husband had enslaved.[55] According to the prosecutors, Taha Al-J murdered the five-year-old child because she was a member of the Yazidi community, which he wanted to exterminate.

To supplement the Rome Statute, newly enacted national codes, such as the Code of Crimes against International Law (Völkerstrafgesetzbuch or CCAIL) in Germany, began adopting the crimes outlined in the Rome Statute into national laws.[56] On June 30, 2002, the CCAIL (Völkerstrafgesetzbuch) took effect, with Section 1 establishing the legal basis for the principle of universal jurisdiction.[57] If there is an initial suspicion that an offence covered under the CCAIL has been committed, the German Federal Prosecutor can open an inquiry. Germany has a proactive approach to extraditing high-level criminals when there is sufficient evidence to prosecute them. Despite the fact that sexual violence, particularly sexualized slavery, against Yazidi females is a fundamental part of ISIS's international crimes against the ethnic and religious minority, the first few cases to go to trial dealing with international crimes against the Yazidis show no sexual violence charges against the accused.[58]

CONCLUSION

In this day and age, the international attention given to the domestic conflicts of nations is well known. The crimes of mass atrocities are unlawful under several national and international

[54] *Yazidi genocide: IS member found guilty in German landmark trial*, BBC (Nov. 30, 2021), https://www.bbc.com/news/world-europe-59474616.
[55] *Id*.
[56] Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?*, 16(1) Journal of International Criminal Justice 165, 171 (2018).
[57] *Id*. at 176.
[58] Silke Studzinsky & Alexandra Lily Kather, *Will Universal Jurisdiction Advance Accountability for Sexualized and Gender-based Crimes? A View from Within on Progress and Challenges in Germany*, 22(5) GERMAN LAW JOURNAL 894, 896 (2021).

jurisdictions. Currently, no international law allows for armed action to prevent significant human rights breaches. No agreement has emerged as to what conditions would justify intervention, who should give the authorization, and who should conduct the intervention. Instead of debating about what to name the crimes, proponents should concentrate on how to avert them. Keeping the lives of people in danger safe and promoting the rights of participation, free expression, and tolerance on a regular basis will achieve humanitarian goals more effectively.

As a response to subsequent acts of mass atrocities, the Rome Statute is believed to have a more beneficial impact on establishing compliance with international law amongst the military and non-military population and promoting the pursuit of justice instead of war. If we do not incorporate systemic transformation, refuse to engage people from both sides of the conflict, and do not integrate cultural, communal, economic, historical, political, and psychosocial processes, any effort to heal the scars of historical mass atrocities will be flawed. History demonstrates that the chances for justice in international criminal law are inextricably linked to power struggles. This conclusion holds even for the most purposeful initiative in international criminal law as yet, the International Criminal Court, which cannot advance its investigations without state cooperation and finance.

PRIVACY IN INTERNATIONAL LAW: WHERE DO INDIA AND THE GLOBAL SOUTH STAND?

- *Swaroop Nair* [1]

ABSTRACT

In December 2021, Russia used its veto power against a resolution in the UNSC linking climate change and security. Now, that does not take the issue completely off the table. However, discussing climate change by expanding upon the Security Council's mandate of maintenance of international peace and security would be giving the powerful members of the Council the authority to dictate and decide on issues that affect different nations differently; it would essentially be antithetical to the entire purpose of the resolution. The idea here is not to completely dismiss the threat climate change poses to global peace and security; the idea, instead, is to direct the discourse towards realizing the double standards of the West and understanding the layered, disproportionate impacts on Global South when we talk about climate change and security. Hence, in that respect, the paper aims to understand the link between climate change and security by placing the interests of the Global South at the focal point.

INTRODUCTION

The goal of lawmakers is to structure long-term legislation in a world that is changing rapidly, and in no other field of law is this truer than in the field of technology and privacy. Privacy is widely accepted as a human right, and a major component of the right to privacy is the protection of data. In today's time and age, people's lives are practically controlled by their data and it is undoubtedly important that this data is protected from getting into the wrong hands. However, when we talk about breaches of privacy – like the time when Facebook shared the data of over eighty-seven million users with Cambridge Analytica[2], an incident that scared internet users all around the world, or even closer home in India, the leakage of private data of

[1] Student at Amity University, Mumbai

[2] Sam Meredith, *Facebook-Cambridge Analytica: A timeline of the data hijacking scandal*, CNBC (Apr. 10, 2018, 09:51 AM), https://www.cnbc.com/2018/04/10/facebook-cambridge-analytica-a-timeline-of-the-data-hijacking-scandal.html.

hundreds of millions of Indians from databases of huge companies like Domino's or Air India[3] – we are not talking about one in a hundred, rarest of rare cases; breaches of privacy have become a rather common happening, and without any concrete legal framework set out to protect the data, to protect the privacy of individuals, the saying "privacy is a myth" will become true in every sense of the phrase.

India is home to the second-largest number of internet users in the world[4] and yet we do not have an extensive law formulated to protect the data of the citizens. The Parliament has been delaying the passing of the proposed Personal Data Protection Bill of 2018;[5] the multiple postponements can be attributed to the several complications in forming comprehensive data protection laws, which would be even more so complicated in a country as huge and diverse as India. As noted in the report of the Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, India being a leading player in the "global digital landscape in the 21st century", there would be an added onus on the lawmakers of India because whatever law we create to protect the data of Indians, it should serve as a template for the Global South.[6]

In this paper, the concepts of privacy and data protection would be seen through the perspective of international law and how the Global South in general and India in particular stand in that regard. While considering the issues in the Global South with respect to privacy and data protection, this paper shall make an attempt to see those issues from a perspective that places India at the focal point. After this introduction, Section 2 of this paper seeks to first establish privacy as a human right in international law, taking the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights as the starting points for that discussion. Section 3 then looks at the need for comprehensive legal frameworks for data protection, which has become more relevant in today's global digital economy. Sections 4 and 5 then contrast the trends in the West to the trends in the Global South with respect to the right

[3]Vijaita Singh &Jagriti Chandra, *Data breaches expose emails, passwords of several government officials to hackers*, THE HINDU (Jun. 12, 2021, 08:03 PM), https://www.thehindu.com/news/national/data-breaches-expose-emails-passwords-of-several-government-officials-to-hackers/article34798982.ece.

[4]MeghaMandavia, *India has second highest number of Internet users after China: Report*, THE ECONOMIC TIMES (Sept. 26, 2019, 04:24 PM), https://economictimes.indiatimes.com/tech/internet/india-has-second-highest-number-of-internet-users-after-china-report/articleshow/71311705.cms?from=mdr.

[5]Yuthika Bhargava &Sobhana K. Nair, *More delays on Data Protection Bill as panel reopens debate*, THE HINDU (Sept. 07, 2021, 08:56 PM), https://www.thehindu.com/news/national/more-delays-on-data-protection-bill-as-panel-reopens-debate/article36344706.ece.

[6] Data Protection Committee Report, Available at, https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf.

to privacy and data protection laws, and it also tries to understand the problems inherent in the Global South that stand in the way of protection of the right to privacy. Finally, the concluding section, after making a study of the aforementioned areas, tries to determine the way forward.

I. PRIVACY AS A HUMAN RIGHT IN INTERNATIONAL LAW

That the right to privacy is a fundamental human right is widely accepted by the International community – the provisions of two of the most important documents in the history of human rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (to both of which India is a signatory), firmly establish that.

Article 12 of the UDHR reads as follows:

> *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*[7]

Article 17 of the ICCPR reads as follows:

> *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks."*[8]

Furthermore, it is also the Human Rights Committee, the aim of which was to interpret and implement the provisions laid down in the ICCPR, which gave the General Comments on specific issues covered in the Covenant. Out of them, General Comment 16 provides us with a deeper analysis and interpretation of Article 17; it recognizes that:

> *"The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized*

[7] Universal Declaration of Human Rights, 1948, art. 12.
[8] International Covenant on Civil and Political Rights, 1966, art. 17.

by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his privatelife, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Everyindividual should also be able to, ascertain which public authorities or private individualsor bodies control or may control their files. If such files contain incorrect personal data orhave been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination."[9]

In addition to that, the term privacy also finds mention in Article 16 of the Convention on the Rights of the Child[10] and Article 14 of the International Convention on the Protection of All Migrant Workers and Members of Their Families.[11]

Furthermore, the United Nations General Assembly adopted several resolutions on the right to privacy in the digital age, first in 2013, then in 2014, 2016 and 2018. These resolutions reaffirmed the right to privacy, both online and offline and called upon States to take appropriate measures to protect the right to privacy.

And that is the interesting part; the term privacy finds mention in many international treaties and conventions, yet until recently, it was not at the forefront of legal policies.[12] However, with the advancement of technology and the realization of the worth of personal data and the importance of privacy, throughout the world, there is a general movement towards the adoption of comprehensive privacy laws that set a framework for protection.

Now the aim of international human rights law is that it attempts to adapt the practices of local cultures so as to bring them in line with the universally accepted principles of human rights.[13] In that regard, over one-hundred-and-thirty countries, directly or indirectly, have constitutional

[9]UN Human Rights Committee (HRC), *General comment no. 16, Article 17.*
[10] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3
[11]UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158
[12]Kristian P. Humble (2021) *International law, surveillance and the protection of privacy*, 25 THE INT'L J. OF HUMAN RIGHTS, 1-25 (2021).
[13]Tom Zwart, *Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach*, 34 HUMAN RIGHTS Q. 546-569 (2012).

statements regarding the protection of privacy.[14] In India too, in what is considered to be a landmark judgement, Article 21 of the Indian Constitution[15] was interpreted by the Supreme Court in the *Puttaswamy case* to include the dimension of the right to privacy as an important aspect of living with dignity.[16] Often considered to be the most important fundamental right, the meaning of Article 21, which is in consideration here, is incomplete without the aspect of dignity. Within the rights which humans need to live a life of dignity comes the right to privacy too; to be able to keep certain information secret from others is fundamental to protecting oneself. It would, thus, not be wrong at all to say that "the right to privacy is considered to be an identifiable human right with universal qualities deserving legal recognition and protection, although the scope of such legal protection is still being determined."[17]

II. THE NEED FOR LAWS THAT PROTECT DATA AND PRIVACY

While dealing with the concept of privacy and the continuous advancement of new technologies, it can make anyone question what level of protection of our right to privacy is possible in a world where personal information of more or less any person can be accessed by just a click or the press of a button. New technologies in the form of the internet, social networks, remote access to information, etc., though they bring the whole world at our fingertips, make it increasingly more difficult to maintain privacy rights in cyberspace such that online invisibility has become next to impossible. In this context, it has become increasingly important that there are rules that protect privacy. The presence of such rules would give us the ability to strengthen our rights in the face of significant power imbalances. The right to privacy is important for us to protect ourselves and society against arbitrary and unjustified use of power, by reducing what can be known about us and done to us while protecting us from others who may wish to exert control. In fact, in the larger scheme of things, privacy could be considered not simply as an individual right, but as a collective right. But obviously, the right to privacy, like any other right for that matter, is not absolute. States may lawfully restrict an individual's rights in order to protect the rights of others, the general

[14]PRIVACY INTERNATIONAL, (last visited: Sept. 29, 2021), https://privacyinternational.org/explainer/56/what-privacy.
[15] INDIA CONST. art. 21.
[16] Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.
[17] Alexandra Rengel, *Privacy as an International Human Right and the Right to Obscurity in Cyberspace*, 2 GRONINGEN J. INT'L L. (2014).

welfare, public order, morality and the security of all. In doing so, States may not take out the entire essence of what the term privacy encompasses.

Hence, in order to protect the right of privacy of individuals, particularly in cyberspace, the need of the hour is a concrete data protection law. And the mammoth question that presents itself in front of academicians and lawmakers is what would such a concrete data protection law entail.

In the Indian context, the judgement of the Supreme Court of India in the case of *People's Union for Civil Liberties (PUCL) v. Union of India*[18] set us on the path of recognizing the importance of the right to privacy. And then further in the landmark judgement in the *Puttuswamy case,* the right to privacy was rightly held to be a fundamental right "flowing from the right to life and personal liberty as well as other fundamental rights securing individual liberty in the Constitution".[19]The rationale behind upholding the right to privacy as a fundamental right can also be seen from the perspective of individual dignity – to protect their identity, a person must be free to retain or share their data with their consent. "This core of informational privacy, thus, is a right to autonomy and self-determination in respect of one's personal data. Undoubtedly, this must be the primary value that any data protection framework serves."[20]

III. TRENDS IN THE WEST IN CONTRAST WITH THE TRENDS IN THE GLOBAL SOUTH

The Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, set up to deliberate on a data protection framework,[21] noted at the beginning of their report that broadly there are three approaches to data protection.

The two most popular approaches to data protection are the approaches of the United States of America and that of the European Union. In the United States of America, a *laissez-faire* approach is followed; courts of law in landmark cases like *Roe v. Wade*[22] and *Griswold v.*

[18] People's Union for Civil Liberties (PUCL) v. Union of India, (1997) 1 SCC 301.
[19] Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.
[20] Data Protection Committee Report, Available at, https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf.
[21] *Justice Krishna to head expert group on Data Protection Framework for India*, PRESS INFORMATION BUREAU GOVERNMENT OF INDIA (Aug. 01, 2017), https://pib.gov.in/newsite/PrintRelease.aspx?relid=169420.
[22] Roe v. Wade 410 U.S. 113 (1973).

Connecticut[23] have interpreted constitutional provisions laid down in the First, Fourth, Fifth and Fourteenth Amendments to their Constitution[24] to recognize the right to privacy that protects the citizens against the federal government and also against the private sector.

When the European Union enacted the General Data Protection Regulation (henceforth, EU GDPR)[25], it was seen as a milestone for data protection standards.[26] The EU GDPR is a rather comprehensive set of regulations that keeps the protection of personal data and the right to privacy of individuals at the forefront; it does indeed look like a promising set of regulations that places the consumers before the corporations.[27] Even as a regulation, and not as a directive, it served as a model that several countries, even outside the European Union, adopted to protect the personal data of individuals.

China has the third approach to protecting data; the nation has approached the issue of data protection "primarily from the perspective of averting national security risks".[28] Although there seems to be "a growing convergence between Europe and China's approaches in emerging data protection regimes", China's new national standard on personal information protection looks more stringent than even the EU GDPR.[29]

Now, of course, the policies of the Western States cater to their own interests, and China's, the other major point of power, which has its own interests that are reflected in its own policies. As the committee report further remarks, India's interests are not exactly coincidental with thatof the three aforementioned legal regimes. And this is generally true for the Global South. The cultural and political scenario in the Global South presents its own new dimension of data protection related issues which cannot simply be dealt with by Western legal frameworks. Crimes over and through the digital landscape have increased in the Global South but the "concepts of privacy and citizens' corresponding political rights have not been well-developed

[23] Griswold v. Connecticut 381 U.S. 479 (1965).
[24]U.S. Const. amend. I, IV, V, XIV.
[25] EU General Data Protection Regulation, Regulation (EU) 2016/679.
[26] J. Albrecht, *How the GDPR Will Change the World*, 2 EUROPEAN DATA PROTECTION LAW REVIEW 287-289 (2016).
[27]Payal Arora, *General Data Protection Regulation—A Global Standard? Privacy Futures, Digital Activism, and Surveillance Cultures in the Global South*, 17 SURVEILLANCE & SOCIETY (2019).
[28] Data Protection Committee Report, Available at, https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf.
[29]Samm Sacks, *New China Data Privacy Standard Looks More Far-reaching than EU GDPR*, CENTRE FOR STRATEGIC AND INTERNATIONAL STUDIES (Jan. 29, 2018), https://www.csis.org/analysis/new-china-data-privacy-standard-looks-more-far-reaching-gdpr.

in non-Western contexts".[30] And that is a chief reason why the United Nations Conference on Trade and Development reported that a good fraction of nations around the globe lack proper legislation for data protection.[31]

And has thus become relevant to the old academic debate on "universalism versus particularism". As is true for almost any other aspect of the law, privacy-related problems in the Global South cannot be seen through the eyes of the developed West. While acknowledging that the universally accepted documents like the UDHR and the ICCPR (which also have shades of Western legal and political thought) do lay down the basic idea, the Global South cannot have data protection laws modelled after Western views and institutions.

IV. PRIVACY RELATED ISSUES IN THE GLOBAL SOUTH

Today's digital economy is vastly data-driven. This gives immense potential to India and other countries in the Global South to embark on the path of empowerment, development, progress and innovation.[32] However, just as much potential it has to empower, data has equal potential to harm; it comes with its own set of risks and it can create new dimensions of inequalities and injustices.

Data protection is in its own regard a complicated topic of law, framing a legal policy for which would be an intersection of national security with technology, a cobweb of power dynamics, innovation and regulation. On one hand, the personal data of individuals is viewed as a strategic state resource and this view comes in conflict with the idea of privacy. The discourse on privacy, data and law transcends that as we span cultural backgrounds. What is implied here isthat there are vast differences when we compare issues related to privacy in the developed Westand in the Global South. So, when we add to that discourse the other economic, social, culturaland political problems, the already existing problems related to data privacy then look more pronounced in the Global South.

[30]Ahmed, Syed Ishtiaque& Haque, Md & Guha, Shion& Rifat, Mohammad Rashidujjaman& Dell, Nicola. (2017). *Privacy, Security, and Surveillance in the Global South: A Study of Biometric Mobile SIM Registration in Bangladesh*, CHI 906-918 (2017).

[31] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, https://unctad.org/page/data-protection-and-privacy-legislation-worldwide (last visited Sept. 29, 2021).

[32] GERALDINE BASTION & MUKKU, SREEKANTH, DATA AND THE GLOBAL SOUTH KEY ISSUES FOR INCLUSIVE DIGITAL DEVELOPMENT 7 (Heinrich-Böll-Stiftung 2020).

However, when we say most countries outside the West have lax or no privacy laws,[33] the reasons behind it are multifaceted. For one, privacy concerns may be compromised in the Global South for the sake of more pressing needs like economic and social development. So, while in a more developed region like Europe, users have a seemingly legitimate and comprehensive legal framework in the form of the EU GDPR to protect them against privacy violations, the citizens of the Global South are at a greater risk of indiscriminate data surveillance because their governments are fighting other battles at the same time. This takes them farther away from having corporations and governments move toward governance rooted in universal human rights. And then there is also the other perspective – many governments in the Global South rule by the law while being above it – extensive privacy laws would not facilitate these authoritarian elites in power to weaponize laws against their people to sustain their regimes.[34]

In the Indian context too, there are multiple challenges that pose themselves before lawmakers in the process of framing a comprehensive data protection legal framework. As Honourable Justice Chandrachud noted in the *Puttuswamy case*,

"Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State."[35]

The Supreme Court of India held that Indian citizens are protected from the State's invasion of privacy unless done by the least restrictive means. To that end, a compressive data protection law is the need of the hour. If we are to have a law for data protection, then it would not be ideal if such a law would give unprecedented powers to the bureaucratic apparatus. The proposed bill for data protection needs a few things to be addressed. It has to protect personal data and non-personal data. It has to place emphasis on consent, in theory, and in practice. If there is data gathering for legitimate purposes, then it should be more transparent. More importantly, there must be an independent system of checks and balances that individuals can

[33]TAYLOR, LINNET & FLORIDI, LUCIANO & SLOOT, BART, GROUP PRIVACY: NEW CHALLENGES OF DATA TECHNOLOGIES (Springer 2017).
[34]Payal Arora, *General Data Protection Regulation—A Global Standard? Privacy Futures, Digital Activism, and Surveillance Cultures in the Global South*, 17 SURVEILLANCE & SOCIETY (2019).
[35]Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

resort to if their data is compromised and their right is violated. The State cannot be left to *de facto* encroach upon the data that is out there in public domains.

V. THE INDIAN APPROACH

It has been over four years since the *Puttuswamy* judgment affirmed the Constitutional right to privacy and the key issue of protection of personal data of individuals has not yet been legislated upon and codified in a strong, comprehensive set of laws. The proposed Personal Data Protection Bill, which was tabled in Parliament in 2019, has several issues pertaining to it and several controversies surrounding it, which all need to be addressed before it is passed and enacted as an act of Parliament and consolidates the individual right to privacy.

The criticisms against the proposed bill start right from the composition and the working of the Justice Srikrishna Committee that was tasked with examining its nuances. The working of the committee has to be questioned because of the lack of social participation and lack of transparency in its working.

In theory, it emphasizes consent – ideally individuals are vested with the right to know and deny access to their data – but a major point of concern with this proposed bill is how its provisions seem to be favouring the interests of corporate and/or non-corporate entities by enabling them to exploit personal data of individuals and use it against them. Moreover, even though the government has been given the power to process data of individuals for "functions of the State", there is not really a system of checks and balances when the government is allowed to use data without consent. Indeed, there is the provision for the establishment of the Data Protection Authority, a regulatory agency tasked with the regulation of the use of personal data across sectors. However, there are serious qualms about the independence of the agency[36] because its appointment is bound by the Central Government and it is not even mandatory for it to constitute at least one independent expert or a member of the judiciary on its governing committee, an issue that was raised in the reports of the Joint Parliamentary Committee. Although the very fact that the draft bill was sent to a Joint Parliamentary Committee instead

[36] *#StartFromScratch: Why is the data protection bill being criticized?*, Internet Freedom Foundation, https://internetfreedom.in/why-is-the-data-bill-being-criticized/

of following the traditional route of it being examined by the Standing Committee on Information Technology was a questionable decision taken by the legislators, the report of the JPC did indeed address quite a few of the concerns earlier raised when the draft bill was proposed; however, even if the recommendations are taken into consideration, it does not still fully provide for a strong safeguard for the protection of data of individuals.[37]

The legal atmosphere surrounding privacy in India is more or less in a state of quagmire. Several pieces of legislations that are being enacted or that are going to be enacted have the common problem of being characterized by imprecise language, arbitrary content legislation and requirements of traceability and decryption to questionable extents. This is true not only inthe case of the proposed Data Protection Bill but the notorious intentions of the authorities canbe seen in the introduction of the IT Rules[38], the controversies surrounding the alleged procurement of the Pegasus spyware from the Israeli NSO group[39], the Indian law enforcement's increasing reliance on artificial intelligence (AI) and facial recognition technology in recent times in an unregulated manner[40], all of which could pose a potentially dangerous threat to citizen's right to privacy by giving rise to surveillance by State.

The current government and the Prime Minister's goals of Digital India and the country becoming a $5 trillion economy[41] need "innovation, aspiration and application of technology" as driving forces to fuel it. The ambitious movement towards a digital economy as envisioned by the government is deemed to be important to improve lives, and indeed, data has the potential to do that. However, in this technology-driven era and in this ecosystem of big data,

[37]Pallavi Bedi, *What the JPC Report on the Data Protection Bill Gets Right and Wrong*, THE WIRE (Dec. 20, 2021), https://thewire.in/tech/what-the-jpc-report-on-the-data-protection-bill-gets-right-and-wrong.
[38]*IT Rules 2021 add to fears over online speech; critics believe it may lead to outright censorship*, FIRSTPOST (Jul. 16, 2021, 12:17 PM), https://www.firstpost.com/tech/news-analysis/it-rules-2021-add-to-fears-over-online-speech-privacy-critics-believe-it-may-lead-to-outright-censorship-9810571.html#:~:text=Many%20other%20critics%20say%20Modi's,will%20benefit%20and%20empower%20Indians .
[39]The Hindu Bureau, *Opposition slams Government as New York Times report says India bought Pegasus spyware*, THE HINDU (Jan. 29, 2022, 11:33 AM), https://www.thehindu.com/news/national/pegasus-and-a-missile-system-were-centerpieces-of-2-billion-deal-between-india-and-israel-in-2017-nyt/article38343251.ece.
[40]Jai Vipra, *The use of facial recognition technology for policing in Delhi*, VIDHI CENTRE FOR LEGAL POLICY (Aug. 16, 2021), https://vidhilegalpolicy.in/research/the-use-of-facial-recognition-technology-for-policing-in-delhi/.
[41]*India poised to become $5-trillion economy by 2024-25: Puri*, ECONOMIC TIMES (Oct. 21, 2021, 05:08 PM),https://economictimes.indiatimes.com/news/economy/indicators/india-poised-to-become-5-trillion-economy-by-2024-25-puri/articleshow/87185563.cms?from=mdr.

the privacy of Indian citizens cannot be compromised. The Centre in several areas of legislation has strongly said that it cannot blindly follow the West. It is indeed true in the case of privacy and data protection, however, the current approach taken by our country's legislators is not adequate enough to safeguard the interests of the Indian public. The need of the hour is the enactment of a strong data protection law, but it does not mean that a shoddily crafted bill giving unprecedented powers to the bureaucratic apparatus be imposed, that would not meet constitutional standards if taken to Court and be eventually struck down. The urban-rural divide, the digital gap, and rampant discrimination on various constitutionally barred grounds are not unrelated matters in the discourse on privacy and data protection. Without taking into account these pressing matters, we cannot have a good law enacted to protect the data of individuals.

CONCLUSION

Although it is a relatively newer idea, the right to privacy is a fundamental human right – the UDHR and the ICCPR, as we have seen, establish that firmly. Nations agreed to protect this right in resolutions of the United Nations General Assembly and in addition to that, many of their Constitutions also reflect that. For the right to privacy to not lose its essence, it is essential that there be a comprehensive set of regulations, and a solid legal framework to protect the data of individuals. Undoubtedly, this is a complicated faction of law, which, in practicality, becomes even more so complicated in the Global South. The nations in the Global South have their battles to fight, which, in essence, are vastly different from the experiences of the West. It would, hence, not be appropriate to impose the same set of data protection regulations applicable in the developed West on the nations that constitute the Global South. The approaches of neither the United States of America, the European Union, nor China would be fit for the situations prevailing in the Global South. That is not to say that these approaches are not sound sets of regulations; in fact, they do offer a source of inspiration. Perhaps a combination of these three approaches along with newer ideas put on the table can yield a framework of data protection laws suitable for the Global South. The Global South needs its own model of a data protection law that "protects individual privacy, ensures autonomy, allows data flows for a growing data ecosystem and creates a free and fair digital economy". India has the opportunity to lead the way for the Global South – India can pave the way for governance that respects individual autonomy and universal human rights.

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